

No. 19-1609

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NATIONAL WILDLIFE FEDERATION,  
*Plaintiff/Appellee,*

v.

SECRETARY OF THE UNITED STATES  
DEPARTMENT OF TRANSPORTATION, et al.,  
*Defendants/Appellants,*

and

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,  
*Defendant/Intervenor/Appellant.*

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Appeal from the United States District Court  
for the Eastern District of Michigan  
No. 2:17-cv-10031 (Hon. Mark A. Goldsmith)

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**BRIEF OF AMICUS CURIAE NATURAL RESOURCES  
DEFENSE COUNCIL IN SUPPORT OF PLAINTIFF/APPELLEE  
NATIONAL WILDLIFE FEDERATION**

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTERESTS**

Pursuant to 6th Cir. Rule 26.1, amicus curiae Natural Resources Defense

Council makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If

Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Dated: October 25, 2019

s/ Ann Alexander

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ANN ALEXANDER

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## **RULE 29(a)(4)(E) STATEMENT COUNCERING COUNSEL**

Pursuant to Federal Rules of Appellate Procedure Rule 29(a)(4)(E), counsel for amicus curiae Natural Resources Defense Council affirms as follows:

1. No party's counsel co-authored the foregoing brief in whole or in part.
2. No party's counsel contributed money that was intended to fund preparing or submitting the brief.
3. No person, other than the amicus curiae, contributed money that was intended to fund preparing or submitting the brief.

Dated: October 25, 2019

s/ Ann Alexander

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## **BACKGROUND AND INTEREST OF AMICUS CURIAE**

Amicus curiae Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization with offices in multiple locations across the United States, and submits this brief pursuant to Federal Rules of Appellate Procedure Rule 29(a). NRDC has been extensively engaged over the years in both advocacy regarding oil pipeline construction and operation, and litigation aimed at ensuring robust application of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). We address in this brief the larger importance of the trial court's decision to our advocacy, and explain how it will advance our institutional objective – and the statutory objective embodied in NEPA, ESA, and the Clean Water Act (CWA) – of ensuring that environmental risks associated with oil spills and their cleanup are fully vetted.

NRDC's institutional focus on NEPA and ESA as applied to pipelines has been on prominent display in the legal challenge to the Keystone XL pipeline, in which NRDC serves as co-lead counsel. In that case, NRDC argued and won claims that NEPA review of the pipeline inadequately considered, among other things, risks associated with potential spills and leaks. *Indigenous Env't'l Network v. US Dep't of State*, 347 F.Supp.3d 561 (D.Mont. 2018), *dismissed on other grounds*, 2019 WL 2542756 (9<sup>th</sup> Cir. June 6, 2019). More generally, NRDC has

been extensively engaged in public advocacy surrounding pipeline safety and oil spill cleanup, addressing specific risks of heavy oil spills such as the 2010 Kalamazoo River spill, as well spill prevention issues. NRDC has a track record of litigating NEPA and ESA issues over the course of nearly fifty years and hundreds of cases, focused in significant part on ensuring robust application of these statutes to a broad array of federal decision making.

Based on this extensive experience with both pipeline safety and the relevant environmental review statutes, NRDC knows the stakes are high here. The Kalamazoo River spill from an Enbridge pipeline in 2010 turned into the costliest inland spill in United States history,<sup>1</sup> in part due to spill response deficiencies in the immediate aftermath. As explained in this amicus brief, the dearth of federal regulatory approval requirements applicable to domestic oil pipelines make the spill plan approval process, in many cases, the only opportunity for NEPA and ESA review addressing the possibility of an environmental catastrophe.

The District Court has recognized that these environmental reviews would assist the Pipeline and Hazardous Materials Safety Administration (PHMSA) in ensuring spill plan adequacy. This brief addresses in more depth as to how such

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<sup>1</sup> See “Enbridge Fined for Failing to Fully Inspect Pipelines After Kalamazoo Oil Spill,” *Inside Climate News* May 3, 2018, available at <https://insideclimatenews.org/news/03052018/enbridge-fined-tar-sands-oil-pipeline-inspections-kalamazoo-michigan-dilbit-spill>.

review would be useful as a practical matter in that process, enabling better decision making regarding the sensitive species and ecosystems potentially affected by a spill. PHMSA may not have completely unbounded discretion in approving spill plans; but it clearly has very significant discretion to consider environmental protection in that process and must be given the information it needs to exercise it wisely.

