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December 14, 2009

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: 74 Fed. Reg. 55797-55803; October 29, 2009; Pipeline Safety: Pipeline Damage Prevention Programs; Advance notice of proposed rulemaking;
Docket #: PHMSA-2009-0192.

Dear Mr. Wiese:

The American Petroleum Institute (API) and the Association of Oil Pipe Lines (AOPL) write in response to the Office of Pipeline Safety (OPS), Pipeline and Hazardous Materials Safety Administration's (PHMSA's) advance notice of proposed rulemaking (ANPRM) to determine how and when PHMSA will exercise its statutory authority for enforcement of damage prevention laws in the states. API and AOPL are national trade associations representing companies that own and operate approximately eighty-five percent of the hazardous liquids pipeline miles across the nation.

We applaud PHMSA for addressing this important issue and welcome the opportunity to submit comments. Our members have vested interests in the protection of their assets from excavation-related external force damage and the protection of the public and our environment from releases of the product transported in our pipelines. Eighty-five percent of one call partner incidents resulted from a failure to follow one or more of the Common Ground Alliance (CGA) best practices, which have been in place for more than ten years. More must be done to encourage stakeholders to adhere to state damage prevention laws and state and national programs already in place. We recognize and support the role of the states in preventing damage to pipelines. However, in some cases, state excavation damage prevention laws do not exist, are weak or incomplete, or are not adequately enforced. We respectfully request that PHMSA move forward

promptly to issue a final rule to accomplish the objective set forth in the ANPRM of promoting better, more effective enforcement of state damage prevention laws.

We agree with PHMSA that where strong and effective state damage prevention laws and enforcement programs exist, PHMSA need not and should not exert its federal authority. Otherwise, a costly, potentially inefficient layer of federal oversight could result. However, absent both strong state laws and vigorous enforcement, it is imperative that PHMSA move quickly to establish and to vigorously enforce minimum requirements in all states. The fundamental minimum requirements that should apply are that all excavators, including state agencies and municipalities, (1) use state one-call systems prior to excavation, (2) follow location information or markings established by pipeline operators, (3) report all excavation damage to pipeline operators, and (4) immediately notify emergency responders when excavation damage results in a release of pipeline products.

The scope of enforcement for all programs, federal and state, should encompass all excavators, including state agencies, municipalities, counties, parishes, agricultural entities, and railroads. Those organizations should be compelled to use the state's one-call system and request that underground utilities in the area of the planned excavation be located and marked prior to digging. The exclusion of a category of excavator should be considered a basis for PHMSA regulation and direct enforcement. The threat to pipelines is the same regardless of the category of excavator.

PHMSA stated in the ANPRM that it believes that “states should retain the primary responsibility to effectively enforce damage prevention laws.” This belief should not prevent PHMSA from efficiently establishing clear criteria for acceptable state damage prevention laws and programs, nor should such belief cause PHMSA to hesitate to use the authority granted by Congress to enforce damage prevention laws where state programs are inadequate.

PHMSA should continue its assistance to state agencies seeking to develop and enforce effective damage prevention programs through grants and other support mechanisms. This assistance should include providing quantitative analyses that demonstrate the effectiveness of existing damage prevention programs and developing incentives to ensure that agencies and other stakeholders (e.g., utility operators, excavators, state lawmakers) in the states cooperate in these efforts.

A. Considerations for Determining the Adequacy of State Damage Prevention Enforcement Programs

API and AOPL strongly support PHMSA’s proposed threshold criteria to determine whether a state has established and exercised authority to assess civil penalties for violation of one-call laws. Most of the other criteria listed in the ANPRM derive from these criteria and demonstrate that laws are in place and being enforced.

Civil penalties are a very important element of damage prevention programs. With respect to civil penalties associated with the violation of one-call laws, there are indications that states that have and use civil penalties experience fewer incidents than those that do not. As an example, the State of Texas experienced 20 excavation-related pipeline releases in 2006 and 28 in 2007. After implementing their current enforcement program, the number of releases has dropped to 10 in 2008 and 12 in 2009. Therefore, we strongly support the focus on utilization of civil penalties.

PHMSA should establish clear guidelines and criteria for determining which state damage prevention programs are effective and effectively enforced. These criteria should be based on transparent data, where available, but should not impose additional data collection on the states.

Evaluations should be based primarily on the effectiveness of the overall programs in place and allow for flexibility in the statutory or regulatory language. For example, a state program may be considered adequate if it has met the fundamental requirements described in the introduction, but failed to meet other program elements required by PHMSA, as long as the state can demonstrate overall program effectiveness. A damage prevention program that establishes a generally acceptable baseline should provide an objective measuring stick.

