UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, in her official capacity, Defendant.	)	Case No. 15-cv-13535 (MAG/RSW)

***AMICI CURIAE* BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE ASSOCIATION OF OIL PIPE LINES IN SUPPORT OF FEDERAL DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

ISSUE PRESENTED

The American Petroleum Institute and the Association of Oil Pipe Lines hereby incorporate and adopt the issues identified in the Federal Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pages i-ii (June 26, 2017) [ECF No. 52].

MOST PERTINENT AUTHORITY

The American Petroleum Institute and the Association of Oil Pipe Lines hereby incorporate and adopt the most pertinent authority identified in the Federal Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, page ix (June 26, 2017) [ECF No. 52].

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INTRODUCTION

The American Petroleum Institute ("API") and the Association of Oil Pipe Lines ("AOPL") (collectively "Amici"), representing the interests of a large number of pipeline operators in the United States, submit this Amicus Brief in support of the Federal Defendant's Memorandum in Opposition to Plaintiff National Wildlife Federation's ("NWF") Motion for Summary Judgment (hereinafter "Federal Defendant's Brief") [ECF Doc. 52].[1]

Amici agree with the Secretary of Transportation ("Secretary") that PHMSA has properly exercised its statutory authority to approve emergency response plans ("ERPs") that cover the entirety of "onshore" pipeline facilities, including the portions of those facilities that cross waters of the United States. Further, the Secretary has ratified PHMSA's actions, removing any doubt as to the lawfulness of PHMSA's delegated authority to do so and mooting this case.[2]

NWF argues that the Secretary cannot adopt PHMSA's ERP approvals for pipelines that include water crossing segments because such approvals were issued in accordance with PHMSA's regulations found at 49 C.F.R. Part 194 ("Part 194 Regulations"). NWF claims that those regulations cover only "onshore" segments

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[1] This Court authorized Amici to file this brief by Order dated March 30, 2017 [ECF No. 50].

[2] *See* Federal Defendant's Brief, at Exhibit B (hereinafter "Ratification") [ECF No. 52-3].

of pipeline facilities, and not any water crossing – which it labels as "offshore" – segments of those same pipeline facilities. *See* NWF's Brief in Support of Motion for Partial Summary Judgment, 21-27 ("NWF Brief") [ECF No. 51]. However, that theory is based on a fiction that a pipeline facility can have both "onshore" and "offshore" elements at the same time – and that fiction is entirely unsupported.

PHMSA and its predecessor agency, the Research and Special Programs Administration ("RSPA"), have been in the business of reviewing pipeline ERPs under the CWA for over 23 years under detailed regulations adopted in 1993 and now codified at 49 C.F.R. Part 194 that implement the CWA authority delegated to them by the Secretary. Neither NWF nor any other entity has – until now – questioned the authority of these agencies to specify response planning requirements for pipeline water crossings. Nor has any entity or agency questioned the use of any PHMSA-approved ERPs to address pipeline spills into waters that have occurred in the past. In fact, NWF has failed to identify a single specific deficiency relative to plans to respond to pipeline spills into water in any of the large number of pipeline facility ERPs that are publicly-available.[3]

PHMSA's Part 194 Regulations have long required pipeline operators to prepare a *single* ERP for an *entire* pipeline facility if *any* segment of that pipeline comes into the vicinity of and/or crosses navigable waters of the United States.

[3] *See* https://www.phmsa.dot.gov/pipeline/oil-spill-response-plan.

See 49 C.F.R. § 194.101. Contrary to what NWF seems to contemplate, ERPs are not prepared on a patchwork basis depending on whether particular segments of a pipeline are classified as "onshore" or "offshore." Such an approach to preparing ERPs is not what the law requires, and would no doubt lead to confusion as to where one set of plans begins and another ends, decreasing safety.

