No. 19-1609
(Consolidated with Case No. 19-1610)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL WILDLIFE FEDERATION,

Plaintiff-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF TRANSPORTATION; ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
CASE NO. 2:17-cv-10031

BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

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DISCLOSURE STATEMENT

Pursuant to Sixth Cir. R. 26.1, *amici curiae* make the following disclosure:

1. Is any of *amici curiae* a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus curiae*, that has a financial interest in the outcome?

No.

Dated: September 6, 2019 /s/ Kirsten L. Nathanson
Kirsten L. Nathanson

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae represent critical domestic infrastructure—namely, the interstate oil and natural gas pipeline industry—as well as entities that account for the vast majority of petroleum products that are refined, manufactured, and sold in the United States.

American Petroleum Institute ("API") represents all facets of the oil and natural gas industry, which supports 10.3 million jobs and nearly 8% of the U.S. economy. API's 600+ members include exploration, production, refining, pipeline, service, and supply companies, and provide most of the nation's energy. Founded in 1919, API has developed more than 700 standards to enhance operational and environmental safety, efficiency and sustainability.

Association of Oil Pipe Lines ("AOPL") members operate liquid pipelines that carry approximately 96% of the crude oil and petroleum products moved by pipeline in the United States, extending over 215,000 miles nationwide. These pipelines safely, efficiently, and

[1] All parties consent to the filing of this brief. Under Fed. R. App. P. 29(a)(4)(E), counsel for *amici* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than the *amici*, their members, and their counsel has contributed financially to the preparation and submission of this brief.

reliably deliver over 21 billion barrels of crude oil and petroleum products each year in compliance with safety regulations implemented by U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA").

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

Amici have substantial interests in ensuring sensible and consistent application of the laws affecting energy infrastructure. *Amici* seek to provide the Court with additional information about the oil pipeline industry and assist the Court in understanding the errors in the district court's first-of-its-kind opinion. *See Nat'l Wildlife Fed'n v. Sec'y of Dep't of Transp.*, 374 F. Supp. 3d 634 (E.D. Mich. 2019) ("NWF"). That decision wrongly held that nondiscretionary approvals of oil spill response plans ("Response Plans") under 33 U.S.C. § 1321(j)(5) require Endangered Species Act ("ESA") consultation and National Environmental Policy Act ("NEPA") analysis. Such

consultation and analysis, and related litigation, are burdensome and costly for regulated entities and regulatory agencies. Left to stand, the district court's decision could have significant practical consequences for pipeline owners and operators, fuel producers, and regulatory agencies without serving the goals of either the ESA or NEPA—and in fact frustrating the Clean Water Act's ("CWA") goal of ensuring that Response Plans are timely approved for implementation in the rare event of an actual or threatened oil spill.

BACKGROUND

I. PIPELINE INFRASTRUCTURE IS CRITICAL TO FULFILLING THE NATION'S ENERGY NEEDS.

Pipelines are "[t]he arteries of the Nation's energy infrastructure, as well as one of the safest and least costly ways to transport energy products."[2] The approximately 21 billion barrels of crude oil and petroleum products carried annually by domestic oil pipelines—such as Line 5, the subject of the Response Plans at issue here—provide gasoline, diesel, jet fuel, home heating oil and raw materials used in

[2] *See* U.S. Pipeline and Hazardous Materials Safety Admin., *General Pipeline FAQs*, https://www.phmsa.dot.gov/faqs/general-pipeline-faqs (last visited Aug. 31, 2019).

consumer goods.[3] Demand for U.S.-produced petroleum is on the rise domestically and abroad, and will continue to rise in the coming decades.[4] The maintenance of pipeline infrastructure is thus critically important to U.S. energy independence and the national economy more broadly.

Underscoring the critical role of pipelines in fulfilling our nation's energy needs, Presidential Administrations of both parties have announced policies to streamline and expedite approvals related to energy and infrastructure projects, among other reasons, to enhance energy security.[5]

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[3] *See* AOPL, *About & Consumer Benefits*, http://www.aopl.org/about-aopl/ (last visited August 21, 2019).

[4] *See* U.S. Energy Info. Admin., *Annual Energy Outlook 2019* at p.12, 28, 51-60, https://www.eia.gov/outlooks/aeo/pdf/aeo2019.pdf (last visited August 21, 2019).

