**MEMORANDUM**

Date: May 4, 2018

To: Rayne Pearson, Interim Director
Administrative Law Division

From: Sean C. Mayo, Director

 Darren Tinnerstet, Investigator

 Pipeline Safety Program

Subject: Docket D-180342, Penalty Assessment recommendation of $1,000 against All American Fencing for violation of RCW 19.122.

**I. Background**

The Washington State Dig Law Safety Committee (Safety Committee) received a complaint against All American Fencing regarding a potential violation of the Washington state Dig Law, RCW 19.122, for work performed in 2017. The complainant in this case was Puget Sound Energy (PSE).

On April 18, 2018, the Safety Committee heard the complaint in case 18-011 against All American Fence. The Safety Committee determined that All American Fencing committed the following violation:

* One violation of RCW 19.122.030(2) for failing to request locates prior to excavating.

The Safety Committee recommended that the following penalty be assessed against All American Fence:

* $1,000 penalty for one violation of RCW 19.122.030(2); and
* The opportunity to defer $800 of the penalty if the owner and field supervisors of All American Fencing complete National Utility Contractor Association (NUCA) Dig Safe Training within six months of the issuance of a penalty assessment by the Commission, and incur no additional dig law violations within 12 months.

**II. Analysis**

**Case 18-011**

The recommended penalty is for one violation of RCW 19.122.030(2), which states, in part, that an excavator must provide the notice required by subsection (1) to a one-number locator service not less than two business days prior to excavating. Subsection (1) states that before commencing excavation, the excavator must mark the boundary of the excavation area with white paint, then provide notice of the scheduled excavation to all facility operators through a one-number locator service.

The complainant, PSE, alleges that on Dec. 22, 2017, All American Fencing failed to request utility locates prior to excavating to install a new fence at 27805 153rd Pl SE, in Covington, WA. PSE Damage Prevention Field Representative Bob Douglas observed recent fence construction at the above address. Mr. Douglas proceeded to contact the company owner, Richard Shanebrook, to advise him of the potential violation of digging without locates. A check was done with the one-call ticket management database and it was determined that All American Fencing had not requested a utility locate for this address. Mr. Douglas proceeded to take pictures of the job site, which were ultimately submitted to the Safety Committee for review.

Staff investigated this referral from the Safety Committee and found that no utility locate request was submitted by All American Fencing for this location. Staff determined that All American Fencing committed one violation of RCW 19.122.030(2) by failing to request locates prior to excavating.

Staff relied upon the information provided by PSE to the Safety Committee for this investigation. All American Fencing failed to show up or contact the Safety Committee on the day the case was reviewed. The documents for this case included multiple photographs of the newly installed fence posts. Staff also took into consideration the following factors in determining the appropriate penalty amounts:

1. **How serious or harmful the violation is to the public.**

While no damage occurred, the incident was very serious and could have been harmful to the public. The incident could have resulted in serious injury to the excavator and the general public

1. **Whether the violation is intentional.**

The violation appears to be due to negligence on the Company’s part as opposed to a lack of knowledge regarding Washington state’s dig law. PSE had approximately five previous discussions with the Company about the requirement to request locates prior to the Dec. 22, 2017, incident. Staff’s research also indicates that All American Fencing has a positive history of requesting utility locates. Since Jan. 1, 2017, All American Fencing has requested a total of 158 utility locates in the state of Washington.

1. **Whether the company self-reported the violation.**

The Company did not self-report the violation. The commission became aware of the violation after PSE filed a complaint with the Safety Committee.

1. **The likelihood of recurrence.**

The likelihood of recurrence depends on the company’s actions going forward. The company will need to take proactive measures to ensure that no future violations of Washington state’s dig law occur.

**III. Recommendation**

RCW 19.122.070(1) authorizes a penalty of not more than $1,000 for an initial violation, and not more than $5,000 for each subsequent violation in a three-year period, to anyone who violates any provision of RCW 19.122.[[1]](#footnote-1)

Staff’s investigation concurred with the Safety Committee’s determination in regards to the violation, but staff ultimately disagrees with the recommendation to suspend $800 of the penalty amount with conditions. Staff based this decision on two factors: 1) The Company failed to appear for the review hearing and failed to notify the Safety Committee that it would not be present; and 2) The Company was contacted multiple times by PSE prior to the violation being reported, which in turn provided the Company with ample opportunities to change its excavating practices prior to being penalized.

Accordingly, Staff recommends the commission assess a $1,000 penalty against All American Fencing for one violation of RCW 19.122.030(2) for failing to provide the required notice to a one-number locator service not less than two business days before excavating. The recommended penalty is as follows:

* $1,000 penalty for one violation of RCW 19.122.030(2), which occurred on Dec. 22, 2017.

Staff also recommends that All American Fencing’s owner and employees attend NUCA Dig Safe Training within six months of this penalty assessment.

1. Except for violations of RCW 19.122.055, which consists of failing to notify a one-number locator service and causing damage to a hazardous liquid or gas underground facility. This violation is subject to a civil penalty of not more than $10,000 for each violation. [↑](#footnote-ref-1)