



# GEORGIA UTILITY CONTRACTORS ASSOCIATION, INC.

804 Main Street, Suite C, Forest Park, Georgia 30297-1476 \* (404) 362-9995 \* Fax: (404) 362-9211



## 2010-2011 GUCA BOARD OF DIRECTORS

*Mitch Stephens, President*  
John D. Stephens, Inc.

*Charlie Murren, 1<sup>st</sup> Vice President*  
C.A. Murren & Sons Company, Inc.

*Angela Lance, 2<sup>nd</sup> Vice President*  
Peed Bros., Inc.

*Regina Shelmutt, Treasurer*  
Robert M. Anderson, Inc.

*Mark Gravel, Secretary*  
Willow Construction, Inc.

*Bobby Cates, Director*  
Ruby-Collins, Inc.

*Billy Egan, Director*  
E.F.S., Inc.

*Larry Gilmore, Director*  
Controlled Blasting, Inc.

*Guy Kenimer, Jr., Director*  
Gordy Construction Co.

*Matt McCormack, Director*  
Acher Western Contractors, Ltd.

*John Morris, Director*  
Heavy Constructors, Inc.

*Bryan Ponder, Director*  
Brock Built, LLC

*Ed Shipley, Director*  
Ronny D. Jones Enterprises, Inc.

*Reese Taylor, Director*  
Barnett Southern Corporation

*Kelly Wilson, Director*  
Western Summit Constructors, Inc.

*Fielder Martin, Associate Director*  
Shapiro, Fussell, Wedge & Martin, LLP

*Tom Savage, Associate Director*  
Large & Gilbert, PC

*Judy Turpin, Ex Officio*  
Turpin, Inc.

*Charles Surasky, Of Counsel*  
Smith, Currie & Hancock, LLP

*Vikki T. McReynolds*  
Executive Director

April 22, 2011

Ray LaHood  
Secretary of Transportation  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590-0001



Dear Secretary LaHood:

The members of the Georgia Utility Contractors Association, Inc. would like to thank you and the office of PHMSA for the opportunity to attend and participate in the USDOT and PHMSA's Pipeline Safety Executive Forum on April 18, 2011. We found the Forum informative, educational, and enlightening.

It was a pleasure meeting you and Cynthia Quarterman and speaking with you both about the critical issues that face our nation regarding safety and pipeline infrastructure.

Holding pipeline operators accountable for hundreds of thousands of miles of gas transmission lines in the ground that need to be replaced because they were installed early in the twentieth century and are made of cast iron or low grade seam welded steel which have been neglected, not inspected and over pressured, leaving them to fail, is to be commended.

We want to help be a part of the solution. Georgia has been a model state for Damage Prevention for many years. We have found that educating all those involved in the process is one of the key elements in safety in and around these pipelines - both in the process of excavators rehabilitating and for third party excavators working on other utilities. If in fact, enforcement is one factor being considered we would like to encourage that it not trickle down to the local excavator who has no control over the actions of the pipeline operator.

The National Utility Contractors Association, Inc. which represents excavators throughout the United States submitted comments to the USDOT regarding enforcement of State Damage Prevention Programs. We believe helping States with their programs through education is the key to successful Damage Prevention. We have enclosed a copy of this report for your review.

Again, thank you for bringing this much needed issue to the forefront. Keep up the good work and we look forward to future endeavors of the same from your office(s)

Sincerely,

Vikki McReynolds  
Executive Director

VSM/vm

Copy: National Utility Contractors Association, Inc.



**DECEMBER 14, 2009**

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

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

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

The National Utility Contractors Association (NUCA) represents thousands of underground utility contractors, manufacturers, and suppliers who provide the materials and workforce to build and maintain our nation's network of water, sewer, gas, telecommunications, and construction site development industries. NUCA appreciates the opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPRM) on the Pipeline and Hazardous Materials Safety Administration's (PHMSA) initiative to establish criteria for determining adequate enforcement of state pipeline damage prevention laws.

