December 13, 2016

Docket Operations
U.S. Department of Transportation
West Building, Ground Floor, Room W12-140
1200 New Jersey Ave., SE
Washington, DC 20590

RE: Comments of the Interstate Natural Gas Association of America on Interim Final Rule, "Pipeline Safety: Enhanced Emergency Order Procedures" Docket No. PHMSA-2016-0091

The Interstate Natural Gas Association of America ("INGAA")[1] hereby submits comments in response to the Interim Final Rule ("IFR") issued by the Pipeline and Hazardous Materials Safety Administration ("PHMSA" or the "Agency") on October 14, 2016, in the above-referenced proceeding.[2] INGAA appreciates the opportunity to comment on the temporary regulations in the IFR. INGAA supports the IFR since it generally follows the requirements of the PIPES Act.[3] However, INGAA requests certain changes, identified below, be made in the final regulations to adhere more closely to Congress' intent and to provide an even more transparent, efficient, and effective emergency order process.

I. Introduction

Section 16 of the PIPES Act amended section 60117 of the pipeline safety laws[4] to establish the new emergency order authority in subsection 60117(o).[5] This authority allows for the issuance of an emergency order if "an unsafe condition or practice, or a combination of unsafe

[1] INGAA is a trade organization that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America. INGAA is comprised of 24 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada. INGAA's members, which operate approximately 200,000 miles of pipelines, provide an indispensable link between natural gas producers and natural gas consumers in the residential, commercial, industrial, and electric power sectors. INGAA's members are committed to providing safe and reliable transportation services to their diverse customers, without undue discrimination, and to maintaining a high level of customer service.
[2] 81 Fed. Reg. 70980 (Oct. 14, 2016).
[3] "Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016," Pub. L. No. 114-183, 130 Stat. 514 (codified as amended at 49 U.S.C. §§ 60101-60141 (2016) ("PIPES Act").
[4] *See* 49 U.S.C. § 60117.
[5] *Id*. at § 60117(o).

conditions and practices, is causing an imminent hazard."[6] The IFR states that the new authority allows "PHMSA to act quickly to address imminent safety hazards that exist across a subset or larger group of owners or operators."[7]

The interstate natural gas pipeline industry is committed to protecting the health and safety of its workers, customers, and the communities through which its facilities operate. Pipeline operators work diligently to construct, operate, and maintain their facilities safely, reliably, and with a goal of zero incidents. Consistent with these core industry principles, INGAA recognizes that there could be extraordinary circumstances that would cause the Agency to issue an emergency order should PHMSA determine that an "imminent hazard" exists.

The temporary regulations appropriately reflect the requirement in the PIPES Act that PHMSA carefully consider the potential broad impacts of an emergency order before any agency action. Specifically, INGAA supports the provisions of § 190.236(c) of the temporary regulations, which 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.[8]

The listed considerations are particularly important because the PIPES Act provides that "emergency restrictions, prohibitions, and safety measures" may be imposed on pipeline owners and operators "without prior notice or an opportunity for a hearing."[9] Given that an emergency order could impose conditions that have far reaching consequences, it is imperative that the Agency consider how an emergency order could hinder the reliability of interstate natural gas service that is essential to provide power and heat to the homes and businesses of the American public. Therefore, INGAA stresses the importance of prior Agency consultation with the Federal Energy Regulatory Commission ("FERC") and other government agencies, and affected pipeline operators, before issuing an emergency order.

The IFR also appropriately 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)

[6] *Id*. at § 60117(o)(1).
[7] 81 Fed. Reg. at 70981.
[8] 81 Fed. Reg. at 70986.
[9] 49 U.S.C. § 60117(o)(1).

needed to remedy the hazard."[10] The PIPES Act further provides that a written order must set forth how the action "is tailored to abate the imminent hazard" and the reasons why use of existing authorities in §§ 60112 and 60117(l) of the pipeline safety laws are insufficient to do so.[11]

In addition, INGAA stresses the importance of the Agency establishing and employing adequate procedures to ensure a fair and expeditious review since there is no opportunity for a hearing prior to the issuance of an emergency order. The PIPES Act sets forth requirements to allow an aggrieved party to seek review on a timely basis, and provides procedures for the development of an evidentiary record.[12] In this regard, the PIPES Act provides that an order in response to a petition for review is to be issued within 30 days of the filing of a petition for review,[13] and that judicial review of an emergency order "shall be given expedited consideration."[14] This is an essential safeguard because the issuance of an emergency order would be an extraordinary action.

