

Billing Code: 4910-60-W

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 190

[Docket No. PHMSA-2016-0091]

RIN: 2137-AF26

Pipeline Safety: Enhanced Emergency Order Procedures

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA),
Department of Transportation (DOT).

ACTION: Interim Final Rule.

SUMMARY: This interim final rule (IFR) establishes regulations implementing the emergency order authority conferred on the Secretary of Transportation (Secretary) by the “Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016” (PIPES Act). These regulations are mandated by the PIPES Act and, in accordance with the Act, PHMSA is establishing procedures for the issuance of emergency orders that will be used to address an unsafe condition or practice, or combination of unsafe conditions or practices, that pose an imminent hazard to public health and safety or the environment. By implementing this statutory mandate, PHMSA will enhance its existing enforcement authority to respond immediately to conditions or practices that exist in a subset of, or across, the pipeline industry. This IFR solely affects agency enforcement procedures to implement the emergency order provisions of the law and; therefore, this rulemaking results in no additional burden or compliance costs to industry. PHMSA is issuing this IFR because the PIPES Act directs PHMSA to first issue temporary regulations.

However, the agency invites comments and will, if appropriate, make changes to the IFR prior to the issuance of a final rule, which the agency must issue, by statute, no later than 270 days following enactment of the PIPES Act.

DATES: This Interim Final Rule is effective beginning on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

COMMENTS: Comments must be received by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by any of the following methods:

- U.S. Government Regulations web site: <http://www.regulations.gov>. Use the search tools to find this rulemaking and follow the instructions for submitting comments.
- U.S. Mail or private delivery service: Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue, SE, W12-140, Washington, DC 20590-0001.
- Fax: 1-202-493-2251.
- Hand Delivery: To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, 20590 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number, PHMSA-2016-0091 or the Regulatory Identification Number (2137-AF26) for this rulemaking at the beginning of your comment. Note that all comments received will be posted without change to the U.S. Government Regulations web site: <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act section of this document.

FOR FURTHER INFORMATION CONTACT: James M. Pates, Assistant Chief Counsel for Pipeline Safety, (202) 366-0331; Kristin T. L. Baldwin, Senior Attorney, Office of Chief Counsel, (202) 366-6139, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 16 of the PIPES Act amends 49 U.S.C. 60117 by establishing a new emergency order authority for PHMSA in the area of pipeline safety. See 49 U.S.C. 60117(o). The statutory mandate requires PHMSA to develop procedures for the issuance of emergency orders to address unsafe conditions or practices posing an imminent hazard. This emergency order authority augments PHMSA's existing authority (e.g., Corrective Action Orders, Notices of Proposed Safety Order, Advisory Bulletins, etc.) by allowing PHMSA to act quickly to address imminent safety hazards that exist across a subset or larger group of owners or operators.

PHMSA is initiating this rulemaking with an IFR without prior notice of proposed rulemaking and opportunity to comment because section 16 states that the Secretary of Transportation¹ must issue temporary regulations no later than 60 days (August 21, 2016) following enactment of the PIPES Act. Furthermore, the Secretary must issue final regulations no later than 270 days (March 19, 2017) following enactment of the PIPES Act, at which time the temporary regulations will expire. In order to comply with this section of the PIPES Act as quickly as possible, PHMSA has determined that good cause exists for issuing an IFR.

II. Background and Purpose.

On June 22, 2016, the President signed the PIPES Act, Pub. L. No. 114-183, which amended the Pipeline Safety Laws in title 49 of the statute, 130 Stat. 514. Congress enacted section 16 to address the current gap in PHMSA's authority that prevents it from addressing conditions or practices that extend beyond or affect more than a single pipeline owner or operator and must be addressed immediately in order to protect life, property or the environment. Section 60117(o) augments PHMSA's existing enforcement authority to act quickly to address imminent safety hazards that exist across a subset or larger group of owners or operators. Section 60117(o) authorizes PHMSA to issue an emergency order if it determines that a violation, unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard. Under this section, an emergency order may impose restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities

¹ The Secretary has delegated the responsibility to exercise the authority vested in chapter 601 of title 49, U.S.C. to the Administrator for PHMSA. See 49 CFR § 1.97(a).

without prior notice or an opportunity for a hearing. This regulatory authority allows PHMSA to impose conditions on a subset, or a broader group, of owners/operators, facilities, or systems, in accordance with the statutorily-mandated procedures outlined in this IFR.

