



NATIONAL WILDLIFE FEDERATION®
Great Lakes Regional Center®

July 28, 2015

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590
Certified Mail # 7015 0640 0002 9761 5645

RE: Notice of Intent to Sue over Violation of the Clean Water Act

Dear Mr. Secretary:

I am writing on behalf of the National Wildlife Federation (“NWF”) to notify you of its intent to sue the U.S. Department of Transportation (“DOT”) for violating the Clean Water Act (“CWA”), § 311(j), 33 U.S.C. § 1321(j), and Executive Order 12777.

DOT has failed to perform its nondiscretionary duty under CWA § 311(j)(5)(A)(i) and Executive Order 12777. Specifically, DOT has failed to issue regulations requiring an owner or operator of an offshore facility landward of the coast line to prepare and submit a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance. As a result of DOT’s failure to issue such regulations, an owner or operator of an oil pipeline located in, on, or under any of the navigable waters of the United States landward of the coast line:

- is not required to prepare such a plan, known as a facility response plan (“FRP”),
- is not required to obtain DOT’s approval of any FRP the owner or operator might voluntarily prepare, and
- may transport oil through the pipeline without DOT’s approval and without operating the pipeline in compliance with any FRP the owner or operator might voluntarily prepare.

For instance, Enbridge Energy, Limited Partnership, and Enbridge (U.S.) Inc., the owner and operator, respectively, of Line 5 of the Lakehead Pipelines:

- were not required to prepare an FRP for the offshore sections of Line 5 located in, on, or under the Straits of Mackinac, the St. Clair River, and other inland navigable waters,

- were not required to and did not obtain DOT's approval of an FRP for the offshore sections of Line 5 located in, on, or under the Straits of Mackinac, the St. Clair River, and other inland navigable waters – which means that DOT has not determined that Enbridge Energy, Limited Partnership, and Enbridge (U.S.) Inc. have ensured the availability of private personnel and equipment necessary to remove, to the maximum extent practicable, a worst case discharge from the sections of Line 5 in, on, or under these waters, and to mitigate or prevent a substantial threat of such a discharge, and
- may and do transport oil through the offshore sections of Line 5 located in, on, or under the Straits of Mackinac, the St. Clair River, and other inland navigable waters without DOT's approval and without operating the pipeline in compliance with an approved FRP for the offshore sections of Line 5.

Enbridge Energy, Limited Partnership, and Enbridge (U.S.) Inc. prepared FRPs for Line 5 for the onshore sections of the pipeline. Specifically, they prepared FRPs to demonstrate compliance with the regulations in 49 C.F.R. Part 194, titled "Response Plans for Onshore Oil Pipelines."¹ These regulations contain requirements for FRPs "to reduce the environmental impact of oil discharged from onshore oil pipelines."² The regulations define "onshore oil pipeline facilities" as pipes, among other things, "used in the transportation of oil located in, on, or under, any land within the United States other than submerged land."³

In January 2013, Enbridge Pipelines Inc. submitted the FRPs for the onshore sections of Line 5 to the Pipeline and Hazardous Materials Safety Administration ("PHMSA").⁴ John C. Hess, Director of the Emergency Support and Security Division in PHMSA's Office of Pipeline Safety, approved the FRPs on July 11, 2013. He expressly limited his approval to the onshore sections of Line 5, stating "I conclude that the Plan and [Region #866 (Superior) and Region #867 (Chicago)] Annexes comply with the requirements of PHMSA's regulations concerning onshore oil pipelines, found at 49 Code of Federal Regulations (CFR) Part 194."⁵ DOT has not given PHMSA authority to review or approve FRPs for offshore pipelines landward of the coast line, nor to issue regulations requiring owners or operators of such pipelines to prepare and submit FRPs.⁶

Because DOT has not issued regulations establishing requirements for FRPs for oil pipelines located in, on, or under any of the navigable waters of the United States landward of the coast line, the agency has no basis for determining whether any FRP an owner or operator

¹ Enbridge Pipelines, Inc., *Integrated Contingency Plan: Superior Region (#866) Response Zone*, Version #1, Revision #3 at A1-1, A1-2 (Jan. 2014) [hereafter "Superior Region Plan"]; Enbridge Pipelines, Inc., *Integrated Contingency Plan: Chicago Region (#867) Response Zone*, Version #1, Revision #3 at A1-1, A1-2 (Jan. 2014) [hereafter "Chicago Region Plan"].