[5] *See, e.g.*, Exec. Order No. 13,766, *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*, 82 Fed. Reg. 8,657, 8,657 (Jan. 30, 2017); Exec. Order No. 13,807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463, 40,463 (Aug. 24, 2017); Presidential Memo. Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, 77 Fed. Reg. 18,891 (Mar. 28, 2012).

This bipartisan commitment to pipelines is not surprising given that pipelines are safer, more efficient, and have less environmental impacts than alternative modes of oil transportation. It would take approximately 750 tanker trucks, operating 24 hours a day seven days a week, or a train comprised of at least 225 28,000-gallon tank cars, to move the volume of even a modest oil pipeline.[6]

II. PIPELINES ARE SUBJECT TO MANY FEDERAL REGULATORY REQUIREMENTS.

Oil pipelines are subject to extensive federal regulation by agencies including PHMSA, EPA, the Army Corps of Engineers, and the U.S. Coast Guard. Owners and operators rely on proper application of these regulatory requirements, including timely agency review and approval decisions.

PHMSA's regulations, pursuant to the Pipeline Safety Act, 49 U.S.C. §§ 60101, *et seq*., provide comprehensive oversight of pipeline safety. *See generally* 49 C.F.R. Part 195. Many provisions seek to prevent releases of oil to the environment, addressing the pressures at which pipelines may be operated (49 C.F.R. § 195.406); when and how

[6] *See* PHMSA, *General Pipeline Facts*, *supra* n. 4.

often operators must conduct investigations to identify integrity threats (49 C.F.R. § 195.452); operators' responses to indications of a potential discharge (49 C.F.R. § 195.446); the placement of valves that may be shut to prevent a release (49 C.F.R. § 195.116); and the use of alarms to notify operators in the event of a release or potential release (49 C.F.R. § 195.446(e)).

Moreover, pipeline construction is generally subject to NEPA analysis and ESA consultation—often multiple times. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 35-37 (D.C. Cir. 2015) (noting, in rejecting claim that additional NEPA analysis was required for an oil pipeline, that the defendant agencies had "consulted with [FWS] pursuant to ESA Section 7 regarding their approvals' potential impact on listed species," resulting in the preparation of a Biological Opinion on the anticipated impacts of the whole pipeline's construction and operation; and also performed multiple NEPA analyses "assess[ing] the anticipated environmental effects" of various easements granted by the agencies in connection with pipeline construction).

Finally, the government has imposed extensive emergency response planning requirements on pipeline and other petroleum

facility operators under the Oil Pollution Act to ensure they are prepared to respond to, contain, and minimize a discharge of oil to the environment in the unlikely event one occurs. *See* 33 U.S.C. § 1321. This includes the requirement that facility operators prepare comprehensive Response Plans detailing how the operator will address a spill or threatened spill. *See* 33 U.S.C. § 1321(j)(5)(A) & (D).

III. RESPONSE PLANS SERVE AN IMPORTANT, BUT LIMITED, PURPOSE.

A Response Plan plays an important, but limited, role in regard to oil pipelines: it describes the equipment and personnel that a facility operator must have available in the event of a spill or threatened spill, and the plan for deploying those resources to optimally clean up or prevent a spill. *See* 33 U.S.C. § 1321(j)(5)(A)(i) & (D) (requiring "a plan for responding, to the maximum extent practicable, to a worse case discharge . . . of oil or a hazardous substance," which must describe the "personnel and equipment necessary to remove," or "mitigate or prevent," a discharge); *see also* 49 C.F.R. Part 194 (purpose of Response Plans is to ensure that a release of oil is quickly contained, direct initial clean-up efforts, and establish procedures for coordinating with state and federal agencies).

Response Plans are reviewed and approved by one of two federal agencies, depending on the location of the pipeline. PHMSA has delegated authority to require and approve plans for onshore pipelines, including the plans at issue here, while the Bureau of Safety and Environmental Enforcement ("BSEE") has the same responsibilities in regard to offshore pipelines.[7] PHMSA currently oversees over 600 active Response Plans, approximately 550 of which address pipelines, while BSEE oversees hundreds more Plans for offshore facilities.[8]

Critically, a Response Plan is dedicated solely to addressing a discharge or threatened discharge, and does not itself authorize activities necessary to transport oil by pipeline. Approval of a Plan comes separate from authorizations necessary for construction and operation of an oil pipeline, pursuant to the many federal and state

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[7] *See NWF*, Order at 2-3 (describing President's delegation of his CWA authority regarding Response Plans to different agencies within the Dep't of Transportation and the Dep't of the Interior); *see also* 49 C.F.R. § 1.97(c).

