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 72 million residential, commercial and industrial natural gas customers in the U.S., of which 94 percent — over 68 million customers — receive their gas from AGA members. Today, natural gas meets more than one-fourth of the United States’ energy needs.

I. General Comments

AGA appreciates the opportunity to comment on the Interim Final Rule (IFR) published in the Federal Register on October 14, 2016 establishing temporary regulations to implement PHMSA’s emergency order authority.1 AGA believes that in general, the temporary regulations are consistent with the PIPES Act,2 but that some changes to the final regulations are necessary to implement Congress’ clear intent. AGA requests that PHMSA promulgate final regulations prior to the statutory deadline that take into account the comments below.

In June 2016, Congress granted PHMSA with the authority to issue “Emergency Orders” through Section 16 in the PIPES Act. This authority allows PHMSA to issue an Emergency Order if “an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard.”3 Congress required that the Secretary of Transportation issue temporary regulations no later

1 81 FR 70980.
than 60 days (August 21, 2016) after enactment of the PIPES Act and final regulations no later than 270 days (March 19, 2017) after the enactment of the PIPES Act.

AGA is committed to pipeline safety and supports PHMSA’s ability to issue an Emergency Order in the extraordinary circumstance that PHMSA identifies an imminent hazard. Given the seriousness of an imminent hazard, AGA joins PHMSA in its “hope [that PHMSA] never ha[s] to use it,” ⁴ and generally agrees with PHMSA’s descriptions of when use of this authority could arise. For example, AGA agrees that examples of when PHMSA may need to use this authority include instances where a serious manufacturing flaw has been discovered in pipe, equipment or other materials, or when an accident reveals a specific industry practice that is unsafe and needs immediate correction. ⁵ However, in the preamble to the Interim Final Rule, PHMSA also suggests that a natural disaster could give rise to using an emergency order. ⁶ AGA does not understand how a natural disaster, either impending or past, could lead to a circumstance where PHMSA could issue an emergency order tailored to abate the imminent hazard. AGA encourages PHMSA when publishing the final regulations to ensure that any description in how its emergency order authority arises is clarified.

Congress likewise recognized the extraordinary circumstance of an emergency order, in part due to the potential ripple effects an emergency order could have on the public and consumers. AGA appreciates that the temporary regulations reflect this concern and require the Administrator, before issuing an emergency order, to consider:

(1) The impact of the emergency order on public health and safety;
(2) The impact, if any, of the emergency order on the national or regional economy or national security;
(3) The impact of the emergency order on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers; and
(4) The result of consultations with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations.⁷

In light of the seriousness of an Emergency Order, AGA also appreciates that the temporary regulations recognize Congress’ instruction that any emergency order be limited to remedying the imminent hazard. AGA believes these safeguards to be crucial so that operator actions can be focused on abating the circumstances giving rise to the imminent hazard and emergency order.

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⁵ Id.; 81 Fed. Reg. 70982.
⁷ 49 C.F.R. §190.236(c).
Along these lines, AGA also requests that in the extraordinary event that PHMSA does issue an emergency order, PHMSA be specific as possible as to the entities to which the emergency order applies and for PHMSA to contact potentially affected operators before issuing an emergency order. PHMSA recognizes that the scope of any emergency order must be “narrowly tailored to the discrete and specific safety hazard and identify the corrective action(s) needed to remedy the hazard.”8 In order to do this, AGA believes it is imperative for PHMSA to contact potentially affected operators or industry organizations prior to issuing the emergency order. Doing so would allow PHMSA to learn more about the potential impacts any emergency order may have on public health and safety, the economy, national security, and the reliable delivery of natural gas. Such early communication will be crucial to PHMSA employing its emergency authority effectively and ensuring that emergency orders are appropriately tailored.