## **ARGUMENT**

### **I. Other Than Spill Plan Review, There Are Often No Meaningful Environmental Review Opportunities for Domestic Oil Pipelines**

NEPA and ESA, as explained in this proceeding, apply at major federal decision points. NEPA applies to any “major Federal actions significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(C); and the ESA consultation requirements apply in connection with any federal action where listed species may be present. 16 U.S.C. § 1536(c). Although the law governing construction of certain specific types of pipelines, such as natural gas pipelines, involves federal decision points that trigger NEPA and ESA reviews, the law governing domestic oil pipelines does not. PHMSA review of the spill plans for these pipelines thus frequently represents the only consistent opportunity for the public to understand and weigh in on their potentially destructive impact.

The PHMSA governing statute and regulations set forth safety standards for oil transportation pipelines, addressing pipeline design, operation and maintenance,

personnel qualification, and corrosion control, among other things. 49 C.F.R. Part 195. However, these laws contain no requirement that an oil pipeline operator obtain a permit before building or operating a domestic oil pipeline. Hence, there is no formal federal approval process for such pipelines that would trigger applicability of either NEPA or the ESA during the course of planning and construction.<sup>2</sup>

This regulatory structure stands in contrast to the requirements applicable to some other types of pipelines that require a formal permitting process and hence environmental review. Most notably, natural gas pipelines require a “convenience and necessity” determination by the Federal Energy Regulatory Commission (FERC) that triggers full environmental reviews. 15 U.S.C. § 717f (requiring FERC approval for construction of natural gas pipelines); *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (finding FERC’s NEPA review conducted in connection with a proposed pipeline to be inadequate).<sup>3</sup>

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<sup>2</sup> In any event, Line 5 was, like many of the nation’s oil pipelines, constructed decades ago - in 1953 - before the advent of NEPA and the ESA. *Nat’l Wildlife Federation v. Dep’t of Transp.*, 374 F.Supp.3d 634, 642 (E.D.Mich. 2019).

<sup>3</sup> Furthermore, until recently oil pipelines that crossed international borders, such as the proposed Keystone XL pipeline, required a permit from the State Department, which triggered full NEPA review. However, President Trump recently revoked the requirement for the State Department to issue such permits. *See Indigenous Envt’l Network v. US Dep’t of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), *dismissed and remanded*, 2019 WL 2542756 (9th Cir. June 6, 2019) (judgments vacated and remanded with instruction to dismiss the district court

Thus, the suggestion by PHMSA and Enbridge that other existing avenues of environmental review are sufficient is deeply misleading. *See* Opening Brief for the Federal Appellants (PHMSA Brief) at 38-45; Enbridge Energy, Limited Partnership’s Opening Brief as Appellant (Enbridge Brief) at 18-20. Defendants’ cited authorities for this proposition facially demonstrate exactly the opposite, as they illustrate *exemptions* from full-scale NEPA and ESA review of pipeline projects. The remainder mostly have to do with consideration of environmental concerns *after* a spill occurs, whereas the purpose of NEPA and ESA is to evaluate such concerns as early as possible in the planning process.

Both PHMSA and Enbridge point to the “NEPA review” of pipelines performed by the U.S. Forest Service (USFS), the U.S. Army Corps of Engineers (Corps), and the U.S. Fish and Wildlife Service (FWS) in connection with pipeline construction. PHMSA brief at 42-43; Enbridge Brief at 18-20. However, the referenced USFS “review” was, in fact, a determination by USFS that *no NEPA review was necessary*. With respect to Line 5’s crossing of both the Huron-Manistee National Forest and the Chequamegon-Nicolet National Forest, the USFS takes the position that these crossings are entitled to a “categorical exclusion” from NEPA review, meaning that no Environmental Assessment (EA) or Environmental

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actions as moot following President Trump’s revocation of the Executive Order requiring a State Department permit).

