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DOT Docket Management System
U.S. DOT, Docket Operations M–30
West Building Ground Floor, Room W12–140
1200 New Jersey Avenue SE
Washington DC 20590–0001

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

The National Association of Pipeline Safety Representatives (NAPSR), established in 1982, is a non-profit organization of state pipeline safety personnel who serve to support, encourage, develop, promote, and enhance pipeline safety in the United States and its territories. NAPSR supports the safe delivery of pipeline products by working closely with USDOT's Pipeline and Hazardous Materials Safety Administration (PHMSA), the industry, and other interested organizations. NAPSR provides an effective mechanism for fostering the federal/state partnership through 52 state agencies in the lower 48 states, Puerto Rico and the District of Columbia. NAPSR's mission is "To strengthen state pipeline safety programs through promotion of improved pipeline safety standards, education, training, and technology". NAPSR's Board of Directors is the governing body of the organization and is responsible for NAPSR policy. NAPSR respectfully offers the following comments on the Notice of Proposed Rulemaking (NPRM) in the above-referenced docket number.

General Comments

The NPRM seeks to revise the Pipeline Safety Regulations to: Establish criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs; establish an administrative process for making adequacy determinations; establish the Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs; and establish the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. PHMSA conducted a study that reviewed three states before and after they had enforcement programs and concluded that excavation enforcement

programs might decrease pipeline excavation damages over time and therefore decrease fatalities, injuries and property damage. For the States without enforcement programs, the NPRM does not indicate that PHMSA reviewed whether these states have experienced damage reduction on a year to year basis as the result of non-enforcement DP initiatives; it only documents TOTAL damages and incidents over a twenty-two year period. In order to show the true advantages of a damage prevention enforcement program versus non-enforcement initiatives, it would be beneficial to show the damage trending rates of the states without enforcement programs. Also, PHMSA states that they intend to investigate all incidents in states without pipeline excavation damage enforcement programs. In its NPRM, PHMSA suggests that the 63% reduction is a helpful starting point on which to estimate the benefits of this rulemaking. PHMSA utilized three separate rates to conservatively evaluate the benefits of this rulemaking. Any significant reduction in damages would depend upon implementation of all nine (9) elements – not just occasional incident enforcement.

Proposed 49 CFR 196.3 Definitions.

Excavation – The proposed definition of '*excavation'* only covers operations performed "below existing grade" which may lead to confusion, especially in cases where excavation activities are performed, backfilled, and graded on multiple occasions over a period of time.

The proposed definition of '*excavation'* specifically excludes "homeowners excavating on their own property with hand tools". This exclusion would directly conflict with many state laws and with state and national awareness initiatives. Any person performing excavation activities, including homeowners, should be encouraged to call for utility locates and wait the required time allowed for marking before excavation begins, pursuant to state regulations and requirements. To specifically exclude "homeowners excavating on their own property with hand tools" from the definition of excavation and from the requirement to have underground facilities located prior to digging is contrary to the marketing campaigns and public awareness activities designed to reduce damages to underground facilities. Common "homeowner" excavation activities include planting trees and shrubs, landscaping activities, installing mailboxes, decks, sprinkler systems, and fences, all of which could damage underground facilities and pose significant danger to the excavator, property owner, nearby structures, and others.

The definition of *"excavation"* should not exclude hand digging by homeowners. Therefore, the sentence *"This does not include homeowners excavating on their own property with hand tools."* should be removed from the definition of *"excavation" in 196.3.*

Pipeline - The proposed definition of *'pipeline'* does not cover all appurtenances of a pipeline structure, only those "attached or connected to pipe…". This would exclude tracer wire

systems or other devices, such as radio frequency identification (RFID) or other electronic marking system (EMS) devices, used to facilitate proper locating and marking of the operator's infrastructure.

The definition of *"pipeline"* should be written to include tracer wire and other devices used to facilitate proper locating and marking of the operator's infrastructure.

Proposed 49 CFR 196.103 What must an excavator do to protect underground pipelines from excavation-related damage?