In enacting the PIPES Act, Congress described emergency orders as applying to “owners or operators” of pipeline facilities. AGA believes that the reference to owners and operators suggests that Congress intended PHMSA to be as specific as possible in identifying affected entities. Identifying specific owners and operators will minimize confusion as operators attempt to determine whether they are an “affected entity,” and this will also allow those affected entities to communicate and coordinate a response. AGA also suggests that PHMSA notify the applicable utility commissions and state pipeline safety offices so that they are aware of the pending emergency order and can provide affected entities any necessary assistance in complying. AGA realizes that it may not always be possible to identify specific owners, operators, state pipeline safety offices, and utility commissions, but AGA strongly encourages PHMSA to do so when possible. Where PHMSA cannot identify specific owners, AGA encourages PHMSA to be as specific as possible in describing the imminent hazard, and recognize that operators will need time to evaluate their systems and determine whether they are an “affected entity.” To this end, the response requirements should recognize the need to determine whether an operator is an “affected entity” and provide operators time for this evaluation.

II. Specific Concerns

AGA is supportive of regulations that implement PHMSA’s emergency order authority in a manner that is consistent with Congress’ intent for emergency orders to address extraordinary circumstances. AGA believes the temporary regulations generally implement Congress’ direction, but encourages PHMSA to make the following changes in the final regulations.

8 81 Fed. Reg. at 70983.
A. PHMSA Should Not Deviate From The Statutory Definition Of “Emergency Order”

PHMSA defines “emergency order” broadly as a “written order imposing restrictions, prohibitions, or safety measures on affected entities.” This definition is in stark contrast to both the statutory description of an emergency order, as well as PHMSA’s description of “emergency order” in the Preamble to the Interim Final Rule:

- **Statutory Language:** “imposing emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities without prior notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.”

- **Section-by-Section Analysis:** “Emergency order means a written requirement imposing an emergency restriction, prohibition, or safety measure on owners and operators of gas or hazardous liquid pipeline facilities without prior notice or an opportunity for a hearing.”

PHMSA has offered no explanation for deviating from the clear statutory language. PHMSA’s temporary definition of emergency order could be read broadly to include a wide range of situations that do not rise to the level of hazard that Congress intended. AGA recommends that at a minimum, PHMSA’s final regulations reflect the statutory definition:

> Emergency order means a written order imposing emergency restrictions, prohibitions, or safety measures on affected entities, but only to the extent necessary to abate the imminent hazard.

B. PHMSA’s Service Requirements for Emergency Orders Should Ensure That All Affected Entities Be Notified of Emergency Orders

Section 190.236 of the temporary regulations exempts the Emergency Order provisions from PHMSA’s standard service requirements. Instead, the temporary regulations allow PHMSA to satisfy service requirements by publication in the Federal Register and its Web site.

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9 A similar discrepancy exists in the temporary definition of “Imminent Hazard.” There, PHMSA added the term “administrative” to “formal proceeding.” Again PHMSA offers no explanation for deviating from the statutory text. In fact, the Preamble description of the definition does not include this term. AGA requests that PHMSA revise the final definition to reflect the statutory language.

10 49 C.F.R. § 190.3.


13 Defining “emergency order” as imposing “emergency” restrictions is also consistent with PHMSA’s definition of “emergency order” under the Hazardous Materials regulations. See 49 C.F.R. §109.1.

14 49 C.F.R. § 190.236(d).
Emergency Orders are intended to address the extraordinary situation of an imminent hazard where PHMSA believes an immediate response is required by industry to mitigate that imminent hazard. In many circumstances, time will be of the essence when an emergency order is issued. The quicker that affected parties receive notice of the emergency order, the quicker the imminent hazard may be abated. AGA is concerned that PHMSA’s proposed service requirements – through the Federal Register and its Web site – are not sufficient to ensure that all affected operators receive the order and are therefore able to respond quickly. For this reason, AGA suggests that the final regulations should not exempt Emergency Orders from PHMSA’s general service requirements, which provide for individual service to affected parties.

AGA believes that an electronic means of notification could also be used in addition to the traditional service methods in §190.5. One such method of electronic notification is an email distribution to all individuals listed as “Compliance Officers” and all listed alternate contacts in the Operator Identification (OPID) Contact Management section of the PHMSA Portal. AGA understands that this system will allow operators to manage their listed contacts and designate multiple individuals for notifications. This appears to be an established means that could be used to distribute Emergency Order information to all impacted operators.