In the PIPES Act, Congress directed PHMSA to issue final regulations within 270 days of enactment. Accordingly, INGAA requests that PHMSA promulgate final regulations prior to the statutory deadline consistent with the comments below.

II. Comments on Specific Provisions

As noted above, INGAA believes that the IFR tracks the PIPES Act in most respects. However, certain provisions, as identified below, should be modified in the final regulations to make them fully consistent with the directives of Congress and to more fully develop the emergency order process, as follows:

A. Definition of Emergency Order

Section 190.3 of the temporary regulations defines an emergency order as "a written order imposing restrictions, prohibitions, or safety measures on affected entities."[15] While this definition incorporates part of the PIPES Act's language, it notably omits key portions of the statutory language, including the mandate that the "restrictions, prohibitions, or safety measures" imposed by an emergency order must be applied "only to the extent necessary to abate the imminent hazard."[16] It is imperative that the omitted language be included in the final regulations in order to reflect Congress' mandate that emergency orders be narrowly tailored. Therefore, INGAA requests that the definition of "emergency order" in the final regulations reflect the statutory language and state as follows:

[10] 81 Fed. Reg. at 70983.
[11] *Id*. at § 60117(o)(3)(E).
[12] 49 U.S.C. § 60117(o)(4).
[13] *Id*. at § 60117(o)(5).
[14] *Id*. at § 60117(o)(6).
[15] 81 Fed. Reg. at 70985.
[16] *Id*.

> 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. Determination of an Imminent Hazard

In § 190.236(a) of the temporary regulations, the IFR states that PHMSA's emergency order authority is triggered 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."[17] However, the PIPES Act does not contain the italicized language above, and simply states that PHMSA's emergency order authority is triggered when "the Secretary determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard."[18]

INGAA requests that the final regulations be modified to eliminate the added language. The PIPES Act does not provide that a violation of a pipeline safety law, regulation, or order would be a sufficient basis for an emergency order. Furthermore, Congress included an express Savings and Limitations Clause in the PIPES Act, which specifically provides that PHMSA may not use its emergency order authority to "alter, amend, or limit the Secretary's obligations" under the Administrative Procedure Act ("APA") or to modify the Code of Federal Regulations.[19] The Savings and Limitations Clause must be included in the final regulations, because it is further evidence of Congress' intent that PHMSA's emergency order authority only be used in limited circumstances, and that it may not be used to achieve broader policy objectives. Thus, it is clear that Congress did not intend to give PHMSA the authority to issue emergency orders any time an operator violates a pipeline safety law, regulation, or order. In these cases, the italicized language, referenced above, appears to give PHMSA the authority to issue emergency orders without the requisite finding that one or more unsafe conditions or practices have occurred.

Accordingly, the language allowing PHMSA to issue emergency orders in such a situation should be eliminated from the final regulations and § 190.236(a) should read:

> 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 a writing that describes:

[17] 81 Fed. Reg. at 70985 (emphasis added).
[18] 49 U.S.C. § 60117(o)(1).
[19] 49 U.S.C. § 60117(o)(9).

Additionally, the Savings and Limitations Clause be must be added as a new subsection at the end of § 190.236, that reads:

> (e) Limitations and Savings Clause – An emergency order issued under this section may not be construed to:
>
> (1) alter, amend, or limit the Secretary's obligations under, or the applicability of, section 553 of title 5; or
> (2) provide the authority to amend the Code of Federal Regulations.

C. Consultation Requirement

Prior to the issuance of an emergency order, both the IFR and the PIPES Act require PHMSA's Administrator to consult "as the Administrator determines appropriate, with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations."[20] INGAA seeks clarification that this language allows the Administrator discretion only as to what agencies are consulted and to what extent those agencies are consulted. However, as stated in the PIPES Act, the Administrator *shall* consult with some subset of the stated entities in order to comply with Congress' explicit mandate.[21]

INGAA notes that it would be appropriate, if not imperative, for the Administrator to consult with certain agencies in almost every conceivable situation. As stated above, the impact of an emergency order on reliability and the ability of operators to provide continuity of service must be considered prior to the issuance of an emergency order.[22] It logically follows from this that before any emergency order is issued to a FERC regulated pipeline that FERC should be consulted at a minimum for impact to reliability. Additionally, the Department of Energy also would be an appropriate consulting agency in some cases due to its overarching interest in energy policy and electric reliability. Furthermore, INGAA volunteers itself, not as an entity that must be consulted, but as a tool for the Agency to employ to provide a technical evaluation of the possible impact to the nation's infrastructure as represented by the INGAA membership.