The reporting requirements suggested as a basis for evaluation could have the effect of requiring duplicate (or even triplicate) reporting for pipeline operators and/or other regulated entities. Given that recently proposed revisions to PHMSA's own accident and incident reports (7000.1 and 7000.2) would collect, and CGA's DIRT report already collects, significant information about excavation damage incidents, PHMSA should consider changing the reporting requirements by which a state program is judged to allow for the use of the CGA or PHMSA data. State agencies and PHMSA should explore means to share that information electronically rather than imposing an additional reporting requirement.

B. Administrative Process

API and AOPL recommend that PHMSA require annual reviews of state damage prevention programs, but that such reviews be initiated after initial adequacy determinations have been completed. Annual reviews should focus on continuing effectiveness indicators (i.e., whether or not excavation damage incidents are declining) and not simply on whether every incident has merely been documented and inspected.

In order to encourage states to establish and execute adequate damage prevention programs, PHMSA should use a multi-step process when determining whether a state's program is inadequate, perhaps including preliminary determinations, interim determinations, and eventually final determinations. At each step of the process, PHMSA should clearly describe, in functional rather than prescriptive terms, changes required for a state's program to be deemed adequate. PHMSA should provide opportunities for states to respond at each step of the process. Enough time should be granted at each step of the process to realistically allow states to modify their programs as needed at the legislative and/or regulatory level. This process should, however, be completed expeditiously, to ensure that compliance is timely and the public interest is preserved.

We support the development of administrative procedures that would be available for states that elect to contest a notice of inadequacy. The process for this provision should be the same as is currently used in the State Certification Program. We also believe that the assessment of a state's program should be at the program level, not at an individual case level. Furthermore, we question the efficacy of direct federal enforcement against an excavator who violates a state's damage prevention law and damages a pipeline. Currently, state one-call laws vary with respect to elements such as notification time, ticket life, tolerance zone, and white lining. Without a federal minimum standard to support federal enforcement, we do not believe it is appropriate or practical for PHMSA to enforce state laws evenly or consistently. To that end, PHMSA should consider the establishment of minimum standards for critical elements of state one-call laws, such as, but not limited to, notification time, tolerance zones and white lining (or otherwise denoting the area of intended proposed excavation), in addition to the fundamental minimum requirements described in the introductory section of these comments. PHMSA may also consider using its grant resources, such as the Damage Prevention Grants, to encourage state compliance with the elements of this rulemaking. That may require changes to the existing grant criteria that could be included in a proposed and final rule.

C. Federal Standard for Excavators

API and AOPL support developing minimum requirements for excavators based on the PIPES Act language and CGA Best Practices. The proposed requirements should lead to greater pipeline safety by making excavators more aware of their one-call responsibilities and the consequences of failing to comply with state laws and regulations. Interstate pipeline operators are currently exposed to myriad differences in one-call laws which do not always appear to be warranted by "best practices." For example, some states require advance notification within two working days, others 48 hours, some three days. Another difference relates to the one-call ticket life length, with periods varying from ten days, to fourteen days, to twenty-eight days, to no expiration. Other differences include tolerance zones (the horizontal distance specified on each side of the facility in which extra precautions are required – a.k.a. approximate locations) of 18 or 24 inches, vertical depths defining when actual "excavation" begins, differences within response definitions, and response time for emergencies. While we recognize that conditions vary from state to state and that "one size does not fit all", PHMSA should establish minimum requirements through a notice and comment rulemaking process.

D. Adjudication Process

The provisions outlined by PHMSA in the ANPRM appear to afford adequate protection to excavators. We certainly support an adjudication process for excavators that assures for due process. That being said, the adjudication should allow the hearing officer sufficient flexibility in the conduct of the proceeding such that the process can be prompt and efficient where appropriate, such that decisions may be rendered without undue delay.

E. Existing Requirements Applicable to Owners and Operators of Pipeline

API and AOPL see no need for PHMSA to consider making the existing regulatory requirements more detailed and explicit as proposed. Owners and operators of pipelines should be held to the same standards as other facility owners and excavators and should be held accountable to respond to locate requests in a timely and accurate manner. However, we do support regulations, such as those in California (CA Govt. Code Section 4216-4216.9), that impose more explicit and additional requirements for both the owner and the excavator when excavating in close proximity to high priority, subsurface installations.

Conclusion

API and AOPL appreciate the opportunity to comment on the ANPRM. It is imperative that PHMSA support effective state damage prevention programs and, while doing so, exercise its authority to enforce damage prevention laws where state programs are inadequate. PHMSA should not wait for a significant incident in an “inadequate” state before initiating enforcement actions. These procedures should only be implemented as a last resort, but must be in place and executed appropriately to provide incentive for state action.

Please contact us if you have any questions about these comments.

Sincerely,



c: John Gale, PHMSA
Steve Fischer, PHMSA
Docket #: PHMSA-2009-0192