² 49 C.F.R. § 194.1.

³ 49 C.F.R. § 194.5.

⁴ See Superior Region Plan at S1-1; Chicago Region Plan at S1-1.

⁵ Superior Region Plan at A5-5; Chicago Region Plan at A5-5.

⁶ See 49 C.F.R. § 1.97(c)(2) (delegating only the authority to regulate onshore facilities, which DOT received under Executive Order 12777); Exec. Order No. 12777 § 2(d)(2), 56 Fed. Reg. 54757, 54761 (Oct. 18, 1991).

might voluntarily prepare and submit complies with CWA § 311(j)(5)(D), 33 U.S.C. § 1321(j)(5)(D). Specifically, DOT has no basis for determining whether an FRP is adequate to respond, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

For instance, DOT has no basis for determining that either Enbridge Energy, Limited Partnership, or Enbridge (U.S.) Inc. has an FRP capable of responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance from the offshore sections of Line 5 located in, on, or under the Straits of Mackinac, the St. Clair River, and other inland navigable waters that Line 5 crosses.

If, within sixty days, DOT does not issue regulations requiring an owner or operator of an offshore facility landward of the coast line to prepare, submit, and obtain agency approval of an FRP that complies with CWA § 311(j), 33 U.S.C. § 1321(j), NWF will bring an action against the agency for violating the CWA and Executive Order 12777.

I. DOT HAS VIOLATED THE CWA AND EXECUTIVE ORDER 12777

A. DOT Failed to Perform Its Nondiscretionary Duty to Issue Regulations Requiring an Owner or Operator of an Offshore Facility Landward of the Coast Line to Prepare, Submit, and Obtain Approval of a Plan for Responding, to the Maximum Extent Practicable, to a Worst Case Discharge, and to a Substantial Threat of Such a Discharge, of Oil or a Hazardous Substance

The Oil Pollution Act of 1990 (“OPA”), Pub. L. 101-380, was enacted on August 18, 1990. Section 4202(a) of the OPA amended section 311(j) of the Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. 1321(j). Specifically, § 4202(a)(6) directed that “[t]he President shall issue regulations which require an owner or operator of ... [an offshore facility] to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.”⁷ Section 311 of the Clean Water Act defines an “offshore facility” as “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.”⁸

The OPA also directed that “the President shall issue regulations for ... facility response plans under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act” “[n]ot later than 24 months after the date of the enactment of this Act.”⁹ In other words, the OPA required the President to issue regulations requiring FRPs no later than August 18, 1992. In addition, the OPA prohibited an owner or operator of an offshore facility from handling,

⁷ Codified at 33 U.S.C. § 1321(j)(5)(A)(i), (C)(iii).

⁸ *Id.* at § 1321(a)(11).

⁹ OPA § 4202(b)(4)(A).

storing, or transporting oil if it failed to submit an FRP pursuant to the regulations the Act required by February 18, 1993.¹⁰ Furthermore, the OPA provided that, by August 18, 1993, an owner or operator of an offshore facility must be operating in compliance with an FRP approved under the regulations the Act required.¹¹

Following the enactment of the OPA, the President issued Executive Order (“EO”) 12777 on October 18, 1991.¹² The Executive Order delegated “[t]he functions vested in the President by Section 311(j)(5) of FWPCA and Section 4202(b)(4) of OPA, respecting the issuance of regulations requiring the owners or operators of ... transportation-related *onshore* facilities ... to prepare and submit response plans, the approval of means to ensure the availability of private personnel and equipment, the review and approval of such response plans, and the authorization of ... transportation-related *onshore* facilities ... to operate without approved response plans, are delegated to the Secretary of *Transportation*.”¹³ The Executive Order delegated “[t]he functions vested in the President by Section 311(j)(5) of FWPCA and Section 4202(b)(4) of OPA, respecting the issuance of regulations requiring the owners or operators of *offshore* facilities, including associated pipelines ... to prepare and submit response plans, the approval of means to ensure the availability of private personnel and equipment, the review and approval of such response plans, and the authorization of *offshore* facilities, including associated pipelines ... to operate without approved response plans, are delegated to the Secretary of the *Interior*.”¹⁴

