

2018 State Damage Prevention Program Grants FINAL Progress Report
CFDA Number: 20.720

Award Number: **693JK31840008PSDP**
Project Title: **“State Damage Prevention (SDP) Program Grants – 2018”**
Date Submitted: **April 30, 2020** (*period ending 3/27/2019*)
Submitted by: **Jacqueline Hartzell on behalf of Melissa C Holbrook**

**Accomplishments for this period (Item 1 under Article IX, Section 9.01 Progress Report:
“A comparison of actual accomplishments to the objectives established for the period.”**

Specific Objective(s) of the Agreement

Under this grant agreement, the recipient will: Fund the salary of one damage prevention investigator to be hired by the Commission. (Element 7)

At the time of the application, the Kentucky Public Service Commission (KYPSC) was applying for the full \$100,000 grant amount. The award was approximately \$70,000, therefore, the original scope could not be accomplished with the amount awarded. The funds have been exclusively used to fund one full time position to conduct damage investigations and enforcement.

Work Scope

Under the terms of this grant agreement, the Recipient will address the following applicable elements listed in the approved application, pursuant to 49 U.S.C. §60134 (a), (b).

- Element 1 (Effective Communications): (Not Applicable)
- Element 2 (Comprehensive Stakeholder Support): (Not Applicable)
- Element 3 (Operator Internal Performance Measurement): (Not Applicable)
- Element 4 (Effective Employee Training): (Not Applicable)
- Element 5 (Public Education): A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities. (Applicable)

In anticipation of the need for Jurisdictional Operator, Excavator/Contractor, and General Public education relating to the KYPSC’s new enforcement authority of KRS 367.4901-4917, the Kentucky Dig Law, KYPSC staff began a robust outreach effort in May of 2018. KYPSC’s Division of Inspections (DOI) staff have participated in approximately 37 meetings with various stakeholder groups. Staff presentations have reached approximately 1,300 individuals in an effort to educate all stakeholder groups including multiple presentations to all four of Kentucky’s Damage Prevention Councils of the Commission’s new enforcement procedures.

In additions to the activities described above, the KYPSC has expended a portion of the collected penalties’ to fund a statewide education and outreach radio spots. These radio spots focus on the

changes to Kentucky's dig law, particularly the KYPSC's authorization to investigate and enforce the law.

- Element 6 (Dispute Resolution): A process for resolving disputes that defines the State authority's role as a partner and facilitator to resolve issues. (Applicable)

The DOI-s developed Standard Operating Procedures (SOP) to define the investigative process to be used to ensure each reported damage is thoroughly investigated. This process includes a requirement and process for all jurisdictional natural gas and hazardous liquid operators to report all damages to their facilities through the Commission's website. Each operator is required to register with the Commission to receive a unique login for providing their report. A report is provided online with requested information relating to each damage to their facility. Upon receiving a submitted report, the investigator assigned to the case will ensure the information provided is complete, request the KY811 locate request ticket associated with the damage reported, and confirm the reported alleged damaging party is a viable entity registered with the Kentucky Secretary of State. The alleged damaging party is then contacted by the investigator. Upon making a determination of the responsible party, a Demand Letter will be issued, outlining the results of the investigation and the penalty associated with the case. If the responsible party is not in agreement with resolution of the case, the responsible party may request a formal Administrative Hearing before the Commission. If after having being heard and the responsible does not agree with the decision of the Commission, a case will be filed in Franklin County Circuit Court.

Since the Commission began enforcement 1,717 instances of underground facility damage have been reported to the Commission. The Commission has investigated 1075 of these and made an initial determination whether any violation occurred. Of these, 975 instances have been closed, meaning the alleged violator paid a civil penalty or the investigator determined no violation had occurred.

The Commission holds administrative hearings regularly once a month to consider those cases in which an alleged violator has been assessed a civil penalty by the investigator, but has not paid the penalty. The Commission has heard fifteen cases at these regularly-scheduled hearings. Of these the Commission has dismissed three cases and assessed civil penalties in the remaining twelve.

After receiving notice of several alleged violations of the Underground Facility Damage Prevention Act, an operator requested an administrative hearing to potentially obtain a global resolution to the alleged violations. The Commission granted the request for a hearing and the operator, the Commission's Division of Inspections, and excavators provided testimony. The Commission recently issued a final order in the proceeding.

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- Element 7 (Enforcement): Enforcement of State damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate State authority. (Applicable)

Enforcement of Kentucky's damage prevention law is granted to the KYPSC in KRS 367.4901-4917 and addresses the areas described above in Element 6.