D. Service of Emergency Orders

The temporary regulations in the IFR do not require personal service of an emergency order on affected entities. Instead, the IFR simply states that notice of emergency orders will be published in the Federal Register and notice also will be posted on the PHMSA website.[23] Due to this method of service, it is foreseeable that an operator could fail to realize that it is subject to an emergency order if it is not explicitly named in the order. This becomes even more likely in cases where an emergency order contains ambiguous language regarding its scope and applicability.

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[20] § 60117(o)(2)(B); 81 Fed. Reg. at 70985.
[21] § 60117(o)(2)(B).
[22] 81 Fed. Reg. at 70986.
[23] 81 Fed. Reg. at 70986.

Therefore, INGAA respectfully notes that due process requires that PHMSA alter the method of service in the final regulations so as to provide for personal service on all the entities affected by an emergency order. It is well established that notice by publication is insufficient when the contact information of the affected parties is easily accessible.[24] Thus, the publishing of the emergency order in the Federal Register and its posting on the PHMSA website is insufficient, where the Agency has both the requisite contact information for the entities under its jurisdiction as well as the information necessary to determine what entities would be affected by any potential emergency order. Furthermore, personal service would not be overly burdensome to PHMSA for the reasons stated above, but it would be tremendously beneficial to affected operators so that they are apprised promptly of any emergency order issued by PHMSA and thus able to comply timely with its terms. Accordingly, INGAA requests that PHMSA revert back to its current regulations and remove the exception to the personal service requirement in the final regulations so that § 190.5 reads:

> (a) Each order, notice, or other document required to be served under this part~~, with the exception of emergency orders under § 190.236,~~ will be served personally, by certified mail, overnight courier, or electronic transmission by facsimile or other electronic means that includes reliable acknowledgement of actual receipt.

E. Petitions for Review

1. Request for Formal Hearing

The IFR gives PHMSA's Associate Administrator the power to issue an administrative decision in cases where the petition for review does not include a formal hearing request or *fails to state material facts in dispute*.[25] Therefore, the Associate Administrator could unilaterally deny a formal hearing request if, in his or her view, the petition for rehearing fails to state material facts in dispute. This is in strict contrast to Congress' explicit directive that "the Secretary *shall* provide an opportunity for review of the order under section 554 of title 5."[26] Thus, it would be wholly inconsistent with the PIPES Act for the Associate Administrator to have the discretion to unilaterally deny a formal hearing request based upon a finding that the petition for review fails to state material facts in dispute.

As evidenced by the many factors that PHMSA is statutorily required to consider before issuance as discussed above, emergency orders could potentially have far-reaching consequences on, among other things, reliability, continuity of service, and the national or regional economy. It is imperative that affected entities be given the chance to develop an evidentiary record before an independent Administrative Law Judge ("ALJ"), because emergency orders will be issued without prior notice or the opportunity for a hearing. Consequently, INGAA requests that PHMSA modify

[24] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).
[25] 81 Fed. Reg. at 70986 (emphasis added).
[26] 49 U.S.C. § 60117(o)(4) (emphasis added).

the language of § 190.237 so that the Associate Administrator does not have the discretion to unilaterally deny an affected entity the opportunity to pursue a formal hearing.

2. Amending a Petition for Review

The temporary regulations in the IFR do not contemplate allowing an affected entity the opportunity to amend its petition for review. This is problematic in cases where an accident triggers PHMSA's emergency order authority, because it is often extremely difficult to gather information as to the cause of the accident immediately following the event. As such, operators likely will not have all the relevant facts necessary to properly support a petition for review of an emergency order immediately following an accident. Additional facts may develop in the days and weeks following an accident. Thus, INGAA requests that affected entities be given the opportunity to amend their petitions for review anytime within the 30-day deadline for a final agency decision should new information become available that materially affects the review proceeding. INGAA would like to further clarify that such an opportunity to amend petitions for review should not affect the 30-day deadline for a final agency decision that PHMSA established in § 190.237 of the temporary regulations.

3. Consolidation

Under § 190.237 of the temporary regulations, PHMSA is obligated to issue a final agency decision within 30 days of the filing of a petition for review irrespective of whether the decision is issued through a formal or informal hearing process.[27] However, the temporary regulations also allow the Associate Administrator the discretion to consolidate petitions for review if "those petitions share common issues of law or fact."[28] This raises concerns regarding situations where various operators file petitions for review at different times and what that may mean in the context of these two portions of the temporary regulations. In order to address this potentially problematic situation, PHMSA should explicitly state in its regulations that where multiple petitions for review are consolidated, the 30-day deadline for a final agency decision is controlled by the earliest petition filed. Not only would this clarify concerns as to how consolidation will affect the proceeding from a procedural standpoint, but it would also ensure that consolidation does not lead to violating the 30-day deadline stated in the IFR and the PIPES Act.