The Pipeline, Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006 addresses enforcement of inadequate state pipeline damage prevention laws by authorizing federal dollars to improve the quality and effectiveness of state programs, and by authorizing expanded federal enforcement authority. Specifically, the ANPRM states that the PIPES Act provides PHMSA with "authority to conduct civil enforcement proceedings against excavators who damage pipelines in a state that has failed to adequately enforce its damage prevention laws."

**General Comments**

NUCA is grateful to have participated on a task team to review annual state damage prevention grant applications for these federal dollars since the PIPES Act was enacted. Providing additional federal resources to improve state damage prevention programs, and enforcement of them, is an effective and proactive way to assist states to provide a safer work environment and enhance damage prevention of underground facilities.

Establishing a federal role in enforcement of damage prevention laws is another matter entirely. NUCA agrees with many of the stakeholders in the damage prevention community that enforcement of damage prevention laws is entirely inadequate in many states. However, often overlooked in the debate is that enforcement of *all* parties responsible for preventing damage is often inadequate, not just enforcement of excavation requirements. Damage prevention is a two-way street – the responsibilities of those locating and marking underground facilities are equally important as those performing excavation activities. Consistent with the enforcement provisions in the PIPES Act, PHMSA's final rulemaking should ensure for a balanced approach to damage prevention enforcement.

Additionally, any damage prevention organization worth its salt recognizes the importance of "shared responsibility", as advocated by PHMSA and the highly-acclaimed Common Ground Alliance (CGA). The CGA is an organization made up of virtually all damage

**NATIONAL UTILITY CONTRACTORS ASSOCIATION**

prevention stakeholders who work on improving all areas of damage prevention. Since its inception in 2000, the CGA has grown in size and influence around the country as the leading national damage prevention organization, effectively partnering with government and private sector entities at the federal, state, and local level. NUCA has been a proud member of the CGA since it was established, representing the "Excavator" stakeholder group on the CGA Board of Directors and on all working committees.

The following comments will address several of the items included in the ANPRM, as well as other issues the association believes PHMSA should consider as this initiative moves forward.

#### **"Prohibitions" in the PIPES Act**

According to PHMSA, the intent of the ANPRM is to "issue criteria and procedures, through a rulemaking proceeding, for determining whether states are adequately enforcing their damage prevention laws, and for conducting federal enforcements if necessary." PHMSA has publicly indicated that the agency's intent is *not* to dictate or control state enforcement practices, but will reserve the authority to enforce damage prevention laws in states deemed to have inadequate enforcement.

The PIPES Act includes "Prohibitions" language that restricts 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..."

The "Prohibitions" also address 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 on 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."

In other words, the PIPES Act requires 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 as described above. Comparably, pipeline owners and/or operators must respond to locate requests and provide accurate locating and marking of their facilities in a timely fashion (according to state law). NUCA believes that these primary responsibilities are imperative to achieving damage prevention, and that if either side fails to do its part, safety is compromised.

#### **Federal Enforcement Only if States Neglect Enforcement Responsibilities**

The "Limitation" provision in the PIPES Act restricts PHMSA to conduct "an enforcement proceeding... against persons who violate that state's damage prevention laws, unless (PHMSA) has determined that the state's enforcement is inadequate to protect safety, consistent with this chapter, and until (PHMSA) issues, through a rulemaking proceeding, the procedures for determining inadequate state enforcement of penalties."

NUCA believes that the best place for development and enforcement of damage prevention programs is at the state level. The federal government should encourage states to adopt

efficient policies, educational activities, and enforcement procedures that promote effective damage prevention programs. For years, PHMSA has demonstrated a strong track record of effectively partnering with state and local governments as well as the private sector to promote quality damage prevention programs. The success of the CGA speaks for itself, and PHMSA played an imperative role in establishing it. Moreover, the agency's steadfast support of the CGA in testimony before Congress and in communications with other federal and state government entities provide countless examples of PHMSA's partnership with virtually all damage prevention stakeholders.

