The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial and industrial natural gas customers in the U.S., of which 92 percent — more than 65 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets almost one-fourth of the United States’ energy needs.

AGA appreciates the opportunity to submit comments to the docket in response to the Pipeline and Hazardous Materials Safety Administration (PHMSA) Notice of Proposed Rulemaking (NPRM), as published in the Federal Register on April 2, 2012. AGA commends PHMSA for a well-written and thoughtful proposed rule for determining the adequacy of state enforcement of pipeline damage prevention laws. PHMSA did an effective job in taking into consideration all the comments it received from the Advance Notice of Proposed Rulemaking (ANPRM), published on October 29, 2009. AGA believes that there were many good suggestions expressed by a variety of stakeholders in response to the ANPRM. This is a reflection of how important damage prevention is to all the parties working throughout the excavation and one call community.

AGA believes that PHMSA’s ultimate goal should be working to ensure there is effective and consistent enforcement of excavation damage prevention laws and regulations at
the state level in order to reduce the risk associated with excavation damage to natural gas pipelines and hazardous liquids pipelines. Regardless of whether the enforcement is actually administered by a state authority or the federal government (PHMSA), the process must be designed so that excavators risking public safety by failing to follow safe digging practices and excavation laws are held accountable. Likewise, the process should also ensure appropriate penalties are taken against pipeline operators who fail to locate their facilities accurately and on time. Although AGA believes in most instances enforcement is ideally performed by a specifically defined and motivated state entity, PHMSA must lay out a clear path which identifies the process the federal government will take if a state damage prevention program is deemed to be inadequate and the state fails to make needed improvements. Importantly, AGA believes it is not sufficient for states to have excavation damage prevention laws that give a state agency the authority to impose penalties against those who violate the laws; it is also critical for that particular state agency to have the resources and the interest to exercise its authority over excavators and pipeline operators, whenever necessary.

In most parts of the country, excavators have historically not been held accountable to the use of safe digging practices, the reporting of damages caused to pipelines, and general compliance with applicable damage prevention laws. This is especially true for 3rd party excavators. Those few states where enforcement against excavators and operators is actually performed have seen significant decreases in excavation damages to pipelines.

This point is emphasized by the “Integrity Management for Gas Distribution Pipelines Report of Phase 1 Investigations” which was issued in December 2005:

“Analysis of five individual states with comprehensive damage prevention programs that include effective enforcement (Minnesota, Virginia, Georgia, Connecticut and Massachusetts) shows a material improvement in gas distribution excavation damages per 1000 locate tickets compared to individual states that do not have effective enforcement programs. For example, states with mature damage prevention programs that include enforcement, such as Virginia and Minnesota, have normalized excavation damage rates that are less than half the rates of states without effective enforcement programs.” (p. 168)
That is exactly why AGA and its members are supportive of the NPRM and encouraged by the possibilities of stronger enforcement in states determined to have inadequate programs. Addressing the risk of excavation damage should have a substantial benefit in reducing incidents and improving pipeline safety.

Before a state’s damage prevention program is evaluated, PHMSA should consider what circumstances will actually trigger federal enforcement action in states that have been evaluated and found to have inadequate damage prevention programs. Is damage to a pipeline resulting in a particularly serious consequence the only trigger or might there also be a mechanism for federal intervention due to complaints over excavators or operators who have repeatedly failed to follow state damage prevention laws? AGA encourages PHMSA to consider this issue carefully in its rulemaking. Clearly, the right balance must be achieved as PHMSA would not have sufficient resources to investigate all pipeline damages related to excavation. However, there should be a mechanism to pro-actively address repeat offenders who have a history of damaging pipelines due to risky behaviors or who have failed to report damages to the pipeline operator. This would also include pipeline operators who have a history of failing to locate their pipelines accurately or on time.

It would be invaluable for PHMSA to get involved when there is an excavator or operator who has a history of flagrantly neglecting state damage prevention laws. Simply having the threat of enforcement can influence behaviors and might prevent a tragic excavation damage from occurring. In the interest of safety, operators and excavators should have a mechanism to file a formal complaint with PHMSA to request federal enforcement action for states determined to have an inadequate damage prevention program.

AGA’s remaining comments answer specific questions posed in the NPRM.

A. Standards for Effective State Damage Prevention Enforcement Programs

*PHMSA may also consider individual enforcement actions taken by a state in evaluating the effectiveness of a state’s damage prevention enforcement program. PHMSA requests comments on this issue.*

*PHMSA invites comments on the proposed criteria. In particular, are these criteria sufficient to assess the adequacy of state excavation damage prevention law enforcement programs?*
Do these criteria strike the right balance between establishing standards for minimum adequacy of state enforcement programs without being overly prescriptive?

A state damage prevention law may contain language about penalties or fines which may be levied against those excavators who are negligent in damaging pipelines or reporting damage to the pipeline operator. A state’s historical record for issuing penalties and taking actions against at-fault 3rd party excavators who have damaged pipelines is a critical data point for state program effectiveness. But PHMSA should look further in order to make a proper evaluation of overall enforcement effectiveness for state programs. In reviewing a state’s damage prevention enforcement adequacy, it is essential for PHMSA to look at a state’s excavation damage investigation processes, standards for excavators, and excavator education efforts. Consideration might also be given to a state’s commitment to continual improvement of its processes and standards. This NPRM is primarily focused on addressing 3rd party excavators who damage pipelines and what must be done to ensure they are held accountable if they failed to follow safe excavation practices and laws. Therefore, it would be shortsighted for PHMSA to only rely on past enforcement actions taken against pipeline operators in gauging the effectiveness of a state’s damage prevention program.

PHMSA should also be mindful that in many states, enforcement of pipeline safety regulations is often assigned to state utility commissions who may only have jurisdiction over pipeline operators, whereas enforcement of excavation laws and related violations may rest with other state agencies having broader jurisdiction over excavators. In such instances, PHMSA must not create perverse incentives that spur excessive enforcement actions against pipeline operators alone, who are often the victims of excavation law violations, while not creating an incentive for state agencies assigned the task of enforcing one call violations against 3rd party excavators or underground utilities that fail to properly locate and mark their lines in a timely fashion.

AGA reminds PHMSA of the “Guide to the 9 Elements” of an effective damage prevention program, written by a consortium of stakeholders, including AGA, the Interstate Natural Gas Association of American (INGAA), Association of Oil Pipelines (AOPL), Association of General Contractors (AGC) and National Utility Contractors Association (NUCA). The document provides guidance to stakeholders seeking to enhance their state damage prevention program through incorporation of the 9 elements, as contained in the 2006 PIPES Act. Under Element 6, “A process for
resolving disputes that defines the State authority’s role as a partner and facilitator to resolve issues”, some very good insights are provided:

“The process developed under Element 6 must clearly establish the state authority’s role as a partner and facilitator in the process....

A clear role for the state authority in this process will also mean recognizing other existing realities such as exemptions, bad actors and the status of the states’ existing enforcement regime. The frequency, or lack thereof, of the use of civil penalties by the state, the circumstances under which those penalties are eligible and/or used, will also all need consideration when constructing the process under Element 6...

The state authority is ideally the authority with jurisdiction over underground facilities and excavation safety. To “partner and facilitate” in resolving disputes, the state authority must have a thorough working knowledge of the damage prevention program in the state, have experience in excavation, understand how underground facilities are installed, maintained and operated and know and be respected by all excavation damage prevention stakeholders. (pages 32-33)

AGA is fully supportive of PHMSA’s proposed criteria to evaluate the effectiveness of a state’s damage prevention program. AGA is providing comments on how to structure the evaluation.

AGA has six suggestions for PHMSA to consider in structuring its evaluation of state programs:

(i) PHMSA should examine state damage prevention performance metrics (damages/1,000 locate requests) to determine if the state is performing adequately or improving. Damages per 1,000 requests should only be used to gage an individual state’s improvement over time, not to compare to other states or determine “adequate performance.” Many factors impact the damage rate due to different one-call requirements. For instance, states that require a separate ticket for each address will have a greater number of tickets in the denominator resulting in a lower normalized rate.

(ii) PHMSA should collect data on the number of enforcement actions taken against excavators and operators by the state authority in order to determine overall enforcement effectiveness. Enforcement actions are not restricted to fines and
penalties. Other examples of enforcement actions could include mandatory training and warning letters issued.

(iii) There should be an annual, formal evaluation conducted of excavation programs in those states which are close to being inadequate (or are found to be inadequate) and a more general evaluation of excavation programs in those states which are far above the threshold.

(iv) The criteria, particularly in 198.55(a)(6), should be adjusted to include operators’ responsibilities for locating and marking, in order to assess the adequacy of a state program in a more balanced manner.

