**Before the**

**DEPARTMENT OF TRANSPORTATION**

**PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION (PHMSA)**

# Notice of Proposed Rulemaking

**RE: Docket No. PHMSA-2009-0192**

**on**

# PHMSA's Proposal to Establish Criteria for Determining Adequacy of State Enforcement of Pipeline Damage Prevention Laws

**Comments submitted by the**
**PUBLIC UTILITIES COMMISSION OF OHIO**

**December 14, 2009**

**COMMENTS ON PHMSA'S PROPOSAL TO ESTABLISH CRITERIA FOR DETERMINING THE ADEQUACY OF STATE ENFORCEMENT OF PIPELINE DAMAGE PREVENTION LAWS**

**BY**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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The Public Utilities Commission of Ohio (PUCO) would like to thank the Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) for the opportunity to comment on its advanced notice of proposed rulemaking (ANPRM) to establish criteria for determining the adequacy of state damage prevention programs. Under the Pipeline Inspection, Protection, Safety, and Enforcement (PIPES) Act of 2006, establishment of these criteria is a prerequisite before PHMSA, should it find it necessary, could conduct an enforcement proceeding against an excavator for violation of one-call damage prevention laws in the absence of an enforcement action by the state where the event occurred. This ANPRM by PHMSA is to solicit feedback and comments regarding the criteria and procedures that should be used to determine if a state's enforcement of its damage prevention laws is adequate.

PHMSA is seeking comment on four areas: (1) the criteria for determining the adequacy of a state's enforcement program; (2) the procedures PHMSA would use to make this determination; (3) the federal standards to be enforced against an excavator in the event PHMSA determines a state to have "inadequate" enforcement; and (4) the administrative process for imposing fines or penalties on an excavator alleged to have violated the applicable standards.

## 1. Criteria for Determining the Adequacy of a State's Enforcement Program

In proposing criteria for determining the adequacy of a state's enforcement program, PHMSA posits the question "does the responsible state agency conduct investigations of all excavation damage to pipeline incidents?" It is unclear whether the term "incident" as used in this query is intended to be the same as what is found in 49 C.F.R. 191.3. If it PHMSA's intent to require the states to investigate a larger number of events than are currently defined as an "incident" under 49 C.F.R. 191.3 it is unclear whether additional financial assistance will be made available to the states to help support this increased workload.

In general, it is unclear whether it is PHMSA's intent to evaluate the adequacy under state law of damage prevention or just the program as it relates to pipeline safety. For example, one of the listed criteria is to require the states to have maximum civil penalties similar to the federal maximums. It is unclear how PHMSA intends the states to have the authority to impose large civil penalties against excavators where damage prevention violations are not related to gas pipeline safety (i.e. if a hypothetical excavator cuts a cable television line, not a gas pipeline, does the excavator need to be subject to potential civil penalties similar to the federal maximums?)

In addition despite the stated assurance in the ANPRM that funding for the development and implementation of damage prevention programs is "intended to be addition to, and independent of existing federal funding of the state pipeline safety

programs", the implications of designation of "inadequate" or "nominally adequate" on a state damage prevention program current funding is not addressed. It would be beneficial for PHMSA to describe whether and how state funding for the gas pipeline safety program will be affected by such a determination.

2. **<u>The Procedures PHMSA will Use to Make this Determination</u>**

The administrative due process for determining whether a state program is "inadequate" is very general and appears to be an informal process. Specifically PHMSA proposes it would, "

> notify a state that it considers its damage prevention enforcement inadequate (i.e. following its annual review) and the state would then have an opportunity to submit written materials and explanations. PHMSA would then make a final written determination including the reasons for its determination including the reasons for the decision.

It is unclear whether the determination that a state program is "inadequate" is to be made by the head of PHMSA, regional managers, a board or panel at PHMSA or some other entity altogether. The proposed procedure asserts further that states may wish to petition for a reconsideration of the "inadequate" designation at a later date by submitting an informal petition to the same person or group that made the initial "inadequate" determination thereby degrading a meaningful appeal option for any state that disagrees with a determination of inadequacy. Procedures for the determination of an "inadequate" program and the process for reconsideration should be more fully described and a requirement for PHMSA to review and respond to any petition for reconsideration within a certain time frame should be added.

Finally, the administrative process includes a designation that a state may be determined to be "nominally adequate". The meaning of this term and its implications are unclear. A definition of "nominally adequate", a description of how states may be qualified as "nominally adequate" and a listing of the implications of this designation for state programs should be provided.

### 3. The Federal Standards to be Enforced against an Excavator in the Event PHMSA Determines a State to have Inadequate Enforcement

The stated purpose and scope of the ANPRM is to solicit feedback and comments regarding proposed federal standards to be enforced against an excavator in the event PHMSA determines a violation of the applicable standards and an "inadequate" state response, but does not include enforcement against owners or operators of pipeline facilities. The PIPES Act of 2006 states that "any owner or operator of a pipeline facility who fails to respond to a location request … shall be subject to a civil action under section 60120 or assessment of a civil penalty under section 60122". ANPRM section E *Existing Requirements Applicable to Owners and Operators of Pipeline Facilities* invites comments on the adequacy of existing requirements for pipeline operators under 49 CFR 192.614. Requirements against pipeline operators and excavators should parallel and PHMSA should consider providing guidance on how it intends to evaluate liability and enforcement in the event that an excavator damages a pipeline system due to a

pipeline owner/operator failing to mark underground lines or marking them incorrectly or inaccurately.

The proposed federal standards for excavator include marking standards, should PHMSA find a state damage prevention program to be inadequate. The development of consistent and well understood marking standards at the state level involves a significant investment of time and money. The PUCO believes that any federal standards imposed should avoid specific requirements for marking standards that may conflict with reasonable and appropriate marking standards developed by individual states.

**4. <u>The Administrative Process for Imposing Fines or Penalties on an Excavator Alleged to have violated the Applicable Standards</u>**

PHMSA queried among other things whether a "state damage prevention law provide enforcement authority including the use of civil penalties, and are the maximum penalties similar to the federal maximums? [see 49 U.S.C. 60122(a)]." The ANPRM does not indicate how large state maximum civil penalties have to be in order to be considered "similar" to federal maximums or the appropriateness of federal maximum penalties against non-gas pipeline excavators.

**Summary and Conclusion**

The PUCO is concerned that changes as to how PHMSA evaluates state damage prevention programs, resulting in a designation of an "inadequate" state damage prevention program, may affect funding, and ultimately gas pipeline safety. The PUCO also believes that the use of the term "incident" needs to be clarified to ensure this term has the same meaning as defined in 49 C.F.R. 191.3. The maximum civil penalties under state law that will be required in order for a state program to be determined "adequate" should be clarified. The definition and implications of a state program designation "nominally adequate" need to be clarified. Finally, the process for determining whether a state is "inadequate" should contain an appeals process and dates by which PHMSA needs to respond to appeals. Thank you for the opportunity to comment on this advanced notice of proposed rulemaking.

Respectfully submitted,

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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/9/2009 8:56:50 AM**

**in**

**Case No(s). 93-6000-GA-FAD**

Summary: Comments submitted to the Department of Transportation, Pipeline and Hazardous Materials Safety Administration, in respnose to its Notice of Proposed Rulemaking, Docket No. PHMSA-2009-0192, filed by Thomas Lindgren on behalf of the Commission electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio