

# The 35th Annual National Conference of Regulatory Attorneys



# Damage Prevention is Not Just the Excavator's Responsibility

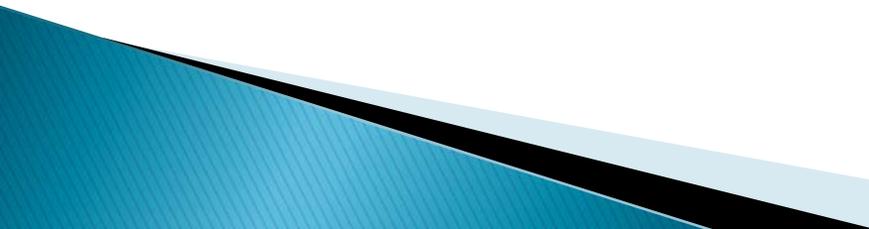
- ▶ Operator
  - ▶ State
  - ▶ Excavator
- 

# Operator's (Utility) Portion of Responsibility

49 CFR 192.614(a) – "...each operator of a buried pipeline shall carry out in accordance with this section a written program to prevent damage to that pipeline by excavation activities."

- ▶ NOTE: An operator is not required to join a one-call association to comply with this section, but is required to comply with (c)(3), below, only through a one-call association.
- (c) The damage prevention program required by paragraph (a) of this section must, at a minimum:
  - (1) Include the identity, on a current basis, of persons who normally engage in excavation activities in the area in which the pipeline is located.
  - (2) Provides for notification of the public in the vicinity of the pipeline and actual notification of the persons identified in paragraph (c)(1) of this section of the following as often as needed to make them aware of the damage prevention program:
    - (i) The program's existence and purpose; and
    - (ii) How to learn the location of underground pipelines before excavation activities are begun.

# Operator's (Utility) Portion of Responsibility, cont.

- (3) Provide a means of receiving and recording notification of planned excavation activities.
  - (4) If the operator has buried pipelines in the area of excavation activity, provide for actual notification of persons who give notice of their intent to excavate of the type of temporary marking to be provided and how to identify the markings.
  - (5) Provide for temporary marking of buried pipelines in the area of excavation activity before, as far as practical, the activity begins
  - (6) Provide as follows for inspection of pipelines that an operator has reason to believe could be damaged by excavation activities:
    - (i) The inspection must be done as frequently as necessary during and after the activities to verify the integrity of the pipeline; and
    - (ii) In the case of blasting, any inspection must include leakage surveys.
- 

# State's Portion of Responsibility

- ▶ The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES Act)
  - Pipeline and Hazardous Materials Safety Administration (PHMSA) given limited authority over excavators
  - PHMSA ordered to write a rule defining the process by which the Secretary of DOT can evaluate a state's damage prevention program

# Nine Elements of a Successful Damage Prevention Program

- ▶ Element 1: Participation by operators, excavators, and other stakeholders in the development and implementation of methods for establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate.
  - ▶ Element 2: A process for fostering and ensuring the support and partnership of stakeholders, including excavators, operators, locators, designers, and local government in all phases of the program.
- 

# Nine Elements of a Successful Damage Prevention Program, cont.

- ▶ Element 3: A process for reviewing the adequacy of a pipeline operator's internal performance measures regarding persons performing locating services and quality assurance programs.
- ▶ Element 4: Participation by operators, excavators, and other stakeholders in the development and implementation of effective employee training programs to ensure that operators, the one-call center, the enforcing agency, and the excavators have partnered to design and implement training for the employees of operators, excavators, and locators.

# Nine Elements of a Successful Damage Prevention Program, cont.

- ▶ Element 5: A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities.
- ▶ Element 6: A process for resolving disputes that defines the State authority's role as a partner and facilitator to resolve issues.
- ▶ Element 7: Enforcement of State damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate State authority.

# Nine Elements of a Successful Damage Prevention Program, cont.

- ▶ Element 8: A process for fostering and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground pipeline locating capability, and gathering and analyzing information about the accuracy and effectiveness of locating programs.
  - ▶ Element 9: A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews.
- 

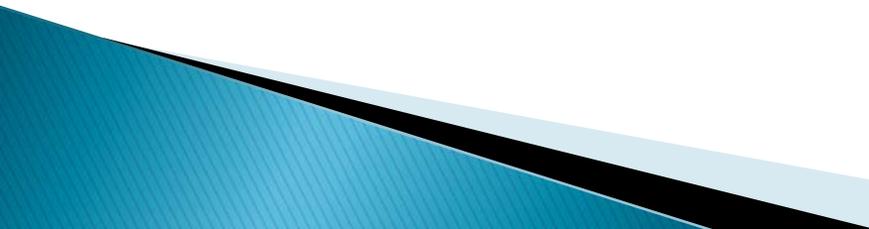
# NPRM April 2, 2012 Damage Prevention Programs

- ▶ Establish criteria and procedures PHMSA will use to determine the adequacy of state pipeline excavation damage prevention law enforcement programs.

# Standards for Effective State Damage Prevention Programs

1. Does the state have the authority to enforce its state excavation damage prevention law through civil penalties?
  2. Has the state designated a state agency or other body as the authority responsible for enforcement of the state excavation damage prevention law?
  3. Is the state assessing civil penalties for violations at levels sufficient to ensure compliance and is the state making publicly available information that demonstrates the effectiveness of the state's enforcement program?
- 

# Standards for Effective State Damage Prevention Programs, cont.

4. Does the enforcement authority (if one exists) have a reliable mechanism (e.g., mandatory reporting, complaint driven reporting, etc.) for learning about excavation damage to underground facilities?
  5. Does the state employ excavation damage investigation practices that are adequate to determine the at-fault party when excavation damage to underground facilities occurs?
- 

# Standards for Effective State Damage Prevention Programs, cont.

6. At a minimum, does the state's excavation damage prevention law require the following?
  - a. Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.
  - b. Excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator.
  - c. An excavator who causes damage to a pipeline facility:
    - i. Must report the damage to the owner or operator of the facility at the earliest practical moment following discovery of the damage; and,
    - ii. If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

# Standards for Effective State Damage Prevention Programs, cont.

7. Does the state limit exemptions for excavators from its excavation damage prevention law?
- 

# Excavator's Portion of Responsibility (Indiana)

## IC 8-1-26 Damage to Underground Facilities

- ▶ Call to request locates two “working” days prior to beginning excavation activities
  - ▶ Call operator and Indiana 811 upon damage to a gas or hazardous liquid pipeline
  - ▶ Call 911 in the event of damage and a release of product
- 

# Excavator's Portion of Responsibility (Indiana), cont.

July, 2009 – Civil penalties added to the law for each of seven violations

## IC 8-1-26 Code Reference

Code Reference	Short Description
IC 8-1-26-15(d)	Failure to maintain Association membership after December 31, 2009.
IC 8-1-26-16(g)	Failure to provide notice of excavation.
IC 8-1-26-16(h)	Failure to perform required white lining.
IC 8-1-26-18(f)	Operator failed to locate or provided incorrect locate markings.
IC 8-1-26-18(h)	Knowingly moves, removes, damages or otherwise alters a facility marking.
IC 8-1-26-19(c)	Knowingly provides false notice of an excavation.
IC 8-1-26-20(b)	Failure to maintain two (2) feet clearance with mechanized equipment.

NOTE: Highlighted rows involve damage to a buried natural gas or hazardous liquid pipeline

# Excavator's Portion of Responsibility (Indiana), cont.

- ▶ Penalties include
    - Financial
    - Education/Training program
    - Development of written plan to avoid future violations
    - Warning letter
- 

# Excavator's Portion of Responsibility (Indiana), cont.

- ▶ Possible dollar outlays for the excavator
  - Chapter 26 civil penalties are up to \$10,000
  - May also be required to pay up to 3 times damage to utility
  - Liability to homeowners and property owners for damage

# Excavator's Portion of Responsibility (Indiana), cont.

- ▶ Possible dollar outlays for the operator
  - Chapter 26 civil penalties are up to \$1,000
  - Federal civil penalties – \$200K/day/violation, \$2M max
  - State civil penalties – \$25K/day/violation, \$1M max
  - Liability to homeowners and property owners for damage
- ▶ Failure to maintain Indiana 811 membership after 12/31/2009 = \$100/day, no maximum!

# Process for Ruling on Damage Reports

- ▶ Reports come in to the IURC, Pipeline Safety Division
  - Indiana 811
  - Operators/Utilities
- ▶ Request for information to both parties
- ▶ Pipeline Safety Division conducts investigation based on responses
- ▶ If a violation occurred, Division forwards cases to Underground Plant Protection Advisory Committee
- ▶ Advisory Committee supports or denies Division's findings, makes penalty recommendation to IURC
- ▶ Commission approves or disapproves Committee's recommendation