



July 6, 2012

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

**Comments on Notice of Proposed Rulemaking
Pipeline Safety: Pipeline Damage Prevention Programs**

**Docket No. PHMSA-2009-0192
Enforcement of State Damage Prevention Programs**

The Distribution Contractors Association (DCA) represents contractors, suppliers and manufacturers who provide distribution construction services including installation, replacement and rehabilitation of gas pipelines as well as fiber optic, cable and duct systems in communities across the country. DCA commends the efforts of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) to improve state one-call and damage prevention programs, and we appreciate the opportunity to comment on the Notice of Proposed Rulemaking (NPRM), published in the *Federal Register* on April 2, 2012.

Natural gas distribution systems are a primary market for DCA members across the country. Distribution contractors help meet the rising demand for natural gas development resulting from the ever-growing shale gas boom. A recent study released by America's Natural Gas Alliance on job creation and other economic impacts expected from alternative natural gas sources over the next 25 years reports that work related to "unconventional" natural gas alone will employ up to 2.4 million jobs, generate approximately \$85 billion in government revenue, and contribute almost \$332 billion to America's gross domestic product by 2035.

While development of these domestic natural resources will serve as a key driver to economic recovery and a reduced dependence on foreign energy sources, increased awareness of construction safety practices must accompany the significant increases in projects, and excavation damage prevention will be a priority. Therefore, PHMSA's initiative to improve state damage prevention programs and enforcement practices comes at a critical time, and DCA looks forward to participating in the effort.

DCA members also work to replace aging cast iron and bare steel pipelines as part of "accelerated main replacement programs" conducted by many local distribution companies, and other projects related to compliance with PHMSA's Distribution Integrity Management Program.

Excavation damage prevention is a responsibility shared by all stakeholders involved in the process. All who play a role must do their part to make damage prevention programs as effective as they can be.

Shared responsibility has been the mantra of PHMSA and leading damage prevention organizations such as the Common Ground Alliance (CGA) since its establishment in 2000, and should be at the forefront of PHMSA's approach to improve state damage prevention enforcement practices.

General Comments

PIPES Act and the "Nine Elements" of Damage Prevention

The Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006 authorized federal enforcement in states whose damage prevention laws are either inadequate or not sufficiently enforced. Despite the fact that federal requirements for pipeline operators to locate and mark their facilities are provided in 49 CFR §192.614 and §195.442, Congress addressed both sides of the damage prevention coin in the "Prohibition" language of the PIPES Act.

Specifically, the law restricts individuals from engaging in demolition, excavation, tunneling, or construction "without first using that system to establish the location of underground facilities," or "in disregard of location information or markings established by a pipeline facility." This appropriately addresses one-call notification and safe digging responsibilities subject to the excavator. However, the PIPES Act also address the responsibilities of the pipeline operator, stating that an "owner or operator of a pipeline facility who fails to respond to a location request in order to prevent damage to the pipeline facility or who fails to take reasonable steps, in response to such a request, to ensure accurate marking of the location of the pipeline facility in order to prevent damage to the pipeline facility shall be subject to a civil action under section 60120 or assessment of a civil penalty under section 60122."

Clearly, the PIPES Act addressed the fundamentals of underground damage prevention from the very beginning of the law, requiring excavators to call the appropriate one-call center and respect the markings provided by the pipeline operator, as well as reminding pipeline owners and/or operators of their obligation to respond to locate requests and provide accurate locating and marking of their facilities or face a civil penalty. If any of these primary responsibilities are not met, safety is inevitably compromised.

As PHMSA develops a final rule on damage prevention enforcement and begins a dialogue with state entities charged with enforcing damage prevention requirements, DCA encourages PHMSA to mirror its approach with the spirit of the PIPES Act. Although requirements for locating and marking pipeline facilities exist in the Code of Federal Regulations, they are commonly neglected in state enforcement practices. PHMSA should be ever mindful that a balanced approach to damage prevention is needed both in practice and in enforcement of the law.

The PIPES Act describes the "nine elements" of an effective state damage prevention program. The nine elements are goal-oriented and flexible in terms of how states can meet each element. As reiterated in the NPRM, these elements include:

1. Enhanced communication between operators and excavators.
2. Fostering support and partnership of all stakeholders in all phases of the program.
3. Operator's use of performance measures for locating of pipelines and pipeline construction.
4. Partnership in employee training.

5. Partnership in public education.
6. Enforcement agencies' role as partner and facilitator to help resolve issues.
7. Fair and consistent enforcement of the law.
8. Use of technology to improve all parts of the process.
9. Analysis of data to continually evaluate/improve program effectiveness.