A. Current Authorities: Corrective Action Orders and Safety Orders

1. *Corrective Action Orders*

Section 60112 of title 49, United States Code, provides for the issuance of a Corrective Action Order (CAO) to a pipeline facility after notice and an opportunity for a hearing. Prior to issuing a CAO, the Associate Administrator for Pipeline Safety must consider the following factors, if relevant: (1) the characteristics of the pipe and other equipment used in the pipeline facility involved, including its age, manufacturer, physical properties (including its resistance to corrosion and deterioration), and the method of its manufacture, construction or assembly; (2) the nature of the materials transported by such facility (including their corrosive and deteriorative qualities), the sequence in which such materials are transported, and the pressure required for such transportation; (3) the characteristics of the geographical areas in which the pipeline facility is located, in particular the climatic and geologic conditions (including soil characteristics) associated with such areas, and the population density and population and growth patterns of such areas; (4) any recommendation of the National Transportation Safety Board (NTSB) issued in conjunction with any investigations conducted by the NTSB; and (5) such other factors as the Associate Administrator may consider appropriate. 49 CFR 190.233(e). After weighing these factors and finding that a particular facility “is or would be hazardous to life, property, or the environment,” see 49 CFR 190.233(a), the Associate

Administrator may order the suspended or restricted use of a pipeline facility, physical inspection, testing, repair, replacement, or other appropriate action. Furthermore, if the Associate Administrator finds that failure to issue the CAO expeditiously would result in the likelihood of serious harm to life, property, or the environment, the CAO may be issued without prior notice and an opportunity for a hearing. See 49 CFR 190.233(b). In such cases, the affected owner or operator must be provided with the opportunity for a hearing and expedited review as soon as practicable following issuance of the CAO. In all circumstances, CAOs are issued to and binding upon a single owner, operator, or pipeline facility. PHMSA's statutory grant of authority does not confer the ability to issue a CAO to more than one owner or operator.

2. Safety Orders

PHMSA also utilizes a Notice of Proposed Safety Order (NOPSO) to notify an operator that a particular pipeline facility has a condition or conditions that pose a pipeline integrity risk to public safety, property, or the environment. The NOPSO proposes specific measures that an operator must take to address the identified risk. These may include inspections, testing, repairs, or other appropriate actions to remedy the identified risk or condition. A NOPSO addresses pipeline integrity risks that may require the owner or operator to take immediate corrective actions or ones that must be addressed over a longer period of time. Again, these orders may only be issued to a single owner or operator and are not intended to address imminent safety or environmental hazards.

B. Hazmat Emergency Order Authority

The Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA) conferred on the Secretary enhanced inspection authority for

hazardous materials transportation, investigation, and enforcement authority. Pub. L. 109-59 (Aug. 10, 2005). Prior to the enactment of HMTSSRA, DOT could obtain relief against a hazmat safety violation posing an imminent hazard only through a court order. After finding such a threat, the DOT operating administration was required to enlist the Department of Justice to file a civil action against the offending party, and seek a restraining order or preliminary injunction. As a practical matter, judicial relief could rarely be obtained before the hazardous transportation movement was complete. In 2011, PHMSA published a final rule instituting enhanced enforcement authority. (Hazardous Materials: Enhanced Enforcement Authority Procedures, 76 FR 11570 (Mar. 2, 2011)). The final rule included streamlined administrative remedies that materially enhanced PHMSA's ability to prevent the unsafe movement of hazardous materials. These procedures address the issuance of emergency orders to abate unsafe conditions or practices posing an imminent hazard related to the transportation of hazardous materials. The Emergency Order Authority regulations contained in this IFR are modeled after the enhanced authority conferred by HMTSSRA, to the extent required by the PIPES Act.

