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RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Chairman Christi Craddick
Commissioner Ryan Sitton
Commissioner Wayne Christian

FROM: Haley Cochran, Attorney *HPC*
Office of General Counsel

THROUGH: Alexander C. Schoch, General Counsel

DATE: October 31, 2017

SUBJECT: Proposed Amendments to 16 TAC §18.1, §18.4, and §18.11 to incorporate PHMSA program requirements

| November 7, 2017 | | |
|------------------------|--------|---------|
| Approved | Denied | Abstain |
| <i>CC</i> <i>AS</i> | | |

Attached is Staff's recommendation to amend 16 Texas Administrative Code §18.1, §18.4, and §18.11. The proposed amendment to §18.1 removes a reference to "intrastate" pipelines to clarify that, pursuant to House Bill 1818 (85th Legislature, 2017) the Commission now has damage prevention authority over interstate pipelines as well as intrastate pipelines. Staff also recommends two additional amendments to bring Chapter 18 into compliance with PHMSA damage prevention program requirements: (1) an amendment to §18.4 and §18.11 to require an excavator that damages a pipeline to notify the pipeline operator at the earliest practical moment, but not later than one hour, after the incident; and (2) an amendment to §18.11 to require an excavator to report any release of product from a damaged pipeline by calling 911. Finally, staff recommends an amendment to §18.11 to allow excavators and operators 30 days after a damage incident to submit information regarding the incident to the Commission. Currently parties only have 10 days.

Staff requests the Commission's approval to publish the proposed amendment in the *Texas Register* for public comment. If approved at conference on November 7th, the proposal should appear in the November 24th issue of the *Texas Register*. The proposal and an online comment form would also be made available on the Commission's website by November 8th, giving interested persons more than two additional weeks to review and submit comments to the Commission.

cc: Wei Wang, Interim Executive Director
Kari French, Director, Oversight and Safety Division
Jim Osterhaus, Director of Pipeline Safety, Oversight and Safety Division

1 The Railroad Commission of Texas (Commission) proposes amendments to §18.1, relating to
2 Scope, Applicability, and General Provisions, to clarify the Commission’s authority over interstate
3 pipelines. The Commission also proposes amendments to §18.4 and §18.11, relating to Excavator
4 Obligation to Avoid Damage to Underground Pipelines and Reporting Requirements, respectively, to
5 implement program requirements imposed by the Pipeline and Hazardous Materials Safety
6 Administration (PHMSA).

7 House Bill 1818 (HB 1818), enacted by the 85th Legislature (Regular Session, 2017), amended
8 §117.012 of the Natural Resources Code, §756.126 of the Health and Safety Code, and §121.201 of the
9 Utilities Code to provide the Commission damage prevention authority over interstate pipelines. Thus, the
10 proposed amendments to §18.1 remove language in subsection (a) limiting the scope of Chapter 18 to
11 intrastate pipelines. The proposed amendments also include minor corrections to the language in §18.1.

12 PHMSA recently conducted an evaluation of Texas's damage prevention enforcement program
13 pursuant to 49 United States Code (USC) §60114 and 49 Code of Federal Regulations (CFR) Part 198,
14 Subpart D. The evaluation criteria include whether a state's damage prevention program requires the
15 following when damage to a pipeline occurs: (1) the excavator to report damage to the operator at the
16 earliest practical moment; and (2) the excavator to call 911 if a release of product occurs. Therefore, the
17 Commission proposes the amendments to §18.4 and §18.11 to comply with PHMSA's standards.

18 In addition, the proposed amendments to §18.11 include extending the deadline for reporting a
19 damage incident from 10 days after an incident to 30 days after an incident. Extending the deadline will
20 allow parties time to conduct a thorough investigation of an incident.

21 Kari French, Director, Oversight and Safety Division, has determined that for each year of the
22 first five years the proposed amendments will be in effect, there will be no fiscal effect on state or local
23 government or persons required to comply as a result of the proposed amendments.

24 Ms. French has determined that for each year of the first five years that the amendments will be in
25 effect the primary public benefit would be consistency with applicable statutes and federal requirements.

1 During the first five years the proposed rule would be in effect, no government program would be
2 created or eliminated. The proposed amendments would modify existing regulations, by increasing the
3 number of pipelines subject to the Commission's damage prevention requirements in Chapter 18,
4 implementing more stringent notice requirements in the event excavation damages a pipeline, and
5 providing parties more time to gather data prior to submitting an investigation report to the Commission.
6 The proposed amendments would not: create or eliminate any employee positions; require an increase or
7 decrease in future legislative appropriations; increase or decrease fees paid to the Commission; or impact
8 the state's economy.

9 The Commission has determined that the proposed amendments will not have an adverse
10 economic effect on rural communities, small businesses, or micro-businesses.

11 The Commission has also determined that the proposed amendments will not affect a local
12 economy. Therefore, the Commission has not prepared a local employment impact statement pursuant to
13 Texas Government Code, §2001.022.