[8] *See* Aug. 17, 2017 Letter from F. Fulton to R. Sumwalt, https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/300246/osrp-audit-report-final-dotp-12-1and2.pdf (last visited Aug. 21, 2019).

regulatory requirements that invariably accompany such activities—usually including ESA consultation and NEPA analysis.

Moreover, the approving agencies, PHMSA and BSEE, do not execute or implement Response Plans, or even have any authority to oversee spill cleanup conducted by a facility operator in accordance with a Response Plan. Rather, EPA and the Coast Guard oversee containment and cleanup activities in the event of a spill or threatened spill.[9] Not surprisingly then, prior to the decision below, no federal court had ever held that PHMSA and BSEE approval of such plans requires ESA consultation or NEPA analyses.

SUMMARY OF ARGUMENT

The district court's conclusion that reviewing agencies cannot approve Response Plans without first consulting other agencies under the ESA *and* completing either an environmental assessment ("EA") or

[9] *See* 40 C.F.R. § 300.120 (delegating authority over spill response actions to EPA and the Coast Guard); Dep't of Transportation, June 19, 2017 OSRP Audit Report ("DOT Audit Report") at 13 ("If an oil spill occurs, either EPA or USCG will provide Federal On-Scene Coordinators who are responsible for federal oversight of the response"), https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/300246/osrp-audit-report-final-dotp-12-1and2.pdf (last visited Aug. 21, 2019).

environmental impact statement ("EIS") under NEPA is illogical, incorrect as a matter of law, and would have immense negative repercussions for the oil pipeline industry, the agencies that regulate it, and the public. If affirmed, the district court's decision would dramatically expand PHMSA's and BSEE's regulatory obligations, increasing the time and expense needed to review and approve Response Plans. The end result: unnecessary regulatory review and fewer timely approvals of Response Plans, to the detriment of not only facility operators seeking to maintain compliance with their CWA obligations, but also the public, as the Agencies fall behind in fulfilling their duty to confirm that each Plan meets the statutory criteria and thereby optimally safeguards the environment in the event of an actual or threatened spill.

This is easily avoidable. This Court should reverse the lower court's decision, which is at odds with both the CWA's text and the case law. The CWA unequivocally directs PHMSA and BSEE to approve Response Plans that meet a short list of statutory criteria. Because the agencies lack discretion to incorporate the results of ESA consultation or NEPA analysis into their decision, those processes are logically and

legally irrelevant. Consequently, the only other court to consider the precise question at issue here concluded that ESA consultation and NEPA analysis are not required before approving Response Plans, and courts from the Supreme Court on down have rejected attempts to implicate ESA and NEPA in cases addressing similar statutory obligations. This Court should overturn the district court's contrary decision, restoring predictability, timeliness and uniformity to the Response Plan approval process.

ARGUMENT

I. PHMSA APPROVAL OF A RESPONSE PLAN IS NOT DISCRETIONARY.

The Supreme Court has made quite clear that an agency's duty to consult under the ESA "covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake . . . ." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S.644, 669 (2007) ("*NAHB*"); *see also* 50 C.F.R. § 402.03. The Court has similarly held that NEPA does not apply unless an agency has discretion to incorporate the information learned through a NEPA analysis into its decision-making process. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). Thus, the Supreme Court has been clear

that, where Congress gives an agency statutory authority to take a specific action based on specific criteria, that authority is not discretionary and NEPA and the ESA do not apply.

As Appellants ably argue, PHMSA's mandatory approval of oil spill response plans is not discretionary; rather, the statute mandates that PHMSA "shall" approve a Response Plan so long as it satisfies a discrete list of criteria, *see* 33 U.S.C. § 1321(j)(5)(D)-(E), leaving the Agency with no option to disapprove or require changes based on potential impacts on species or the environment. *Amici* wish to highlight certain flaws in the district court's treatment of this issue, as well as the clear tension between that court's conclusion and the Supreme Court's decisions in *NAHB* and *Public Citizen*.

A. The district court misinterpreted the statutory text to wrongly conclude PHMSA has sufficient discretion to trigger ESA consultation or NEPA analysis.

