I. Introduction

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 comment on the above referenced notice of proposed rulemaking (NPRM) published in the August 13, 2012 Federal Register. The rulemaking updates the administrative civil penalty maximums for violation of the pipeline safety regulations to conform to current law, updates the informal hearing and adjudication process for pipeline enforcement matters to conform to current law, amends other administrative procedures used by PHMSA personnel, and makes other technical corrections and updates to certain administrative procedures.

In accordance with the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90) (the Act), PHMSA proposes to: update the administrative civil penalty maximums and the informal hearing process for pipeline enforcement matters to conform to current law and to amend other administrative procedures used by PHMSA personnel; amend the criminal
enforcement provisions to conform to current law and practice; make corrections to the special permit provisions in the procedures for adoption of rules; implement the new enforcement authority for Part 194 oil spill response plans; and make certain technical amendments and corrections.

The amendments to 49 CFR 190 are specifically designed to provide administrative due process to the interstate pipeline companies that are under the jurisdiction of PHMSA. Most AGA member companies are not under the direct jurisdiction of PHMSA and will therefore not be impacted by these amendments. However, AGA has members that are or have interstate natural gas transmission operations or affiliates that will be directly affected. In addition, PHMSA regulations may be perceived or used as guidance or persuasive authority.

The majority of AGA members are investor owned natural gas utilities that operate under state charters. They are allowed certain monopoly rights due to the practical need to service entire geographic areas with one system, but they are regulated by state or city public utility commissions under state laws. The states adopt federal pipeline safety minimum safety standards, but generally not the federal administrative procedures used by federal administrative agencies. Many state legislators or utility commissions have decided not to adopt 49 CFR 190, and instead use their own administrative procedures for compliance and enforcement. The administrative procedures and enforcement practices are logically different from those used by PHMSA because state utility commissions have a much broader power over pipelines companies than PHMSA. The utility commissions usually have the responsibility of ensuring that natural gas, electricity, telephone and transportation service providers provide safe, adequate and reliable services at reasonable rates. The utility commissions also often have the mandate of assuring that oil and gas producers protect correlative rights and environmental resources. Finally, utility commissions are often charged to perform duties related to energy resources; such duties include requesting, accepting and administering federal funds for various state energy programs.

The National Association of State Pipeline Safety Representatives (NAPSR) published the “Compendium of State Pipeline Safety Requirements & Initiatives Providing Increased Public Safety Levels compared to Code of Federal Regulations”. This is a comprehensive document that includes over 1,150 specific safety enhancements described in 22 categories ranging from
enforcement, enhanced reporting, and record keeping, cathodic protection, to design and installation requirements have been adopted by states to help enhance pipeline safety. Formalized pipeline replacement programs have been implemented by many states to upgrade the pipeline infrastructure. In many cases it is not practical within the state legislative authority for utility commissions to apply the administrative procedures or civil penalties provided in 49 CFR 190. In lieu of these federal procedures, state commissions have significant control over the capital and maintenance budget used by pipeline operators in their jurisdiction. In many cases it is much better for state agencies to proactively seek alternative compliance, rather than respond to probable violations or incidents by assessing civil penalties. Penalties are paid to state or federal treasuries and can actually result in reducing funds that can be used to improve pipeline safety.

AGA’s comments on the proposed amendments are limited to the following:

- Section 190.233 – Corrective Action Orders
- Section 190.249 – Petitions for Reconsideration
- Section 190.211(d)(e) – Exchange of Information Prior to Hearing

Section 190.233 – Corrective Action Orders

The preamble states, “Section 20(a)(1)(C) of the Act requires PHMSA to issue regulations ensuring “expedited review” of any Corrective Action Order (CAO) issued without prior notice pursuant to 49 U.S.C. 60112(e). Section 20(a)(3) also requires the agency to define the term “expedited review” for purposes of this regulation. The procedural regulations for issuance of a CAO after notice and opportunity for hearing are outlined in § 190.233”.

Because of the safety performance of the pipeline industry, CAOs are relatively rare. However, this administrative procedure is important for safety enforcement and for the continuation of energy service to customers. PHMSA proposal seems consistent with the Act, however, AGA is concerned that the PHMSA definition of expedited review is not sufficiently quantitative to provide the administrative assurances that were intended by Congress. The proposed rule says, “For purposes of this section, the term “expedited review” is defined as the process for making a prompt determination of whether the order should remain in effect or be terminated, in accordance with paragraph (g) of this section. The expedited review of an order issued under this paragraph will be complete upon issuance of such determination”.