Proposed language in 196.103 includes *"where an underground gas or hazardous liquid pipeline **may** be present". (emphasis added)* This language would directly conflict with many state laws and with state and national awareness initiatives. Do we really want excavators to try to establish where a pipeline may be present or shouldn't they always be required to comply with the proposed requirements of 196.103 and state regulations and "call before digging"? Once again, all excavators should be encouraged to call for utility locates and wait the required time allowed for marking before excavation begins, pursuant to state regulations and requirements. To exempt an operator from the requirements when it is believed that a pipeline *may* not be present is, once again, contrary to the marketing campaigns and public awareness activities designed to reduce damages to underground facilities.

Therefore, *"where an underground gas or hazardous liquid pipeline may be present" should be removed from 196.103.*

Proposed language in 196.103(b) states that an excavator must *"If the 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",* but fails to define what is meant by "in the *area"* and does not specify the amount of time in which the operator is expected to *"wait for the pipeline operator to arrive" and "mark the location".* This, also, does not account for instances when an operator fails to establish and mark the location of its underground facilities. What actions must an excavator take in the event the pipeline operator fails to respond? How close to the excavation does the pipeline need to be in order to be considered *"in the area"* and how long is an excavator expected to *"wait for the pipeline operator"*?

The term *"area"* should be better defined, the time between calling for locates and the beginning of excavation should be specified, and actions an excavator is to take when an operator fails to establish and mark the location of its underground facilities should be specified.

Proposed language for 196.103(c) is vague and does not adequately address what "*proper regard"* or *"respecting the marks"* means. This could be further clarified by adding a reference to the Common Ground Alliances (CGA) best practices for safe excavation around an underground facility.

Proposed 49 CFR 196.105 Are there any exceptions to the requirement to use one-call before digging?

Proposed language for 196.105 exempts *"homeowners using hand tools…on their own property"* from using a one-call prior to digging. As previously mentioned, this conflicts with many state laws and with state and national awareness initiatives. Any person performing excavation activities, including homeowners, should be encouraged to call for utility locates and wait the required time allowed for marking before excavation begins, pursuant to state regulations and requirements. To specifically exclude "homeowners excavating on their own property with hand tools" from the requirement to have underground facilities located prior to digging is contrary to the marketing campaigns and public awareness activities designed to reduce damages to underground facilities. Common "homeowner" excavation activities include planting trees and shrubs, landscaping activities, installing mailboxes, decks, sprinkler systems, and fences, all of which could damage underground facilities and pose significant danger to the excavator, property owner, nearby structures, and others.

Furthermore, state laws may include reasonable exemptions to the requirement to use one-call before digging. Examples include opening a grave in a cemetery, landfill operations, and tilling for agricultural purposes.

Therefore, any requirements or exceptions on when to use the one-call system before digging needs to defer to the state law in the state where the excavation is going to occur.

Proposed 49 CFR 196.107 What must an excavator do if a pipeline is damaged by excavation activity?

Proposed language in 196.107 states that "*if a pipeline is damaged in any way by excavation activity, the excavator must report such damage to the pipeline operator".* Consideration should be given to requiring the excavator to also notify the one-call center in the event of damage to an underground facility and/or a release of product. This would provide a centralized location for the reporting of damages as well as a method of proper documentation of such damages.

Proposed 49 CFR 196.109 What must an excavator do if damage to a pipeline from excavation activity causes a leak where product is released from the pipeline?

Proposed language in 196.109 states that "*if damage to a pipeline from excavation activity causes the release…from the pipeline that may endanger life or cause serious bodily harm or damage to property or the environment…the excavator must immediately report the release…to appropriate emergency response authorities by calling 911. Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site."* If the incident is such that it "may endanger life or cause serious bodily harm" then emergency personnel should always respond to the site; the excavator should not be making a "judgment call" at this point.

The sentence *"Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site."* should be removed from the proposed language in 196.109.

Proposed 49 CFR 196.111 What if a pipeline operator fails to respond to a locate request or fails to accurately locate and mark its pipeline?