C. Need for Enhanced Emergency Order Authority for Pipelines

While CAOs are an effective tool for the prompt evaluation and correction of a particular operator's facilities or procedures and advisory bulletins provide recommendations — but not enforceable requirements — to a wider audience, no enforcement vehicle existed, prior to adoption of the PIPES Act, that would allow PHMSA to address immediate safety threats facing the wider industry. This new enforcement tool will allow the Administrator to issue an emergency order either prohibiting an unsafe condition or practice or imposing an affirmative requirement when

an unsafe condition, practice, or other activity in the transportation of natural gas or hazardous liquids poses a threat to life or significant harm to property or the environment. The emergency order authority conferred by the PIPES Act is intended to serve as a flexible enforcement tool that can be used to address time-sensitive, safety conditions affecting multiple owners/operators, facilities, or systems that pose a threat to life or significant harm to property or the environment. Unlike a CAO issued to a single operator, an emergency order would affect multiple or all operators and/or pipeline systems that share a common characteristic or condition. A variety of circumstances could warrant such an action, including: (1) where a natural disaster affects many pipelines in a specific geographic region; (2) where a serious flaw has been discovered in pipe, equipment manufacturing, or supplier materials; and (3) where an accident reveals a specific industry practice that is unsafe and needs immediate or temporary correction. This list is not intended to be exhaustive. PHMSA will examine the specific facts in each situation to determine if an imminent hazard exists and will tailor each emergency order to address the specific imminent hazard under each circumstance presented, while observing the statutorily-mandated due process procedures.

D. PIPES Act Requirements Related to the Emergency Order Authority

Under section 16 of the PIPES Act, PHMSA may issue an emergency order without prior notice or an opportunity for a hearing when an unsafe condition or practice, or a combination of unsafe conditions and practices constitutes or is causing an imminent hazard. Section 16 defines an “imminent hazard” as “the existence of a condition relating to a gas or hazardous liquid pipeline facility that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health,

property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of such death, illness, injury, or endangerment.”

The IFR requires that prior to issuance of an emergency order, PHMSA must consider the impact that an emergency order will have on public health and safety, the national or regional economy or national security, and the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers. An aggrieved entity may file a petition for review, at which time PHMSA must provide an opportunity for a review of the emergency order under 5 U.S.C. 554 to determine whether the order should remain in effect, be modified, or be terminated. If no agency decision with respect to the petition is issued on or before the last day of the 30-day period beginning on the date on which the petition is filed, the order will cease to be effective, unless the Administrator determines in writing, on or before the last day of such period, that the imminent hazard still exists.

III. Basis for Good Cause Determination.

Under the Administrative Procedure Act (APA) and the Federal Pipeline Safety Laws, PHMSA may issue an IFR when there is “good cause” to find that the notice-and-comment process would be “impracticable, unnecessary, or contrary to the public interest,” and the agency incorporates that finding and a brief statement of the reasons supporting the finding into the rulemaking document. See 5 U.S.C. 553(b)(3)(B), and 49 U.S.C. 60102(b)(6)(C). These statutes are incorporated into PHMSA’s pipeline safety regulations at 49 CFR 190.311, which allow PHMSA to modify aspects of an IFR in

issuing the final rule after receiving and reviewing public comments, as well as any other relevant documents.

The good cause exception was made part of the APA to address certain scenarios encountered by federal agencies where delay would jeopardize their assigned missions to protect the public. Advance notice and comment rulemaking procedures may be deemed impracticable when an agency cannot both follow the notice-and-comment procedure and still achieve its statutory objectives. The “impracticability exception” to normal notice and comment procedures is an important exception that is used where delay would do real harm.

In this instance, the PIPES Act established a 60-day timeline for issuing these temporary or interim emergency-order regulations. This statutory deadline makes notice and comment impracticable, and not in the public interest. The final details of the PIPES Act were not known to PHMSA until after the statute was enacted, and the PIPES Act only affords PHMSA 60 days to issue temporary regulations implementing emergency order authority. Thus, allotting time for notice and public comment (the standard comment period for a notice of proposed rulemaking is 60 days) prior to issuing temporary regulations would thwart PHMSA’s ability to manage the schedule laid out by Congress and impede the due and timely execution of the agency’s functions. Furthermore, section 16 of the PIPES Act directs a specific regulatory outcome—establishing a standard for determining when an emergency order is warranted, identifying particular factors for the agency to consider, and directing the agency to follow specific consultation requirements—for which PHMSA has no discretion.

IV. Summary of Proposals in this IFR.

This IFR establishes interim procedures to implement the expanded emergency order enforcement authority conferred by the PIPES Act. These procedures will apply only when PHMSA determines that an unsafe condition or practice is causing an imminent hazard. PHMSA may issue an emergency order without advance notice or opportunity for a hearing. The emergency order may impose emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities, but only to the extent necessary to abate the imminent hazard.

Section-by-Section Analysis

PHMSA proposes to amend part 190 of title 49, Code of Federal Regulations. Below is an analysis of the regulatory provisions.

Section 190.3 Definitions.

This section contains a comprehensive set of definitions for part 190. PHMSA will add two definitions in order to clarify the meaning of these important terms as they are used in the text of this IFR.

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.

As defined by statute, *imminent hazard* means “the existence of a condition relating to a gas or hazardous liquid pipeline facility that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion

date of a formal proceeding begun to lessen the risk of such death, illness, injury, or endangerment.”

Section 190.5 Service.

This section contains procedures for effective service of enforcement actions issued under part 190 and is amended to specifically exclude service of emergency orders from this section. Service of emergency orders will be defined in Section 190.236 Emergency Orders.

Section 190.236 Emergency Orders.

A new section 190.236 is added to authorize the Administrator to issue emergency orders upon determining that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard. This tool is necessary to abate conditions or other widespread circumstances that pose a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment that may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of such death, illness, injury, or endangerment. The order must articulate a sufficient factual basis to address the emergency situation warranting prompt corrective action.

Paragraph (a) outlines the critical elements that must be established in an emergency order prior to issuance. Principally, the order must be in writing and describe the violation, condition or practice that is causing the imminent hazard; specify the entities subject to the order; enumerate the restrictions, prohibitions, or safety measures

imposed; explain the standards and procedures for obtaining relief from the order; explain how the order is circumscribed to abate the specific imminent hazard and why the authorities under sections 60112 and 60117(1) are insufficient; and explain how certain considerations were taken into account. In other words, the order must be narrowly tailored to the discrete and specific safety hazard and identify the corrective action(s) needed to remedy the hazard.

Paragraph (d) outlines how service of an emergency order will be achieved. The Administrator will publish emergency orders in the Federal Register as soon as practicable. In addition, OPS will post emergency orders on its website. The emergency order will contain filing and service requirements, including the address of the DOT Docket Office and all persons to be served with petitions for review.

Section 190.237 Petitions for review.

A new section 190.237 is added to provide an affected party with administrative due process rights to seek redress of an emergency order, and thus, 49 CFR 190.237 sets forth the procedures for filing a petition for administrative review of an emergency order. The petition: 1) must be in writing; 2) specifically state the section(s) of the emergency order being appealed; 3) include all information and arguments in support of the appellant's petition; and (4) follow appropriate service procedures. The petitioner may request a formal or an informal hearing. If a petitioner requests review of the order under section 554 of title 5, the party must detail the material facts in dispute giving rise to the hearing request. This process will allow PHMSA and the aggrieved entity to present evidence and argument in relation to the emergency order. If the petitioner does not

request a formal hearing, the petition will be handled informally through the Office of Pipeline Safety unless the Associate Administrator determines that there is a reasonable basis for handling the petition through the formal hearing process.

Paragraphs (c) sets out the Associate Administrator for Pipeline Safety's responsibilities. These include: 1) upon receipt of a petition for review of an emergency order that includes a formal hearing request and states material facts in dispute, immediately assigning the petition to the Office of Hearings, DOT; 2) for a petition for review of an emergency order that does not include a formal hearing request or fails to state material facts in dispute, issuing an administrative decision on the merits within 30 days of receipt of the petition (the Associate Administrator's decision will constitute the agency's final decision); 3) if more than one petition for review of an emergency order is received, and those orders are substantially similar, the Associate Administrator may consolidate the petitions for the purposes of complying with 49 CFR 190.237; and 4) in the event that a petitioner does not request a formal hearing, the Associate Administrator may reassign the petition to the Office of Hearings, DOT, when there is a reasonable basis for the reassignment.

Paragraphs (d) through (k) set out the administrative hearing procedures that the Department's Office of Hearings would employ. Upon receiving the petition from PHMSA, the Chief Administrative Law Judge assigns it to an Administrative Law Judge (ALJ), who schedules and conducts an "on the record" hearing under 5 U.S.C. 554. Given the statutory language of the PIPES Act, a petitioner must be afforded an opportunity for a formal hearing that addresses the merits of a petition to ensure that a

record is created in a proceeding that forms the basis for the final agency decision and judicial review, if necessary.

Paragraph (d)(1) provides that an ALJ may administer oaths and affirmations, issue subpoenas as authorized by PHMSA's regulations, enable the parties to engage in discovery, and conduct settlement conferences and hearings to resolve disputed factual issues. PHMSA expects ALJs to conduct efficient and expeditious proceedings, including controlling discovery actions, to enable the parties to obtain relevant information and present material arguments at a hearing within the time parameters established.

Paragraph (g) requires the ALJ to issue a report and recommendation when the record is closed. The decision must contain factual findings and legal conclusions based on legal authorities and evidence presented on the record. Critically, the decision must be issued within 30 days after the Chief Counsel receives the petition.

PHMSA notes that Congress mandated that the Secretary must decide a petition for review within 30 days of its receipt, unless the Secretary determines in writing that an imminent hazard continues to exist, extending the order, pending review of the petition. See 49 U.S.C. 60117(o)(5). Therefore, paragraph (j) provides that the emergency order will no longer be effective if no agency decision has been rendered on the petition within 30 days of the receipt of the petition, unless the Administrator determines in writing that the imminent hazard continues to exist. The order would then remain in effect pending the disposition of the petition unless stayed or modified by the Administrator. PHMSA maintains that this provision is necessary to ensure that the order is extended until the imminent hazard is abated.

Paragraph (h) provides that an aggrieved party may file a petition for reconsideration of the ALJ's report and recommendation with the Associate Administrator for Pipeline Safety within one day of the issuance of the decision. The Associate Administrator is charged with issuing a final agency decision on the petition for reconsideration within three days of service of the final pleading, but no later than 30 days after receipt of the original petition for review.

Judicial review would be available in an appropriate District Court and afforded expedited consideration. All parties should note that the filing of a petition will not stay or modify the force and effect of final agency decision unless otherwise ordered.

Paragraph (k) specifies the computation of time in the adjudications process.

Rulemaking Analyses and Notices

A. Statutory/Legal Authority for this Interim Final Rule

PHMSA's general authority to publish this IFR and prescribe pipeline safety regulations is codified at 49 U.S.C. 60101, et seq. Section 16 of the PIPES Act authorizes the Secretary of Transportation to establish procedures for the issuance of emergency orders that will be used to address an unsafe condition or practice, or combination of unsafe conditions or practices that pose an imminent hazard to public health and safety or the environment. The Secretary has delegated the responsibility to exercise this authority to the Administrator. See 49 CFR 1.97(a).

B. Executive Order 12866, Executive Order 13563, and DOT Policies and Procedures

This IFR is a non-significant regulatory action under section 3(f) of Executive Order 12866, 58 FR 51735 (Oct. 4, 1993) and 13563, 76 FR 3821 (Jan. 21, 2011), and;

therefore, was not reviewed by the Office of Management and Budget (OMB). This IFR is non-significant under the Regulatory Policies and Procedures of the Department of Transportation. 44 FR 11034 (Feb. 26, 1979).

Executive Orders 12866 and 13563 require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” This IFR solely affects agency enforcement procedures to implement the emergency order provisions of the law, and therefore this rulemaking results in no additional burden or compliance costs to industry. However, under circumstances warranting that PHMSA issue an emergency order, there may be incremental compliance actions and costs to operators and benefits related to the immediate lessening of the imminent risks of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment across the entirety of affected populations and environments. In the case of existing regulatory provisions, costs and benefits are attributable to the original rulemaking.

Executive Order 13132

This IFR has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). 64 FR 43255 (Aug. 10, 1999). This IFR does not introduce any regulation that: (1) has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on state and local governments; or (3) preempts state

law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Further, this IFR does not have an impact on federalism that warrants preparation of a federalism assessment.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 60101 et seq., requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule will not have a significant impact on a substantial number of small entities. Because this rule does not directly impact any entity, PHMSA determined that this IFR will not have a significant impact on a substantial number of small entities.

D. Paperwork Reduction Act

PHMSA has analyzed this IFR in accordance with the Paperwork Reduction Act of 1995 (PRA). Pub. L. 96-511 (Dec. 11, 1980). The PRA requires federal agencies to minimize paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve Government performance, and improving the federal government's accountability for managing information collection activities. This IFR contains no new information collection requirements subject to the PRA. However, following issuance of an emergency order, PHMSA may require the issuance of status updates, reports, or other information. PHMSA seeks comment on the potential paperwork burdens associated with this rulemaking.

E. Executive Order 13175

PHMSA has analyzed this IFR according to the principles and criteria in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). 65 FR 67249 (Nov. 9, 2000). Because this IFR will not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

F. Executive Order 13211

This IFR is not a significant energy action under Executive Order 13211. 66 FR 28355 (May 18, 2001). It is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant, adverse effect on the supply, distribution, or use of energy. Furthermore, this IFR has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

G. Unfunded Mandates Reform Act of 1995

The proposal in this IFR would not impose unfunded mandates under the Unfunded Mandates Act of 1995. Pub. L. 104-4 (Dec. 4, 1995). The IFR would not result in annual costs of \$100 million or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector, and is the least burdensome alternative to achieve the objective of the IFR.

H. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321-4375, requires that federal agencies analyze proposed actions to determine whether an action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering

(1) the need for the proposed action (2) alternatives to the proposed action (3) probable environmental impacts of the proposed action and alternatives and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

1. *Purpose and Need*

Congress enacted the PIPES Act, in part, to address safety issues affecting multiple or all owners/operators of gas or hazardous liquid pipeline facilities

2. *Alternatives*

Because this IFR addresses a Congressional mandate, we have limited latitude in defining alternative courses of action. The option of taking no action would be both inconsistent with Congress' direction and undesirable from the standpoint of safety and enforcement. Failure to implement the new authority would continue PHMSA's inability to address conditions or practices constituting an imminent risk of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment.

3. *Analysis of Environmental Impacts*

There are no direct environmental impacts to analyze. However, the issuance of an emergency order represents a reduction in imminent risk of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment that cannot be lessened timely enough through a formal proceeding begun to lessen the risk.

I. Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service

Center publishes the Unified Agenda in spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the United Agenda.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement published in the Federal Register, see 65 FR 19477-78 (April 11, 2000), or you may visit <http://www.regulations.gov>.

List of Subjects

49 CFR Part 190

Emergency Orders; Administrative practice and procedures.

For the reasons discussed in the preamble, PHMSA proposes to amend 49 CFR Subchapter C as follows:

PART 190 – PIPELINE SAFETY PROGRAMS AND RULEMAKING

PROCEDURES

1. The authority citation for part 190 is revised to read as follows:

Authority: 49 U.S.C. 60101 et seq.

PART 190 – [AMENDED]

2. In § 190.3, new definitions for “Emergency Order” and “Imminent Hazard” are added in alphabetical order to read as follows:

§ 190.3 Definitions.

* * * * *

Emergency order means a written order imposing restrictions, prohibitions, or safety measures on affected entities.