On August 12, 1992, the Minerals Management Service (“MMS”) within the Department of the Interior issued notice that it was preparing to develop regulations under the OPA for oil spill response for offshore facilities, including state submerged lands and pipelines.¹⁵ The MMS recognized that the OPA required it to issue regulations requiring response plans for “all offshore areas including State submerged lands.”¹⁶ MMS stated that it would “determine what regulations are needed for facilities in areas under lease by a State and to offshore pipelines on a right-of-way.”¹⁷

Subsequently, on February 8, 1993, after the OPA’s August 18, 1992, deadline, MMS issued an interim final rule establishing “requirements for spill-response plans for offshore facilities including associated pipelines.”¹⁸ However, MMS defined “offshore” to mean “the area *seaward* of the line of ordinary low water along that portion of the coast which is in direct

¹⁰ See *id.* at § 4202(b)(4)(B).

¹¹ See *id.* at § 4202(b)(4)(B), (C).

¹² 56 Fed. Reg. 54757.

¹³ Exec. Order No. 12777 § 2(d)(2), 56 Fed. Reg. at 54761 (emphasis added).

¹⁴ Exec. Order No. 12777 § 2(d)(3), 56 Fed. Reg. at 54761-62 (emphasis added).

¹⁵ Oil Spill Prevention and Response for Offshore Facilities Including State Submerged Lands and Pipelines, 57 Fed. Reg. 36032 (Aug. 12, 1992).

¹⁶ *Id.*

¹⁷ *Id.* at 36033.

¹⁸ Spill-Response Plans for Offshore Facilities Including State Submerged Lands and Pipelines, 58 Fed. Reg. 7489 (Feb. 8, 1993).

contact with the open sea and the area seaward of the line marking the limit of inland waters.”¹⁹ Thus, its requirements that all offshore facilities, including operators of offshore facilities in State waters, submit an FRP only applied to facilities seaward of the coast line, not those located in, on, or under any of the inland navigable waters of the United States.²⁰ To this day, the regulations of MMS’s successor, the Bureau of Safety and Environmental Enforcement, require an FRP only from owners or operators of an oil handling, storage, or transportation facility located seaward of the coast line.²¹

EO 12777 also provided that “[t]he functions vested in the President by Section 311(j) of FWPCA or Section 4202(b)(4) of OPA which have been delegated or assigned by Section 2 of this order may be redelegated to the head of any Executive department or agency with his or her consent.”²² Subsequently, in a Memorandum of Understanding (“MOU”) among the U.S. Environmental Protection Agency and the Departments of the Interior and Transportation, which became effective on February 3, 1994, the Department of the Interior redelegated to DOT the “responsibility for transportation-related facilities, including pipelines, landward of the coast line.”²³ The term “transportation-related onshore and offshore facilities” includes “[i]nterstate and intrastate onshore and offshore pipeline systems.”²⁴ The term “coast line” means “the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.”²⁵

Thus, for the past twenty-one years, DOT has had the responsibility to issue regulations that should have been issued twenty-three years ago – regulations requiring an owner or operator of an offshore facility landward of the coast line to prepare, submit, and obtain approval of a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.²⁶ However, DOT has not issued regulations requiring such FRPs.

¹⁹ *Id.* at 7490 (emphasis added) (codified at 30 C.F.R. § 254.1 (1993)).

²⁰ *See id.* (codified at 30 C.F.R. §§ 254.2, 254.3, 254.5 (1993)).

²¹ 30 C.F.R. § 254.1 (2015).

²² Exec. Order No. 12777 § 2(i), 56 Fed. Reg. at 54763.

²³ 40 C.F.R. § Pt. 112, App. B.

