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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



June 1, 2012

Mr. Jeffrey D. Weise
Associate Administrator
Pipeline & Hazardous Material Safety Administration
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Re: Docket No. PHMSA-2009-0192, Pipeline Safety: Pipeline Damage Prevention Programs

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the Pipeline and Hazardous Materials Safety Administration (PHMSA) Notice of Proposed Rulemaking (NPRM) which establishes the criteria for determining the adequacy of state enforcement of pipeline damage prevention laws and proposes a process for federal enforcement under the authority of the Pipeline Inspection, Protection, Safety, and Enforcement (PIPES) Act of 2006. The safety of our employees and the public and the prevention of damage to underground facilities are high priorities for AGC and its members.

AGC is the leading association for the construction industry in the United States. Founded in 1918 at the express request of President Woodrow Wilson, AGC represents more than 33,000 firms in 95 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. AGC firms engage in the construction of public and commercial buildings, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. AGC firms regularly perform construction services for private owners, state departments of transportation, municipal authorities and the federal government. The majority of AGC members are small and closely-held businesses and AGC proudly represents both union and open-shop construction contractors. Safety is a top priority to AGC and our contractor members. AGC and our nationwide network of Chapters emphasize all aspects of worker safety and regularly conduct training and provide services to ensure that our workforce comes home safely at the end of the day.

A Bottom-Up Approach to Damage Prevention

AGC supports the premise that the best place for enforcement decisions to be made is in the states themselves. The federal government's first priority should not only be to encourage states to adopt policies and procedures that promote effective damage prevention and one-call programs, but also to allow the states to operate and enforce them. AGC does not support a

permanent federal role in enforcing state one-call laws. Our position is that it is the state's job to enforce state laws, and should remain so. AGC is hopeful that this rulemaking will serve as a positive influence and an incentive for state authorities to ensure that state damage prevention programs and enforcement practices protect all underground facilities and address enforcement in a balanced and comprehensive manner based on consensus "Best Practices" developed by the Common Ground Alliance (CGA).

AGC and its members are extremely supportive of state one-call programs and, as a National Launch Partner of the 811 program and active members of CGA, we have demonstrated our commitment to damage prevention. We will continue to work with the states through our national network of chapters and the CGA to educate stakeholders and improve compliance, enforcement, and the effectiveness of one-call and damage prevention programs all over the country. AGC has been honored to serve on PHMSA's State Damage Prevention Grant Review team for several years, and is represented on the Board of Directors of the Common Ground Alliance. AGC has played a prominent role in the various committees of the CGA including the committee responsible for writing and approving CGA's "Best Practices" and regional CGA efforts. In many states, AGC members actively participate on state one call boards and provide education and training for our members and opportunities for interaction with all damage prevention stakeholders.

Some of the most successful safety efforts have come from the joint efforts and joint obligations of the underground facility owners/operators, the locating industry, and contractors, which have all joined together nationally to create the CGA. The CGA has been successful in creating a cooperative environment for damage protection, and PHMSA's participation and financial support of CGA has been crucial to its success. One of the aspects of the CGA that makes its model so successful is the deeply held belief by its members that to be effective, the approach to damage prevention and enforcement must be balanced so that the responsibilities of the pipeline companies and other underground facility owners and operators are considered equally important as the responsibilities of the excavators. AGC urges that this philosophy permeate the investigations and evaluations of state damage prevention programs.

Proposed Federal Evaluation Standards

AGC believes that the standards for effective state damage prevention enforcement programs outlined in the NPRM (page 19803 referred hereinafter as the "proposed standards") are a great start. However, AGC insists that PHMSA take into account all "Nine Elements" of an effective damage prevention program and take a holistic and comprehensive approach to reviewing current state damage prevention regimes under PHMSA's jurisdiction, particularly focusing on the degree to which all stakeholders are involved in State damage prevention efforts. The "Nine 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 persons performing 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

AGC believes the proposed standards place too much emphasis on enforcement and the excavator, and too little on the owner/operator and locators' responsibilities for timely and accurate locates and determining whether damage prevention has the support of all stakeholders. PHMSA itself commented that "in determining a state program's adequacy, PHMSA would evaluate a state's overall damage prevention enforcement program..." (page 19809). AGC is supportive of PHMSA taking a position to evaluate a state's overall damage prevention program, and encourages PHMSA to make this clearer in the proposed standards.

PHMSA's existing requirements for locating and marking requirements in 49 CFR 192.614 for gas pipelines and 49 CFR 195.442 for hazardous liquid pipelines recognize the crucial role and shared responsibility of owners and operators in damage prevention. PHMSA should encourage State regulatory authorities to equally enforce state laws applicable to underground facility owners and operators who fail to respond to a location request or fail to take reasonable steps, in response to such a request. Accurate and timely enforcement will help all parties ensure accurate marking and locating of the pipeline facility to prevent damage. Unfortunately, locating and marking duties are all too often neglected or performed inadequately by underground facility operators and the contract locators retained by them. It is absolutely critical that enforcement of these requirements be a high priority for state authorities.

