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It’s been said that you can’t dig a hole anywhere in Oklahoma without striking a pipeline. New laws should help deter pipeline excavation damage.

The Oklahoma Underground Facilities Damage Prevention Act (Damage Prevention Act)¹ has worked reasonably well to define responsibility for damage to underground utility lines² by those who excavate³ with mechanized equipment. The act imposes strict liability on excavators who fail to follow the procedures of the act⁴ and who damage underground lines in the process. A notification of impending excavation triggers the familiar display of brightly colored spray paint and plastic flags⁵ marking the location of underground utility lines in the target construction area. Under the auspices of the act, the Oklahoma One-Call System Inc. has been established as a convenient statewide notification center to receive notifications about mechanized digging and to coordinate the marking of all utility lines accordingly.⁶ The act imposes liability for damages on an excavator who fails to give the required notice or who excavates with mechanized equipment in disregard for locations marked as covering buried utility lines.⁷

The principal means of enforcement under the Damage Prevention Act has been civil suits against excavators causing damage.⁸ When a utility line is damaged in connection with a violation of the act, an operator of the damaged line is motivated to seek and collect the cost of repair from the offending excavator. This process has not been entirely effective to deter and remedy violations. Some excavators choose to ignore the act completely, apparently on the theory it will be faster and cheaper to blindly operate their machinery, risk damage to any underground facilities and if any occurs, take

their chances with the operator or in court. This approach incorporates the inherent gamble that no lines will be struck at all, in which case the excavator will likely escape any sanction for his violations.

Until recent Oklahoma legislation and implementing rules of the Oklahoma Corporation Commission were established, no process existed to fill this gap in enforcement remedies against excavators who violate the act but who cause little or no damage. An operator is entitled to injunctive relief against a repeat offender, but that relief related only to repeated instances of past damage coupled with the expectation of future damage, all by the same excavator.⁹ Injunction has thus been of limited usefulness except in egregious and rare cases.

Violations of the act can be particularly critical where pipelines carrying petroleum products or natural gas are present. Rupturing such a pipeline can result not only in service outages and repair cost, but also the loss of valuable product, environmental contamination, explosion, fire, property damage, personal injury and death. For decades, the Oklahoma Corporation Commission has exercised statutory jurisdiction to maintain and enforce pipeline safety standards for oil and gas pipelines.¹⁰ Those regulations focus on pipeline owners and operators and on safe pipeline operations, and the process is designed fundamentally to “correct a violation” of the pipeline safety requirements.¹¹ The commission has expressly included in its regulations the obligation for pipeline operators to comply with the Damage Prevention Act,¹² but the commission’s jurisdic-

tion over pipeline safety has not heretofore extended to excavators.

That changed in 2014 — at least with respect to pipelines carrying hydrocarbons. The journey to this point began with Congress' enactment of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES).¹³ PIPES extended federal jurisdiction to excavators so as to prohibit "demolition, excavation, tunneling or construction" without first using the state's one-call notification system to establish the location of any underground pipelines and to prohibit such "activity in disregard of location information or markings established" by a pipeline operator.¹⁴ PIPES also imposed a requirement on excavators to "promptly notify" the pipeline operator of serious damage and to call "the 911 emergency telephone number" where "flammable, toxic, or corrosive gas or liquid" is released.¹⁵ Congress expressly limited this federal jurisdiction over excavators to those instances where the secretary of transportation "determined that the State's enforcement is inadequate" according to procedures to be established by a federal rule-making proceeding.¹⁶

In response, the Pipeline and Hazardous Material Safety Administration (PHMSA), an agency of the federal Department of Transportation, initiated a rule-making to determine the process by which state laws would be examined for adequacy. On April 2, 2012, PHMSA issued a Notice of Proposed Rulemaking (NPRM) for this purpose, as a "prerequisite should PHMSA find it necessary to conduct an administrative enforcement proceeding against an excavator."¹⁷ In its notice, PHMSA cast a particularly skeptical eye toward states that had no government agency responsible for enforcement of state one-call laws, no civil penalties for violations and no requirement for reporting excavation damage and notifying emergency authorities.¹⁸