As of July 14, 2018, the Commission implemented a formal enforcement process that includes: the required reporting of damages to natural gas or hazardous liquids lines by the operator; investigation of these damages by the Commission; assessment and collection of civil penalties for violations; and other judicial action beyond the scope of the Commission (Franklin Circuit Court) should the Commission's informal enforcement action fail to render compliance. Penalties are addressed in the state law: KRS 367.4917 (1) An excavator who fails to comply with any provision of KRS 367.4911, or an operator who fails to comply with any provision of KRS 367.4909, shall be guilty of endangering underground facilities and may be subject to a fine of two hundred and fifty dollars (\$250) for the first offense, no more than one thousand dollars (\$1,000) for the second offense within one (1) year, and no more than three thousand dollars (\$3,000) for the third and any subsequent offense. (2) A protection notification center that fails to comply with any provision of KRS 367.4913 shall be subject to a fine of one thousand dollars (\$1,000) for each offense. (3) A person that knowingly provides false notice to a utility notification center of an emergency as defined in KRS 367.4903 shall be subject to a fine of one thousand dollars (\$1,000) for each offense. (4) Any person who violates any provision of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, that involves damage to a facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive, or hazardous material shall be subject to a fine not to exceed one thousand dollars (\$1,000) for each offense. The penalties of this subsection are not in conflict with and are in addition to civil damages for personal injury or property damage.

(5) (a) All fines recovered for a violation of this section shall be paid to the general fund of the state, county, city, or fire protection agency which issued the citation. As of March 2020, \$1,410,400 in civil penalties has been assessed for violations of Kentucky's Underground Facilities Damage Prevention Act. All penalties are used for the support of the Damage Prevention Public Outreach and Education Program and in no way augment the Commission budget as it relates to salaries or administrative costs.

If an alleged violator contests the findings of the investigator, the Commission will hear the facts of the case at a formal administrative hearing. The Commission conducts these hearings once a month. To date, fifteen cases have been heard by the Commission. Three of these were dismissed and civil penalties were assessed in the remaining twelve cases.

The Commission has sought enforcement of its orders regarding penalties in Franklin Circuit Court in seven cases. Of these, judgment liens have been ordered in four cases.

- Element 8 (Technology): (Not Applicable)

- Element 9 (Damage Prevention Program Review): A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews. (Applicable)

Program effectiveness is measured on a weekly basis through tracking of new reports received, investigations initiated, enforcement actions completed and penalties assessed/collected. These statistics will be compared on a monthly basis once a more robust data set is complete and a full calendar year cycle has been accomplished to account for variability in seasonal activity in the excavation community. We anticipate seeing a reduction in violations of KRS 367.4901-4917 due to aggressive and consistent enforcement activity. A graph has been attached for review from 2018-current data.

Quantifiable Metrics/Measures of Effectiveness (Item 2 under Article IX, Section 9.01 Progress Report: “Where the output of the project can be quantified, a computation of the cost per unit of output.”)

The enforcement of the Kentucky Dig Law is a new program for the KYPSC that is greatly enhancing our efforts in Kentucky’s commitment to damage prevention. The grant funds have assisted the KYPSC in the development and administration of the program.

Since the program’s inception and after the July 14, 2018 effective date of the amended Kentucky Dig Law, the DOI staff have received over 670 cases of reported damages from our jurisdictional natural gas and hazardous liquid operators. DOI staff have investigated and closed 241 cases issuing 171 Demand Letters resulting in \$291,000 in penalties assessed and collected \$281,950 to date. The data indicates that the responsible party has been determined to be approximately 50 percent Contractor/Excavator, 40 percent Operator and 10 percent Homeowner. It should be noted that this program is in its infancy and it is difficult to speak to its effectiveness with the limited data we have. This data only represents 43 percent of the cases reported to the Commission since inception.

For 2019 DOI staff have received over 1075 cases of reported damages from our jurisdictional natural gas and hazardous liquid operators. DOI staff have investigated and closed 625 cases issuing 380 Demand Letters resulting in \$ 1,031,650.00 in penalties assessed and collected \$ 972, 00.00. The 2019 data indicates that the responsible party has been determined to be approximately: Contractors/Excavators: 242, Utility Operators: 208, Home Owners: 45, Municipality: 18, Utility: 18, State Agency: 4. It should be noted that this program is in its infancy and it is difficult to speak to its effectiveness with the limited data we have.

Issues, Problems or Challenges (Item 3 under Article IX, Section 9.01 Progress Report: “The reasons for slippage if established objectives were not met. “)

The new program was implemented with few issues and staff is very comfortable with our existing procedures moving the program forward. Our greatest challenge has been the lack of dedicated staff to perform the investigative work. As noted above, existing DOI staff have been conducting

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the investigations and charged to the grant to move the program forward until such time dedicated investigative staff are hired. The additional challenge associated with this issue is the resulting backlog of damage cases submitted awaiting investigation. Two investigators have been offered positions and will begin their dedicated work on April 1, 2019, and will be instrumental in reducing this backlog and will be able maintain an acceptable level of pending cases.

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