Proposed language in 196.111 states that *"PHMSA may enforce existing requirements applicable to pipeline operators, including those specified in 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114…".* However, most state regulations are more stringent then 192.614, 195.442, and 60114, which generally cover only the broad basics and are do not include as detailed compliance requirements as state law. Also, how is PHMSA going to know if the pipeline operator fails to respond, are additional reporting requirements on either pipeline operators, excavators, or both going to be established?

State laws, regulations, and rules usually provide specific and detailed requirements for when an operator fails to respond to a locate request or fails to accurately locate and mark its pipelines. Therefore, any requirements concerning failure to respond or accurately locate needs to defer to the state law in the state where the event occurred.

Proposed 49 CFR 198.53 When and how will PHMSA evaluate state excavation damage prevention law enforcement programs?-

Proposed language in 198.53 states that *"PHMSA will also conduct annual reviews of state excavation damage prevention law enforcement programs."* and goes on to state that "*If PHMSA finds a state's enforcement program inadequate, PHMSA may take immediate enforcement against excavators in that state."* and that "*A state that fails to establish an adequate enforcement program in accordance with 49 CFR 198.55 within five years of the*

finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107." The proposed language further states that "*The amount of the reduction in 49 U.S.C 60107 grant funding shall not exceed 10% of prior year funding."* NAPSR believes that the proposed grant funding penalties for state's deemed by PHMSA to have inadequate excavation damage prevention law enforcement programs is unnecessary, unjustified, and unfairly penalizes a state's pipeline safety program. Furthermore, a ten (10) percent reduction in a state's pipeline safety program base grant is disproportionate and excessive, especially when compared with the point allocations of the other parts of the annual evaluation scoring (i.e. incident investigations, field inspections, field inspections). Penalizing a state that is in need of additional resources to implement an "adequate" program does nothing but increase the difficulty of making the necessary changes, which may require legislative action that is beyond the control of the state agency.

NAPSR believes the proposed penalty for state's deemed by PHMSA to have inadequate excavation damage prevention law enforcement programs is unnecessary, unjustified, and excessive and this provision should be removed from the proposed language, or at a minimum, should be reevaluated to determine a more equitable and reasonable level of penalty.

Proposed 49 CFR 198.55 What criteria will PHMSA use in evaluating the effectiveness of state damage prevention enforcement programs?

Proposed language in 198.55(a)(3) asks if a state is *"assessing civil penalties for violations at levels sufficient to ensure compliance"* as well as if the state is *"making publicly available information that demonstrates the effectiveness of the state's enforcement program",* which are two separate provisions, with only the first part (assessing civil penalties) being an enforcement action. Publicizing enforcement actions is not of itself an act of enforcement and should not be used to judge if state enforcement is effective. Also, how will PHMSA determine if the assessment of civil penalties is "*sufficient to ensure compliance"?* New violations could occur even though a state may issue significant civil penalties for violations. Will other methods of "penalties", i.e. mandatory training, be considered as enforcement if they lead to greater levels of compliance?

The proposed language in 198.55 includes many criteria that will be used in determining if the state has an effective enforcement program. How will PHMSA use this to evaluate a state program? Does a state have to fulfill each and every criteria? What if PHMSA determines that a state doesn't fulfill one of the items, if the entire program deemed ineffective?

Proposed language included in 198.55(6) and 198.55(7) concerns a state's excavation damage prevention law and exemptions, if any, included in this law. 49 U.S.C. 60114(f) authorizes PHMSA to determine the adequacy of state pipeline excavation damage prevention

law enforcement programs, not the potential inadequacy of the law itself. To evaluate a state damage prevention program on provisions that may not be included in the state's law should not be included in this proposed rule. The proposed rule was to "establish criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs" (emphasis added) of existing state law. Furthermore, whether or not a state has exemptions (which may be reasonable and justifiable) has nothing to do with the state's enforcement program and whether or not its enforcement is "adequate".

NAPSR believes the proposed language in 198.55(6) and 198.55(7) should be removed from this rule.