Rather, once a pipeline is categorized as "onshore," PHMSA's regulations have always required that an ERP be prepared for that *entire* pipeline facility if any portion has the potential to cause the release of oil (either directly or indirectly) into any waters. That includes those portions of onshore facilities that cross inland waters. This is in full satisfaction of the information and planning requirements under the CWA for releases of oil into the environment from any type of transportation facility.[4]

PHMSA's regulations are consistent with the Secretary's reasonable interpretation of the CWA and the scope of authority delegated to PHMSA, under which "onshore facilities" are unitary in nature and ERPs for such pipelines apply to crossings of both land and inland waters. By contrast, "offshore" pipelines consist of those facilities that are located seaward of the coast, the ERPs for which are subject to approval by the U.S. Department of Interior ("DOI"). There is no

[4] *See* 33 U.S.C. § 1321(j)(5)(D) (the statute does not specify different response planning requirements for onshore and offshore facilities).

mystery to this long-standing division of responsibility, which DOT, DOI, and the EPA memorialized in a 1994 Memorandum of Understanding ("MOU").[5] That MOU fully resolved any doubt as to DOT's and DOI's respective jurisdiction by confirming DOT as the federal agency with primary jurisdiction over the entirety of "onshore" pipeline facilities, including water crossings. That MOU required no change to the regulations that RSPA adopted, currently the Part 194 Regulations, under which PHMSA exercises jurisdiction over onshore pipelines that cross navigable waters. The Part 194 Regulations are also commensurate with PHMSA's authority under recent legislation and the Pipeline Safety Act ("PSA"), 49 U.S.C. §§ 60101, *et seq*., through which PHMSA regulates the safety and integrity of entire onshore pipeline facilities, including water crossings.

For the reasons set forth below, Amici request that this Court conclude that the Secretary has complied with the CWA, and that existing ERPs reviewed and approved by PHMSA, as ratified by the Secretary, fully satisfy the response planning requirements under that statute.

BACKGROUND

i. Interest of Amici

API is the primary national trade association of the oil and natural gas industry, representing more than 600 companies involved in all aspects of that

[5] 40 C.F.R. Part 112, Appendix B.

industry, including the safety of transportation on inland offshore pipelines and emergency response planning for such pipelines in accordance with federal law. *See* Declaration of Peter Tolsdorf, ¶ 3 ("Tolsdorf Dec.") [ECF No. 10-3].

AOPL is a national trade association that represents owners and operators of pipelines across North America, educating the public about the vital role oil pipelines serve in the daily lives of Americans, including the measures taken to ensure the safety of oil pipelines and the resources and procedures in place to respond to discharges from pipelines. *See* Declaration of Andrew J. Black, ¶ 3 ("Black Dec.") [ECF No. 10-4].

Collectively, Amici's members include owners and operators of crude oil and other energy liquid pipelines that span thousands of miles across the United States, transporting approximately 96 percent of the crude oil and petroleum products that are shipped through the pipelines in this country. The pipelines of Amici's members that cross both land and waters within the continental United States have long been characterized by the Government and the pipeline industry as "onshore" pipelines. *See* Black Dec. at ¶ 4.

ii. The ERPs Implemented by Amici's Members Cover the Entirety of Onshore Pipelines, Consistent with PHMSA's Part 194 Regulations and the CWA

The ERPs that are at issue in this case are implemented by pipeline operators only if the other precautionary measures applicable to pipeline safety fail and a

release occurs. Such other measures include comprehensive integrity management and leak detection programs that are prepared under PHMSA's regulatory oversight under the PSA to ensure the safe operating condition of a pipeline facility and to identify and minimize the potential for a release, regardless of whether a pipeline is located partially on land and partially under water. *See* Black Dec. at ¶ 6; Tolsdorf Dec. at ¶ 6.

In the unlikely event that a release does occur, Amici's members then implement their ERPs that are specific to the pipeline at issue. The ERPs are typically hundreds of pages long and set forth detailed strategies and protocols to respond to a release from pipelines at *any* location in the geographic area covered by the ERP, including water-crossing segments that are the focus of NWF's complaint. The response planning information contained in operator ERPs is highly specific and includes, for example: (i) response strategies and techniques, including entry-point tactics, to initiate initial response efforts on specific pipelines; (ii) the equipment, including inventories of pre-positioned equipment, necessary to respond to and contain a potential release; and (iii) personnel requirements and responsibilities to initiate response efforts, to deploy equipment, and coordinate with federal, state, and local responders. Further, ERPs are only one element in the national response planning efforts required under the CWA, an effort in which many federal and state agencies (e.g., EPA, U.S. Coast Guard and

state environmental agencies) are involved – none of which agencies have raised the concerns raised by NWF in this lawsuit.