* * * * *

Imminent hazard means the existence of a condition relating to a gas or hazardous liquid pipeline facility that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal administrative proceeding begun to lessen the risk of such death, illness, injury or endangerment.

* * * * *

3. In § 190.5, paragraph (a) is revised to read as follows:

§ 190.5 Service.

(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.

* * * * *

4. Add § 190.236 to subpart B to read as follows:

§ 190.236 Emergency orders.

(a) 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 a hearing. The basis for any action taken under this section will be set forth in writing that describes:

(1) The violation, condition, or practice that constitutes or is causing the imminent hazard;

(2) Those subject to the order;

(3) The restrictions, prohibitions, or safety measures imposed;

(4) The standards and procedures for obtaining relief from the order;

(5) How the order is tailored to abate the imminent hazard and the reasons the authorities under 49 U.S.C. 60112 and 60117(l) are insufficient to do so;

(6) How the considerations listed in paragraph (c) of this section were taken into account.

(b) Consultation Requirement. In evaluating the considerations under paragraph (c), the Administrator shall consult as the Administrator determines appropriate, with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations.

(c) Considerations. Prior to issuing an emergency order, the Administrator must consider the following:

(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.

(d) Service. The Administrator will publish emergency orders in the Federal Register, as soon as practicable upon issuance. In addition, OPS will post emergency orders on its website. The emergency order will contain filing and service requirements, including the address of DOT Docket Operations and of all persons to be served with petitions for review.

5. Add § 190.237 to subpart B to read as follows:

§ 190.237 Petitions for review.

(a) Requirements. An entity that is subject to and aggrieved by an emergency order may petition the Administrator for review to determine whether the order will remain in place, be modified, or terminated. A petition for review must:

(1) Be in writing;

(2) State with particularity each part of the emergency order that is sought to be amended or rescinded and include all information, evidence and arguments in support thereof;

(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; and,

(4) Be filed and served in accordance with paragraph (f) of this section.

(b) Response to the petition for review. An attorney designated by the Office of Chief Counsel may file and serve, in accordance with paragraph (f) of this section, a response,

including appropriate pleadings, within five days of receipt of the petition by the Chief Counsel.

(c) Associate Administrator for Pipeline Safety Responsibilities –

(1) Hearing requested. Upon receipt of a petition for review of an emergency order that includes a formal hearing request and states material facts in dispute, the Associate Administrator for Pipeline Safety will immediately assign the petition to the Office of Hearings, DOT. Unless the Associate Administrator for Pipeline Safety issues an order stating that the petition fails to set forth material facts in dispute and will be decided under paragraph (c)(2) of this section, a petition for review including a formal hearing request will be deemed assigned to the Office of Hearings three days after the Associate Administrator for Pipeline Safety receives it.

(2) No hearing requested. For a petition for review of an emergency order that does not include a formal hearing request or fails to state material facts in dispute, the Associate Administrator for Pipeline Safety must issue an administrative decision on the merits within 30 days of receipt of the petition. The Associate Administrator for Pipeline Safety's decision constitutes the agency's final decision.

(3) Consolidation. If the Associate Administrator for Pipeline Safety receives more than one petition for review of an emergency order, and those petitions share common issues of law or fact, the Associate Administrator for Pipeline Safety may consolidate those petitions for the purposes of complying with this section.

(4) Agency authority to request a formal hearing. In the event that a petitioner does not request a formal hearing, the Associate Administrator for Pipeline Safety may still

reassign the petition to the Office of Hearings, DOT, when a reasonable basis exists for the reassignment.

(d) Hearings. Formal hearings must be conducted by an Administrative Law Judge assigned by the Chief Administrative Law Judge of the Office of Hearings. The Administrative Law Judge may:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas as provided by the appropriate agency regulations (49 CFR 190.7 and 49 U.S.C. 60117);
- (3) Adopt the relevant Federal Rules of Civil Procedure for the United States District Courts for the procedures governing the hearings when appropriate;
- (4) Adopt the relevant Federal Rules of Evidence for United States Courts and Magistrates for the submission of evidence when appropriate;
- (5) Take or cause depositions to be taken;
- (6) Examine witnesses at the hearing;
- (7) Rule on offers of proof and receive relevant evidence;
- (8) Convene, recess, adjourn or otherwise regulate the course of the hearing;
- (9) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and,
- (10) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of an issue raised.