(v) Define an evaluation system using the criteria listed in the NPRM and make it transparent so that the public can see exactly which actions must be taken in order for a particular state’s excavation program to become adequate.

(vi) AGA suggests that there be a multi-stakeholder advisory council to flesh out the evaluation process after the regulation has been finalized. PHMSA would still conduct the evaluation, but the advisory council would provide guidance on how to perform that evaluation such as:

- What considerations should be made in evaluating each of the criteria listed
- What data/information would be used in making the evaluation (and where to obtain the data/information)
- How to conduct the overall evaluation with respect to the various criteria reviewed and evaluated
- How to address criteria where data/information is missing or non-existent
- How to determine whether or not a state’s grant funding should be reduced, if the state is taking some actions to improve its damage prevention program under a waiver submission

The advisory council could be comprised of anyone with experience in damage prevention. Implementing an advisory council will help PHMSA gain support for the evaluations performed for each state.
B. Administrative Process for States

PHMSA invites further comments on these proposed administrative procedures. In particular, does this process strike the right balance between Congress’ direction to undertake Federal administrative enforcement, where necessary, while providing a state with a fair and efficient means of showing that the state’s enforcement program is adequate?

PHMSA specifically requests comments on the adequacy of these incentives and the need for additional incentives for states to enforce their own excavation damage prevention laws.

In the interest of improving pipeline safety, PHMSA must take care in applying appropriate penalties to state programs that have been determined to be inadequate. AGA believes that:

- Any funding cuts from the assessment of adequacy of a state damage prevention program should be limited to damage prevention grants money. The general pipeline safety funding for the state should not be affected in any way.
- A five year grace period after initial determination of inadequacy is too long and allows states to continue to operate as status quo with no recourse. Three years is a more appropriate grace period before funding is reduced.
- Any incremental improvements and actions shown by a state’s damage prevention program should be considered by PHMSA before funding is actually reduced.

C. Federal Excavation Standard

The NPRM proposes to add new excavation standards that include requirements to use an available one-call system before digging, to excavate with proper regard for location information or marking established by a pipeline operator, to promptly report any damage to the pipeline operator, and to report any emergency release of hazardous products to appropriate authorities by calling 911 immediately. PHMSA is seeking comment in this NPRM on whether or not it should establish an upper limit on the time frame to report any damage to pipeline operators, such as two hours following discovery.

AGA suggests that the new Part 196 should include requirements for excavators to follow a tolerance zone, which explicitly states the forms of “softer excavation” that are allowed in the immediate area of the marked location of the pipeline. For instance, this would include hand-digging and vacuum excavation. Part 196 should also include
language about the excavator having to take steps to protect and even expose the pipeline using soft excavation methods to confirm accuracy of the markings. This is often characterized throughout the industry as “reasonable care”. These concepts are consistent with the excavation best practices in Chapter 5 of Common Ground Alliance Best Practices 9.0.

AGA supports the establishment of an upper limit on the time frame to report damage to pipeline operators, once the excavator is aware of the damage. AGA suggests one hour as the maximum period for excavators to report damage to a pipeline operator. It is critical for the operator to have timely knowledge of any damage in order to assure public safety. Having a specific time constraint for damage reporting will also make it easier for enforcement purposes.

Additionally, AGA requests that proposed §196.107 be amended to state that an excavator may not backfill a site where damage has occurred until the operator has been provided an opportunity to inspect the pipeline at the excavation site. Oftentimes, excavators may damage a pipeline and backfill the affected area before the operator has an opportunity to reach and assess the damaged site. Operators incur additional expense and lose valuable time re-digging the affected area in order to evaluate the extent of the damage. Requiring excavators to wait for operator assessment prior to backfilling the affected area would reduce the time needed to inspect the pipeline and make any necessary repairs.

AGA strongly supports that the following additional modifications be made to the federal excavation standard being proposed under Part 196:

- §196.103 – delete “where an underground gas or hazardous liquid pipeline may be present” from the first paragraph. The excavator should always call for staking prior to using power excavating equipment. There is no way for an excavator to determine if a pipeline “may be present” without a staking request.
- §196.103(d) – this paragraph seems unnecessary – a staking request is understood to be required at “other” locations
- §196.103 – an addition should be made to this section that requires excavators to make a reasonable effort to communicate directly with operators, in specific instances as requested by the operator, when excavating in the immediate
vicinity of critical pipelines, to allow the operator to inspect and/or monitor the excavation. This will have a significant impact in reducing the possibility of 3rd party excavation damage.

