



Energy and Telecommunications Interim Committee

64th Montana Legislature

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February 25, 2016

TO: ETIC Members

FR: ETIC Staff

RE: Montana's One-Call Law and Federal Noncompliance

Montana's pipeline excavation damage prevention program does not comply with federal requirements, setting the stage for federal enforcement actions against excavators in Montana who damage pipelines in certain instances. At the March 11, 2016 meeting, the Energy and Telecommunications Interim Committee (ETIC) will hear from Montana stakeholders about their plans to develop potential draft legislation for consideration by the 2017 Legislature to bring Montana into compliance. The ETIC may wish to discuss its role, if any, in the development of the legislation.

In July 2015 the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) finalized a rule establishing a process for evaluating state excavation damage prevention law enforcement programs and enforcing minimum federal damage prevention standards in states where laws are determined to be inadequate. The Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006 gave PHMSA the new enforcement authority over excavators who damage pipelines in states with inadequate excavation damage prevention law enforcement programs.

Montana's one-call law, Title 69, chapter 4, part 5, establishes the responsibilities of excavators and underground facility owners and establishes damage fees. The damage fees were enacted by the Montana Legislature in 2005 (Senate Bill No. 326). The law is often referred to as Montana's one-call law.

Montana is one of five states that lacks an enforcement mechanism in its damage prevention or one-call law. The other four states with no enforcement program are Alaska, Colorado, Mississippi, and West Virginia. PHMSA prioritized program evaluations in those five states, and on February 11, 2016, PHMSA visited Montana and began its evaluation of the Montana program. On the majority of the pass/fail questions for program evaluation, Montana's program failed.

An official letter stating that Montana's program is out-of-compliance is expected in the next month. When the letter is issued, PHMSA will be formally authorized to take enforcement action against excavators in Montana for certain violations. For example, if an excavator in Montana fails to utilize Montana's one-call law and damages a gas pipeline, instead of facing a first time

damage fee of 25% of the total cost of repairing the underground facility not to exceed \$125 for the first incident, the excavator could face a federal fee of up to \$200,000 a day.

During the February 11 meeting with Montana stakeholders, PHMSA evaluated Montana's damage prevention program, by evaluating seven criteria:

- Enforcement of damage prevention laws and regulations;
- Designated state entity to enforce laws and regulations;
- Sufficient civil penalties or other sanctions in laws and regulations;
- Reliable mechanism for learning about excavation damage to facilities;
- Equitable and reliable investigation practices to determine fault;
- Required use of one-call, respect of marks provided, required notification of excavation hits to the operator, and requirements to call 911 if flammable, toxic or corrosive releases occur; and
- Limitations on exemptions to one-call requirements.

Montana's law fails on the first three points largely because responsibility for safe excavation and demolition near underground utilities, including pipelines, falls to the excavators and utility operators themselves under Montana's existing damage prevention program. Montana law establishes no relationship between the Montana damage prevention program and any governmental entity other than the one-call members themselves.

Federal regulators have indicated Montana's current one-call law fails to meet PHMSA standards, particularly in the areas of enforcement. As noted above, there is no enforcement authority in Montana. Until an enforcement authority is designated in law, at least with respect to pipelines, Montana's law will remain out of compliance.

Montana's one-call law and its potential noncompliance with federal requirements are not a new issue before the ETIC. During the 2011-2012 interim, the ETIC completed a study of Montana's one-call law. The study is attached for committee review. Because the federal rulemaking was not complete before the conclusion of the 2011-2012 interim, the ETIC did not advance draft legislation to modify Montana's one-call law. Their findings on the subject can be found on page 4 of the report.

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