The district court erred when it found discretion sufficient to implicate the ESA and NEPA in the six statutory criteria for Response Plan approval. The CWA provides that Response Plans must:

> (i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;
>
> (ii) identify the qualified individual having full authority to implement removal actions, and require immediate

> communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause (iii);
>
> (iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;
>
> (iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;
>
> (v) be updated periodically; and
>
> (vi) be resubmitted for approval of each significant change.

33 U.S.C. § 1321(j)(5)(D). While the first four[10] of these criteria require operators to provide substantial information to PHMSA, verification that a plan meets them is ultimately a yes-or-no inquiry. And the Act states that PHMSA "shall" approve a Response Plan that meets these discrete requirements. 33 U.S.C. § 1321(j)(5)(E).

[10] The last two do not impose substantive criteria for Plan approval, but rather simply instruct that operators must periodically revise and resubmit Plans.

The district court nonetheless discovered in this statutory list sufficient discretion to require ESA consultation and NEPA analysis. The court relied on the phrase "to the maximum extent practicable" from the third criterion, and pointed to the fact that the statutory and regulatory descriptions of the National Contingency Plan ("NCP") and Area Contingency Plans ("ACPs") (referenced in the first criterion) mention protection of wildlife and the environment. 374 F. Supp. 3d at 660-61. Both premises for the court's conclusion are flawed.

First, that certain of the statutory criteria for Response Plan approval have subjective components that require some exercise of judgment does not mean that PHMSA has the discretion to decline to approve a Plan *because of impacts on species or the environment*. In other words, the district court failed to understand that there must be a link between the discretion available to the agency and the product of ESA consultation or NEPA analysis for those statutes to apply. *See Public Citizen,* 541 U.S. at 767 (NEPA analysis must be "useful[] . . . to the decisionmaking process"); *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012) (en banc) (agency's discretion must be able to inure to benefit of protected species).

That link is missing here. The statutory phrase "to the maximum extent practicable" relates to the removal of an oil discharge. It allows PHMSA to assess whether an operator is optimally prepared to clean up a "worst case" spill; if so, PHMSA's inquiry ends. *See* 33 U.S.C. § 1321(j)(5)(D)(iii).[11] To be sure, this language requires PHMSA to make a judgment call on whether a Response Plan ensures the availability of adequate personnel and equipment to clean up a "worst case" spill. It even gives PHMSA some discretion to approve a Response Plan that is incapable of removing the "worst case" spill—namely, if it finds that removing more oil would be "impractical." *Id*. It does *not*, however, give PHMSA discretion to evaluate the potential impacts of either a discharge or the pipeline itself on species, habitat, or the environment more broadly. Thus, the "discretion" the district court found in the third

[11] To aid in this assessment, PHMSA's regulations spell out exactly how operators are to calculate the "worst case discharge" volume, including how much credit operators can claim for specific spill prevention measures. *See* 49 C.F.R. § 194.105. Thus, PHMSA's discretion in determining whether an operator is prepared "to the maximum extent practicable" to respond to a spill is limited by regulation—and in any event, has no relationship to, and leaves no room for, consideration of species and environmental impacts under the ESA or NEPA.

criterion for Plan approval is not discretion linked to NEPA analysis or ESA consultation.

Second, the fact that the NCP and ACPs, referenced in the first statutory criterion, mention species and the environment does not mean that PHMSA has the discretion to refuse to approve a Response Plan *because of* potential impacts on species or the environment. The court pointed to regulatory text stating that one of the NCP's purposes is to minimize environmental impacts. *See* 374 F. Supp. 3d at 661 (citing 40 C.F.R. § 300.317). But this general statement of purpose does not give PHMSA discretion to decline to approve a facility-specific Response Plan based on potential impacts on species and the environment from either the Plan or the activity it addresses (here, the operation of a pipeline).[12] Once PHMSA determines that the facility operator has demonstrated that a Response Plan is consistent with the NCP and ACPs, its consideration of the first statutory criterion is over.

[12] As discussed above, *see* Background § II *supra*, both ESA consultation and NEPA analysis generally take place before a pipeline is constructed because such activity requires the operator to obtain numerous federal easements, permits, and discretionary approvals.

The court also pointed to a statement in an ACP Annex that facility operators must determine the maximum distance at which a spill could harm fish, wildlife, or the environment, and develop plans to mitigate those potential impacts. *See* 374 F. Supp. 3d at 661. But again, this general recognition of the obvious relationship between mitigating the effects of a worst-case discharge and avoiding harm to wildlife and the environment does not mean that PHMSA has authority under the CWA to disapprove a Response Plan based on information that might be gained through ESA consultation or NEPA analysis.