Impact Statement (EIS) evaluating project alternatives is necessary. *See* 36 C.F.R. § 220.6 (defining criteria for categorical exclusions “from further analysis and documentation in an EIS or EA”); *See Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402 (6th Cir. 2016) (upholding USFS application of a categorical exclusion for Huron-Manistee crossings); USFS application documents concerning Enbridge Energy Limited Partnership Special Use Permit (SUP) (Enbridge brief at 19)<sup>4</sup> (expressing USFS intention to apply a categorical exclusion to the Chequamegon-Nicolet crossing). An exemption from NEPA review cannot, by any stretch of logic, be deemed NEPA review.

In any event, these types of discrete segment reviews – even where not categorically excluded – may well be very limited in scope. The NEPA reviews cited by PHMSA and Enbridge concern instances where parts of the pipeline cross over federally-managed land, such as USFS land, or water crossings regulated by the Corps; or else concern maintenance work on a discrete pipeline segment (PHMSA Brief at 43, citing 78 Fed. Reg.15,374 (Mar. 11, 2013)). The question is whether environmental review of impacts related to small segments of a pipeline give rise to an obligation on the part of the federal agency to review the impacts of the pipeline as a whole, as opposed to just the impacts of the segment in question –

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<sup>4</sup> The SUP documents are available at <https://www.fs.usda.gov/project/?project=44889&exp=detail>.

a concept sometimes referenced as the NEPA “small handle problem.” *See, e.g.,* Rodgers and Burleson, *Rodgers Environmental Law Second Edition* § 9:9 (July 2019 update).

From NRDC’s perspective, NEPA is clear that a federal agency reviewing even just a portion of a project should consider impacts of the entire project in its environmental review. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005) (With respect to Corps’ review of discrete dredge and fill projects in connection with a gated community development, court held, “Although the Corps' permitting authority is limited to those aspects of a development [within the agency’s jurisdiction], it has responsibility under NEPA to analyze all of the environmental consequences of a project.”). However, that position has not consistently been adopted by federal courts. In two recent cases, courts declined to require whole-pipeline NEPA review in connection with federal decisions affecting small portions of the pipeline at issue. *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 44 (FWS issuance of an ESA incidental take statement in connection with construction of portions of an oil pipeline on federal and Indian lands, and approval of water crossings under a nationwide general permit, held not to trigger NEPA review for the entire pipeline); *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015) (approval of water crossings under CWA nationwide general permit held not to trigger NEPA review for the entire pipeline).

Thus, Defendants' suggestion that approvals other than PHMSA's will always trigger a full environmental review of oil pipelines is, for all practical purposes, incorrect.

The other purported examples of environmental review and coordination provided by Defendants, while valuable in and of themselves, fall mostly into the category of steps taken *after* a spill has occurred and opportunity for careful deliberation has passed, rather than during the planning stage when there is still the luxury of time to carefully weigh alternatives. The express purpose at the heart of NEPA, reflected also in the pre-project consultation structure of the ESA, is to take a "hard look" at environmental risks "*at the earliest possible time* to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2 (emphasis added); *March v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (NEPA requires "that agencies take a 'hard look' at the environmental effects of their planned action"). PHMSA's examples of "environmental review and consultation" include coordination with EPA in the midst of oil spill triage concerning whether to use dispersants and how to protect sensitive areas (PHMSA Brief at 38-40),



which are precisely the sorts of issues that PHMSA should be addressing under NEPA and the ESA *before* the oil lands on the water.<sup>5</sup>

In their substance, none of the purported other opportunities for environmental review cited by PHMSA and Enbridge offer any of the core informational and deliberative benefits of NEPA and the ESA. As noted above, some of these supposed opportunities are merely exemptions from review altogether under a categorical exclusion. The other claimed avenues of review are bare references to consultation with an agency – with no parameters regarding the type of information to be exchanged in the consultation or criteria governing a decision, and no requirement that the public be kept in the loop and offered opportunities to have input into the decision. By contrast, under NEPA, PHMSA would be required to hold a public scoping session to identify the key discretionary