- §196.109 – add a requirement that an excavator responsible for a damage resulting in the escape of dangerous fluids or gasses must take actions to protect the public (evacuation, etc) until the arrival of the operator or public safety personnel. This would be consistent with the second half of CGA Best Practice 5-25: “The excavator takes reasonable measures to protect everyone in immediate danger, the general public, property, and the environment until the facility owner/operator or emergency responders arrive and complete their assessment.”

- §196.109 – delete “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” This type of decision should not be left up to the judgment of the excavator. The discretion should reside solely with the 911 operator based upon the unique circumstances of the damaged pipeline and whether the gas/liquid has been controlled, the proximity of people and property, and the ability of the operator to respond in a timely fashion.

AGA is concerned that the civil penalty (196.207) proposed under PHMSA enforcement should always be restricted to the state’s maximum penalty. Excessive federal penalties would actually serve as a deterrent for an excavator in reporting a damage, or perhaps even tempt individuals to make their own unauthorized repairs to a pipeline rather than notifying the operator. Either way, this is a legitimate concern which can lead to an unsafe condition.

PHMSA proposed an exception from federal enforcement for homeowners using hand tools on their own property under §196.105. AGA understands that in doing so, PHMSA is simply attempting to establish a reasonable boundary around the excavation damages it would be considering enforcement actions on in those states with inadequate programs. For the purpose of a federal standard, AGA recommends that hand digging to shallow depths be allowed for any party since digging with hand tools to shallow depths is typically not one of the highest risks among 3rd party excavations.

AGA recognizes the definition of “excavation” proposed under §196.3 comes from CGA’s Damage Information Reporting Tool. AGA suggests that PHMSA delete the
sentence “This does not include homeowners excavating on their own property with hand tools” since it is likely to cause confusion and is unnecessary if the language in §196.105 is amended in the following manner:

§196.105 Are there any exceptions to the requirement to use one-call before digging excavating?

Homeowners All individuals using only hand tools, rather than mechanized excavating equipment, on their own property are not required to use a one-call prior to digging excavating if the excavation is less than 12 inches in depth.

AGA would like to emphasize that this in no way suggests that it is in favor of adopting this type of broad exclusion in an actual state law. But for the purpose of federal enforcement only, this language strikes a good balance between what is reasonable and what is feasible for PHMSA staff to focus on, in those states determined to have an inadequate damage prevention program.

AGA also applauds PHMSA's use of the word “exception” under 196.105 since its incorporation into a federal excavation standard is very different from the one call exemptions that exist at the state level.

If PHMSA rejects AGA’s suggestion and chooses to retain language about a homeowner in the final rule, then AGA encourages PHMSA to clarify the exception and restrict the exception for homeowners to have a maximum depth limitation of 12” for hand digging, which would cover a very high percentage of excavation activities done by homeowners. Consideration should also be given to whether or not farmers are a “homeowner” and if so, whether their exception would be for their entire property or just on their farm? Page 25 of CGA’s 2010 DIRT Report shows that “occupant/farmer” is the excavator involved on 10% - 17% of the events collected for six of the eight OCSI Regions, so this is a significant issue.
Conclusion

AGA is in full agreement that PHMSA’s primary goal should be to encourage states to implement or maintain effective excavation damage prevention laws in order to eliminate the need for federal enforcement action against excavators that damage natural gas and hazardous liquids pipelines. Federal enforcement should only be used as a final resort, when state damage prevention enforcement programs have been fairly evaluated and found to be inadequate, and the state program is not demonstrating improvement relative to critical elements. PHMSA has put forth a thoughtful NPRM, which addresses most of the key issues. The mere possibility of federal intervention may stimulate some positive changes in a state’s damage prevention program; however, PHMSA must also be prepared to follow through with a clear plan for enforcement for those states that are found to be inadequate.

To make enforcement effective at the state level, it is essential for states to have a statute that provides an appropriate, specified state agency the mandate and authority to impose penalties against those who violate the state’s excavation laws, but it must also allocate resources so that the entity can actually exercise its authority. Historically, many state agencies have not used their enforcement authority over 3rd party excavators, because they do not have the resources or they simply lack the interest in doing so.

Excavation damage continues to be the greatest threat to the safe operation of natural gas distribution pipelines and AGA looks forward to supporting PHMSA’s efforts in reducing this threat.

Respectfully submitted,

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By: ______________________

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