



A View From the Underspace

By Mike Parilac, Publisher
mike@underspace.com

We're from the Federal Government and Your Thoughts are Important to Us!

For the past year I've been using this column to examine an initiative known as the Damage Prevention Assistance Program (DPAP): Improving State Damage Prevention Programs. The foundation of DPAP is what its author, the Pipeline and Hazardous Materials Safety Administration (PHMSA), terms "The Nine Elements of Effective Damage Prevention Programs." I have written about the first four Elements. In light of an email I received in December, I thought it appropriate to skip Elements Five and Six for now and address Element Seven.

Element Seven calls for the "fair and consistent enforcement of the law." I find Element Seven completely reasonable, particularly when it calls for "the use of remediation measures such as training, helping with public education...funding of R&D...in lieu of or to reduce fines."

Last year, as I scanned the Elements, I remember thinking that there's little to say about Element Seven. But I was proven wrong when Element Seven's name popped up in an email from my local damage prevention council as a response to a proposed Federal Rule:

Further, it is our considered opinion that the Proposed Rule fails to meet "Element 7," stipulated in the Rule as mandatory for a "*comprehensive* damage prevention program." The Rule falls on its face in that PHMSA's jurisdiction is

limited solely to pipelines and excludes all other underground facilities. By undertaking enforcement actions relating only to pipelines, PHMSA creates a de facto, dual, enforcement system, which in itself is a key criterion in determining if an enforcement program is adequate, or not. By definition then, the Proposed Rule establishes an "inadequate enforcement program" and therefore should not be implemented.

The council used Element Seven to bolster their argument against the adoption of this proposed Federal Rule. The Rule, if implemented, initiates a procedure to establish criteria for determining if a state's damage prevention laws are adequate. State laws aside, my damage prevention council was told if PHMSA determines that a state does not have an "adequate" enforcement program, the Feds could take over the enforcement of that state's damage prevention laws.

OK, let me simplify this. PHMSA is part of the U.S. Department of Transportation. It is the federal regulatory agency that oversees pipeline safety issues for interstate pipelines, intrastate pipelines, and local natural gas distribution companies. In many states, PHMSA permits state agencies to take over the bulk of their program's administrative and field audit tasks.

Presently, PHMSA is making waves in some states. PHMSA says its aim is to "help the

states help themselves" with regards to creating more stringent damage prevention law enforcement. I think most states are glad for the help, but I could be wrong. However, if PHMSA encountered many roadblocks when working with a particular state, they might just make a threat to take over a state's pipeline safety program. As long as there was a small amount of progress being made, the threat would probably remain just a threat, unless there was a tragic event in that state that forced PHMSA's hand.

So, back to the council's reply, a creative one at that. Assume PHMSA assumed control over enforcement of a state's damage prevention law. Since PHMSA's jurisdiction "is limited solely to pipelines and excludes all other underground facilities," the state agency would still be the state's enforcement agency for all other utilities. Now, two different agencies enforce the state damage prevention law: the Feds with authority over pipelines and gas distribution companies, and the state with authority over everyone else. In this scenario, PHMSA's actions would create a situation where there is not "consistent enforcement of the law," a situation diametrically opposed to the message contained in Element Seven.

Thanks, council, for giving me material for my editorial on Element Seven. I'm not sure what PHMSA thinks of your response but I aim to find out. Stay tuned. **UF**