Further, virtually all "onshore" pipeline facilities in the United States cross near or through inland navigable waters[6] at some point and the ERPs filed with and approved by PHMSA (and ratified by the Secretary) recognize this. *See* Black Dec. at ¶ 6; Tolsdorf Dec. at ¶ 6. For example, Sunoco has an ERP in place that applies to its entire pipeline facility located in Kentucky, Ohio, and Michigan, including a "section of [that] pipeline [that] crosses a river." *See* Sunoco Mid-Valley Hebron Response Zone, at 5.[7] Sunoco's ERP specifically includes "response actions for water based spills and land based spills," as well as "spill tracking and surveillance guidelines specifically for water-based spills." *See id*. at 24-25. Similarly, ExxonMobil's ERP expressly applies to a pipeline release at the Conway-Doniphan S-110C Pipeline crossing of the Little Red River in White County, AR. *See* ExxonMobil Corsicana Zone Plan, at 88.[8]

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[6] The term "navigable water" includes rivers, lakes, wetlands, streams, etc. *See* 49 C.F.R. § 194.5.

[7] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/ERR/Sunoco_MidValley-Hebron.pdf.

[8] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/ERR/PHMSA%20000006516_000006805%20EM%20Corsicana%20Zone%20Plan.pdf.

Because the ERPs at issue in this case already fully address the CWA emergency response planning criteria for the water crossing segments that NWF refers to as "offshore," Amici's members would not need to make any changes to these plans in the event that the further review and approval by the Secretary sought by NWF was required by this Court. Thus, regardless of the "onshore" and "offshore" labels on which NWF focuses, PHMSA-approved ERPs already identify resources to respond to any spill into any waters crossed by a pipeline. NWF's failure to demonstrate any specific deficiencies in these plans is notable and should be fatal to its case.

ARGUMENT

I. The Secretary's Ratification Justifies Dismissal of NWF's Complaint on Mootness and Standing Grounds

NWF's allegation that the Secretary has failed to review and approve ERPs for pipeline segments that cross waters is moot as a result of the Secretary's Ratification of PHMSA's review and approval of all ERPs covering pipeline segments "located landward of the coast line, including [response] plans covering pipeline segments in, on or under inland waters." Ratification, at 1.

Through the Ratification, the Secretary has concluded that PHMSA's and RSPA's prior approvals "are fully valid exercises of authority delegated to the Secretary" and the Secretary has "ratified PHMSA's prior and current approvals of [ERPs] submitted [under] Part 194 . . . [for such] pipeline segments." *Id*. That

Ratification satisfies the Secretary's obligations to review and approve ERPs under the CWA because PHMSA's prior approvals were issued pursuant to its Part 194 Regulations, which address planning requirements for all water crossings by pipelines, as explained in Section II below. *See* Federal Defendant's Brief, at 10 (citing *Murray Energy Corp. v. F.E.R.C.*, 629 F.3d 231 (D.C. Cir. 2011) (a ratification is a valid means to correct an alleged lack of delegation to a sub-operating agency by a federal agency). As a result of the Ratification, no case or controversy remains with respect to NWF's allegation that the Secretary has failed to review and approve existing ERPs applicable to inland water crossings by pipeline facilities. *See United States v. City of Detroit*, 401 F.3d 448, 450 (6th Cir. 2005) (a case becomes moot when "the issues presented are no longer live or parties lack a legally cognizable interest in the outcome.").

NWF's arguments that the Secretary's Ratification is somehow deficient cannot stand. First, NWF's reliance on *Advanced Disposal Servs. East, Inc. v. N.L.R.B.*, 820 F.3d 592 (3d Cir. 2016) is misplaced because the Secretary has not blindly affirmed PHMSA's approvals. Rather, in issuing the Ratification, the Secretary had "full knowledge," consistent with *Advanced Disposal*, of the review and approval process under which PHMSA assesses the adequacy of ERPs, which has been long-established for decades now ever since the Part 194 Regulations were first promulgated in 1993 in accordance with the authority delegated by the

Secretary to RSPA/PHMSA over onshore pipelines that cross land and water. *See id*. at 602-03. Second, the fact that the Ratification may be only a few sentences long is irrelevant given its express language and intent; as stated in *Advanced Disposal*, the "mere lack of detail" in the Ratification is *not* sufficient to demonstrate that an agency failed to make a considered affirmation of its sub-operating agency. *Id.* at 605 (emphasis added). Third, the 10-month gap between the filing of NWF's lawsuit and the Secretary's Ratification does not overcome the presumption of validity that this Court should apply to find that the Secretary made a "considered affirmation" in determining that PHMSA's approvals comply with the CWA. Nor has NWF demonstrated that the Secretary has any obligation to review each ERP where PHMSA has already done so pursuant to regulations that are commensurate with the CWA authority delegated to PHMSA both prior to and subsequent to the Ratification by the Secretary.