(e) Parties. The petitioner may appear and be heard in person or by an authorized representative. PHMSA will be represented by an attorney designated by the Office of Chief Counsel.

(f) Filing and service.

(1) Each petition, pleading, motion, notice, order, or other document submitted in connection with an order issued under this subpart must be filed (commercially delivered or submitted electronically) with: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. All documents filed will be published on the Department's docket management Web site, <http://www.regulations.gov>. The emergency order must state the above filing requirements and the address of DOT Docket Operations.

(2) Service. Each document filed in accordance with paragraph (f)(1) of this section must be concurrently served upon the following persons:

(i) Associate Administrator for Pipeline Safety, OPS, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590

(ii) Chief Counsel, PHC, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590 (facsimile: 202-366-7041)

(iii) If the petition for review requests a formal hearing, the Chief Administrative Law Judge, U.S. Department of Transportation, Office of Hearings, M-20, Room E12-320, 1200 New Jersey Avenue, SE., Washington, DC 20590 (facsimile: 202-366-7536).

(iv) Service must be made personally, by commercial delivery service, or by electronic means if consented to in writing by the party to be served, except as otherwise provided herein. The emergency order must state all relevant service requirements and list the persons to be served and may be updated as necessary.

(3) Certificate of service. Each order, pleading, motion, notice, or other document must be accompanied by a certificate of service specifying the manner in which and the date on which service was made.

(4) If applicable, service upon a person's duly authorized representative, agent for service, or an organization's president constitutes service upon that person.

(g) Report and recommendation. The Administrative Law Judge must issue a report and recommendation at the close of the record. The report and recommendation must:

(1) Contain findings of fact and conclusions of law and the grounds for the decision based on the material issues of fact or law presented on the record;

(2) Be served on the parties to the proceeding; and

(3) Be issued no later than 25 days after receipt of the petition for review by the Associate Administrator of Pipeline Safety.

(h) Petition for Reconsideration.

(1) A party aggrieved by the Administrative Law Judge's report and recommendation, may file a petition for reconsideration with the Associate Administrator of Pipeline Safety within one day of service of the report and recommendation. The opposing party may file a response to the petition for reconsideration within one day of service of a petition for reconsideration.

(2) The Associate Administrator of Pipeline Safety must issue a final agency decision within three days of service of the final pleading outlined in paragraph (h)(1) above, but no later than 30 days after receipt of the original petition for review.

(3) The Associate Administrator of Pipeline Safety's decision on the merits of a petition for reconsideration constitutes the agency's final decision.

(i) Judicial review. After the issuance of a final agency decision pursuant to paragraphs (c)(2) or (h)(3) above, or the issuance of a written determination by the Administrator pursuant to paragraph (j) below, a person subject to, and aggrieved by, an emergency order issued under section 190.236 may seek judicial review of the order in the appropriate District Court of the United States. The filing of an action seeking judicial review does not stay or modify the force and effect of the agency's final decision under paragraphs (c)(2) or (h)(3) above, or the written determination under paragraph (j) below, unless stayed or modified by the Administrator.

(j) Expiration of order. If the Associate Administrator of Pipeline Safety, or the Administrative Law Judge, where appropriate, has not disposed of the petition for review within 30 days of receipt, the emergency order will cease to be effective unless the Administrator issuing the emergency order determines, in writing, that the imminent hazard providing a basis for the emergency order continues to exist.

(k) Time. In computing any period of time prescribed by this part or by an order issued by the Administrative Law Judge, the day of filing of the petition for review or of any other act, event, or default from which the designated period of time begins to run will not be included. The last day of the period so computed will be included, unless it is

a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Issued in Washington, DC on _____, under authority delegated in 49 CFR 1.97.

Marie Therese Dominguez,
Administrator.