In response to the expected federal review of state law, the Oklahoma Legislature enacted House Bill 2533¹⁹ in May 2014 to fill the enforcement gap in the Damage Prevention Act: the pipeline safety jurisdiction of the Oklahoma Corporation Commission was extended to include authority to enforce the act against exca-

vators. This new jurisdiction applies only in the context of those pipelines identified in the statute by reference to federal pipeline safety jurisdiction: pipelines and pipeline systems as those terms are defined "by the currently effective definition[s] ... in 49 CFR Part 192.3 and ... 49 CFR Part 195.2."²⁰ Consequently, the commission's new enforcement authority over excavators does not extend to instances involving oil and gas gathering lines or to other types of utility lines, such as telephone, electric or water lines.

Significantly, House Bill 2533 expressly preserves private rights of action to recover damages against excavators: "Enforcement authority granted in this section shall be concurrent with and shall not be construed to modify or limit any private right of action, including those available pursuant to Section 142.9a of Title 63 of the Oklahoma Statutes."²¹ According to this provision, operators remain free to file suit against excavators for damages and for injunctive relief as before, without regard to whether the commission has or may proceed against the same excavator regarding the same violation(s).

Section 2 of House Bill 2533 directed the commission to open a notice of inquiry process to explore its new enforcement authority, including the "implementation of a complaint process under the regulatory authority of the Commission." The commission did open such a process, as well as a subsequent rule-making proceeding.²² As a result, the commission promulgated new regulations in Chapter 5 (Rules of Practice)²³ and in Chapter 20 (Pipeline Safety)²⁴ of its rules. In promulgating these new regulations, the commission took into consideration the then-expected federal criteria for determining adequacy of state laws to prevent excavation damage.²⁵

The new rules in Chapter 20 accomplish several purposes. First, these rules require excavators to comply with the provisions of the Damage Prevention Act and assert the commission's authority to enforce any violation against excavators as well as pipeline operators subject to the act.²⁶ Second, the rules impose on excavators the duty to notify local 911 authorities of an incident that results in a

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release of product from the pipeline.²⁷ Third, the rules confirm their applicability only in the context of a “pipeline” or “pipeline system” as those terms are defined by federal regulations in 49 C.F.R. §§192.3 and 195.2.²⁸ Fourth, the rules confirm that they do not modify or limit private rights of action.²⁹

The new rules in Chapter 5 establish a specific complaint-driven procedure for enforcement of violations by excavators. The commission’s Pipeline Safety Department (PSD) is authorized to commence a cause “to enforce the [Damage Prevention] Act” and for “contempt for disobedience to or violation of an order or judgment of the Commission.”³⁰ A cause is commenced when the PSD files a verified complaint containing specifics about the violation alleged.³¹ A pipeline operator or other “aggrieved person” may submit information to the PSD about a violation and request an investigation.³² After the notice and hearing specified in the rules, the commission may apply a variety of enforcement remedies, including an order to correct a violation, an order requiring a party to attend damage prevention training, or the imposition of a monetary penalty.³³ House Bill 2533 did not prescribe the penalties that the commission might apply to violators, so in its rules the commission simply incorporated existing statutory authority to impose penalties for violating a commission rule.³⁴

Significantly, the enforcement authority of the commission is not conditioned on any finding that damage to a pipeline has actually occurred. This means that the previous “no harm, no foul” approach to enforcement should no longer be a safe harbor for excavators. Accordingly, the rules could be quite helpful to enforce the act and to deter violations. Whether they satisfy the federal government in its review of the “adequacy” of state law is another matter. A likely scenario is that the PHMSA will look closely at the many exemptions³⁵ to Oklahoma’s Damage Prevention Act, but that is a topic for another day.

1. 63 OKLA STAT. §§142.1 – 142.13

2. Covered by the act are a broad array of underground oil and gas pipelines, telecommunications lines, electric power lines, and water and sewer lines. 63 OKLA STAT. §142.2(15).