Similar to the Associate Administrator's authority to consolidate a proceeding, the Associate Administrator should also have the discretion to deconsolidate a proceeding if circumstances warrant. As discussed above, it is easily foreseeable that facts potentially altering the review proceeding may arise after petitions for review have been consolidated. Thus, the Associate Administrator should be given the ability to address such situations and deconsolidate proceedings after petitions have been consolidated

[27] *See* 81 Fed. Reg. at 70986.
[28] *Id.*

4. Lifting Emergency Orders as to Some Operators

In cases where numerous operators are subject to a given emergency order, it is naturally conceivable that a vast diversity exists regarding the circumstances of each individual operator, particularly those relevant to the emergency order. 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. Some operators may have multiple pipelines and hundreds of miles affected, while others may simply have a few short segments. In such a scenario, it would be patently 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, INGAA requests that PHMSA clarify in the final regulations that emergency orders can be lifted as to some operators, while remaining in effect as to others.

5. Emergency Orders Resulting from Accidents

The IFR states that PHMSA has the authority to issue emergency orders affecting multiple owners and operators if "an accident reveals a specific industry practice that is unsafe and needs immediate or temporary correction."[29] As discussed earlier, information may be difficult to gather immediately following an accident so it is highly likely that the operator involved in the accident will not immediately have all of the facts regarding what caused the accident until it completes its investigation. Furthermore, operators whose facilities were *not* directly involved in the accident that triggered the emergency order, but are still subject to the order because it addresses "a specific industry practice," will have little or no access to critical information about the causes of the accident at the time the emergency order is issued. For example, in situations where the NTSB investigates a pipeline accident, the operator typically agrees not to discuss publicly the cause or specifics of the accident.

In order to combat this, emergency orders must contain as much specificity as possible as to the "imminent hazard" so that each operator can determine whether the order is applicable and how each operator may terminate or modify the order as it pertains to its own system. Additionally, in many situations, the "imminent hazard" may not be known until after PHMSA and the directly impacted operator conduct an investigation so that adequate facts can be provided in the emergency order. As discussed above, INGAA reasserts the importance of PHMSA contacting potentially affected operators before issuing emergency orders so that PHMSA understands how to tailor its emergency order to adequately address the imminent hazard, or, in the alternative, contacting groups or organizations, such as INGAA, that can disseminate information quickly to operators. Such communication will be crucial to PHMSA employing its emergency authority effectively.

Similarly, INGAA argues that when emergency orders are issued after "a serious flaw has been discovered in pipe, equipment manufacturing, or supplier materials,"[30] no amount of specificity may be enough to inform operators that the emergency order is applicable. In such cases, INGAA argues that the Administrator should have the discretion to allow operators to investigate, for a

[29] 81 Fed. Reg. at 70982.
[30] 81 Fed. Reg. at 70982.

specified amount of time, whether the conditions described in the emergency order are applicable to them *prior* to the remedial actions (e.g., removing a line from service, replacing certain equipment over a specific period of time, etc.) going into effect. This will allow PHMSA and the potentially affected operators to better understand the extent of the situation that the Agency is attempting to address with the emergency order.

6. Agency Authority to Require a Formal Hearing

In cases where the petition for review does not request a formal hearing, § 190.237(c)(4) of the temporary regulations provides the Associate Administrator the authority to reassign the petition for review to the Office of Hearings for a formal hearing "when a reasonable basis exists for the reassignment."[31] Such authority does not exist under the PIPES Act, and INGAA seeks clarity regarding in what circumstances the Associate Administrator would initiate a formal hearing process regarding review of an emergency order when the affected operator has not requested one. Such a process would be counter to all established interests of judicial economy. Furthermore, it would be highly burdensome if the Agency were to compel a formal hearing process, because the affected operator would need to unnecessarily expend a great deal of time, money, and resources associated with the formal ALJ hearing process. Consequently, INGAA requests that § 190.237(c)(4) of the temporary regulations be stricken from the final regulations. However, if § 190.237(c)(4) is not stricken from the final regulations, INGAA requests that PHMSA provide guidance regarding what circumstances would prompt the Associate Administrator to initiate a formal hearing process when the affected operator has not requested one.