C. The Determination of an Imminent Hazard Must be Consistent with the Statutory Language

The emergency order authority granted to PHMSA predicates PHMSA’s issuance of an emergency order on the determination “that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard.” 15 Section 190.236(a), however, improperly expands the scope upon which a determination can be made to include “a violation of a provision of the Federal pipeline safety laws, or a regulation or order prescribed under those laws.” AGA believes that the final regulations must be modified as follows to reflect Congress’ clear intent that there be limited circumstances giving rise to an emergency order:

**Determination of imminent hazard.** When the Administrator determines that a violation of a provision of the Federal pipeline safety laws, or a regulation or order prescribed under those laws, an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard, as defined in § 190.3, the Administrator may issue or impose an emergency order, without advance notice or an opportunity for hearing. The basis for any action taken under this section will be set forth in writing that describes:

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D. Petition For Review Process

The PIPES Act instructed PHMSA to provide for an opportunity for review of an emergency order through a formal hearing, in accordance with 5 U.S.C. § 554 upon receipt of a petition for review from an entity subject to the emergency order.\textsuperscript{16} In the temporary regulations, PHMSA has predicated an entity receiving a formal hearing on the requirement that there be material facts in dispute giving rise to the request for the hearing.\textsuperscript{17}

In providing PHMSA with the authority to issue emergency orders, Congress was clear that any affected entity had a right to a formal hearing, regardless of the ability to demonstrate material facts in dispute through a petition. AGA believes that the final regulations should be revised to eliminate the reference to material facts in §190.237(a)(3) as follows:

(3) State whether a formal hearing in accordance with 5 U.S.C. 554 is requested, and, if so, the material facts in dispute giving rise to the request for a hearing;

Furthermore, PHMSA should recognize and address the reality that where numerous operators are subject to a given emergency order, the time necessary for each operator to respond may vary greatly. For example, in a situation where PHMSA issues an emergency order requiring operators to perform assessment or remediation activities, it is likely that the impacts of these requirements will vary by operator and system characteristics. If PHMSA intends for emergency orders to remain in effect until PHMSA lifts the order, it would be unfair for operators that can rectify the issue quickly to have to wait for others that may need substantially more time to complete required assessments and remediation. Thus, AGA requests that PHMSA clarify in the final regulations that in this situation emergency orders can be lifted as to some operators, while remaining in effect as to others.

E. Good Cause

The PIPES Act required that PHMSA issue “temporary regulations” not later than 60 days after the date of the enactment of the PIPES Act, which was signed into law on June 22, 2016. In issuing these temporary regulations, PHMSA invoked the “good cause” exemption under the Administrative Procedure Act to bypass the statutorily required notice-and-comment process. PHMSA states that the PIPES Act’s 60-day deadline for issuing temporary regulations made notice and comment rulemaking “impracticable, and not in the public interest.”\textsuperscript{18} AGA notes that the “mere existence” of a deadline is usually insufficient to establish good cause,\textsuperscript{19} and that PHMSA did not publish the

\textsuperscript{17} 49 C.F.R. § 190.237(a)(3).
\textsuperscript{18} 81 Fed. Reg. 70982.
\textsuperscript{19} United States Steel Corp. v. United States Environmental Protection Agency, 595 F.2d 207, 213 (5th Cir. 1979)
temporary regulations for more than 100 days after enactment of the PIPES Act, suggesting that notice-and-comment was not impracticable.

Congress also instructed PHMSA to issue “final regulations” 270 days after enactment of the PIPES Act.\textsuperscript{20} Any good cause that PHMSA may have had to enact the temporary regulations through an interim final rule does not apply to the final regulations. AGA expects that PHMSA will undertake a proper notice-and-comment rulemaking to publish the final regulations.

III. Conclusions

AGA appreciates the opportunity to provide PHMSA these comments. As noted above, AGA is committed to pipeline safety and supports PHMSA’s ability to issue an Emergency Order in the extraordinary circumstance that PHMSA identifies an imminent hazard. AGA believes its suggested comments are necessary for PHMSA’s implementing regulations to be consistent with the statutory requirements and Congress’ intent.

Respectfully submitted,

Date: December 13, 2016

AMERICAN GAS ASSOCIATION

By:

\[\text{Signature}\]

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\textsuperscript{20} 49 U.S.C. § 60117(o)(7).