In fact, construing the statutory criteria for Response Plan approval to require ESA consultation and NEPA analysis before a Plan can be approved for implementation in the event of a spill would be at odds with both the purpose and specifics of the NCP. The main purpose of the NCP is to "promote coordination among the hierarchy of responders and contingency plans."[13] To that end, the core provisions of the NCP regulations establish a "National Response Team" and

[13] U.S. EPA, *Nat'l Oil and Hazardous Substance Pollution Contingency Plan (NCP) Overview*, https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview.

delineate its authority (40 C.F.R. § 300.110); describe the authority and duties of federal On-Scene Coordinators (*id.* §§ 300.120, 300.135, & 300.165); and describe the roles of various federal agencies in responding to releases (*id.* § 300.170, 300.175). Regarding oil spills specifically, the NCP regulations describe the On-Scene Coordinators' duties, the scope of their authority (which depends on the size and nature of the discharge), and the process by which they, working with other agencies and officials, will conduct response actions. *See* 40 C.F.R. §§ 300.320, 300.322-300.324.

In other words, the NCP is largely focused on streamlining and ensuring the efficiency and efficacy of the federally-led process for responding to a discharge. The statutory requirement for a Response Plan to be consistent with the NCP must be viewed in that context. The NCP is not intended to impose barriers to the timely and fulsome response by a private party to a spill or spill threat by requiring supplemental analyses under other statutes before response plans can even be approved, let alone implemented. Because the district court's ruling would erect such barriers, reversal is warranted.

B. The district court's decision cannot be reconciled with Supreme Court precedent regarding when the ESA and NEPA apply.

In addition to being directly at odds with the only Court of Appeals decision specifically addressing Response Plan approval, *see Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir 2015), the district court's decision cannot be reconciled with the Supreme Court's decision in *NAHB* or *Public Citizen*. Those cases addressed different agency actions under different statutes, but are on all fours with the issue presented here.

At issue in *NAHB* was the CWA's requirement that EPA "transfer certain permitting powers to state authorities upon . . . a showing that nine specified criteria have been met." 551 U.S. at 649. As here, the CWA mandates that EPA "shall approve" the submission when those criteria had been met. *Id*. at 650-51 (citing 33 U.S.C. § 1342(b)). And as here, some of those criteria—for example, whether a state has "adequate authority" to "inspect, monitor, enter, and require reports at least to the same extent as required" elsewhere in the Act—require subjective analysis by the agency. 33 U.S.C. § 1342(b)(2)(B). But the Supreme Court found that insufficiently discretionary to trigger ESA

consultation. It *rejected* essentially the same two arguments that the district court adopted here: that the agency's assessment of whether certain criteria had been met involved "some exercise of judgment," and that certain criteria were linked to species and environmental protection. *Id.* at 671-72; *compare with NWF*, 374 F. Supp. 3d at 663 (asserting that certain Plan approval criteria are discretionary because they are "based on the experience and training of the agency," and that others are linked to wildlife and environmental protection). Thus, despite the district court's strained attempt to distinguish *NAHB*, its reasoning and conclusion simply cannot be squared with that decision.

The district court's decision also cannot be squared with *Public Citizen*. There, the statute required the agency to allow foreign motor carriers to provide cross-border services so long as they complied with certain rules. *See* 541 U.S. at 758-59. The Supreme Court reasoned that, since the agency had no authority to prevent cross-border motor operations based on NEPA analyses of their impact, none could be required. *Id.* at 768-70.[14] The same is true here. The statute requires

[14] As Enbridge explains, *see* Enbridge Opening Br. at 46-47, the Court also relied on the fact that the President had lifted a moratorium on (Continued…)

Response Plan approval so long as the Plan complies with certain requirements, and so PHMSA lacks discretion to consider the results of NEPA analysis (or, under the same logic, ESA consultation).

In short, the district court's decision is at odds with both Court of Appeals and Supreme Court precedent confirming that, where an agency lacks discretion to prohibit an activity based on the results of ESA consultation or NEPA analysis, those programs do not apply.

II. BECAUSE RESPONSE PLAN APPROVAL IS NON-DISCRETIONARY, IT HAS "NO EFFECT" ON SPECIES OR HABITAT, RENDERING ESA CONSULTATION MEANINGLESS.