7. Procedural Schedule

According to § 190.237(g) of the temporary regulations, the ALJ must issue a report and recommendation within 25 days of receipt of the original petition for review.[32] Thereafter, an aggrieved party has one day to respond to the ALJ's report by filing a petition for reconsideration with the Associate Administrator, the opposing party has one day to respond to the petition for reconsideration, and the Associate Administrator then has three days to issue a final agency decision.[33] All of this must still occur within the 30-day deadline discussed above.[34]

INGAA requests that PHMSA modify the procedural schedule described above so as to give all of the parties more time in order to more adequately prepare the petition for reconsideration and the respective response. Accordingly, INGAA requests that PHMSA change the deadline for the ALJ's issuance of the report and recommendation from 25 days to 21 days. Further, INGAA requests that the aggrieved party be given three days, instead of one, to file a petition for reconsideration with the Associate Administrator and INGAA also requests that the opposing party be given three days, instead of one, to file a response. Under INGAA's requested procedural

[31] 81 Fed. Reg. at 70986.
[32] 81 Fed. Reg. at 70987.
[33] *Id.*
[34] *Id.*

schedule, the Associate Administrator would still have three days to make a final decision before the 30-day deadline, which should not be altered.

F. *Ex Parte* Communications

Both the PIPES Act and the temporary regulations in the IFR incorporate § 554 of the APA to state the Agency's responsibilities in providing a formal hearing process.[35] That section states, among other things, that the ALJ presiding over a formal agency hearing may not engage in ex parte communications with either party.[36] INGAA would like to emphasize the importance of the strong application of the *ex parte* communication principles. Accordingly, INGAA seeks clarification that the *ex parte* communication principles will go into effect immediately following the issuance of an emergency order so as to ensure a fair hearing process for both parties. INGAA further argues that *ex parte* rules should apply to any discussion of the merits between the ALJ and any Administrator, Associate Administrator, or PHMSA personnel acting on behalf of the Agency. However, it should be noted that *ex parte* rules would not foreclose continued discussions between the affected operators and the Administrator, Associate Administrator, or PHMSA personnel acting on behalf of the Agency. The application of *ex parte* communication principles to all relevant Agency employees, as described above, at the earliest possible stage of the process would combat any appearance of impropriety. Accordingly, INGAA requests that PHMSA apply the *ex parte* communication principles as set forth in § 554 of the APA to all relevant Agency employees immediately following the issuance of an emergency order.

G. The Good Cause Exemption and the IFR Process

The PIPES Act required PHMSA to issue temporary regulations no later than 60 days after it was enacted on June 22, 2016.[37] PHMSA invoked the good cause exemption under the APA in order to bypass the statutorily required notice and comment process, because it found that the 60-day timeline made notice and comment impracticable and not in the public interest .[38] INGAA notes that numerous courts have held that the good cause exemption must be narrowly construed and should be limited to emergency circumstances, such as when a safety investigation demonstrates the necessity of instantly putting a new rule in place or if a rule is of "life-saving importance."[39] Furthermore, INGAA notes that neither the mere existence of a statutory deadline,[40] nor the temporary nature of the IFR constitute good cause by themselves.[41]

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[35] 49 U.S.C. § 60117(o)(4); 81 Fed. Reg. at 70986.
[36] *See* 5 U.S.C. § 554(d).
[37] 49 U.S.C. § 60117(o)(7)(A).
[38] 81 Fed. Reg. at 70982.
[39] *See eg. Mack Trucks, Inc. v. EPA*, 682 F.3d 87,93 (D.C. Cir. 2012).
[40] *United States Steel Corp. v.* EPA, 595 F.2d 207, 213 (5th Cir. 1979); *See also Sepulveda. v. Block*, 782 F.2d 363, 366 (2nd Cir. 1986) (finding that the good cause exemption was met, because Congress' intent that the new regulations be implemented immediately was evidenced by the fact that the enactment date was the same as the effective date).
[41] *Mack Trucks*, 682 F. 3d at 94 (D.C. Cir. 2012).

Congress required PHMSA to issue final regulations no later than 270 days after the enactment of the PIPES Act.[42] In issuing its final regulations, and, consistent with its obligations under the APA,[43] PHMSA must fully consider and respond to comments received.

III. Conclusion

INGAA appreciates the opportunity to comment on the temporary regulations in the IFR, and respectfully requests that PHMSA promulgate final regulations in accordance with the directives of the PIPES Act and the comments submitted by INGAA herein.

Respectfully Submitted,

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[42] 49 U.S.C. § 60117(o)(7)(B).
[43] 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").