²⁴ 40 C.F.R. § Pt. 112, App. A, § 2(C). The full definition provides as follows:

Interstate and intrastate onshore and offshore pipeline systems including pumps and appurtenances related thereto as well as in-line or breakout storage tanks needed for the continuous operation of a pipeline system, and pipelines from onshore and offshore oil production facilities, but excluding onshore and offshore piping from wellheads to oil separators and pipelines which are used for the transport of oil exclusively within the confines of a nontransportation-related facility or terminal facility and which are not intended to transport oil in interstate or intrastate commerce or to transfer oil in bulk to or from a vessel.

²⁵ 40 C.F.R. § Pt. 112, App. B.

²⁶ DOT delegated the responsibility to issue such regulations for onshore pipelines to the Research and Special Programs Administration (“RSPA”). Response Plans for Onshore Oil Pipelines, 58 Fed. Reg. 244, 245 (Jan. 5, 1993); Organization and Delegation of Powers and Duties; Redelegations of Authority to the Research and Special Programs Administrator, Federal Highway Administrator, and Federal Railroad Administrator, 57 FR 62483, 62484 (Dec. 31, 1992). When DOT reorganized RSPA, PHMSA “succeed[ed] to all the authority exercised by RSPA with

DOT must now, finally, carry out Congress's unambiguous mandate that the agency, through a series of delegations, issue regulations requiring an owner or operator of a facility located in, on, or under any of the navigable waters of the United States landward of the coast line to prepare, submit, and obtain approval of a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

B. The Nation Needs Regulations Requiring an Owner or Operator of an Offshore Facility Landward of the Coast Line to Prepare and Submit a Plan for Responding, to the Maximum Extent Practicable, to a Worst Case Discharge, and to a Substantial Threat of Such a Discharge, of Oil or a Hazardous Substance

As Congress's enactment of the OPA reflects, federally-approved FRPs for offshore facilities located in, on, or under any of the navigable waters of the United States landward of the coast line are necessary. For instance, Enbridge's Line 5 oil pipeline is located in and under the Straits of Mackinac, and a substantial spill there may have significant harmful consequences for the environment in the absence of an adequate FRP, assuming an adequate plan could even be devised or implemented. All too often, oil pipeline spills foul the navigable waters of the United States landward of the coast line – including, as mentioned below, the Line 6B oil pipeline owned and operated by Enbridge. To protect these waters, DOT must implement the Congressional mandate that the agency require adequate FRPs that pipeline owners and operators must follow before they may use offshore facilities to handle, store, or transport oil.

1. Line 5 of the Lakehead Pipelines must have an adequate FRP for the offshore sections of the pipeline

Line 5 is a 641.3-mile pipeline, and the pipeline is part of the "Lakehead Pipelines" system.²⁷ Line 5 delivers natural gas liquids and crude oil from Superior, Wisconsin, through Michigan to Sarnia, Ontario, Canada.²⁸ It has the capacity to transport up to 540,000 barrels per day, which is the equivalent of 22.7 million gallons per day.²⁹

regard to pipeline and hazardous materials safety." Pipeline and Hazardous Materials Safety Administration, and to the Administrator, Research and Innovative Technology Administration; Establishment and Delegation of Powers and Duties, 70 Fed. Reg. 8299 (Feb. 18, 2005). PHMSA has no authority to issue regulations requiring an owner or operator of an offshore facility landward of the coast line to prepare and submit a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance. See 49 C.F.R. § 1.97(c)(2).

²⁷ Superior Region Plan at A1-15, A1-18 (Table 1.3); Chicago Region Plan at A1-8, A1-16, A1-19.

²⁸ Superior Region Plan at A1-8, A1-15; Chicago Region Plan at A1-8, A1-16, A1-19.

²⁹ Enbridge Energy, Limited Partnership, *Operational Reliability Plan: Line 5 and Line 5 Straits of Mackinac Crossing 7* (Aug. 7, 2014) [hereafter "Line 5 Plan"], available at <http://www.enbridge.com/InYourCommunity/PipelinesInYourCommunity/Enbridge-in-Michigan/Line-5/Operations-and-Monitoring.aspx>.