The case also should be dismissed because NWF lacks standing. NWF has failed to allege an injury-in-fact because, even assuming that the Secretary was required to ratify existing ERPs (which she was not for the reasons explained in Section II below), the Secretary has now done so after determining that PHMSA's approvals issued under its Part 194 Regulations comply with applicable CWA response planning criteria. Any cognizable injury that may have existed prior to that Ratification therefore no longer exists given the fact that reviewed and

approved ERPs are in place. Further, neither NWF nor its members have suffered any discrete injury proximately caused by the Secretary because the ERPs approved by PHMSA and ratified by the Secretary already satisfy the CWA criteria for both onshore and offshore pipelines. NWF has thus failed to prove that any ERPs personally reviewed/approved by the Secretary would be any more protective than existing ERPs. *See Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532, 537-38 (6th Cir. 2005) (dismissing suit for lack of standing because plaintiff had failed to demonstrate that correcting procedural flaw relative to agency's approval of land management plans would lead to more protective plans).

II. NWF's Argument that Water Crossings for Onshore Pipeline Facilities Constitute Offshore Facilities Does Not Support Its Claim for Relief

The Secretary's Ratification not only moots this case, but it also achieves NWF's apparent goal, which is to have this Court order the Secretary to review and approve ERPs for all onshore pipeline facilities that include water crossings. For the reasons set forth below, the reviews and approvals of ERPs satisfy the mandate under the CWA with respect to response planning requirements for all land-based pipeline facilities that cross waters within the continental United States.

A. The CWA Contemplates That Emergency Response Plans for Onshore Facilities Will Address Inland Water Crossings

NWF's reading of the CWA ignores the Government's and the pipeline industry's position and understanding over the last several decades that the CWA

contemplates that ERPs for "onshore" pipeline facilities are to address water crossings. Simply stated, the CWA does not contemplate that water crossing segments of onshore pipeline facilities are to each be separately regulated as distinct "offshore" facilities. NWF misses this fundamental point.

To the extent that there may be any ambiguity in the CWA's definitions (and Amici do not believe that there is any), they have been logically interpreted by the Secretary and PHMSA to mean that an "onshore" and "offshore" pipeline "facility" will be treated as a single, unitary facility. *See* 33 U.S.C. § 1321(a)(10) ("An "onshore facility" means "any facility . . . of any kind located in, on, or under, any land within the United States other than submerged land."); *see also* 33 U.S.C. § 1321(a)(11) ("offshore facility" means "any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.").

Under long-standing statutory construction, a "facility" (as used in the "onshore" and "offshore" CWA definitions) is not comprised of disjointed and intermittent segments of pipe depending on proximity to water. Rather, as commonly understood by the pipeline industry, a facility has a beginning and an end – that beginning is defined by where a pipeline begins its function to transport oil that is delivered to it, and ends at the point where it has completed its delivery

of that oil to a destination. The beginning and end that define the scope of a facility is dependent on: (i) where the oil offered by shippers is inserted into the pipeline for delivery by the pipeline carrier; and (ii) the point at which the oil leaves the pipeline and arrives at its destination facility (*e.g.*, tanks or terminal) where that oil will then be stored or transferred for further delivery (*e.g.*, by another pipeline or rail).

The boundaries of a facility thus have no relationship to any waters that may be crossed by a pipeline. As a result, any facility that is located landward of the coast line, including those primarily located in, on, or under land within the United States, is a unitary "onshore" pipeline facility under the CWA regardless of whether any or many segments of that same facility cross "navigable waters." *See also* 33 U.S.C. § 2701(9) (the Oil Pollution Act, which amended the CWA, defining a "pipeline" as a single "facility"); *Union Petroleum Corp. v United States*, 651 F.2d 734, 742 (Ct. Cl. 1981) (there "is no doubt" that an onshore facility includes not only a land-based oil distribution terminal but also its dock extending into a navigable water). The fact that Congress intended onshore facilities to encompass navigable water crossings is reinforced by the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (a.k.a., the "PIPES Act of 2016"), through which Congress amended the CWA to specify emergency response planning requirements for pipelines subject to the PHMSA

regulations that cross navigable waters. *See* Pub. L. 114-183, 130 Stat. 527 (2016) (requiring operators to "consider the impact of a discharge into *or on* navigable waters or adjoining shorelines," and that they "include procedures and resources for responding to such discharge in the plan") (emphasis added).