Because review of Response Plans is a non-discretionary statutory task that does not implicate any other action by PHMSA beyond approval or disapproval of a Plan, it has no effect on species or habitat and therefore ESA consultation is not required.[15]

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cross-border motor operations, further highlighting that the agency had no authority to decline to authorize operators that had fulfilled the requirements.

[15] Although Appellants primarily focused on the non-discretionary nature of PHMSA's Plan approval in their briefs below, this issue was addressed briefly by Enbridge and thus has been preserved. *See* Enbridge Cross-Motion for Summary Judgment, No. 2:17-cv-10031 (E.D. Mich., filed June 12, 2018), at 36. Regardless, this is a threshold issue that implicates NWF's standing to bring their ESA claim; if Plan (Continued…)

ESA consultation is only required if a proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Here, the challenged agency action—approval of a Response Plan—has no effect on species or habitat. The Response Plan itself does not authorize *any* pipeline activity or project; it only "identif[ies] and ensure[s] the availability of" the "personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge;" "describe[s] training" and testing procedures sufficient to "ensure the safety of the … facility and to mitigate or prevent the discharge[] or the substantial threat of a discharge;" and identifies the individuals who would be responsible for implementing and managing removal and recovery activities. 33 U.S.C. § 1321(j)(5)(D)(ii)-(iv), (E)(i).

If there were a spill or threatened spill, the operator would take action to address that event pursuant to the authorization and supervision of different agencies (EPA and the Coast Guard). *See* 40 C.F.R. § 300.120. And the Response Plan does not authorize the pipeline-related activities most likely to impact species or habitat:

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approval has "no effect" on species or habitat, then any injuries to NWF's members are not caused by the challenged action.

construction and operation of the pipeline in the first place. Rather, as discussed above, *supra* Background § II, those activities are subject to ESA and NEPA analyses early in the life of the pipeline. Thus, PHMSA's approval of the Response Plan has no effect on species or habitat and so does not trigger ESA consultation. *See Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1019-20 (N.D. Cal. 2012) (agency action was not legal cause of pesticide use and therefore did not trigger ESA consultation), *aff'd on other grounds*, 718 F.3d 829 (9th Cir. 2013); *Ctr. for Biological Diversity v. U.S. Dep't of Housing & Urban Dev.*, 541 F. Supp. 2d 1091, 1100-02 (D. Ariz. 2008) (agency action was "too attenuated to affect the listed species" and so did not trigger consultation).

Moreover, in *NAHB*, the Court aptly noted that an "agency can't be considered the legal 'cause' of an action that it has no statutory discretion *not* to take." 551 U.S. at 667-68; *see also Public Citizen*, 541 U.S. at 770 ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect"). That is the case here. Not only is PHMSA not the practical cause of any

activity that might conceivably affect species or habitat, such as the construction and operation of Line 5 or the implementation of a Response Plan (which is overseen by EPA and the Coast Guard), it has no discretion *not* to approve a Plan that meets the statutory criteria. Thus, PHMSA's approval of Response Plans has no "effect" on listed species or critical habitat as either a practical or legal matter, and therefore does not implicate the ESA.

III. BECAUSE RESPONSE PLAN APPROVAL IS NOT DISCRETIONARY, THAT ACTION IS ALSO NOT A "MAJOR FEDERAL ACTION" UNDER NEPA.

Because PHMSA lacks discretion to reject a plan that meets the statutory criteria, NEPA analysis would serve no purpose. Assessments conducted under NEPA focus on whether there are less environmentally harmful alternatives to the proposed action. *See* 40 C.F.R. § 1502.14. But the CWA does not allow PHMSA to disapprove a Response Plan because there is an environmentally preferable "alternative"; it states that PHMSA "shall approve any plan that meets" the statutory criteria. 33 U.S.C. § 1321(j)(5)(D). And NEPA's broader goals of encouraging public participation and informed decision-making, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) & 40 C.F.R. §

1500.1(b), are not served by requiring an analysis where the agency is simply fulfilling its statutory mandate to review a submission of safety information related to an ongoing, previously authorized activity (like operation of an existing pipeline).