Without accurate locating and marking, contractors are put in harm's way. That is why accurate locating and marking responsibilities of the pipeline operator are clearly defined in the PIPES Act Section 2(a)(1)(e), which addresses the locating and marking responsibilities of the pipeline operator, stating that "[a]ny 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."

These "prohibitions" also restrict persons 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." The legislation also requires that excavators promptly report any damage to the owner or operator caused by excavation, and to call the "911" emergency number if "the damage results in the escape of any flammable, toxic, or corrosive gas or liquid..."

In other words, the PIPES Act clearly dictates the responsibilities of excavators to call the appropriate one-call center, respect the markings provided by the pipeline operator, report any damage and call 911 in hazardous situations. Comparably, the Act dictates that pipeline owners

and/or operators must respond to locate requests and provide accurate locating and marking of their facilities in a timely fashion. The PIPES Act also clearly puts these two responsibilities on equal footing. Accurate and timely locates are critical to damage prevention efforts and absolutely cannot be ignored as a step in the damage prevention process. AGC believes that in reviewing individual state damage prevention laws, it is paramount that PHMSA consider that compliance and participation of all stakeholders in preventive efforts (such as participation in one-call notification centers and accurate locating and marking of facilities) and examine whether penalties for violating state laws not only address excavators, but facility owners and operators, one-call notification centers and facility locators.

Administrative Process for States

AGC believes that the administrative process outlined in the NPRM is fair and strikes an adequate balance between the Congressional directive to undertake federal administrative enforcement where appropriate and maintaining a state's right to a fair and efficient means of showing compliance. AGC is pleased that a state has the ability to petition PHMSA to demonstrate that it has an improved damage prevention program after its inadequacy determination before its next annual review. AGC believes this is consistent with our closely held views, expressed both in our comments on the ANPRM and above, that federal enforcement should not be permanent. AGC does suggest, however, that in the process of the paper hearing that happens after the initial finding of inadequacy, PHMSA calls for input from all stakeholder groups in the state. This would provide a better picture to PHMSA what a state's program is like and how it's operated from multiple perspectives. AGC also suggests in the penalty phase, PHMSA consider education as an alternative or supplement to civil or other penalties and in cases where financial penalties are assessed, revenues generated must be reserved to finance damage prevention education and technologies used in support of damage prevention activities.

Adjudication Process for Excavators

In the event that PHMSA determines that a state's enforcement is inadequate, the adjudication process outlined by PHMSA in the NPRM on its face seems fair. However, AGC recommends an additional layer of formality be adopted. PHMSA asked for comment on whether formal rules of evidence, transcriptions, and/or discovery should apply, and AGC wholeheartedly agrees that in order to conduct a fair proceeding that ensures all parties rights to due process are maintained, all of these formal procedures should apply to ensure the excavator is protected.

'Excavator' and Exemptions

AGC applauds PHMSA for responding to the concern we (and others) raised about the vagueness of the term excavator, used throughout the Advance Notice of Proposed Rulemaking. The term excavator, and thus the focus of federal enforcement proceedings where the excavator is at fault, should refer to all parties doing digging work - including, but not limited to, state agencies, municipal entities, agricultural entities, and railroads. State excavation damage prevention laws and enforcement should also apply equally to pipeline operators and their contract excavators and locators. AGC also agrees with PHMSA's presumption against

exemptions to state damage prevention laws. In general, exemptions of categories of excavators are problematic and can result in increased damages. However, AGC agrees that some exemptions *can* be justified with data. These exemptions can only be determined at the state level, but many of the existing ones should be carefully scrutinized by PHMSA and eliminated if the present a danger to buried facilities. The presumption against exemptions should remain.

Concluding Remarks

AGC would like to commend PHMSA for its public outreach efforts. PHMSA should be congratulated on the substantial improvement that has been achieved in damage prevention through its leadership and crucial participation in, and support of, the Common Ground Alliance. Progress in damage prevention has been significant and while there is always room for improvement, all parties involved in the process agree that damage prevention is truly a shared responsibility which requires a commitment to communication, education and enforcement. AGC fully understands that PHMSA is cognizant of the limitations and prohibitions under which federal enforcement may occur, and is confident that this NPRM will incentivize states with good programs to continue successful efforts and motivate states that are lacking to act responsibly to improve their programs. AGC is proud to work with PHMSA both through CGA and on a bilateral basis to further the cause of underground facility damage prevention.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott M. Berry". The signature is fluid and stylized, with the first name "Scott" written in a cursive-like script, followed by "M. Berry" in a more formal but still handwritten style.

Scott M. Berry
Director
Municipal and Utilities Construction Division