For most of its length, Line 5 is an onshore 30-inch pipe, but it splits into two separate 20-inch offshore pipes as it crosses under the Straits of Mackinac, which lie between the Upper and Lower Peninsulas of Michigan and connect Lakes Michigan and Huron.³⁰ In the Upper Peninsula of Michigan, Line 5 passes through the following counties: Gogebic, Iron, Dickinson, Marquette, Delta, Schoolcraft, and Mackinac.³¹ In the Lower Peninsula of Michigan, Line 5 passes through the following counties: Emmet, Cheboygan, Otsego, Crawford, Oscoda, Ogemaw, Arenac, Bay, Saginaw, Tuscola, Lapeer, and Saint Claire.³² It then crosses under the St. Clair River to Canada.³³

a) Line 5 traverses navigable waters that may suffer significant adverse effects as the result of an oil spill

In Line 5's passage through the Upper Peninsula, it crosses miles of "Unusually Sensitive Areas," including the area near, in, and under the Straits of Mackinac.³⁴ ("Unusually Sensitive Area" "means a drinking water or ecological resource area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release."³⁵) Line 5 also crosses many wetlands, lakes, and streams in the Upper Peninsula.³⁶

Enbridge Pipelines Inc. itself determined that the onshore sections of Line 5 could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on navigable waters or adjoining shorelines.³⁷ Enbridge Pipelines Inc. based this determination on the following factors, among others:

- a line section experienced two or more reportable releases within the past five years, and
- a line is located within a 1-mile radius of potentially affected environmentally sensitive areas and could reasonably be expected to reach these areas.³⁸

³⁰ Superior Region Plan at A1-8, A1-15, A1-18 (Table 1.3); Chicago Region Plan at A1-19.

³¹ Superior Region Plan at A1-13 (Table 1.2)

³² Superior Region Plan at A1-13 (Table 1.2); Chicago Region Plan at A1-13 (Table 1.2).

³³ Enbridge Energy, Limited Partnership, *Operational Reliability Plan: Line 5 and Line 5 Straits of Mackinac Crossing 3* (Aug. 7, 2014), available at <http://www.enbridge.com/InYourCommunity/PipelinesInYourCommunity/Enbridge-in-Michigan/Line-5/Operations-and-Monitoring.aspx>.

³⁴ Superior Region Plan at A3-2, § 3.1 and HCA Management Plan at 15-21, 22-25 (Mar. 2013).

³⁵ 49 C.F.R. § 195.6.

³⁶ Superior Region Plan at §§ 3.0.11, 3.0.12.

³⁷ See Superior Region Plan at A1-4 ("Enbridge has determined that the Superior Response Zone meets the criterion which requires the zone to be considered as having the potential to cause 'significant and substantial' harm."), A1-7 ("ALL of Enbridge Pipelines are considered to be a system of Significant and Substantial Harm."); Chicago Region Plan at A1-4 ("Enbridge has determined that the Chicago Response Zone meets the criterion which requires the zone to be considered as having the potential to cause 'significant and substantial' harm."), A1-7 ("ALL of Enbridge Pipelines are considered to be a system of Significant and Substantial Harm.").

³⁸ Superior Region Plan at A1-7; Chicago Region Plan at A1-7.

An oil spill from the sections of Line 5 actually in, on, or under navigable waters, and a worst-case discharge of oil, in particular, is all the more likely to significantly harm, if not destroy the bountiful fish and wildlife, as well as the recreation and tourism, supported by the Straits of Mackinac and other navigable waters along Line 5's route. For instance, a 2010 oil discharge from Enbridge Line 6B into a wetland, Talmadge Creek, and the Kalamazoo River near Marshall, Michigan, adversely affected several thousand acres of in-stream, floodplain, and upland habitats, which will take years to recover, and killed or oiled hundreds of birds, mammals, reptiles, amphibians, fish, and benthic invertebrates.³⁹ It also caused the loss of approximately 100,000 recreational user-days, including recreational fishing and boating, as well as shoreline park and trail use.⁴⁰

b) Line 5 may significantly affect public health or safety as the result of an oil spill

The FRPs for the onshore sections of Line 5 indicate that they cross or run in the vicinity of public water supplies, water intakes, and wellhead protection areas.⁴¹