Put another way, PHMSA's non-discretionary approvals of oil spill Response Plan are not "major Federal actions," which is a prerequisite for NEPA review. 42 U.S.C. § 4332(2)(C). As the Eight Circuit has explained, where an agency's role is limited to overseeing a discrete aspect of a private operation, as opposed to "enabling another to significantly impact on the environment," there is no "major Federal action." *Goos v. ICC*, 911 F.2d 1283, 1294-95 (8th Cir. 1990). In *Goos*, the court concluded that the ICC's issuance of an interim authorization for conversion of a rail line to trail use, which (as here) the statute mandated that the agency "shall" issue where certain conditions are met, was a "ministerial" action not subject to NEPA. *See id.* at 1295-96. Just as the Eight Circuit distinguished between the ICC's "ministerial" authorization of interim trail use and the separate decision to allow a railroad to permanently abandon a line, PHMSA's ministerial approval of Response Plans cannot be conflated with the construction or

operation of Line 5, or even the actual implementation of a Response Plan (which lies entirely outside PHMSA's authority).

Several of the cases cited by the Agency in its brief below[16] highlight the non-"major" nature of PHMSA's approval of Response Plans. For example, in *South Dakota v. Andrus*, 614 F.2d 1190, 1194-95 (8th Cir. 1980), the court concluded that the issuance of a mining patent was not "major Federal action" because "it does not enable the private party . . . to do anything." Rather, mining laws allow a claim holder to mine with or without a patent, and potential subsequent actions like road and *pipeline construction* would likely require their own permits, at which point the court can consider whether NEPA analysis is required in connection therewith. *See id*. Thus, the "non-discretionary," "ministerial" grant of the patent was not "a 'major' federal action under the statute." *Id*. at 1194. Similarly, in another case cited by the government, *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 502, 512-13

[16] *See* Defendant's Cross-Motion for Summary Judgment, No. 2:17-cv-10031 (E.D. Mich., filed June 5, 2018) at 30, n.11. While the Government did not explicitly state that Plan approval is not "major Federal action," instead focusing on the non-discretionary nature of that action, the cases it relied on, discussed herein, make clear that a non-discretionary, ministerial action is also not "major federal action" under NEPA. In other words, these arguments are two sides of the same coin.

(4th Cir. 1993), the Fourth Circuit agreed with FERC that its certification of whether an incinerator project "meets the size, fuel, and ownership requirements" delineated in regulations was not a "major Federal action."[17] And in *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988), the court concluded that an agency's review of mining operations for "compliance with statutory and regulatory requirements to deter undue degradation," including discharges that kill "fish, aquatic life, and vegetation," was not "major Federal action."

Here, as in those cases, PHMSA did not undertake any "major Federal action" within the meaning of NEPA because it was not authorizing any activity, project, or program. Rather, PHMSA simply confirmed that a pipeline constructed in 1953 continues to comply with a CWA requirement addressing one limited aspect of that ongoing operation. Thus, not only is the Agency's action here insufficiently discretionary to render NEPA analysis useful, for the same reason it is also not "major," and therefore does not trigger NEPA at all.

[17] Notably, the Fourth Circuit was not deterred by the fact that the criteria in question were regulatory, rather than statutory, but instead deferred to the Agency's determination regarding the scope of both its statutory and regulatory authority and the non-"major" nature of the certification at issue. *See* 959 F.2d at 512.

IV. SUBJECTING RESPONSE PLANS TO THE NEPA AND ESA PROCESSES WOULD FRUSTRATE THE CORE PURPOSE OF THOSE PLANS.

Given the vast regulatory responsibilities of agency personnel, PHMSA has often had difficulty timely fulfilling its obligations to review and approve Response Plans. As described in a 2017 DOT Audit Report, for many years there was a significant backlog of Plans awaiting approval.[18] After obtaining additional personnel, PHMSA was largely able to address these issues by late 2014. Currently, however, there is again a backlog, running between six to eight weeks for most Plans.[19] If PHMSA personnel are henceforth required to conduct ESA consultation and NEPA analysis for each of the potentially hundreds of new or resubmitted Response Plans subject to review in any given year, it is very likely that (absent an extraordinary amount of additional funding) the Agency will fall even farther behind—with the result that Plans may again languish for years before PHMSA can ensure that each facility operator has the necessary equipment and personnel available to address a spill or threatened spill.

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[18] *See* 2017 Audit Report at 14-16.