NUCA understands that the intent of this proposed rule is to provide for federal enforcement of damage prevention only under dire circumstances where the state entity is either unaware of its enforcement responsibilities or is simply neglecting them. NUCA does not support a permanent federal role in enforcing state damage prevention laws. Additionally, as our comments address, fair and equitable enforcement on *all* parties responsible for protecting underground facilities will be imperative.

#### **Encourage Balanced Enforcement**

Parts 192 and 195 of the pipeline safety regulations already requires natural gas and hazardous liquid pipeline operators to locate and mark their facilities in response to locate requests by excavators. For example, §192.614 requires gas pipeline operators to carry out "a written program to prevent damage to that pipeline from excavation activities." This section requires operators to "learn the location of underground pipelines before excavation activities are begun," and to "[p]rovide for temporary marking of buried pipelines in the area of excavation activity before, as far as practical, the activity begins."

While working to help the 2006 pipeline safety reauthorization measure, NUCA spent hours with several staff members of House and Senate committees involved with the legislation. Staff repeatedly made the point that locating and marking requirements were already included in the pipeline safety regulations. Our response to this was consistent and clear: a *balanced* approach to damage prevention is fundamental to its effectiveness – excavators as well as facility operators must meet their responsibilities for successful damage prevention. Therefore, we submit that state authorities who evaluate their damage prevention programs and related enforcement practices in response to the PIPES Act must consider both sides of the damage prevention coin.

Additionally, we hope the NPRM will look at "in house" excavators employed by the pipeline company. While "third party" excavators (working under contract for the owner/operator) seem to be at the center of attention in the ANPRM, incidents involving excavators employed by the facility owner are often left out of the discussion. "First party" and "second party" damages, although often unreported, carry the same consequences as damages caused by landscapers, home owners, and contract excavators. The NPRM should address this so that state authorities can adequately look at the big picture.

NUCA was pleased to see the "Prohibitions" (enforcement) section of the PIPES Act include provisions to address the responsibilities of both excavators and underground pipeline operators. We believe PHMSA should follow the approach in the proposed rule. When evaluating determining the adequacy of a state's enforcement program, PHMSA should hold enforcement of facility operators' locating and marking responsibilities in the same regard as the responsibilities of the excavator, and the proposed rule should reflect that.



### **Encourage Comprehensive Enforcement**

To the extent possible, PHMSA should encourage states to evaluate and enhance their enforcement practices for *all* underground facilities. Although federal pipeline safety regulations limit PHMSA's jurisdiction to natural gas and hazardous liquid pipelines, state authorities responding to this regulatory initiative will certainly consider all underground facilities under their jurisdiction.

The broad and vast network of underground facilities varies in shape, size, depth and material, and it carries a wide range of products and provides many important services. However, the activities and responsibilities needed to protect them from damage during excavation are quite similar. Underground facility operators should belong to the appropriate one-call center, and respond to locate requests by accurately locating and marking its underground facilities in a timely manner. Excavators must call the one-call center, wait the required time for the facilities to be marked, respect the markings, and dig carefully. If any of these primary responsibilities are not met, damage prevention is compromised, regardless of the types of facilities that exist in the work area.

NUCA understands that PHMSA's jurisdiction is limited to gas and hazardous liquid pipelines. However, its influence on how state authorities adjust their programs and enforcement practices to protect all underground facilities will be significant as this regulation moves forward. Addressing enforcement in a balanced and comprehensive manner in the proposed rule will facilitate the entire process.

### **Role of "Nine Elements" of the PIPES Act**

The PIPES Act describes what has become widely known as the "Nine Elements of an effective damage prevention program." The Nine Elements include enhanced communication and partnership, performance measures for locators, effective training and public education, fair and consistent enforcement, efficient use of technology, and data analysis to improve performance. Although the ANPRM solicits feedback on what should constitute adequate and inadequate enforcement, NUCA suggests that PHMSA look at the state damage prevention program as a whole. Even if thorough enforcement exists in a particular state, if the program itself does not adequately address the Nine Elements, we submit that the program itself may be inadequate.