3. To “excavate” means “to dig, compress or remove earth, rock or other materials in or on the ground by use of mechanized equipment or blasting, including, but not necessarily limited to, augering, boring, backfilling, drilling, grading, pile driving, plowing in, pulling in, trenching, tunneling and plowing,” subject to several enumerated exclusions. 63 OKLA STAT. §142.2(5).

4. 63 OKLA STAT. §§142.5 and 142.9a.

5. The different colors designate different types of underground facilities, as specified by the Act. 63 OKLA STAT. §142.6(E).

6. 63 OKLA STAT. §142.2(8), 142.3 and 142.10; www.callokie.com.

7. 63 OKLA STAT. §142.9a.

8. See, 63 OKLA STAT. §142.9a. The offending excavator is liable to the operator of the damaged line for repair of the damage.

9. 63 OKLA STAT. §142.9a(C). An operator may seek injunctive relief against an excavator who “by willful act or by reckless disregard of the rights of others, repeatedly violates the provisions of the [Act] ... and repeatedly damages underground facilities, thereby threatening the public health, safety, and welfare.”

10. 52 OKLA STAT. §§5 and 47.3(4); OAC 165:20-5-21, 20-7-1. Gathering lines are subject to certain regulations for reporting of incidents. OAC 165:20-10-1.

11. See, e.g., OAC 165:20-13-14 (1) and (2); OAC 165:20-13-15(a) and OAC 165:20-13-16(a).

12. OAC 165:20-5-41 and 20-7-3. The act imposes on a pipeline operator the principle obligations to locate its facilities and participate in the state-wide one-call notification center. 63 OKLA STAT. §142.3.

13. Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, Pub. L. 109-468 (2006).

14. 49 U.S.C. §60114(d).

15. *Id.* at §60114(d)(3)

16. 49 U.S.C. §60114(f).

17. 77 Fed. Reg. 19800 and 19803 (April 2, 2012).

18. *Id.* at 19803-19804 and 19834.

19. Section 1 of H.B. 2533 has been codified at 63 OKLA STAT. §§142.13.

20. 63 OKLA STAT. §§142.13.

21. *Id.*

22. *In Re: Inquiry of the Oklahoma Corporation Commission to Examine Pipeline Safety, Prevention of Excavation Damage, and Processes Related to Enforcement and Complaints*, Cause No. TD 201400031; *In the Matter of a Permanent Rulemaking of the Oklahoma Corporation Commission Amending OAC 165:20, Gas & Hazardous Liquid Pipeline Safety*, Cause No. RM 201500003.

23. OAC 165:5-27-1 through 5-27-14 (effective Aug. 27, 2015).

24. OAC 165:20-17-1 through 20-17-5 (effective Aug. 27, 2015).

25. After the commission promulgated its new rules, but before they went into effect, PHMSA issued its final rules, which are in most respects identical to its proposed rules. 80 Fed. Reg. 43836 *et seq.* (July 23, 2015).

26. OAC 165:20-17-1(a) and 20-17-4.

27. OAC 165:20-17-5.

28. OAC 165:20-17-2.

29. OAC 165:20-17-1(c).

30. OAC 165:5-27-10.

31. OAC 165:5-27-10(a,b).

32. OAC 165:5-27-14.

33. OAC 165:5-27-11(a).

34. OAC 165:5-27-11(b); 17 OKLA. STAT. §6.1.

35. The federal criteria for review of state laws include this: “Does the State limit exemptions for excavators from its excavation damage prevention law? A State must provide to PHMSA a written justification for any exemptions for excavators” 80 Fed. Reg. 43836 at 43868 (July 23, 2015), to be codified at 49 C.F.R. §198.55(a)(7).

ABOUT THE AUTHOR



Curt Long is a partner at Conner & Winters in Tulsa. His clients include companies engaged in the natural gas, electric and telecommunications industries. He concentrates his practice on such matters as retail and wholesale utility services, natural gas processing and gathering, electric transmission, natural gas supply and storage contracts, telecommunications, utility franchises and rights-of-way, utility rates and tariffs, water service contracts and oil and gas severance tax and royalty.