While initially developed in the *Integrity Management for Gas Distribution, Report of Phase I Investigations* (otherwise known as the "DIMP" Report) released by PHMSA in 2005, the 'nine elements' were included in the PIPES Act and are considered fundamental to a successful state damage prevention program. These elements have been endorsed by the vast majority of damage prevention stakeholders, including the CGA, and should serve as the basis for evaluation of state programs as PHMSA moves forward.

Implementation will be Critical

The NPRM provides a good framework for improvements to damage prevention programs and enforcement of requirements therein. However, while on paper the NPRM effectively proposes criteria, administrative processes, federal requirements for excavators, and adjudication processes, PHMSA should be aware of several factors when applying the rule to "real world" situations in the field.

The NPRM notes that while the proposed rule focuses on enforcement of damage prevention requirements subject to pipelines, "PHMSA strongly believes that individual states should retain their primary responsibility to enforce their excavation damage prevention laws effectively" (pg. 19807). DCA recognizes that PHMSA's jurisdiction is limited to the natural gas and hazardous liquid pipelines. However, the reality is that state policymakers will inevitably look at this regulation when adjusting their laws and enforcement practices subject to water, sewer, electric, telecommunications and other underground infrastructure.

PHMSA should take this into consideration as it begins a dialogue with states that risk being determined to have inadequate enforcement. PHMSA has long held a reputation for being fair, open and accessible to stakeholders impacted by the agency's regulations and related initiatives. DCA recommends that, prior to moving forward with its enforcement authority in a given state, PHMSA invite all government and industry stakeholders to a discussion about alleged problems with the states enforcement practices. An inclusive, open forum among PHMSA and damage prevention stakeholders that operate in the state, prior to issuing a notice of inadequacy in accordance with §190.5, would offer several positives.

First, this type of setting would put state authorities on notice that they are on PHMSA's list and that evaluation and autonomous adjustment of their enforcement practices would be in the state's best interest. Second, discussion among a range of stakeholders would air opinions and concerns about the existing law and enforcement program and offer perspectives not yet considered by enforcement authorities. These perspectives might assist officials in adjusting the state's damage prevention requirements and enforcement practices subject to gas and hazardous liquid pipelines as well as other underground facilities. This would help address concerns expressed by several commenters in response to the ANPRM about states having to administer and enforce two sets of damage prevention requirements, and might provide a more cohesive process during adjustment of rules and enforcement

of the state's damage prevention laws. Lastly, an open forum may well lead to the fostering of positive relationships among stakeholders in the state, as evidenced by the CGA's success over the years.

Public Meetings Encouraged

DCA encourages PHMSA to reconsider its decision not to hold public hearings on the subject of state damage prevention enforcement programs. The expansion of federal enforcement authority provided in the PIPES Act of 2006 has led to the proposal to establish two new Parts to the CFR and will result in significant impacts to PHMSA's regulated community. Although providing a web-based presentation explaining the intent and provisions of the rule will be helpful, more outreach is needed to provide the necessary education to stakeholders impacted by this pending rulemaking.

Specific Comments

A. Standards for Effective State Damage Prevention Enforcement Programs

PHMSA seeks comment on proposed criteria to evaluate the effectiveness of a state damage prevention enforcement program. Adequacy of enforcement would depend on whether the state: has the authority to enforce its damage prevention law through civil penalties; has designated an authority to enforce the law; is sufficiently assessing civil penalties; has a reliable mechanism (i.e. mandatory reporting) to learn about damages; and employs effective investigation to determine at-fault parties.

Minimum requirements of the state law will also be assessed. Specifically, PHMSA will evaluate whether the law includes: one-call notification requirements; requirements to respect pipeline location markings; requirements for the excavator to notify the operator of damages to the pipeline at the earliest practical moment and to call 911 if the damage results in the escape of flammable, toxic, or corrosive product.

DCA believes the proposed criteria to determine the adequacy of a state damage prevention enforcement program is sufficient. As written, enforcement authorities may impose civil penalties or other appropriate measures, whether the at-fault party is an excavator or a pipeline operator. However, the criteria to determine the adequacy of the state law itself provided in paragraph §198.55 A(6) is incomplete.

Just as Congress reiterated the responsibilities of the pipeline operator in the initial "Prohibition" language of the PIPES Act, PHMSA should restate the operator's responsibilities related to one-call participation and accurate locating and marking of their facilities in the criteria to determine the adequacy of a state damage prevention law described in the NPRM. This will clearly depict the primary elements of damage prevention and reduce confusion of state officials who are not well-versed in the fundamentals of excavation damage prevention but are charged with enforcing the requirements.