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<sup>5</sup> The legislative history of the Oil Pollution Prevention, Response, Liability, and Compensation Act of 1989, which amended the CWA to require creation of the NCP, further makes clear that the purpose of that Act was to ensure consideration of complex questions relating to spill cleanup *before* a spill occurs, not after. *See* H.Rep.No. 101-241, Part 2, 101st Cong., 1st Sess. (Sept. 22, 1989). (Discussing the inter-agency controversies surrounding the use of dispersants after the Exxon Valdez spill, report concludes, “The Valdez incident underscores the importance of conducting credible scientific research before the need for the information arises.”); 135 Cong. Rec. H7954-7978 (daily ed. Nov. 2, 1989) (“Early after the [Valdez] spill, we know that Exxon wanted to use chemical dispersants, which must be used immediately after the spill to be effective. However, the Environmental Protection Agency, the National Oceanographic and Atmospheric Agency, and the State of Alaska raised scientific concerns about the use of dispersants. By the time the scientific debate was over, it was too late for dispersants to be of any use.”)

issues to be assessed; prepare either a draft Environmental Impact Statement (EIS) or Environmental Assessment (EA) laying out a series of alternative courses of action on those issues; and invite comments from other agencies, Indian tribes, and the public. 40 C.F.R. §§ 1501.3, 1501.4, 1501.7 (scoping and environmental assessments); § 1502 (required EIS contents, including alternatives analysis); § 1503.1 (agency and public comment requirements). Similarly, under the ESA, both the criteria for consultation and the concrete steps to be taken upon a finding of jeopardy to a species are defined in depth. 16 U.S.C. § 1536.

As the District Court recognized, NEPA and the ESA apply in this case regardless of whether a substitute avenue of environmental review exists. *Nat'l Wildlife Federation v. Dep't of Transp.*, 374 F. Supp. 3d at 657-64. However, the paucity of other opportunities for environmental review of domestic oil pipelines renders it doubly important that this Court uphold the clear legal mandate that such review happen at the oil spill plan approval stage. Without NEPA and ESA informing oil disaster contingency planning, the construction and operation of major domestic oil pipelines near and under our waterways often happens fundamentally in a black box, shielded from public participation and scrutiny.

## **II. Discretion Concerning Environmental Issues in the Spill Plan Approval Process Makes NEPA and ESA Review Valuable**

The Court, and the Appellee, have fully explained the discretion inherent in the CWA provision governing approval of spill response plans, 33 U.S.C.

§ 1321(j)(5). *Nat'l Wildlife Federation v. Dep't of Transp.*, 374 F. Supp. 3d at 657-64. As the Court discussed at length, although § 1321(j)(5)(E) states that the President's designee "shall" approve a response plan that meets specified requirements, the § 1321(j)(5)(D) requirements themselves provide considerable discretionary latitude that triggers the applicability of both ESA and NEPA.

What is important to understand, as context for this finding, is how genuinely valuable review under ESA and NEPA can be in the spill plan review context. Multiple prongs of the § 1321(j)(5)(D) list of requirements for plan approval – which Enbridge dismisses as a mere "checklist" (Enbridge Brief at 20 *et seq.*) – reference analysis implicating the potential environmental impacts of a spill, and of the various cleanup methods that might be used to address it. Although some of the criteria may be more or less binary – *e.g.*, the § 1321(j)(5)(D)(ii) requirement to identify a qualified individual with full authority – as will be discussed below, others call into play analysis of environmental conditions and how various spill cleanup methods might impact them.

We explain below as background the varying approaches to oil spill cleanup that may be appropriate depending on varying facts and circumstances on the ground, giving rise to potential options and tradeoffs in spill cleanup planning. Based on that background, we then envision ways in which a NEPA alternatives

analysis and ESA consultation could meaningfully impact the decision process on these discretionary points.