[19] *Id.*

This is particularly true given that ESA consultation and NEPA analysis both add substantial time to agency approval processes. Although the National Oceanic and Atmospheric Administration ("NOAA") is statutorily required to complete formal ESA consultations in 135 days (a little over four months), and aims to complete informal consultations within 30 days, that agency reported in 2016 that its on-time completion rate was around 50 percent.[20] In 2014, for example, NOAA ended the fiscal year with a backlog of 688 consultations.[21] NOAA admitted that this "relatively low on-time completion rate . . . has impacted other agencies' ability to complete their projects (permitting or funding of roads, bridges, water projects, etc.)."[22]

While the Fish and Wildlife Service ("FWS") completes more of its ESA consultations on time, some projects become mired in decades-long proceedings due to understaffing, the lack of consequences for missing

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[20] NOAA, *Budget Estimates: Fiscal Year 2016* at NMFS - 13, https://www.corporateservices.noaa.gov/~nbo/fy16_bluebook/NOAA_FY16_CJ_508compliant_v2.pdf. The National Marine Fisheries Service, a subdivision of NOAA, conducts these consultations. *Id.* at NMFS -17.

[21] *Id.* at NMFS - 13.

[22] *Id.*

the statutory deadline, and litigation.[23] Flooding FWS and NOAA with hundreds[24] of additional consultation requests annually would have an obvious dilatory effect on the work of those overburdened agencies—and the review of Response Plans by PHMSA and BSEE.

To make matters worse, the time associated with NEPA analyses also can be quite substantial. In a GAO report published in 2014, agencies reported average completion times for Environmental Assessments ("EAs") ranging from one month (the Bureau of Indian Affairs) to 18 months (the Forest Service).[25] Meanwhile, the 197 Environmental Impact Statements ("EISs") completed by federal

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[23] *See* Oversight Hearing before the House Comm. on Nat. Resources (March 28, 2017), Statement of D. Stiles (testifying that two Montana mining projects had been in ESA consultation for thirty years), https://www.govinfo.gov/content/pkg/CHRG-115hhrg24804/html/CHRG-115hhrg24804.htm (last visited Aug. 22, 2019). Witnesses also noted that there is often delay before the official start of ESA consultation. *See id*. at Statement of Rep. Labrodor ("the Services often unilaterally delay the start or the end of consultation--sometimes requiring projects to undergo years of studies, lengthy extensions, and negotiations before starting the clock").

[24] Each of the several hundred active Response Plans must be resubmitted at least every five years; sooner if there is a "significant change." *See* 33 U.S.C. § 1321(j)(5)(E)(iii).

[25] U.S. Government Accountability Office, *Little Information Exists on NEPA Analyses*, GAO-14-369 (April 2014) at 14-15, https://www.gao.gov/assets/670/662543.pdf.

agencies in 2012 had an average preparation time of *4.6 years*.[26] Timing aside, NEPA analyses are quite costly. For example, between 2003 and 2012, the Department of Energy paid its contractors between $3,000 and $1.2 million to produce EAs.[27] When an EIS was required, the costs increased exponentially; DOE paid, on average, $6.6 million for each EIS commissioned between 2003 and 2012. Even taking the lower numbers from a 2003 report estimating that an EIS typically costs between $250,000 to $2 million,[28] this is obviously a substantial burden on PHMSA and BSEE.

This data on the delay and costs associated with ESA consultation and NEPA analysis highlights the fundamental absurdity of applying those processes—which in most cases were conducted prior to the facility's construction and operation—to Response Plans that must be resubmitted at least every five years. If such requirements are imposed and PHMSA must not only decide whether Response Plans meet the statutory criteria, but also conduct and incorporate the results of ESA

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[26] *Id.* at 13.

[27] *Id.* at 12.

[28] *Id.*

and NEPA analyses into those approval decisions, Plans may be perpetually mooted by resubmission before they are approved[29] and the associated costs will skyrocket. Again, the result will be a situation where the Agency cannot efficiently fulfill its core function under 33 U.S.C. § 1321(j)(5)(A): confirming that facility operators have adequate personnel and resources ready to deploy in the event of a spill or threatened spill.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the lower court's decision in this case.

[29] Even if Response Plans are approved before they must be resubmitted, the additional agency decisions resulting from ESA consultation and NEPA analysis will ensure that many remain subject to litigation after they no longer govern. Indeed, that is what happened to the Plans at issue here, which were "superseded" while the district court case was pending, *see* 374 F. Supp. 3d at 644 n.5—and that was without undergoing NEPA analysis or ESA consultation first.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, an electronic copy of the foregoing brief was filed with the Clerk for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished upon the following counsel via the CM/ECF system.

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