Further, the fact that onshore pipelines are comprised of a single, unitary facility is underscored by the fact that pipeline operators' integrity, leak detection, and emergency response programs generally treat an entire pipeline as a singular facility, without isolating or treating any differently those segments of that facility that cross waters. The goal of these programs is to keep oil contained in a single pipe for the duration of its delivery without release. Accordingly, any effort to construe crossings of navigable waters as "offshore facilities" that are to be treated differently from the rest of the onshore pipeline facility would simply result in a myriad of segments of pipe that (under NWF's conception) would be governed by a series of different ERPs. This would be wholly inconsistent with the overarching goal of safely delivering oil from Point A to Point B. Indeed, the notion that a pipeline operator might need a separate response plan for each crossing would do nothing but sow confusion in an actual emergency, *e.g.*, one can readily imagine uncertainty over which of many ERPs could apply to a release that might impact more than one pipeline segment.

DOT's interpretation of the CWA is thus consistent with the concept that pipelines are to be regulated as a single facility in order to better ensure that adequate resources are in place to respond to any oil release along that facility directly into waters. NWF has raised no basis on which to second-guess the reasonableness of that interpretation. *See Nat'l Cable & Television Ass'n v. Brand X. Internet Servs.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute.").

B. PHMSA's Part 194 Regulations Address CWA Criteria for Pipeline Water Crossings

The PHMSA approvals properly ratified by the Secretary were conducted pursuant to the Part 194 Regulations, which address and regulate the emergency response planning requirements for the entirety of "onshore" pipeline facilities, including all navigable water-crossing segments in full satisfaction of CWA planning criteria for both onshore and offshore facilities.

Pipeline operators (including those that are members of Amici) are required under PHMSA's Part 194 Regulations to prepare and submit response plans for review/approval when "any line sections" of an "onshore" pipeline facility can be "expected to cause . . . significant and substantial harm to the environment [in the event of a discharge of] oil into or *on the navigable waters* . . . or adjoining shorelines." 49 C.F.R. § 194.3 (emphasis added). The Part 194 Regulations thus

specifically require pipeline operators to prepare and submit response plans for an "onshore" facility if the operation of any land- or water-based section of that facility could result in a discharge into the very inland waters that NWF alleges to be "offshore." *See id*. at § 194.101.

Further, specific provisions of PHMSA's Part 194 Regulations expressly confirm that those Regulations are intended to apply to all crossings of waterways by "onshore" pipeline facilities, and therefore they address the very concerns raised by NWF. For instance, NWF recognizes that PHMSA's regulations specify more stringent requirements for "high volume areas," which are any portions of a larger-diameter pipeline that "***crosses a major river or other navigable waters***." *Id* at § 194.5. (emphasis added); *see also id*. at Part 194, App. B (identifying major rivers, the crossing of which constitute "high volume areas"). The regulations also address "adverse weather conditions" (*e.g*., ice), which NWF alleges to be lacking under existing ERPs. *See* 49 C.F.R. § 194.5.

It was also expected at the time that the Part 194 Regulations were promulgated in 1993 by RSPA that "most onshore oil pipeline operators [would] be required to prepare and submit response plans" because "most onshore oil pipelines, because of their locations, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines." 58 Fed. Reg. 244, 247 (Jan. 5, 1993). Thus,

NWF's argument that RSPA's and/or PHMSA's existing Part 194 Regulations were never meant to address water crossings is wrong. Even NWF recognizes that RSPA expressly acknowledged that its regulations, which are now administered by PHMSA under Part 194, address pipelines that "cross navigable waters." NWF Brief, at 28.