For example, if a state's damage prevention program and enforcement practices were to exclusively focus on excavator responsibilities, that program is not fully addressing damage prevention. A state that does not evaluate "Element 3," which calls for operators to establish performance measures for both "in house" and contract locators, is not adequately looking at all sides of the issue. Unfortunately, NUCA members in many states do not feel that this fundamental element is properly addressed. PHMSA should consider this a high priority in its efforts to improve state damage prevention programs and enforcement.

### **"ANPRM" Only the First Step in the Process**

Section IV of the ANPRM asks for stakeholder comments on a variety of topics, and notes that commenters "should be aware that the information and data generated in response to this ANPRM could result in a notice of proposed rulemaking." NUCA is grateful for the opportunity to provide "advanced" comments, but we strongly encourage PHMSA to adhere to the traditional rulemaking process and issue a "Notice of Proposed Rulemaking" after the agency reviews the feedback to the ANPRM. This initiative will significantly expand federal jurisdiction, and the end result will have considerable impacts on excavators, underground facility operators, as well as state and local government entities.

## Specific Comments

The following comments are specific to subjects of which PHMSA is soliciting feedback. To the extent possible, these comments follow the bullet points provided in the ANPRM.

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

- *Exemptions.* "Participation" in damage prevention includes both calling the center before excavating as well as underground facility operators *belonging* to the appropriate one-call center. Membership of underground facility operators is fundamental to the damage prevention process. The 1998 *Common Ground Study of One-Call Systems and Damage Prevention Best Practices*, which led to the establishment of the CGA, specifically states that "the underlying premise for prevention damage to underground facilities, and the foundation for this Study, is that all underground facility owners/operators are members of one-call centers, and that it is always best to call before excavation."

Unfortunately, several exemptions currently exist in several state damage prevention laws, including for some state highway departments, railroad companies, municipalities and other stakeholders. NUCA believes that exemptions only increase the likelihood of facility damages.

- *Damage Reporting.* While extensive damage reporting requirements are subject to excavators in most state laws, NUCA believes that the lack of state requirements to report "near misses" obstructs efforts to provide accurate data trends. When underground facility operators fail to locate and mark their lines accurately, that data should be captured regardless if the facility was not hit. Even if reporting of "near misses" is required by state law, it is our understanding that these requirements are rarely enforced.

Timely enforcement of damage data is important, as is the type of information collected. The ANPRM lists "any product release, including the extent of service interruptions, product loss, property damage, evacuations, injuries, fatalities, and environmental damage..." NUCA recognizes the importance of this information, but damages incurred by the excavator should be collected as well. In cases where a facility is hit because of a failure to accurately locate and mark facilities in a timely fashion, that information should be collected, including any damage to the excavator's equipment or property, and any downtime incurred by the excavator while the true location of underground facilities is determined.

- *State Investigation and Enforcement.* NUCA believes that the ANPRM adequately addresses the factors needed to be investigated, but that several state authorities fail to fulfill their investigative responsibilities in all areas of damage prevention, especially with regard to locating and marking of facilities. States must ensure that those conducting damage investigations look at the entire damage prevention

process, from the excavator notifying the one-call center to the facility operator providing accurate and timely markings, to safe excavation and backfill practices by the excavator.

#### *B. Administrative Process*

While NUCA will reserve comment on PHMSA interaction with state administrative processes, we would reemphasize the importance of balanced enforcement. If PHMSA deems a state's enforcement practices as inadequate, "direct federal enforcement against an excavator who violated the state's damage prevention law" should be coupled with direct federal enforcement against pipeline operators who fail to accurately locate and mark their pipelines in accordance with the law.