Following the Enbridge Line 6B oil discharge into navigable waters near Marshall, Michigan, individuals in the vicinity began complaining of strong, noxious odors, reporting respiratory, gastrointestinal, and neurological symptoms.⁴² Three hundred twenty individuals suffered from acute adverse health effects.⁴³ The predominant symptoms were headache, nausea, and respiratory symptoms.⁴⁴ "These symptoms are consistent with the published literature ... regarding potential health effects associated with acute exposure to crude oil."⁴⁵

c) A discharge from Line 5 may significantly adversely affect federally-endangered or threatened species and critical habitat

On its route, Line 5 crosses through or near areas that are home to twelve animals and plants listed as endangered or threatened species under the ESA.⁴⁶ As listed species, they may be adversely affected, if not jeopardized, by the effects of an oil spill – both direct effects on individual organisms and indirect effects on the undisturbed inland navigable waters these species depend on for their survival. Particularly vulnerable is critical habitat that the FWS has

³⁹ U.S. Fish and Wildlife Service, *Draft Damage Assessment and Restoration Plan / Environmental Assessment for the July 25-26, 2010, Enbridge Line 6B Oil Discharges near Marshall, MI* 16-17 (May 2015), available at <http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/#plan>.

⁴⁰ *Id.* at 17.

⁴¹ Superior Region Plan at A3-1, § 3.0.2; Chicago Region Plan at A3-1, § 3.0.2.

⁴² Michigan Dep't of Community Health, *Acute Health Effects of the Enbridge Oil Spill 4* (Nov. 2010), available at http://www.michigan.gov/mdch/0,1607,7-132-2945_5105_29181-264554--,00.html.

⁴³ *Id.* at 4, 17.

⁴⁴ *Id.* at 4, 17.

⁴⁵ *Id.*

⁴⁶ U.S. Fish and Wildlife Service, *Endangered, Threatened, Proposed and Candidate Species in the Upper Midwest*, available at http://www.fws.gov/midwest/endangered/lists/e_th_pr.html.

designated as essential to the conservation of the Piping plover, habitat that requires special protection.

A study of how oil transported through Line 5 might spread in the event of a spill near the north and south shores of the Straits of Mackinac⁴⁷ indicates that a spill from the offshore sections of Line 5 may affect protected species that inhabit the coasts of the Upper and Lower Peninsulas and the islands in the Straits. These include the Piping Plover, dwarf lake iris, Houghton's goldenrod, Michigan monkey-flower, and Pitcher's thistle. The study used a hydrodynamic model of the connected Michigan-Huron system to produce computer simulations and animations of hypothetical tracer releases in the Straits.⁴⁸ The study examined two 20-day release scenarios, one beginning in early August and the other beginning in late September.⁴⁹

In the August release scenario, the study found that tracers impinged on the shore of Lake Huron just east of the Straits as far south as Rogers City, Michigan.⁵⁰ In the September release scenario, the study found that tracers impinged on the shore of Lake Huron from Mackinaw City halfway to Cheboygan, Michigan.⁵¹ In both release scenarios considered by the study, "the shoreline areas most likely to be impacted by a contaminant release in the Straits are Mackinac Island, Bois Blanc Island, and the Lake Huron shoreline from Mackinac City to Rogers City."⁵² This area stretches across Emmet, Cheboygan, and Presque Isle counties and includes the very habitat crucial to the survival of the Piping Plover, dwarf lake iris, Houghton's goldenrod, Michigan monkey-flower, and Pitcher's thistle.

For all the foregoing reasons, assuming an adequate FRP could be devised or implemented for the offshore sections of Line 5 located in, on, or under the Straits of Mackinac, the St. Clair River, and other inland navigable waters that Line 5 crosses, such a plan is critical.

2. Offshore pipelines have spilled in navigable waters landward of the coast line, highlighting the need for regulations requiring both adequate FRPs and that pipeline owners and operators comply with them

DOT's Pipeline and Hazardous Materials Safety Administration "determined that hazardous liquid pipelines cross inland bodies of water at 18,136 locations" in the United

⁴⁷ David J. Schwab, Univ. of Mi. Water Center, *Straits of Mackinac Contaminant Release Scenarios: Flow Visualization and Tracer Simulations* at 2 (May 16, 2014), available at <http://graham.umich.edu/publications/mackinac-report>.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 5.

⁵² *Id.* at 7.