**A. The Wide Variety of Available Cleanup Methods and Potentially Affected Ecosystems May Require Consideration of Environmental Tradeoffs in Spill Response Planning**

As background to understanding how NEPA and ESA would apply as a practical matter to the spill cleanup planning process, it is important to understand that there are multiple technologically available methods for cleaning up spilled oil – including, among others, skimming it from the surface, burning it, allowing it to naturally disperse and disintegrate, and using chemical or biological dispersants to make it sink into the water column.<sup>6</sup> Each one of these methods has advantages and disadvantages in different circumstances, and potential tradeoffs among affected ecosystems.<sup>7</sup> Burning of oil on the surface may keep it from sinking and causing destruction to species on the ocean or lake bottom, but will create heavy air pollution that may threaten human health.<sup>8</sup> Dispersing oil may keep it off the

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<sup>6</sup> National Oceanographic and Atmospheric Administration (NOAA) Office of Response and Restoration, “How Do Oil Spills out at Sea Typically Get Cleaned Up?” *available at* <https://response.restoration.noaa.gov/about/media/how-do-oil-spills-out-sea-typically-get-cleaned.html>.

<sup>7</sup> US Environmental Protection Agency, *Understanding Oil Spills and Spill Response*, *available at* <https://www.epa.gov/sites/production/files/2018-01/documents/ospguide99.pdf>.

<sup>8</sup> NOAA Office of Response and Restoration, “In Situ Burning,” *available at* <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/resources/in-situ-burning.html>.

water's surface, where it is most likely to harm surface-dwelling water birds, but the dispersants themselves are toxic and hence may affect other species in the water column.<sup>9</sup> Skimming the oil off the surface will not work for certain types of heavy oil that sink rapidly to the bottom; but cleaning up this type of oil once it sinks may in some cases do more harm than good to sensitive bottom environments.<sup>10</sup>

Additionally, there are multiple different types of species and aquatic environments that may be affected by any one oil spill. A major spill could cause harm to any combination of seabirds, aquatic mammals, fish, turtles and other reptiles, aquatic plants, or land dwellers who eat any of those; and may simultaneously affect diverse ecosystems including, *e.g.*, marshes, shellfish beds, and estuarine environments.<sup>11</sup> The variety of affected environments may require prioritization of some over others, given the sometimes mutually exclusive choices available in cleanup methods.

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<sup>9</sup> The National Academies Press, *Oil Spill Dispersants: Efficacy and Effects*, Chapter 5, available at <https://www.nap.edu/read/11283/chapter/7>.

<sup>10</sup> The National Academies Press, *Spills of Nonfloating Oils*, available at <https://www.nap.edu/read/9640/chapter/1>.

<sup>11</sup> U.S. Fish and Wildlife Service, *Effects of Oil on Wildlife and Habitat*, available at <https://www.fws.gov/home/dhoilspill/pdfs/DHJICFWSOilImpactsWildlifeFactSheet.pdf>.

**B. The CWA Spill Plan Approval Requirements Give PHMSA Discretion to Consider and Respond to Environmental Information**

Against this backdrop, it becomes clear that the discretionary handles in 33 U.S.C. § 1321(j)(5)(D) identified by the District Court are doorways to an array of choices available to PHMSA in determining whether an operator's spill contingency plan has met statutory requirements. Where multiple species and ecosystems are at risk, and multiple different cleanup approaches are available, tradeoffs may be necessary; meaning that PHMSA is not making a simple, binary decision in approving a plan. Rather, the agency is making a complex discretionary judgment that can be informed by collection of environmental data, outside input, and a carefully defined array of options.

The Court below identified multiple instances where 33 U.S.C. § 1321(j)(5)(D) affords discretion to PHMSA in approving operator plans. *Nat'l Wildlife Federation v. Dep't of Transp.*, 374 F. Supp. 3d at 657-64. All are important, but the key provisions that bear further elucidation here are the requirement that an operator's response plan be "consistent with the requirements of the National Contingency Plan and Area Contingency Plans (§ 1321(j)(5)(D)(i)); and the requirement to "identify . . . personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge" (§ 1321(j)(5)(D)(iii)).