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PHMSA states that the current process works well in cases where an order is issued without prior notice, paragraph (b) already requires that an opportunity for a hearing be provided to the respondent as soon as is practicable after issuance of the order. PHMSA typically schedules hearings within 10 calendar days, except where the respondent requests postponement for good cause.

AGA suggests that Section 190.233 be modified to provide that a hearing will be commenced within 15 days of issuance of the CAO unless a later date is requested by the respondent upon a showing of need, and that the agency render a decision within 15 days after the conclusion of the hearing unless it issues a notice explaining the need for an extension of the 15-day period and providing a date certain for issuing an order.

Section 190.249 – Petitions for Reconsideration
AGA believes that under the existing regulations an operator has exhausted its administrative procedures after issuance of a final order pursuant to §190.213, unless the operator decides to file a petition to reconsider. The proposed amendments would make a petition to reconsider the final order mandatory instead of an option.

Under Section 190.249(g), PHMSA proposes that the agency’s final action is the Associate Administrator’s decision on reconsideration, and that the failure to raise an issue in a petition for reconsideration waives the availability of judicial review of that issue. Further, under Section 190.249(d), the filing of a petition for reconsideration stays the payment of any civil penalty, but does not stay the effectiveness of the underlying order. Finally, the NPRM proposes to eliminate Section 190.337(b), which provides that it is the general policy of the agency to act in response to a petition for reconsideration within 90 days. Taken together, the new regulations would require a party to petition for reconsideration before seeking judicial review, still be subject to an order pending reconsideration (except for the payment of a civil penalty), and there would be no indication of when finality in the agency process would be reached. This approach is inconsistent with the Administrative Procedure Act (“APA”). The APA states:

5 USC § Section 704. - Actions reviewable
Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary,
procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

AGA believes the amended provision places a double burden on the operator. All final actions, except the civil penalty are enforced while judicial review is barred, until the operator petitions the agency that already issued the “final” order to reconsider the order. If the operator fails to seek reconsideration of actions already enforced, judicial review is barred per the regulation. AGA believes that it is settled law that an administrative agency’s petition to reconsider must stay the order in its entirety. As explained in Darby v. Cisneros, 509 U.S. 137, 154 (1993),

*Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be "inoperative" pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.*

The statute controlling judicial review of PHMSA administrative action does not require the operator to file a petition for reconsideration, and PHMSA has cited no legislative authority to support this new precondition to judicial review. AGA believes that PHMSA must cure the administrative defects in its proposed amendment.

**Section 190.211(d)(e) – Exchange of Information Prior to Hearing**

AGA believes that the hearing process is designed to give the parties an opportunity to review all of the information that will be relied upon, so that both parties can adequately discuss the facts and the merits of their respective positions. AGA is concerned that the wording used to describe the burden of evidence production on OPS would require them to produce little or no information. Conversely the operator must produce all records it intends to use at least 10 days before the hearing. The relevant amendment is:

§ 190.211 Hearings.
(d) Request for evidentiary material.
Upon request, to the extent practicable, OPS will provide to the respondent in advance of the hearing all evidentiary material upon which OPS intends to rely or to introduce at

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1 49 USC § 60119 Judicial Review
the hearing that is pertinent to the issues to be determined. The respondent may respond to or rebut this material at the hearing as set forth in this section.

(e) Pre-hearing submission.
Respondent must submit all records, documentation, and other written evidence it intends to use to rebut an allegation of violation at least 10 calendar days prior to the date of the hearing, unless another deadline is ordered by the presiding official. Failure to submit the material in advance of the hearing in accordance with this paragraph will waive the respondent’s right to introduce the material at the hearing, unless the presiding official finds there is good cause for not timely submitting the materials.

AGA believes that in the interest of providing a complete and efficient hearing, both parties should be required to submit records that they will rely upon before hearing.

II. Conclusion
AGA appreciates the opportunity to comment on the proposed update to administrative civil penalty maximums for violation of the pipeline safety regulations to conform to current law, update to the informal hearing and adjudication process for pipeline enforcement matters to conform to current law, amendment to other administrative procedures used by PHMSA personnel, and other technical corrections and updates to certain administrative procedures. AGA respects PHMSA’s important responsibility to enforce pipeline safety regulations. AGA agrees with many of the proposed amendments. However, AGA has concerns about certain amendments to Section 190.233 – Corrective Action Orders; Section 190.249 – Petitions for Reconsideration; and Section 190.211(d)(e) – Exchange of Information Prior to Hearing.

AGA offered suggestions herein that PHMSA may consider to address potential conflicts that the proposed regulation may have with the Administrative Procedures Act. If you have questions or need more information about AGA’s positions, please feel free to contact me at (202) 824-7339.

Respectfully submitted,

Date: September 13, 2012

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American Gas Association