States.⁵³ The Keystone XL oil pipeline alone would cross nearly 2,000 rivers, streams and reservoirs in Montana, South Dakota and Nebraska.⁵⁴

This is cause for serious concern. Rivers especially have a penchant for scouring, which can uncover the pipelines buried beneath the riverbed and expose them to forces that cause spills and leaks.⁵⁵ “Active free-flowing rivers can carve with enough ferocity to lower their riverbeds by 20 feet or shift the waterway onto an entirely new path, which can add new stresses to the pipeline or put the river over pipe that has less cover or lacks reinforcement or protective cement casings.”⁵⁶ This has led to ruptures and spills.

PHMSA “identified 20 accidents occurring at inland water crossings between 1991 and October 2012.”⁵⁷ These accidents resulted in spills in the Big Sioux River in South Dakota and Iowa; the San Jacinto River in Texas; the Red River in Louisiana and in Texas; the Kentucky River in Kentucky; the Atchafalya River in Louisiana; Pole Cat Creek, Pawnee Creek, and Cotton Creek in Oklahoma; the Missouri River in Nebraska and in Iowa; and the Yellowstone River in Montana, among others.⁵⁸

In fact, just this year another oil pipeline crossing the iconic Yellowstone River ruptured. The 2011 and 2015 ruptures together spilled more than 100,000 gallons of oil into a river that supports endangered and threatened species, as well as fishing and rafting.

The first Yellowstone incident is known as the “Silvertip Pipeline Incident.” On July 1, 2011, ExxonMobil’s Silvertip Pipeline ruptured under the Yellowstone River, spilling approximately 1,500 barrels, or 63,000 gallons of crude oil into the river.⁵⁹ High floodwaters had uncovered the pipe, leaving it unprotected from the fast-moving current and traveling debris.⁶⁰

⁵³ PHMSA, *Report to Congress, Results of Hazardous Liquid Incidents at Certain Inland Water Crossings Study 1*, 3 (Aug. 23, 2013), available at <http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Report%20to%20Congress%20-%20Water%20Crossings%20Study.pdf> [hereinafter “*Water Crossings Study*”].

⁵⁴ Inside Climate News, *Yellowstone Oil Spills Expose Threat to Pipelines under Rivers Nationwide*, available at <http://insideclimatenews.org/news/06022015/yellowstone-oil-spills-expose-threat-pipelines-under-rivers-nationwide>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Water Crossings Study* at 2.

⁵⁸ *Id.* at 7-9.

⁵⁹ Montana Dep’t of Env’t. Quality, *Silvertip Oil Spill*, available at <http://www.deq.mt.gov/statesuperfund/silvertipoilspill/default.mcpx#Information>; U.S. Env’t. Protection Agency, *Silvertip Pipeline Incident Fact Sheet 1* (Jul. 6, 2011), available at <http://deq.mt.gov/StateSuperfund/silvertipoilspill/factsheets.mcpx>.

⁶⁰ Inside Climate News, *Yellowstone Oil Spills Expose Threat to Pipelines under Rivers Nationwide*, available at <http://insideclimatenews.org/news/06022015/yellowstone-oil-spills-expose-threat-pipelines-under-rivers-nationwide>.

Oil was found as far as seventy miles downstream from the site of the spill.⁶¹ Many heavily oiled flood debris piles were found along the shorelines and islands in the river.⁶²

The stretch of river affected by the spill provides habitat for the Pallid Sturgeon, an endangered fish species, and migratory birds.⁶³ According to a December 2012 report, recovery efforts located 124 animals that were dead upon recovery or died shortly after capture.⁶⁴ These efforts also located 131 animals that were treated and released.⁶⁵ Their fate is unknown. Three weeks after the spill, reports were that oiled animals included bald eagles, other raptors, a pelican, a Great Blue heron, yellow warblers, Canada geese, Common mergansers, snakes, and toads.⁶⁶

The second spill in the Yellowstone River is known as the “Poplar Pipeline Incident.” On January 17, 2015, Bridger’s Poplar Pipeline ruptured under the Yellowstone River, spilling up to 1,200 barrels, or 50,400 gallons of crude oil.⁶⁷ Once again, river scour was likely a key factor in the accident.⁶⁸