B. Administrative Process for States

DCA believes the administrative process described in the NPRM is sufficient as long as applied equally and equitably among pipeline operators and excavators. Allowing state authorities five years to make program improvements to meet PHMSA's criteria is appropriate.

C. Federal Excavation Standard

PHMSA proposes to add a new Part 196 to Title 49 of the CFR to establish minimum requirements for excavators to follow to protect pipelines from excavation damage. §196.103 of the NPRM proposes that excavators be required to: use the available one-call system; wait for the pipeline facilities to be marked; excavate with proper regard for the marks; and make additional use of one-call for excavations at other locations.

Conceptually this section seems reasonable. However, §196.103(b) specifically states that “[i]f underground pipelines exist in the area, wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating.”

The language as written in the NPRM is inconsistent with state damage prevention laws, the vast majority of which provide a required timeframe for underground facilities to be located and marked. The language in §196.103(b) leaves the door open for pipeline operators to mark their facilities at their discretion. DCA suggests PHMSA revise the language to recognize requirements for accurate marking “in accordance with state damage prevention law.”

DCA questions the need for §196.103(d) which would require excavators to “[m]ake additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be conducted at other locations.” The requirement seems redundant. Excavators would have to comply with the requirements set forth in §196.103(a), (b) and (c) for “additional excavations” that would be conducted at other locations.

The “911 requirement” set forth in §196.109 remains a problem for the excavation community. The NPRM states that in cases where a damage to the pipeline “causes the release of any flammable, toxic, or corrosive gas or liquid from the pipeline that may endanger life or cause serious bodily harm or damage to property or the environment,” the excavator is required to call 911. The language goes on to provide that “the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site.”

Professional excavators are not first responders. Expecting a contract excavator to accurately determine if the product released following excavation damage is one that can “cause serious bodily harm or damage property or the environment” is expecting too much. Further, the language providing the excavator discretion to request the dispatch of emergency response personnel will open the door for unwarranted liability. DCA encourages PHMSA to reevaluate this provision in the final rule.

D. Adjudication Process

PHMSA proposes to apply the same adjudication process for these new regulations as is used for other pipeline safety violations included in 49 CFR Part 190. The process described in the NPRM seems equitable and consistent with current federal law. However, DCA suggests that improvements could be made to the logistical provisions in the final rule for excavators to address alleged violations of the federal excavation standard.

The NPRM states that “PHMSA proposes that hearings would be held as they are now for pipeline operators at one of PHMSA’s regional offices or via teleconference.” It is overly burdensome to expect professional excavators to travel to PHMSA regional offices, which have jurisdiction over several states. For example, PHMSA’s Western Region covers 15 states and U.S. Territories, yet has a single Pipeline Safety Western Region Office in Lakewood, Colorado. DCA suggests that alternative locations be provided in addition to PHMSA regional offices to facilitate participation and due process for excavators to challenge any allegations of wrongdoing.

In response to PHMSA’s request for comments on the need for “formal rules of evidence, transcriptions, or discovery,” DCA assumes that convincing evidence will be required in order to cite contract excavators, and that other factors necessary for due process are provided for in the final rule.

Conclusion

DCA applauds PHMSA for providing a well thought and comprehensive proposed rule to help improve state damage prevention enforcement programs. By soliciting initial feedback from a broad range of stakeholders through the 2009 Advanced Notice of Proposed Rulemaking, PHMSA has again demonstrated its commitment to considering industry perspectives and promoting the spirit of shared responsibility in damage prevention. PHMSA representatives regularly speak at industry forums to discuss this pending regulation, and this is greatly appreciated. Lastly, PHMSA is to be commended for the meticulous summary of stakeholder comments provided in the preamble of the NPRM.

Excavation damage prevention is simple in concept yet can become complex in practice. DCA believes that damage prevention is all about communication and cooperation among all stakeholders in the process. If key stakeholders fail to meet their responsibilities in the damage prevention chain, the entire process is undermined and can bring disastrous consequences. Therefore, fair and consistent enforcement of the rules is needed. PHMSA’s proposed rule is another step in the right direction, but federal and state officials must remain diligent in their efforts to improve damage prevention programs using a balanced approach to enforcement.

DCA appreciates the opportunity to comment on the NPRM, and we look forward to working with PHMSA in this and other efforts to advance excavation damage prevention.

Best Regards,



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