## 1. The Consistency Determination

Enbridge paints the requirement that the operator's spill plan be "consistent with the requirements of the National Contingency Plan and Area Contingency Plans" as a "checklist item" that requires technical expertise but not discretion. Enbridge Brief at 31. However, even a cursory look at the actual language of the National Contingency Plan (NCP) and the applicable Area Contingency Plan (ACP) reveals much in them that is not conducive to a rote consistency check. In both cases, the Plans lay out high-level criteria regarding environmental goals and requirements, that operator plans are then required to address in site-specific planning.

The NCP itself is a lengthy set of regulations governing spill response at the national level, set forth in 40 C.F.R. Part 300. While it defines protocols for response, sometimes specific in terms of, *e.g.*, who must be notified of a spill (40 C.F.R. § 300.300) or how a spill cleanup must be documented for cost recovery purposes (*Id.* § 300.315), for the most part the NCP is a set of guidelines rather than a point-by-point cleanup plan that could be held up for direct rote comparison with an operator's spill plan. Those guidelines are grounded, in part, in directions to consider environmental factors in oil spill response decision making. The NCP incorporates PHMSA's spill cleanup regulations by reference (40 C.F.R. § 300.211(e)); and those regulations in turn state that consistency with the NCP

requires an operator to (among other things) “identify environmentally and economically sensitive areas,” and include in the spill plan “response activities,” defined as “the containment and removal of oil from the water and shorelines, the temporary storage and disposal of recovered oil, or the taking of other actions as necessary to minimize or mitigate damage to the environment.” 49 C.F.R. § 194.107(b)(2)(ii) and (c)(1)(v). The NCP section governing oil cleanup sets out a non-exclusive list of examples of types of cleanup measures that might be used, without specifying which are preferable in what circumstances, and generally referencing protection of sensitive ecosystems:

Defensive actions shall begin as soon as possible to prevent, minimize, or mitigate threat(s) to the public health or welfare of the United States or the environment. Actions may include but are not limited to: Analyzing water samples to determine the source and spread of the oil; controlling the source of discharge; measuring and sampling; source and spread control or salvage operations; placement of physical barriers to deter the spread of the oil and to protect natural resources and sensitive ecosystems; control of the water discharged from upstream impoundment; and the use of chemicals and other materials in accordance with subpart J of this part to restrain the spread of the oil and mitigate its effects.

40 C.F.R. § 300.310(a). These types of general references to environmental protection are found throughout the NCP.

As observed by the court below, the ACPs lay yet another layer of broadly-framed, soft-factor environmental decision making onto a PHMSA spill response plan approval. *Nat’l Wildlife Federation v. Dep’t of Transp.*, 374 F. Supp. 3d at



661. The NCP requires that the ACP, in its Fish and Wildlife Annex, “[d]efine the requirements for evaluating compatibility” of non-federal response plans such as Enbridge’s Line 5 plan with the terms of the Annex. The Annex applicable to Line 5, however, once again punts to broad discretionary environmental factors, stating, “Facility owners or operators must determine the maximum distance at which a worst case oil spill from their facility could cause injury to fish and wildlife and sensitive environments and develop a plan for mitigating that discharge’s potential adverse effects.” Appendix VIII: Fish and Wildlife Annex to the U.S. EPA Region 5 Regional/Area Contingency Plan, Section 10.0.<sup>12</sup> The consistency determination required under § 1321(j)(5)(D)(i) is thus far from cut and dried.