Further, PHMSA regularly asserts jurisdiction over the entirety of "onshore" pipeline facilities under its CWA authority implementing those regulations. For example, PHMSA has issued a number of corrective action orders in accordance with its CWA authority to require pipeline operators to undertake actions to address potential risks from segments of "onshore" pipeline facilities that have the capability to result in a discharge directly into waters of the US. *See*, *e.g.*, PHMSA Corrective Action Order CPF No: 5-2015-5003H (Jan. 23, 2015) (requiring operator to review and assess effectiveness of ERP in light of release of oil directly into the Yellowstone River);[9] PHMSA Corrective Action Order CPF No. 3-2012-5017H (Aug. 1, 2012) (requiring operator to amend ERP to address all segments of that entity's pipeline system, including the crossings of waters).[10]

[9] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/520155003H_Corrective%20Action%20Order_01232015.pdf.
[10] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Press%20Release%20Files/320125017H_Amended%20Corrective%20Action%20Order_08012012.pdf.

NWF's argument that PHMSA's Part 194 Regulations do not extend to waters crossings by "onshore" pipeline facilities therefore reflects a clear lack of understanding of both PHMSA's interpretation of its own regulations and the Agency's practices to enforce those regulations with respect to releases from pipelines that directly cross through waters. Nor has NWF demonstrated that PHMSA's Part 194 Regulations fail to satisfy the CWA criteria for both onshore and offshore facilities given that the CWA does not differentiate between ERP contents for either type of facility. *See* 33 U.S.C. § 1321(j)(5)(D). NWF has also failed to answer the question of how exactly the ERPs that have been operative in the pipeline industry for decades are deficient.[11] For that reason alone, its claims should be rejected.

C. PHMSA's Authority under the CWA to Approve ERPs for Water Crossings of Onshore Pipelines Complements its Broad Safety Authority Under the Pipeline Safety Act and Other Legislation

PHMSA's authority under Part 194 is also commensurate with its authority under the PSA and other legislation. The PSA provides PHMSA with jurisdiction

[11] NWF argues that the distinctions made between onshore and offshore facilities under the Water Quality Improvement Act of 1970 ("WQIA") support its argument that Congress intended different emergency response planning requirements to apply to onshore and offshore pipeline facilities. *See* NWF Brief, at 24-25 (citing Pub. L. No. 91-224, § 102, 84 Stat. 91, 92). However, NWF's reliance on the WQIA is misguided because that Act refers only to oil cleanup liability, and it has no effect or relationship to emergency response planning requirements established under Section 311(j)(D)(5) of the CWA.

(as delegated to it by DOT) over all "onshore" pipeline facilities and appurtenant facilities based on the transportation function they serve; not based on whether such facilities cross waters. *See, e.g.*, 49 U.S.C. § 60101(a)(5) (any pipeline "used in transporting hazardous liquid" falls under PHMSA's jurisdiction without distinguishing between those segments of a pipeline that cross waters). PHMSA's expansive regulations implementing the PSA accordingly govern the entirety of hazardous liquid pipeline facilities, including those segments that cross waters. *See* 49 C.F.R. § 195.452 (specifying heightened safety criteria for pipeline water crossings that are designated as high consequence areas).

Congress has also acknowledged in other legislation that PHMSA's role is to ensure the safety and integrity of onshore pipelines that cross waters. Notably, Section 28 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112-90, Jan. 3, 2012) required PHMSA to conduct a study of pipeline incidents at inland water crossings to identify factors associated with accidental releases of such pipelines. *See* PHMSA Report to Congress, *Results of Hazardous Liquid Incidents at Certain Inland Water Crossings Study*, at 1 (Aug. 27, 2013) (assessing frequency of spills from pipelines that "cross inland bodies of water at 18,136 locations").

Given that PHMSA has authority over pipeline safety for all segments of "onshore" pipeline facilities under the PSA and other federal legislation, it makes

little sense to interpret the CWA, as NWF does, in a manner that deprives PHMSA of authority to review or approve ERPs for portions of "onshore" pipelines that cross water. The breadth of PHMSA's regulatory oversight over onshore pipelines underscores the reasonableness of interpreting the CWA, as DOT has done, to provide PHMSA with delegated authority to review and approve all ERPs for all portions of onshore pipeline facilities, including those that cross waters.

CONCLUSION

For the foregoing reasons this Court should dismiss NWF's claims.

RESPECTFULLY SUBMITTED this 6th day of July, 2017.

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American Petroleum Institute and the Association of Oil Pipe Lines

CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on July 6, 2017, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

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