The spill contaminated a local drinking water supply and sickened local residents.⁶⁹ Its impact on fish and wildlife has not been determined.⁷⁰

Three weeks after the Poplar Pipeline Incident, cleanup efforts were halted because of dangerous ice conditions. This underscores the critical necessity of regulations requiring owners and operators of oil pipelines to prepare, submit, and obtain approval of adequate FRPs, capable

⁶¹ Montana Dep’t of Env’t. Quality, *Silvertip Oil Spill*, available at <http://www.deq.mt.gov/statesuperfund/silvertipoilspill/default.mcp#Information>.

⁶² U.S. Env’t. Protection Agency, *Update on the Yellowstone River oil spill (Silvertip Pipeline)* 1 (Jul. 19, 2011), available at <http://deq.mt.gov/StateSuperfund/silvertipoilspill/factsheets.mcp>.

⁶³ U.S. Env’t. Protection Agency, *Silvertip Pipeline Incident Fact Sheet* at 3 (Jul. 6, 2011), available at <http://deq.mt.gov/StateSuperfund/silvertipoilspill/factsheets.mcp>.

⁶⁴ Montana Dep’t of Env’t. Quality, *Silvertip Pipeline Crude Oil Release, Site Update 2* (Jan. 2012), available at <http://www.deq.mt.gov/statesuperfund/silvertipoilspill/default.mcp#Documents>. Some dead animals did not appear to have been impacted by oil.

⁶⁵ *Id.*

⁶⁶ U.S. Env’t. Protection Agency, *Silvertip Pipeline Incident: Update 4* (Jul. 23, 2011), available at <http://deq.mt.gov/StateSuperfund/silvertipoilspill/factsheets.mcp>.

⁶⁷ Montana Dep’t of Env’t. Quality, *Bridger Pipeline’s Oil Spill on the Yellowstone River near Glendive: Incident Overview*, available at <http://www.deq.mt.gov/yellowstonespill2015.mcp#Maps%20and%20Documents>; U.S. Env’t. Protection Agency, *Bridger Pipeline Release*, available at www2.epa.gov/region8/bridger-pipeline-release.

⁶⁸ Inside Climate News, *Yellowstone Oil Spills Expose Threat to Pipelines under Rivers Nationwide*, available at <http://insideclimatenews.org/news/06022015/yellowstone-oil-spills-expose-threat-pipelines-under-rivers-nationwide>. “Stephen Holnbeck, a Helena, Mont.-based hydraulic engineer with the U.S. Geological Survey’s Wyoming-Montana Water Science Center, said what’s known about the spill so far points to scouring as a key factor.” *Id.*

⁶⁹ American Rivers, *Pipeline Company Gives up on Cleaning Its Oil Spill* (Feb. 6, 2015), available at <http://www.americanrivers.org/blog/yellowstone-oilspill-proving-difficult-to-clean-up/>.

⁷⁰ *Id.*

of responding effectively to all reasonably foreseeable conditions in order to prevent, mitigate, and minimize the significant harm that oil spilling from offshore pipelines in navigable waters landward of the coast line can cause.

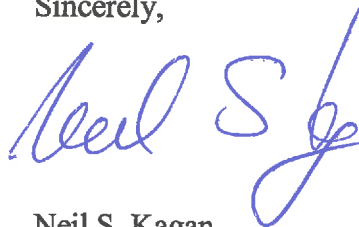
II. CONCLUSION

DOT must remedy its violation of the CWA and Executive Order 12777 by issuing regulations requiring an owner or operator of an offshore facility landward of the coast line to prepare, submit, and obtain agency approval of an FRP that complies with CWA § 311(j), 33 U.S.C. § 1321(j). Among other things, such an FRP must ensure the availability of private personnel and equipment necessary to remove, to the maximum extent practicable, a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, of oil or a hazardous substance.

If, within sixty days, DOT does not issue such regulations, NWF will bring an action against the agency for violating the CWA and Executive Order 12777, seeking declaratory relief, injunctive relief, and litigation costs, including attorney and expert witness fees.

Should you have any questions, please feel free to contact me.

Sincerely,



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