## 2. The Removal Requirement

The statute also requires that operator spill plans “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.” 33 U.S.C. § 1321(j)(5)(D)(iii). As the court below observed, a key term in this requirement is “remove.” “Remove” is expressly defined in the CWA as “containment and removal of oil or hazardous substances from the water and shorelines or the taking of such other actions as may be

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<sup>12</sup> Available at <http://www.rrt5.org/RCPACPMain/RCPACPApendices/FishWildlifeAnnex.aspx>.

necessary to minimize or mitigate damage to the public health or welfare of the United States (including, but not limited to, fish, shellfish, wildlife, public and private property, and shorelines and beaches) or to the environment.” 33 U.S.C. § 1321(a)(8); 40 C.F.R. § 300.5 (NCP incorporation of the definition). *See Nat’l Wildlife Federation v. Dep’t of Transp.*, 374 F. Supp. 3d at 660.

Enbridge asserts that PHMSA may not consider the substance of the statutory “remove” definition in determining whether the § 1321(j)(5)(D)(iii) requirement for a plan to “remove” spilled oil has been met. Enbridge Brief at 35-36. Enbridge does not explain why this is so, nor could it. If, as the company suggests, PHMSA’s sole job is to read through the submitted spill plan to see whether there is some manner of plan to remove spilled oil, then essentially *any* plan would have to pass muster under this criterion, since PHMSA could not look beneath the surface to determine whether the proposed plan would actually be sufficient to protect against harm to “fish, shellfish, wildlife, public and private property, and shorelines and beaches.” 33 U.S.C. § 1321(a)(8). That reading leads directly to the absurd result posited by the court below, of “a checkbox requirement that is met if an operator identifies two responders and a bucket.” *Nat’l Wildlife Federation v. Dep’t of Transp.*, 374 F. Supp. 3d at 660.

The only rational reading of the CWA provision requiring removal as an element of operator spill plans is one that incorporates that CWA definition of

removal. Read in that proper way, § 1321(j)(5)(D)(iii) gives PHMSA significant latitude to weigh environmental information in determining whether a pipeline operator's plan has adequately considered means of protecting wildlife and sensitive ecosystems.

### **C. NEPA and the ESA Can be Meaningfully Applied in PHMSA's Spill Plan Approval Decisions**

The crux of this matter is whether PHMSA can genuinely make use of the processes and information gathering required under NEPA and the ESA. That question is key to assessing the applicability of the two lead U.S. Supreme Court cases that bear on this matter, *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (NEPA review not required where it would serve "no purpose" in light of agency's inability to use environmental information) and *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (ESA consultation requirements not appropriate where they add "an entirely separate prerequisite" rather than informing existing statutory prerequisites).

The latitude to consider environmental factors in approving spill plans, as described in the previous section, makes NEPA and ESA review both meaningful and appropriate. Both statutes empower PHMSA to comprehensively evaluate a pipeline operator's spill planning by gathering relevant information concerning potential environmental and wildlife impacts, obtaining input from other agencies and the public, and considering alternative approaches to minimize and mitigate

environmental impacts. NEPA enables PHMSA to methodically consider the potentially significant tradeoffs involved in assessing a proposed oil spill response; and ESA empowers PHMSA to use that information to ensure that the spill plan will not cause jeopardy to a species.<sup>13</sup>

Under NEPA, PHMSA would be charged with identifying alternatives that meet a specified “purpose and need.” 40 C.F.R. § 1502.13. In the context of the CWA, the “purpose and need” at issue would be developing an operator spill plan that meets the criteria set forth in § 1321(j)(5)(D). As discussed above, two of these criteria – an NCP/ACP consistency assessment and a determination whether “removal” will be accomplished – are dependent upon multiple broadly-defined environmental factors, potentially implicating tradeoffs and varying emphases.

It is easy to envision circumstances in which an array of NEPA alternatives would be powerfully useful in assessing these environmental complexities as they pertain to a particular local area affected by a pipeline. For instance, the agency may encounter two distinct sensitive ecosystems potentially affected by an oil spill on a river: say, a reedy marsh at the shoreline, and a benthic (river bottom) habitat

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<sup>13</sup> As PHMSA points out, it is useful that the On-Scene Coordinator is required to consult with US EPA, the FWS, and others after a spill occurs on such matters as dispersant use (when that issue is not addressed in the ACP) and impacts on endangered or threatened species. 40 C.F.R. §§ 300.910(b), 300.135(k). But NEPA and the ESA would allow those issues to be vetted in advance based on full information.

populated by plants and shellfish. We can further envision a measure of uncertainty as to the potential impacts on the portions of those ecosystems located some distance from the pipeline.

NEPA provides PHMSA with powerful tools to unpack and assess this tangled array of factors. The agency would develop an array of alternatives for a pipeline spill plan, and determine which of them most fully meets the defined purpose and need – *i.e.*, developing a spill plan conforming to § 1321(j)(5)(D) – through protection of sensitive ecosystems and public health. Some alternatives might emphasize, for instance, the use of dispersants or other methods that would tend to protect the shoreline marsh, while others might emphasize protection of the benthic habitat.<sup>14</sup> Some alternatives may more heavily emphasize protection against impacts whose magnitude is difficult to predict, allowing for studied evaluation of the level of risk of harm in the context of resource tradeoffs and constraints. One alternative might aim to clean up spills of sunken heavy oil, while another might be geared toward leaving such oil in place to disintegrate naturally to avoid the harm to the benthic habitat caused by dredging the bottom. The process of vetting these alternatives would provide a platform for agencies and members of the public to bring to bear relevant information that might not

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<sup>14</sup> 40 C.F.R. § 300.910(a) requires Area Committees to address dispersants in their planning, but § 300.910(b) recognizes that not all types of relevant situations will necessarily be addressed in area-wide planning.

otherwise be available to PHMSA. Clearly, this is not a situation where one can plausibly argue that NEPA review serves “no purpose.” *Department of Transportation v. Public Citizen*, 541 US at 767.<sup>15</sup>

Similarly, the ESA provides PHMSA with authority to sort through the issues to determine whether a proposed spill plan protects endangered species. To the extent FWS determines under § 1536(b)(3)(A) that an identified species faces jeopardy as a consequence of a proposed spill cleanup approach, PHMSA would develop a mitigation response that is within the parameters of § 1321(j)(5)(D). If, in our hypothetical locale, a species of shorebirds were critically endangered and would be seriously injured by oil floating on the surface, PHMSA could, for instance, require pursuant to ESA that a spill plan emphasize methods that would remove surface oil. Conversely, if a benthic species was in jeopardy, heavy use of dispersants might be prohibited. Or, in either situation, the problem could be addressed with an incidental take statement. 16 U.S.C. § 1536(b)(4)(B). Implementation of these required mitigation steps would fall within the bounds of

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<sup>15</sup> The NEPA regulatory requirement to consider a “no action” alternative is of no particular consequence here. 40 C.F.R. § 1502.14(d). NEPA review has been held to be necessary even where the law precludes taking no action. *Forelaws on Board v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1984) (NEPA review required even though statute mandated power authority to offer hydroelectric contracts, since terms of those contracts affected environmental matters); *RESTORE: The North Woods v. U.S. Dep’t of Agriculture*, 968 F.Supp. 168, 173-74 (D. Vt. 1997) (NEPA review of proposed federal-private land exchange required even though the statute at issue mandated the exchange of any land the Secretary found to be “acceptable”).

the discretion inherent in the § 1321(j)(5)(D) criteria, rather than constituting a prohibited “entirely separately prerequisite” added to those criteria. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007). Here, unlike in *Home Builders*, protection of threatened and endangered species is “an end in itself” for PHMSA when assessing compliance with the § 1321(j)(5)(D) criteria. *Id.*

## CONCLUSION

Oil spill response planning falls squarely within the category of federal actions that NEPA and the ESA were designed to address: decisions involving potentially very high environmental stakes, with multiple possible approaches in play, and opportunities to prevent the worst outcomes with full information and careful advance planning. The decision below was not only correct but vitally

important. Amicus curiae NRDC therefore respectfully requests that this Court affirm the decision of the District Court in this matter.

Dated: October 25, 2019

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) (referencing the type-volume limitation for the party's principle brief at Fed. R. App. P. 32(a)(7)) because it contains 5,395 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 25, 2019

s/ Ann Alexander

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## **CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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