#### *C. Federal Standard for Excavators*

PHMSA is soliciting feedback on the establishment of federal standards for excavators. The agency would enforce these new federal standards in states that are found to have inadequate enforcement. Specifically, PHMSA suggests requiring the following federal standards: "Use an available one-call system before digging, wait the required time, excavate with proper regard for location information or markings established by the pipeline operator, and report any release of hazardous products to appropriate authorities by calling 911."

NUCA believes these proposed federal standards effectively cover the primary responsibilities of the excavator, and are consistent with past DOT damage prevention messages, such as the "Dig Safely" initiative of the 1990's. However, utilization of "location information" is too vague for inclusion in a new federal standard. General information of underground pipeline facilities should never substitute for meeting all of the operator's locating and marking responsibilities.

Regarding 911 notification, PHMSA should specify that excavators must call 911 if the "damage results in the escape of any flammable, toxic, or corrosive gas or liquid," as specified in the PIPES Act. Excavators are not emergency responders, and the regulation should be as specific as possible as to what product is considered "hazardous" by PHMSA.

Additionally, the proposed rule should address the role of first responders in situations where the escape of flammable, toxic, or corrosive product is released as a result of damage to an underground pipeline. If a 911 call is made, the responders must be educated and trained in how to effectively mitigate the situation. Traditionally, representatives from the company that owns the gas or hazardous liquid pipeline are best educated and equipped to handle these situations. PHMSA should also consider the additional burdens to the 911 emergency system that will inevitably come with the increased calls received when these situations occur.

#### *D. Adjudication Process*

NUCA believes that the process described in the ANPRM is a fair start. Allowing excavators all rights to due process should be recognized, and the same privileges afforded to others subject to federal enforcement (i.e. pipeline operators) should be afforded to excavators.

Additionally, ensuring excavators the right to pursue damages (i.e. downtime expenses), must be considered when establishing a new federal adjudication process. Excavators regularly lose significant revenue in downtime expenses after having to shut down projects because of underground facilities that were either not marked or marked inaccurately. This

is an enormous financial problem facing professional excavators, and one that must be addressed in the PHMSA regulation.

*E. Existing Requirements Applicable to Owners and Operators of Pipeline Facilities*

NUCA appreciates that PHMSA included this issue in the ANPRM. It shows that the agency understands that there are two sides to the damage prevention coin. Without repeating the arguments included throughout these comments, NUCA submits that the locating and marking requirements are too often neglected or performed inadequately by underground facility operators and/or the contract locators retained by them, and that enforcement of these requirements is rarely practiced by state authorities.

The ANPRM solicits feedback about how the current pipeline safety regulations address 1) response time for locate requests, 2) accuracy of facility locations, and 3) operator personnel availability to consult with excavators. All of these issues are of significant concern to the excavation community. In addition to these comments, NUCA suggests PHMSA look at the CGA Best Practices, which directly address all of these important responsibilities. For the most part, pipeline operators responsibilities are addressed in the federal regulations – the problem lies in how many operators respond to locate requests. State authorities must make enforcement of owner/operator requirements a higher priority.

**Conclusion**

NUCA continues to serve as an active member of the CGA, and we appreciate the organization's dedication to "shared responsibility" in damage prevention. The CGA's successful efforts in creating the toll-free "811" number is making great progress in facilitating the process of connecting those engaging in excavation with the appropriate one-call center. However, compliance with the requirements of underground facility operators seems to be considered less of a priority in enforcement practices in many states.

The effectiveness of any state damage prevention program is contingent on how each stakeholder meets its responsibility in the process. Effective planning and design, efficient practices by one-call centers, excavator compliance with all damage prevention requirements, accurate and timely locating and marking practices by *all* facility operators, and educated and prudent oversight and enforcement by all levels of government are needed to fully achieve damage prevention.

NUCA appreciates the opportunity to provide these comments, and we look forward to working with PHMSA as the process moves forward.

Regards,



Lyle Schellenberg  
President