14 The Commission has determined that the amendments do not meet the statutory definition of a
15 major environmental rule as set forth in Texas Government Code, §2001.0225(a); therefore, a regulatory
16 analysis conducted pursuant to that section is not required.

17 Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel,
18 Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at
19 www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail
20 to rulescoordinator@rrc.texas.gov. The Commission will accept comments until noon (12:00 p.m.) on
21 Tuesday, January 2, 2018. The Commission finds that this comment period is reasonable because the
22 proposal and an online comment form will be available on the Commission's web site more than two
23 weeks prior to *Texas Register* publication of the proposal, giving interested persons additional time to
24 review, analyze, draft, and submit comments. The Commission encourages all interested persons to
25 submit comments no later than the deadline. The Commission cannot guarantee that comments submitted
26 after the deadline will be considered. For further information, call Ms. French at (512) 463-8559. The

1 status of Commission rulemakings in progress is available at [www.rrc.texas.gov/general-](http://www.rrc.texas.gov/general-counsel/rules/proposed-rules)
2 [counsel/rules/proposed-rules](http://www.rrc.texas.gov/general-counsel/rules/proposed-rules).

3 The Commission proposes the amendments to §§18.1, 18.4, and 18.11 pursuant to Texas Natural
4 Resources Code, §117.012, and Texas Utilities Code, §121.201, which authorize the Commission to
5 adopt rules that include safety standards related to the prevention of damage to interstate and intrastate
6 hazardous liquids or carbon dioxide pipeline facilities resulting from the movement of earth by a person
7 in the vicinity of the facility, other than movement by tillage that does not exceed a depth of 16 inches. In
8 addition, the Commission proposes the amendments pursuant to Texas Health and Safety Code, §756.126,
9 which authorizes the Commission to adopt and enforce safety rules prescribing standards and best
10 practices, including those described by 49 U.S.C. §6105 et seq., relating to the prevention of damage by a
11 person to a facility under the jurisdiction of the Commission, including an interstate or intrastate pipeline
12 facility.

13 Statutory authority: Texas Natural Resources Code §117.012, Texas Utilities Code §121.201, and
14 Texas Health and Safety Code §756.126.

15 Cross-reference to statute: Texas Natural Resources Code §117.012; Texas Utilities Code
16 §121.201, and Texas Health and Safety Code §756.126.

17
18 §18.1 Scope, Applicability, and General Provisions

19 (a) This chapter implements the authority of the Railroad Commission of Texas (Commission)
20 under Texas Natural Resources Code, §117.012, [~~and~~] Texas Utilities Code, §121.201 [~~(as amended by~~
21 ~~House Bill 2161, Acts 2005, 79th Leg., R.S., ch. 267, §§6 and 13, eff. Sept. 1, 2005)~~], and [~~under~~] Texas
22 Health and Safety Code, [~~§756.106 (as added by Senate Bill 9, Acts 2005, 79th Leg., R. S., ch. 1337, §19,~~
23 ~~and editorially renumbered as Health and Safety Code,]§756.126[)]. Except as provided in subsection (d)
24 of this section, this chapter applies to all persons engaged in or preparing to engage in the movement of
25 earth in the vicinity of an [~~intrastate~~] underground pipeline containing flammable, toxic, or corrosive gas,
26 a hazardous liquid, or carbon dioxide.~~

1 (b) The requirements of this chapter are based on the presumption that an excavator will notify a
2 notification center pursuant to, and that a pipeline operator will respond in accordance with, the provisions
3 of Texas Utilities Code, Chapter 251, and the requirements of the notification center. However, compliance
4 with the provisions of Texas Utilities Code, Chapter 251, and the requirements of a notification center does
5 not necessarily constitute compliance with the requirements of this chapter.

6 (c) Persons that are exempt from the provisions of Texas Utilities Code, Chapter 251, are required
7 to comply with this chapter, unless the person is exempt under the subsection (d) of this section.

8 (d) This chapter does not apply to:

9 (1) the exemptions in Texas Utilities Code, §251.003;

10 (2) the movement of earth that does not exceed a depth of 16 inches;

11 (3) surface mining operations;

12 (4) the following activities when performed by an employee of the Texas Department of
13 Transportation (TxDOT) [~~TxDOT~~] within TxDOT right-of-way:

14 (A) sampling and repair of pavement, base, and subgrade;

15 (B) repair of roadway embankment adjacent to pavement structure;

16 (C) reshaping of unpaved shoulders and drop-offs;

17 (D) installation and maintenance of guardrails, cable barriers, delineators, vehicle
18 attenuators, sign posts, mailboxes, and cables for traffic signals and luminaries;

19 (E) cleaning of ditches; and

20 (F) removal of silt from culverts; or

21 (5) hand digging by an employee or contractor of TxDOT for TxDOT's archeological
22 program.

23 (e) This chapter also applies to movement of earth by tillage that exceeds a depth of 16 inches.

24 (f) Unless otherwise specified, all time periods used in this chapter shall be calculated from the
25 time the original notification is given to the notification center.

26 (g) Unless otherwise specified, all time periods that are stated in days shall mean working days.

1 (h) Unless an excavator and an operator otherwise expressly agree in accordance with the
2 requirements set forth in §18.3 of this title, relating to Excavator Notice to Notification Center, the life of
3 a line locate ticket shall be 14 days.

4 (i) Unless otherwise expressly stated in this chapter, each excavator and each operator shall retain
5 required records for at least four years. At a minimum, each operator and each excavator shall retain locate
6 tickets and positive response notifications. Retention at a notification center is an acceptable method of
7 retention for locate tickets.

8
9 §18.4 Excavator Obligation to Avoid Damage to Underground Pipelines

10 (a) An excavator shall comply with the requirements of §18.3 of this title, relating to Excavator
11 Notice to Notification Center. An excavator shall also comply with the requirements of Texas Health &
12 Safety Code, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way, and
13 shall plan an excavation in such a manner as to avoid damage to and minimize interference with all
14 underground pipelines in the vicinity of the excavation area and shall take all reasonable steps to protect
15 underground pipelines from damage.

16 (b) An excavator shall wait the time required by Texas Utilities Code, Chapter 251, before
17 beginning excavation.

18 (c) Prior to excavation, an excavator shall confirm that a copy of a valid locate ticket for the location
19 is in the possession of the excavator's designated representative and can be obtained from the representative
20 or can be provided within one hour of a request from the operator or the Commission.

21 (d) Prior to excavation, an excavator shall verify that it is at the correct location as specified on the
22 locate ticket; shall verify white-lining; and, to the best of the excavator's ability, shall make a visual check
23 for any unmarked underground pipelines. Checking for unmarked underground pipelines includes, but is
24 not limited to, looking for additional pipeline line markers, such as painted fence post-type markers,
25 aboveground pipeline valves, meter sets, regulator stations, or rectifier units.

1 (e) An excavator shall not begin excavating until a second notice is given to the notification center
2 for the area if:

3 (1) the excavator has knowledge of the existence of an underground pipeline and has
4 received an "all clear" or a "no conflict" response from an operator;

5 (2) the excavator observes clear evidence (such as a line marker or an above-ground fixture)
6 of the presence of an unmarked underground pipeline in the area of the proposed excavation, and has
7 received an "all clear" or a "no conflict" response from an operator;

8 (3) there is no positive response for the excavation area; or

9 (4) the positive response is unclear or obviously erroneous (for example, for a different
10 location or for a different type of underground facility).

11 (f) If an excavator has given a second notice in accordance with this section and there is no positive
12 response within four hours, the excavator may begin excavating.

13 (g) An excavator shall protect and preserve locate markings from the time the excavator begins
14 work until markings are no longer required for the proper and safe excavation in the vicinity of all
15 underground pipelines.

16 (h) Each excavator that damages an underground pipeline shall notify the operator of the damage
17 through the notification center at the earliest practical moment [~~immediately~~] but not later than one hour
18 [~~two hours~~] following the damage incident. An excavator that damages an underground pipeline shall not
19 cover the exposed pipeline without approval of the operator.

20
21 §18.11 Reporting Requirements

22 (a) Each operator of an underground pipeline shall report to the Commission all damage to its
23 pipelines caused by an excavator. Within 30 [~~10~~] days of the damage incident or of the operator's actual
24 knowledge of the damage incident, an operator shall submit the information to the Commission through
25 TDRF, which may be accessed through the Commission's online reporting system using its assigned
26 operator identification code.

1 (b) Each excavator that damages an underground pipeline shall notify the operator of the damage
2 through the notification center at the earliest practical moment [~~immediately~~] but not later than one hour
3 [~~two hours~~] following the damage incident. The excavator shall also submit report of the damage incident
4 to the Commission using TDRF, which may be accessed through the Commission's online reporting system
5 and the excavator sign-in, within 30 [~~10~~] days of the incident.

6 (c) If damage to a pipeline from excavation activity causes the release of any flammable, toxic, or
7 corrosive gas, hazardous liquid, or carbon dioxide from the pipeline, the excavator shall promptly report
8 the release to appropriate emergency response authorities by calling 911.

9 (d) [(e)] Each excavator that makes an additional call to the notification center pursuant to §18.4(e)
10 of this title, relating to Excavator Obligation to Avoid Damage to Underground Pipelines, because the
11 excavator did not receive a positive response, shall report that fact to the Commission through TDRF. An
12 excavator shall also report an operator's failure to provide a positive response to a second call to the
13 Commission through TDRF.

14 (e) [(d)] An emergency response official, a member of the general public, or another person aware
15 of damage to an underground pipeline is encouraged to submit an incident form using TDRF, which can be
16 accessed through the Commission's online reporting system. Entries can be made through the general public
17 or emergency response official sign-in.

18
19 This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within
20 the agency's authority to adopt.

21 Issued in Austin, Texas on November 7, 2017.

22 Filed with the Office of the Secretary of State on November 7, 2017



Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas