



**NATIONAL WILDLIFE FEDERATION®**  
**Great Lakes Regional Center®**

February 22, 2016

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

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The Honorable Sally Jewell  
Secretary, U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
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RE: Notice of Intent to Sue for Violations of the National Environmental Policy Act, Endangered Species Act, and Oil Pollution Act in Connection with Agency Approval of Enbridge Pipelines Inc. Superior Region (#866) and Chicago Region (#867) Facility Response Plans for Lakehead Pipeline "Line 5"

Dear Administrator and Madam Secretary:

I am writing on behalf of the National Wildlife Federation ("NWF") to notify you of its intent to sue the Pipeline and Hazardous Materials Safety Administration ("PHMSA") for violating the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; the Endangered Species Act ("ESA"), 16 U.S.C. § 1536; and the Oil Pollution Act of 1990 ("OPA" or "the Act"), Pub. L. No. 101-380, § 4202(a)(6), 104 Stat. 484 (1990) (codified in part at 33 U.S.C. § 1321(j)), and Executive Order 12777, 56 Fed. Reg. 54757 (Oct. 18, 1991).

On July 11, 2013, PHMSA approved facility response plans ("FRPs") for the onshore and offshore sections of Line 5 of the Lakehead Pipelines ("Line 5"), owned by Enbridge Energy, Limited Partnership, and operated by Enbridge (U.S.) Inc. (collectively, "Enbridge"). PHMSA violated NEPA by failing to prepare an environmental impact statement ("EIS") prior to approving the onshore FRPs, because approving them was a major federal action significantly affecting the quality of the human environment. PHMSA also violated the ESA by failing, prior to approving the onshore FRPs (1) to determine whether species listed or proposed to be listed may be present in the area traversed by Line 5, (2) to determine whether approving the FRPs

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may affect listed species or critical habitat in the area traversed by the pipeline, or (3) to consult with the U.S. Fish and Wildlife Service (“FWS”).

Because PHMSA failed to discharge these mandatory NEPA and ESA duties, the agency had no authority to approve the onshore FRPs. Accordingly, PHMSA’s approval has no force or effect. PHMSA must so inform the owner and operator of the onshore sections of Line 5, formally revoke its approval of the FRPs for the onshore sections of Line 5, and comply with NEPA and the ESA before approving the existing onshore FRPs or any other FRPs that Enbridge may submit for the onshore sections of Line 5.

PHMSA has also violated the OPA by approving FRPs for the inland offshore sections of Line 5, including those in, on, or under the Straits of Mackinac and the St. Clair River. Such approvals were in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, because only the Secretary of the U.S. Department of Transportation has the statutory authority, delegated from the President through the Secretary of the U.S. Department of the Interior, to review and approve FRPs for inland offshore facilities. Accordingly, PHMSA’s approvals have no force or effect. PHMSA must so inform the owner and operator of the inland offshore sections of Line 5 and formally revoke its approval of FRPs for the inland offshore sections of Line 5.

If PHMSA does not take these steps within sixty days, NWF will initiate a lawsuit against the agency for violating NEPA, the ESA, and the OPA.

## **I. PHMSA VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT**

NEPA requires a federal agency to prepare an EIS when its proposal to take major federal action raises substantial questions whether that action may significantly affect the environment.<sup>1</sup> NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast.”<sup>2</sup> PHMSA violated NEPA, exposing the natural resources and people of the State of Michigan and the Great Lakes to potentially significant adverse impacts without first considering and publicly disclosing those impacts in an EIS.

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<sup>1</sup> 42 U.S.C. § 4332(2)(C); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (“Major Federal action is defined to include actions with effects that *may* be major...”); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) (“[A]n EIS *must* be prepared if ‘substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor.’”) (citations omitted); *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 825 (E.D. Mich. 2008) (“[I]n challenging an agency’s decision to issue a FONSI [Finding of No Significant Impact], ‘a plaintiff need not show that significant effects *will in fact occur* [;] raising substantial questions whether a project may have a significant effect is sufficient.’”) (citations omitted).

<sup>2</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

**A. PHMSA's Approval of the FRPs for the Onshore Sections of Line 5 Was a Federal Action**

Under the Clean Water Act, owners or operators of onshore pipeline facilities “that ... could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines” must submit and obtain approval of an FRP from PHMSA.<sup>3</sup> Without federal approval, such an onshore facility may not handle, store, or transport oil.<sup>4</sup> Under the reasoning in *Ramsey v. Kantor*, such approval constitutes federal action.<sup>5</sup> Indeed, in *Spiller v. Walker*, the court rejected an argument that construction of an oil pipeline was not federal action, holding “DOT’s extensive and intricate oversight and approval of the [pipeline’s] safety and emergency-response plan constitutes major Federal action significantly affecting the human environment.”<sup>6</sup>

In January 2013, Enbridge Pipelines Inc. submitted FRPs for Line 5, consisting of an Integrated Contingency Plan and Annexes for the Superior Region (#866) and Chicago Region (#867) Response Zones.<sup>7</sup> 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, 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.”<sup>8</sup> In accepting and approving the FRPs, PHMSA confirmed Enbridge Pipelines Inc.’s own determination that 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.

For these reasons, PHMSA’s approval of the FRPs for the onshore sections – effectively authorizing Line 5 to handle, store, or transport oil – was a major federal action.<sup>9</sup>

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<sup>3</sup> 33 U.S.C. § 1321(j)(5)(E)(iii); 49 C.F.R. § 194.3.

<sup>4</sup> 33 U.S.C. § 1321(j)(5)(F)(i); 49 C.F.R. § 194.7(a).

<sup>5</sup> 96 F.3d 434, 444 (9th Cir. 1996) (“[I]f a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action.”); see also *Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986); see 40 C.F.R. § 1508.18(a) (“Actions include ... activities, including projects ... entirely or partly ... regulated, or approved by federal agencies.”), (b)(4) (“Federal actions [include] ... Approval of specific projects ... includ[ing] actions approved by permit or other regulatory decision.”).

<sup>6</sup> No. A-98-CA-255-SS, 1998 U.S. Dist. LEXIS 18341, \*40-41 (W.D. Texas, Aud. 25, 1998) (emphasis added).

<sup>7</sup> See Enbridge Pipelines, Inc., *Integrated Contingency Plan: Superior Region (#866) Response Zone, Version #1, Revision #3* at S1-1 (Jan. 2014) [hereafter “Superior Region Plan”]; Enbridge Pipelines, Inc., *Integrated Contingency Plan: Chicago Region (#867) Response Zone, Version #1, Revision #4* at S1-1 (Jan. 2014) [hereafter “Chicago Region Plan”].

<sup>8</sup> Superior Region Plan at A5-5; Chicago Region Plan at A5-5.

<sup>9</sup> 42 U.S.C. § 4332(2)(C).

**B. NEPA Applies to PHMSA’s Approval of the FRPs for the Onshore Sections of Line 5<sup>10</sup>**

NEPA applies to PHMSA’s approval of FRPs because the agency has the authority, the duty, and the discretion to consider environmental effects in deciding whether an FRP meets the criteria for approval.<sup>11</sup> Under the Oil Pollution Act, approval of an FRP is discretionary because it requires an analysis whether the requirements of the Act have been met.<sup>12</sup>

For instance, under the OPA, an FRP must “be consistent with the requirements of the National Contingency Plan [(“NCP”)] and Area Contingency Plans.”<sup>13</sup> The National Contingency Plan protects endangered species and requires evaluations “to assess threats to the environment, especially sensitive habitats and critical habitats of species protected under the Endangered Species Act.”<sup>14</sup> Thus, determining whether an FRP is consistent with the NCP requires a thorough evaluation of the plan.<sup>15</sup>

An FRP also must identify and ensure that an owner or operator has the “necessary” resources (that is to say, personnel and equipment) to mitigate or prevent a substantial threat of a worst case discharge of oil or a hazardous substance and to remove, to the maximum extent practicable, a worst case discharge of oil or a hazardous substance.<sup>16</sup> The term “remove” means “containment and removal of the oil ... from the water and shorelines,” as well as “other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”<sup>17</sup> Thus, PHMSA must determine whether a proposed FRP provides for the resources “necessary” to remove by “necessary” actions a worst case discharge “to the maximum extent practicable.” The term “maximum extent practicable” “means the limits of available technology and the practical and technical limits on a pipeline operator in planning the response resources required to provide the on-water recovery capability and the shoreline protection and

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<sup>10</sup> PHMSA’s position is that NEPA does not apply because the agency’s review of FRPs is nondiscretionary. Letter from Madeline Bush, FOIA Officer, PHMSA, to Neil Kagan, NWF, at 2 (February 12, 2015).

<sup>11</sup> Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852, at \*6-7 (9th Cir. Dec. 29, 2015) (Gould, J., dissenting).

<sup>12</sup> *Id.* at \*5.

<sup>13</sup> 33 U.S.C. § 1321(j)(5)(D)(i); 49 C.F.R. § 194.107(b).

<sup>14</sup> Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852, at \*3 (9th Cir. Dec. 29, 2015) (Gould, J., dissenting) (quoting 40 C.F.R. § 300.430(e)(2)(i)(G); *see also* 49 C.F.R. § 194.107(b)(2)(ii) (specifying that a plan must identify environmentally sensitive areas to be consistent with the Area Contingency Plan).

<sup>15</sup> *Id.*

<sup>16</sup> 33 U.S.C. § 1321(j)(5)(D)(iii); 49 C.F.R. § 194.107(a).

<sup>17</sup> 33 U.S.C. § 1321(a)(8); *see also* 49 C.F.R. § 194.5.

cleanup capability to conduct response activities<sup>18</sup> for a worst case discharge from a pipeline in adverse weather.”<sup>19</sup>

In summary, PHMSA is directed to determine the following: the resources “necessary to mitigate or prevent a substantial threat of a worst case discharge of oil or a hazardous substance; the actions “necessary” to prevent, minimize, or mitigate damage to fish, shellfish, wildlife, shorelines, and beaches in the environment; the “maximum” extent “practicable” to which those actions can be executed; and whether the resources identified in an FRP are, indeed, the ones that are “necessary,” to remove oil. The nature of these determinations necessitates the exercise of subjective judgment. In other words, they require the agency to use discretion.<sup>20</sup>

Neither the OPA nor PHMSA’s regulations dictate that the agency must accept an owner’s or operator’s judgment that these requirements have been met simply because the owner or operator has made a judgment that they do. Nor do the OPA or PHMSA’s regulations place any constraint on the agency’s discretion to review whether the owner’s or operator’s judgment is correct. They do not obligate PHMSA to approve any FRP regardless of how it addresses the elements of 33 U.S.C. § 1321(j)(5)(D).

On the contrary, the OPA places a mandatory duty on PHMSA, expressly directing that it “shall ... review” a proposed FRP to determine whether it satisfies those requirements. This requires a thorough evaluation of an FRP.<sup>21</sup> If the review shows that the FRP does not satisfy the requirement, the OPA directs that PHMSA “shall ... require amendments” to the plan.<sup>22</sup> This means PHMSA not only has the obligation to assess whether an owner’s or operator’s judgment is valid. PHMSA also has the discretion to determine whether and what amendments must be made to ensure that the owner or operator has the necessary resources, both to prevent a discharge and to respond to an actual discharge to the maximum extent practicable necessary to prevent, minimize, or mitigate damage to fish, shellfish, wildlife, shorelines, and beaches.<sup>23</sup> Only once such amendments are made may the plan be approved.<sup>24</sup> Thus, PHMSA has the ability and the responsibility to stop or, at least, minimize or mitigate harm to the environment.

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<sup>18</sup> “Response activities means 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. § 194.5.

<sup>19</sup> *Id.*

<sup>20</sup> Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852, at \*2-\*3 (9th Cir. Dec. 29, 2015) (Gould, J., dissenting).

<sup>21</sup> *Id.* at \*3.

<sup>22</sup> 33 U.S.C. § 1321(j)(5)(E)(i) & (ii).

<sup>23</sup> Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852, at \*5 (9th Cir. Dec. 29, 2015) (Gould, J., dissenting).

<sup>24</sup> 33 U.S.C. § 1321(j)(5)(E)(iii); *see also* 135 Cong. Rec. H8241-07 (Nov. 9, 1989) (statement of Mr. Sikorski), 1989 WL 195876 (legislative history explaining spill plans “are not academic, hypothetical, dust collectors. ... And the Government experts should have to sign off on them before they are approved ... [because] a paper plan without benefit of serious independent review, without standards, and public review, did not protect Alaska or Alaskans” after the *Exxon Valdez* spill).

Accordingly, PHMSA's discretion to approve an FRP means the agency must comply with NEPA by considering and evaluating alternatives to a proposed FRP.

**C. PHMSA's Approval of the FRPs for the Onshore Sections of Line 5 Raises Substantial Questions Whether Significant Effects on the Environment Will Ensur**

In determining whether a federal action requires an EIS because it may significantly affect the environment, an agency must consider the context and intensity of the action.<sup>25</sup> "Context refers to the setting in which the proposed action takes place."<sup>26</sup>

Because operation of a pipeline is contingent on the approval of an FRP, the context here is the operation of Line 5. Line 5 is a 641.3-mile pipeline.<sup>27</sup> It delivers natural gas liquids and crude oil from Superior, Wisconsin, through Michigan, to Sarnia, Ontario, Canada.<sup>28</sup> It has the capacity to transport up to 540,000 barrels per day, which is the equivalent of 22.7 million gallons per day.<sup>29</sup>

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.<sup>30</sup> In the Upper Peninsula of Michigan, Line 5 passes through the following counties: Gogebic, Iron, Dickinson, Marquette, Delta, Schoolcraft, and Mackinac.<sup>31</sup> 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.<sup>32</sup> It then crosses under the St. Clair River to Canada.<sup>33</sup>

Another type of context that should be considered is the past performance of the owner or operator of the pipeline, because it bears on the risk the action poses to the environment. "According to Enbridge's own data, between 1999 and 2010, across all of the company's

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<sup>25</sup> 40 C.F.R. § 1508.27.

<sup>26</sup> *Ocean Advocates v. U.S. Army Corps of Engineers*, *supra* at n. 1, 402 F.3d at 865; 40 C.F.R. § 1508.27(a).

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

<sup>28</sup> Superior Region Plan at A1-8, A1-15; Chicago Region Plan at A1-8, A1-16, A1-19.

<sup>29</sup> 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>.

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

<sup>31</sup> Superior Region Plan at A1-13 (Table 1.2)

<sup>32</sup> Superior Region Plan at A1-13 (Table 1.2); Chicago Region Plan at A1-13 (Table 1.2).

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

operations there were 804 spills that released 161,475 barrels (approximately ... 5 million gallons) of hydrocarbons into the environment.”<sup>34</sup> These spills include the largest inland oil spill in U.S. history: a spill of almost a million gallons in the Kalamazoo River, in Michigan, in 2010.<sup>35</sup>

Enbridge’s most recent data shows 349 spills and leaks occurred between 2011 and 2014, releasing 19,703 barrels, or 827,526 gallons of oil.<sup>36</sup> In 2014, five spills and releases were significant, resulting in spills and releases of 113, 975, 200, 113, and 1,346 barrels, respectively, for a total of 2,747 barrels or 115,374 gallons of oil.<sup>37</sup>

In considering the intensity or severity of the potential environmental impacts, an agency should consider a number of factors. Several of these factors indicate that Line 5 poses the potential for severe environmental impacts, namely, the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”;<sup>38</sup> “[t]he degree to which the action affects public health or safety”;<sup>39</sup> and “[t]he degree to which the action may adversely affect a federally endangered or threatened species or its [critical] habitat.”<sup>40</sup> Any one of these factors is sufficient to require preparation of an EIS.<sup>41</sup>

**1. Line 5 traverses a geographic area that has unique characteristics 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,”<sup>42</sup> which “means a drinking water or ecological resource area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release.”<sup>43</sup> Line 5 also crosses many wetlands, lakes, and streams in the Upper Peninsula.<sup>44</sup>

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<sup>34</sup> Richard Girard, Polaris Institute, *Out on the Tar Sands Mainline: Mapping Enbridge’s Web of Pipelines* at 2 (Mar. 2012), available at [https://d3n8a8pro7vhmx.cloudfront.net/polarisinstitute/pages/29/attachments/original/1410802206/Updated\\_Enbridge\\_Profile\\_March\\_2012.pdf?1410802206](https://d3n8a8pro7vhmx.cloudfront.net/polarisinstitute/pages/29/attachments/original/1410802206/Updated_Enbridge_Profile_March_2012.pdf?1410802206). “These figures were compiled from Enbridge’s own Environmental, Health and Safety and Corporate Social Responsibility Reports, <http://csr.enbridge.com/>.” *Id.*

<sup>35</sup> [http://en.wikipedia.org/wiki/Kalamazoo\\_River\\_oil\\_spill](http://en.wikipedia.org/wiki/Kalamazoo_River_oil_spill).

<sup>36</sup> Enbridge, *System Integrity and Leak Detection*, available at <http://csr2014.enbridge.com/report-highlights/material-topics/system-integrity-and-leak-detection/2014-performance/>.

<sup>37</sup> *Id.*

<sup>38</sup> 40 C.F.R. § 1508.27(b)(3).

<sup>39</sup> *Id.* at § 1508.27(b)(2).

<sup>40</sup> *Id.* at § 1508.27(b)(9).

<sup>41</sup> See *Ocean Advocates v. U.S. Army Corps of Engineers*, *supra* at n. 1, 402 F.3d at 865.

<sup>42</sup> Superior Region Plan at A3-2, § 3.1 and HCA Management Plan at 15-21, 22-25 (Mar. 2013).

<sup>43</sup> 49 C.F.R. § 195.6.

<sup>44</sup> Superior Region Plan at §§ 3.0.11, 3.0.12.

Enbridge Pipelines Inc. itself determined that 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.<sup>45</sup> 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.<sup>46</sup>

In addition to the Unusually Sensitive Areas, wetlands, lakes, and streams Line 5 crosses, the following state / local parks, state forests, and national forests in the Upper Peninsula are within five miles of Line 5's response zone corridor:

- a) State / Local Parks
  - (1) Bewabic Park
  - (2) Fort Michilmackinac State Park
  - (3) Indian Lake State Park
  - (4) Lake Gogebic State Park
- b) State Forests
  - (1) Lake Superior State Forest
  - (2) Escanaba River State Forest
  - (3) Mackinaw State Forest

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<sup>45</sup> 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.”).

<sup>46</sup> Superior Region Plan at A1-7; Chicago Region Plan at A1-7.



- c) National Forests
  - (1) Ottawa National Forest
  - (2) Hiawatha National Forest<sup>47</sup>

In the Lower Peninsula, Jaycee Park, the Au Sable State Forest, the Mackinaw State Forest, and the Huron-Manistee National Forest are within five miles of Line 5's response corridor.<sup>48</sup> Several historical / archaeological sites apparently are within the response area corridor.<sup>49</sup>

An oil spill, and a worst-case discharge of oil in particular, may significantly harm if not destroy the unique cultural and natural resources in the shadow of Line 5. So, too, a spill may significantly impact or destroy the bountiful fish and wildlife,<sup>50</sup> as well as the recreation and tourism the ecological resources in the area support.<sup>51</sup> For instance, the 2010 Enbridge Line 6B oil discharge 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.<sup>52</sup> 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.<sup>53</sup>

The potential for similar or worse significant adverse impacts on historic or cultural resources, park lands, wetlands, lakes, streams, forests, or ecologically sensitive areas from an oil discharge from Line 5 necessitates an EIS.

## **2. Line 5 may significantly affect public health or safety**

The FRPs indicate that Line 5 crosses or runs in the vicinity of public water supplies, water intakes, and wellhead protection areas; that 52 schools are within one-half mile of the response zone corridor; that 126 medical facilities are within one-half mile of the response zone corridor; that several residential clusters and businesses exist within the response zone corridor;

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<sup>47</sup> Superior Region Plan at A3-1, § 3.0.4.

<sup>48</sup> Chicago Region Plan at A3-1 – A3-2, § 3.0.4. Line 5 may cross Unusually Sensitive Areas, wetlands, lakes, and streams in the Lower Peninsula, but it is impossible to tell from the publicly available version of the FRP. In some cases, this is because the relevant pages have been redacted, in others it is because the information is not in the FRP. *See id.* at A3-3, §§ 3.0.11, 3.0.12; A3-6 *et seq.*

<sup>49</sup> Superior Region Plan at A3-1, § 3.0.13; Chicago Region Plan at A3-3, § 3.0.13.

<sup>50</sup> *See Ocean Advocates v. U.S. Army Corps of Engineers, supra* at n. 1, 402 F.3d at 868 (recognizing that an oil spill could destroy and disrupt ecosystems).

<sup>51</sup> *Cf. Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 816 (E.D. Mich. 2008) (holding an EIS must address the effects of a proposed action on a unique geographic area renowned for its recreational activities).

<sup>52</sup> 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>.

<sup>53</sup> *Id.* at 17.

and that both interstate and state highways occur along the pipeline route, which may be affected during a response to a discharge.<sup>54</sup>

Following the Enbridge Line 6B oil discharge near Marshall, Michigan, in 2010, individuals in the vicinity began complaining of strong, noxious odors, reporting respiratory, gastrointestinal, and neurological symptoms.<sup>55</sup> Three hundred twenty individuals suffered from acute adverse health effects.<sup>56</sup> The predominant symptoms were headache, nausea, and respiratory symptoms.<sup>57</sup> “These symptoms are consistent with the published literature ... regarding potential health effects associated with acute exposure to crude oil.”<sup>58</sup> The Line 6B spill also damaged or destroyed private and public properties and caused the permanent relocation of about 150 families.<sup>59</sup>

The potential for similar or worse significant adverse impacts on public health or safety from an oil discharge independently necessitates an EIS.

**3. A discharge from Line 5 may significantly adversely affect federally-endangered or threatened species and critical habitat**

**a) FWS has listed a number of species that inhabit the area crossed by Line 5. FWS has also designated critical habitat that overlaps the area crossed by Line 5**

**(1) Piping Plover**

The Piping plover is listed as an endangered species in Michigan.<sup>60</sup> The Piping Plover’s habitat consists of beaches along shorelines of the Great Lakes.<sup>61</sup> “Since the piping plover was listed as endangered in 1986, nests have been recorded at ... breeding sites in ... Cheboygen [sic], ... Emmet, ... and Mackinac counties.<sup>62</sup>

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<sup>54</sup> Superior Region Plan at A3-1, §§ 3.0.2, 3.0.5, 3.0.7, 3.0.8, 3.0.9, 3.0.14; Chicago Region Plan at A3-1, § 3.0.2, A3-2, § 3.0.9, A3-4, § 3.0.14. The Chicago Region Plan redacts information about schools, medical facilities, and residential areas. *Id.* at A3-2.

<sup>55</sup> 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](http://www.michigan.gov/mdch/0,1607,7-132-2945_5105_29181-264554--,00.html).

<sup>56</sup> *Id.* at 4, 17.

<sup>57</sup> *Id.* at 4, 17.

<sup>58</sup> *Id.*

<sup>59</sup> Inside Climate News, *The Dilbit Disaster: Inside the Biggest Oil Spill You’ve Never Heard Of, Part 1* (Jun. 26, 2012), available at <http://insideclimatenews.org/news/20120626/dilbit-diluted-bitumen-enbridge-kalamazoo-river-marshall-michigan-oil-spill-6b-pipeline-epa>.

<sup>60</sup> 50 C.F.R. § 17.11(h).

<sup>61</sup> U.S. Fish and Wildlife Service, Piping Plover (*Charadrius melodus*), available at <http://www.fws.gov/midwest/endangered/pipingplover/index.html>.

<sup>62</sup> Hyde, D.A. 1999. Special animal abstract for *Charadrius melodus* (piping plover) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Charadrius\\_melodus.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Charadrius_melodus.pdf).

FWS has designated the critical habitat for the Great Lakes breeding population of the Piping Plover.<sup>63</sup> In pertinent part, “[t]he term ‘critical habitat’ for a threatened or endangered species means – (i) the specific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.”<sup>64</sup>

The Piping plover’s critical habitat includes critical habitat units in Schoolcraft, Mackinac, Emmet, Cheboygan, and Presque Isle counties in Michigan.<sup>65</sup> Except for Presque Isle, these are all counties traversed by Line 5. “The primary constituent elements required to sustain the Great Lakes breeding population of the piping plover are found on Great Lakes islands and mainland shorelines that support open, sparsely vegetated sandy habitats, such as sand spits or sand beaches, that are associated with wide, unforested systems of dunes and inter-dune wetlands.”<sup>66</sup>

“In order for habitat to be physically and biologically suitable for piping plovers, it must have ... a low level of disturbance from human activities and from domestic animals.”<sup>67</sup> “The current small size of the Great Lakes piping plover population renders it extremely vulnerable to chance ... environmental events which could potentially eradicate this species from the region (Wemmer 1999).<sup>68</sup> Oil spills and oil spill clean-up might have an adverse effect on the Piping Plover’s critical habitat.”<sup>69</sup>

## (2) Hine’s Emerald Dragonfly

The Hine’s emerald dragonfly is listed as an endangered species in Michigan.<sup>70</sup> It is known from eleven sites in Mackinac County and one site in Presque Isle Count.<sup>71</sup>

FWS has designated critical habitat for Hine’s emerald dragonfly.<sup>72</sup> The dragonfly’s critical habitat includes critical habitat units in Mackinac and Presque Isle counties in

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<sup>63</sup> 50 C.F.R. § 17.95-b-Birds-Part 11, Piping Plover (*Charadrius melodus*) (Great Lakes Breeding Population).

<sup>64</sup> 16 U.S.C.A. § 1532(5)(A).

<sup>65</sup> 50 C.F.R. § 17.95-b-Birds-Part 11, Piping Plover (*Charadrius melodus*) (Great Lakes Breeding Population), (1), Units MI-2, 3, 4, 5, 6, 20, 21, 22.

<sup>66</sup> *Id.* at § 17.95-b-Birds-Part 11, (2)(i).

<sup>67</sup> *Id.*

<sup>68</sup> Hyde, D.A. 1999. Special animal abstract for *Charadrius melodus* (piping plover) at 2, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Charadrius\\_melodus.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Charadrius_melodus.pdf).

<sup>69</sup> U.S. Fish and Wildlife Service, Piping Plover – Great Lakes Population, Critical Habitat Questions [sic] and Answers, available at <http://www.fws.gov/midwest/endangered/pipingplover/qandas.html>.

<sup>70</sup> 50 C.F.R. § 17.11(h).

<sup>71</sup> Cuthrell, D.L. 1999. Special animal abstract for *Somatochlora hineana* (Hine’s emerald dragonfly) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Somatochlora\\_hineana.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Somatochlora_hineana.pdf).

<sup>72</sup> 50 C.F.R. § 17.95-i-Insects, Hine’s Emerald Dragonfly (*Somatochlora hineana*).

Michigan.<sup>73</sup> “Adults lay their eggs in small streams in fens and sedge meadows. After hatching, the aquatic larvae spend up to five years in wetlands before completely maturing and emerging as adult dragonflies.”<sup>74</sup>

“Contamination of wetlands by ... pollutants ... poses a threat [to the Hine’s emerald dragonfly]. The dragonfly depends on pristine wetland or stream areas, with good water quality, for growth and development.”<sup>75</sup>

### (3) Northern long-eared bat

The Northern long-eared bat is listed as a threatened species in Michigan.<sup>76</sup> “The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>77</sup>

In the Upper Peninsula of Michigan, the bat’s range includes every county Line 5 crosses: Gogebic, Iron, Dickinson, Marquette, Delta, Schoolcraft, and Mackinac.<sup>78</sup> In the Lower Peninsula of Michigan, the bat’s range includes every county Line 5 crosses: Emmet, Cheboygan, Otsego, Crawford, Oscoda, Ogemaw, Arenac, Bay, Saginaw, Tuscola, Lapeer, and Saint Claire.<sup>79</sup> The bat’s range also includes Presque Isle County in the Lower Peninsula.<sup>80</sup>

The Northern long-eared bat it is one of the species of bats most impacted by the disease white-nose syndrome.<sup>81</sup>

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<sup>73</sup> 50 C.F.R. § 17.95-i-Insects, Hine’s Emerald Dragonfly (*Somatochlora hineana*), (1).

<sup>74</sup> U.S. Fish and Wildlife Service, Hine's emerald dragonfly (*Somatochlora hineana*), available at <http://www.fws.gov/midwest/endangered/insects/hed/index.html>.

<sup>75</sup> U.S. Fish and Wildlife Service, Hine's emerald dragonfly (*Somatochlora hineana*), available at [http://www.fws.gov/midwest/endangered/insects/hed/hins\\_fct.html](http://www.fws.gov/midwest/endangered/insects/hed/hins_fct.html).

<sup>76</sup> 50 C.F.R. § 17.11(h).

<sup>77</sup> 16 U.S.C.A. § 1532(20).

<sup>78</sup> U.S. Fish and Wildlife Service, Counties in Northern Long-eared Bat Range (Apr. 30, 2015, Excel Spreadsheet), available at <http://www.fws.gov/midwest/endangered/mammals/nleb/nlebRangeMap.html>; Superior Region Plan at A1-13 (Table 1.2).

<sup>79</sup> U.S. Fish and Wildlife Service, Counties in Northern Long-eared Bat Range (Apr. 30, 2015, Excel Spreadsheet), available at <http://www.fws.gov/midwest/endangered/mammals/nleb/nlebRangeMap.html>; Superior Region Plan at A1-13 (Table 1.2); Chicago Region Plan at A1-13 (Table 1.2).

<sup>80</sup> U.S. Fish and Wildlife Service, Counties in Northern Long-eared Bat Range (Apr. 30, 2015, Excel Spreadsheet), available at <http://www.fws.gov/midwest/endangered/mammals/nleb/nlebRangeMap.html>.

<sup>81</sup> U.S. Fish and Wildlife Service, Northern Long-Eared Bat (*Myotis septentrionalis*), available at <http://www.fws.gov/midwest/endangered/mammals/nleb/index.html>.

**(4) Kirtland's Warbler**

The Kirtland's warbler is listed as an endangered species in Michigan.<sup>82</sup> The warbler nests in jack pine forests in the northern part of the Lower Peninsula and in the Upper Peninsula.<sup>83</sup> The bulk of the breeding population occurs in Crawford, Oscoda, and Ogemaw counties in the Lower Peninsula.<sup>84</sup> The breeding range also includes Marquette, Delta, and Schoolcraft counties in the Upper Peninsula.<sup>85</sup> These are all counties traversed by Line 5.

“The ultimate limiting factor for the warbler is its specific nesting habitat.”<sup>86</sup> The Huron-Manistee National Forest manages jack pine habitat to conserve the warbler, and creates breeding habitat each year within designated Kirtland's warbler management areas.<sup>87</sup> The Hiawatha National Forest Plan objective is “to regenerate an average of 670 acres of Kirtland's warbler habitat per year with a goal to provide a minimum of 6,700 acres of jack pine in the appropriate size class.”<sup>88</sup>

**(5) Snuffbox**

The Snuffbox mussel is listed as an endangered species in Michigan.<sup>89</sup> “The snuffbox mussel has been confirmed recently in the Pine, Belle and St. Clair Rivers in St. Clair County.”<sup>90</sup>

“The existence of most of the remaining populations of ... snuffbox mussels is threatened by point and nonpoint source pollution.”<sup>91</sup>

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<sup>82</sup> 50 C.F.R. § 17.11(h).

<sup>83</sup> U.S. Fish and Wildlife Service, Kirtland's warbler (*Setophaga kirtlandii*), available at <http://www.fws.gov/midwest/endangered/birds/Kirtland/index.html>.

<sup>84</sup> U.S. Fish and Wildlife Service, Kirtland's Warbler, available at <http://www.fws.gov/midwest/endangered/birds/Kirtland/kiwamgmt.html>; Olson, J. A. 2002. Special animal abstract for *Dendroica kirtlandii* (Kirtland's warbler) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Dendroica\\_kirtlandii.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Dendroica_kirtlandii.pdf).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 3.

<sup>87</sup> See U.S. Fish and Wildlife Service, Kirtland's Warbler, available at <http://www.fws.gov/midwest/endangered/birds/Kirtland/kiwamgmt.html>; Memorandum of Understanding among the USDI, Fish and Wildlife Service, the Michigan Dep't of Natural Res., and the USDA, Forest Service, Eastern Region at 3, 4 (May 21, 2011), available at <http://www.fws.gov/midwest/endangered/birds/Kirtland/index.html> and [http://www.fws.gov/midwest/endangered/birds/Kirtland/pdf/KIWA\\_MOU27April2011.pdf](http://www.fws.gov/midwest/endangered/birds/Kirtland/pdf/KIWA_MOU27April2011.pdf).

<sup>88</sup> *Id.* at 4.

<sup>89</sup> 50 C.F.R. § 17.11(h).

<sup>90</sup> Carman, S.M. and R.R. Goforth. 2000. Special animal abstract for *Epioblasma triquetra* (snuffbox) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Epioblasma\\_triquetra.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Epioblasma_triquetra.pdf).

<sup>91</sup> U.S. Fish and Wildlife Service, Rayed Bean and Snuffbox Mussels, Questions and Answers, available at <http://www.fws.gov/midwest/endangered/clams/rayedbean/RayedBeanSnuffboxFinalListQAsFeb2012.html>.

Adult mussels, because they are sedentary (meaning that they tend to stay in one place), are easily harmed by toxins and poor water quality caused by pollution. Pollution may come from specific, identifiable sources such as accidental spills . . . . Contaminants may directly kill mussels, but they may also reduce water quality, affect the ability of surviving mussels to have young, or result in lower numbers or disappearance of host fish.<sup>92</sup>

#### (6) Hungerford's Crawling Water Beetle

The Hungerford's crawling water beetle is listed as an endangered species in Michigan.<sup>93</sup> It is known from the East Branch of the Maple River and from the Carp River, both in Emmet County.<sup>94</sup> Line 5 passes through Emmet County.

"All of the sites where the beetles have been found are characterized by open to partially open canopy, moderate to fast stream flow, good stream aeration, inorganic substrate and alkaline water conditions."<sup>95</sup> Stream modification, including pollution, has been the primary threat to the species.<sup>96</sup>

#### (7) Hart's-tongue Fern

The Hart's-tongue fern is listed as a threatened species in Michigan.<sup>97</sup> "Hart's-tongue is currently known from seven stations in eastern Mackinac County, supporting from about 25 to several hundred plants each."<sup>98</sup> "Four localities have been documented within the Hiawatha National Forest."<sup>99</sup> "Preservation of this extremely rare fern will depend, in the short term, on protection of its habitat from major disturbances and from unscrupulous collectors."<sup>100</sup>

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<sup>92</sup> U.S. Fish and Wildlife Service, Snuffbox (freshwater mussel), *Epioblasma triquetra*, Fact Sheet, available at <http://www.fws.gov/midwest/endangered/clams/snuffbox/SnuffboxFactSheet.html>.

<sup>93</sup> 50 C.F.R. § 17.11(h).

<sup>94</sup> Hyde, D, and M. Smar. 2000. Special animal abstract for *Brychius hungerfordi* (Hungerford's crawling water beetle) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/zoology/Brychius\\_hungerfordi.pdf](http://mnfi.anr.msu.edu/abstracts/zoology/Brychius_hungerfordi.pdf).

<sup>95</sup> *Id.* at 2.

<sup>96</sup> *Id.* at 3.

<sup>97</sup> 50 C.F.R. § 17.12(h).

<sup>98</sup> Penskar, M.R. and P.J. Higman. 1996. Special plant abstract for *Asplenium scolopendrium* (Hart's-tongue fern) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/botany/Asplenium\\_scolopendrium.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Asplenium_scolopendrium.pdf).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2; see U.S. Fish and Wildlife Service, American Hart's-Tongue Fern (*Asplenium scolopendrium* var. *americanum*), available at <http://www.fws.gov/midwest/endangered/plants/amerihtf.html>.

**(8) Dwarf Lake Iris**

The dwarf lake iris is listed as a threatened species in Michigan.<sup>101</sup> “*Iris lacustris* is endemic to the northern shores of Lakes Michigan and Huron, growing nowhere else in the world. Its distribution centers around the Mackinac Straits region.”<sup>102</sup> Its range includes Delta, Schoolcraft, and Mackinac counties, but its area of greatest abundance includes southeastern Presque Isle and Cheboygan/Emmet counties, “where it occurs almost continuously for many miles along the lakeshores and then densely to discontinuously over a few square miles inland.”<sup>103</sup> Line 5 crosses all these counties except Presque Isle County.

**(9) Houghton’s Goldenrod**

Houghton’s goldenrod is listed as a threatened species in Michigan.<sup>104</sup> “Houghton's goldenrod typically grows on moist sandy beaches and shallow depressions between low sand ridges along the shoreline ... habitat ... called interdunal wetland.”<sup>105</sup> “The greatest concentrations of *S. houghtonii* lie in Chippewa, western Mackinac, northern Emmet, Cheboygan, and northern Presque Isle counties. Each of these areas has large populations extending over at least a mile of shoreline, as well as several scattered smaller populations.”<sup>106</sup>

**(10) Lakeside Daisy**

The lakeside daisy is listed as a threatened species in Michigan.<sup>107</sup> “This Great Lakes endemic is known from a single location in the eastern Upper Peninsula, where a small, extremely localized colony of approximately 200 clumps occurs along a roadside in Mackinac County.”<sup>108</sup>

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<sup>101</sup> 50 C.F.R. § 17.12(h).

<sup>102</sup> Penskar, M.R., S. R. Crispin, & P.J. Higman 2001. Species Account for *Iris lacustris* (dwarf lake iris) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/botany/Iris\\_lacustris.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Iris_lacustris.pdf).

<sup>103</sup> *Id.*

<sup>104</sup> 50 C.F.R. § 17.12(h).

<sup>105</sup> U.S. Fish and Wildlife Service, Houghton's Goldenrod (*Solidago houghtonii*) Fact Sheet, available at <http://www.fws.gov/midwest/endangered/plants/houghton.html>.

<sup>106</sup> Penskar, M.R., P.J. Higman, and S.R. Crispin. 1996. Special plant abstract for *Solidago houghtonii* (Houghton's goldenrod) at 1, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/botany/Solidago\\_houghtonii.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Solidago_houghtonii.pdf).

<sup>107</sup> 50 C.F.R. § 17.12(h).

<sup>108</sup> M.R. Penskar and P.J. Higman. 2002. Special Plant Abstract for *Hymenoxys herbacea* (Lakeside daisy) at 1-2, Michigan Natural Features Inventory, available at [http://mnfi.anr.msu.edu/abstracts/botany/Hymenoxys\\_herbacea.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Hymenoxys_herbacea.pdf).

**(11) Michigan Monkey-flower**

The Michigan monkey-flower is listed as an endangered species in Michigan.<sup>109</sup> Colonies are found along Burt and Mullett Lakes in Cheboygan County and portions of the Mackinac County shoreline.<sup>110</sup> “The primary conservation need for this globally critically imperiled taxon is the protection of habitat for all sites.”<sup>111</sup>

**(12) Pitcher’s Thistle**

Pitcher’s thistle is listed as a threatened species in Michigan.<sup>112</sup> “*Cirsium pitcheri* is most common in Michigan along the extensive dune systems on the northern and northeastern shores of Lake Michigan ... [and i]t is scattered along the perimeters of ... northern Lake Huron.”<sup>113</sup> Emmet County, among other Lower Peninsula counties, has occurrences with large populations.<sup>114</sup>

**b) The potential significant adverse impacts on endangered and threatened species and critical habitat from an oil discharge from Line 5 necessitates an EIS**

As described above, Line 5 crosses through or near areas that are home to twelve animals and plants listed as endangered or threatened species under the ESA. 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 and coastal habitat these species depend on for their survival. Particularly vulnerable is the critical habitat that FWS has designated as essential to the conservation of the Piping plover and Hine’s emerald dragonfly. This habitat requires special protection.

Clearly, then, PHMSA’s approval of the FRPs for the onshore sections of Line 5 – allowing the transport of oil – raises substantial questions whether endangered or threatened species, or critical habitat, will suffer significant adverse impacts as a result.<sup>115</sup> Consequently, NEPA requires PHMSA to address these questions in an EIS.

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<sup>109</sup> 50 C.F.R. § 17.12(h).

<sup>110</sup> Penskar, M.R. and P.J. Higman 2001. Special Plant Abstract for *Mimulus michiganensis* (Michigan monkey-flower) at 1, Michigan Natural Features Inventory, *available at* [http://mnfi.anr.msu.edu/abstracts/botany/Mimulus\\_michiganensis.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Mimulus_michiganensis.pdf).

<sup>111</sup> *Id.* at 3.

<sup>112</sup> 50 C.F.R. § 17.12(h).

<sup>113</sup> Higman, P.J. and M.R. Penskar. 1999. Special plant abstract for *Cirsium pitcheri* at 1, Michigan Natural Features Inventory, *available at* [http://mnfi.anr.msu.edu/abstracts/botany/Cirsium\\_pitcheri.pdf](http://mnfi.anr.msu.edu/abstracts/botany/Cirsium_pitcheri.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> See *Ocean Advocates v. U.S. Army Corps of Engineers*, *supra* at n. 1, 402 F.3d at 868 (recognizing that an oil spill could kill or injure threatened and endangered species).



## II. PHMSA VIOLATED THE ENDANGERED SPECIES ACT

The ESA requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”<sup>116</sup> Agency actions are broadly defined by regulation as “encompassing all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States.”<sup>117</sup>

To assist federal agencies in complying with their substantive duty to avoid jeopardizing listed species, ESA section 7(a)(2) establishes an interagency consultation requirement.<sup>118</sup> The threshold for triggering consultation under the ESA is low; the ESA requires federal agencies to consult with the Secretary of Interior whenever their actions “may affect” a listed species or its critical habitat.<sup>119</sup>

For the following reasons, PHMSA has and violated its duty to determine whether approval of Enbridge’s FRPs for the onshore sections of Line 5 may affect the listed species and critical habitat in the area crossed by Line 5, and the agency has and violated its duty to consult with FWS before approving the FRPs.

### A. PHMSA Must Comply with the ESA’s Consultation Requirement Because It Has Discretion to Take Action for the Benefit of Listed Species or Critical Habitat

The ESA’s consultation requirement applies if a federal agency has discretion to take action for the benefit of a listed species or critical habitat.<sup>120</sup> The Oil Pollution Act gives PHMSA discretion to take such action in reviewing and deciding whether to approve an FRP.<sup>121</sup>

For instance, as indicated in the discussion of NEPA,<sup>122</sup> the OPA requires PHMSA to exercise discretion in determining whether the owner or operator of an oil facility has the “necessary” resources to take actions “as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare, *including, but not limited to, fish, shellfish, wildlife, and*

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<sup>116</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>117</sup> 50 C.F.R. § 402.02.

<sup>118</sup> 16 U.S.C. § 1536(a)(2).

<sup>119</sup> 16 U.S.C. § 1536(a)(2)-(c); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011); 50 C.F.R. § 402.14(a).

<sup>120</sup> *Natural Res. Defense Council v. Jewell*, 749 F.3d 776, 779-80 (9th Cir.) *cert. denied sub nom. Glenn-Colusa Irrigation Dist. v. Natural Res. Def. Council*, 135 S. Ct. 676, 190 L. Ed. 2d 389 (2014); 50 C.F.R. § 402.03.

<sup>121</sup> *Alaska Wilderness League v. Jewell*, No. 13-35866, 2015 WL 9466852, at \*5 (9th Cir. Dec. 29, 2015) (Gould, J., dissenting); see text, *supra*, at 3-5.

<sup>122</sup> See text, *supra*, at 3-5.

*public and private property, shorelines, and beaches*” “to the maximum extent practicable.”<sup>123</sup> Those species of fish and wildlife that are listed under the ESA must be included within the fish and wildlife the statute references generally. Similarly, the critical shore and beach habitat must be included in the shoreline and beaches the statute references generally. Preventing, minimizing, and mitigating damage to listed species and critical habitat is certainly as important as taking such actions on behalf of unlisted fish and wildlife species and undesignated habitat.

Thus, PHMSA has the discretion to take action for the benefit of the listed species and critical habitat in the area crossed by Line 5. Therefore, PHMSA must comply with the ESA’s consultation requirement.

**B. PHMSA Violated Its Duty to Determine Whether Species Listed or Proposed to Be Listed May Be Present in the Area Traversed by Line 5**

If an agency proposes to take an action that is a “major construction activity,” the first step in the consultation process requires the agency (the “action agency”) to ask FWS “whether any species which is listed or proposed to be listed may be present in the area of such proposed action.”<sup>124</sup> More particularly, the action agency must convey to FWS “either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.”<sup>125</sup>

A “[m]ajor construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act.”<sup>126</sup> As demonstrated in the discussion of NEPA, above, PHMSA’s approval of the FRPs for the onshore sections of Line 5 fits within this definition because it authorizes the handling and transportation of oil. As a matter of law, Congress has recognized this as an activity that inherently can “reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.”<sup>127</sup> And as a matter of fact, Line 5 could reasonably be expected to cause significant and substantial harm to the environment by discharging oil into or on navigable waters or adjoining shorelines.<sup>128</sup>

In approving the FRPs, PHMSA found only that they complied with the requirements of PHMSA’s regulations concerning onshore oil pipelines.<sup>129</sup> PHMSA did not comply with the first

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<sup>123</sup> 33 U.S.C. § 1321(a)(8) (emphasis added), (j)(5)(D)(iii); *see also* 49 C.F.R. §§ 194.5, 194.107.

<sup>124</sup> 16 U.S.C. § 1536(c)(1); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2014); 50 C.F.R. § 402.12(b).

<sup>125</sup> 50 C.F.R. § 402.12(c).

<sup>126</sup> 50 C.F.R. § 402.02.

<sup>127</sup> 33 U.S.C. § 1321(j)(5)(C)(iv); 49 C.F.R. § 194.3.

<sup>128</sup> *See text, supra*, at 7 and n. 36.

<sup>129</sup> Superior Region Plan at A5-5; Chicago Region Plan at A5-5.

step in the ESA consultation process, either by asking FWS for a list of listed or proposed species or designated or proposed critical habitat, or by notifying FWS of the species and critical habitat that PHMSA would include in a biological assessment.<sup>130</sup>

### **C. PHMSA Violated Its Duty to Prepare a Biological Assessment**

If, in response to an action agency's request for information about the presence of species listed or proposed to be listed, FWS "advises ... that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action."<sup>131</sup> "A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary."<sup>132</sup>

Although PHMSA did not ask FWS for information about the presence of species listed or proposed to be listed, twelve animals and plants listed as endangered or threatened are, indeed, present in the area of Line 5.<sup>133</sup> The presence of these species, and any others in the area that may be listed or proposed to be listed, obligated PHMSA to prepare a biological assessment. PHMSA failed to meet this obligation.

### **D. PHMSA Violated Its Duty to Consult with FWS**

If an action agency determines, based on its biological assessment, that its proposed action "may affect" a threatened or endangered species, formal consultation is required to insure that the action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."<sup>134</sup>

Despite PHMSA's failure to conduct a biological assessment, 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 Mackinac<sup>135</sup> shows that authorizing Enbridge to transport oil through Line 5 "may

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<sup>130</sup> Because PHMSA's position is that its review of FRPs is nondiscretionary, NWF presumes that the agency did not comply with the first or any other step in the consultation process. See Letter from Madeline Bush, FOIA Officer, PHMSA, to Neil Kagan, NWF, at 2 (February 12, 2015)

<sup>131</sup> 16 U.S.C. § 1536(c)(1).

<sup>132</sup> 50 C.F.R. § 402.12(a); see also 50 C.F.R. § 402.12(k)(1).

<sup>133</sup> See text, *supra*, at 9-15.

<sup>134</sup> 16 U.S.C. § 1536(a)(2); *Western Watersheds Project v. Kraayenbrink*, *supra*, 632 F.3d at 495; 50 C.F.R. § 402.14(a).

<sup>135</sup> 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>.

affect” at least those 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.<sup>136</sup> The study examined two 20-day release scenarios, one beginning in early August and the other beginning in late September.<sup>137</sup>

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.<sup>138</sup> In the September release scenario, the study found that tracers impinged on the shore of Lake Huron from Mackinaw City halfway to Cheboygan, Michigan.<sup>139</sup> 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.”<sup>140</sup> 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.

Because these species, as well as others along Line 5’s route, may be affected by PHMSA’s approval of the FRPs for the onshore sections of Line 5, the agency was required to enter into formal consultation with FWS. Therefore, PHMSA’s failure to consult with FWS before approving the FRPs violated the ESA.

### **III. PHMSA VIOLATED THE OIL POLLUTION ACT AND AND EXECUTIVE ORDER 12777**

The Department of Transportation has claimed that PHMSA’s regulations for FRPs for onshore pipelines also apply to FRPs for transportation-related facilities, including pipelines, landward of the coast line located in, on, or under any navigable waters of the United States (“inland offshore facilities”).<sup>141</sup> Further, the Department of Transportation has stated that FRPs have been submitted by owners or operators for inland offshore facilities and have been approved pursuant to the onshore regulations since 1993.<sup>142</sup>

Thus, in approving Enbridge’s FRPs, PHMSA approved FRPs for the inland offshore facilities of Line 5, including those in, on, or under the Straits of Mackinac and the St. Clair River. Such approvals were in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, because only the Secretary of the U.S. Department of Transportation has the

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<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.* at 4.

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.* at 5.

<sup>140</sup> *Id.* at 7.

<sup>141</sup> Def.’s Memo 4, ECF No. 16, *Nat’l Wildlife Fed’n v. Sec’y, U.S. Dep’t of Transp.*, No. 15-13535 (E.D. Mi.).

<sup>142</sup> *Id.* at 4-5.

statutory authority, delegated from the President through the Secretary of the U.S. Department of the Interior, to review and approve FRPs for inland offshore facilities.

The OPA amended § 311(j) of the Clean Water Act (“CWA”) by imposing on the President a nondiscretionary duty to review FRPs and, if they meet the OPA’s requirements, to approve them not later than August 18, 1993.<sup>143</sup> However, the CWA authorized the President to delegate the administration of CWA § 311(j) “to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate.”<sup>144</sup> Pursuant to this authorization, on October 18, 1991, the President issued Executive Order 12777, delegating to the Secretary of the U.S. Department of the Interior (“Interior Secretary”) the President’s nondiscretionary duties under CWA § 311(j)(5) and OPA § 4202(b)(4) to review and approve FRPs for offshore facilities.<sup>145</sup>

Executive Order 12777 also provided that a recipient of the delegation of the President’s nondiscretionary duties under CWA § 311(j)(5) or OPA § 4202(b)(4) may redelegate those duties “to the head of any Executive department or agency with his or her consent.”<sup>146</sup> Pursuant to this authorization, on February 3, 1994, the U.S. Environmental Protection Agency (“EPA”), the Interior Secretary, and the Secretary of the U.S. Department of Transportation (“Transportation Secretary”) signed a Memorandum of Understanding (“MOU”).<sup>147</sup> In the MOU, the Interior Secretary redelegated to the Transportation Secretary, and the latter agreed to assume, the President’s nondiscretionary duties under CWA § 311(j)(5) and OPA § 4202(b)(4) to review and approve response plans for inland offshore facilities, if they meet the OPA’s requirements.<sup>148</sup>

The Transportation Secretary has not delegated his authority or duty with respect to inland offshore facilities to any unit within the Department of Transportation, including PHMSA.<sup>149</sup> “Agency actions beyond delegated authority are ‘*ultra vires*’.”<sup>150</sup> Accordingly,

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<sup>143</sup> OPA, Pub. L. No. 101-380, § 4202(a)(6) (adding to § 311(j)(5) subparagraph (E) [now (F)], which prohibits all offshore facilities and certain onshore facilities from handling, storing, or transporting oil unless a response plan has been reviewed and approved by the President pursuant to subparagraph (D) and the facilities follow the plan) (codified at 33 U.S.C. § 1321(j)(5)(F)), § 4202(b)(4)(B) (providing that the President’s obligation to review and approve response plans that meet the OPA’s requirements “shall take effect 36 months from the date of the enactment of this Act”), 104 Stat. 484 (1990).

<sup>144</sup> 33 U.S.C. § 1321(l).

<sup>145</sup> Exec. Order No. 12777 § 2(d)(3), 56 Fed. Reg. 54757, 54761 (1991).

<sup>146</sup> *Id.* at § 2(i), 56 Fed. Reg. at 54763.

<sup>147</sup> 40 C.F.R. § Pt. 112, App. B.

<sup>148</sup> *Id.*

<sup>149</sup> See 49 C.F.R. § 1.97(c)(2) (delegating to PHMSA only the authority to issue regulations for onshore facilities, as delegated by the President to the Secretary in Section 2(d)(2) of Executive Order No. 12,777); Exec. Order No. 12,777, § 2(d)(2), 56 Fed. Reg. 54,757, 54,761 (Oct. 18, 1991).

<sup>150</sup> See *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992); *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993).

PHMSA's approvals of FRPs for the inland offshore sections of Line 5 were in excess of statutory authority or short of statutory right.

#### **IV. CONCLUSION**

PHMSA must inform the owner and operator of the onshore sections of Line 5 that it had no authority to approve the onshore FRPs, formally revoke its approval of the FRPs for the onshore sections of Line 5, and comply with NEPA and the ESA before approving the existing onshore FRPs or any other FRPs that Enbridge may submit for the onshore sections of Line 5.

PHMSA must remedy its violation of NEPA by preparing an EIS to describe the environment affected by the onshore sections of Line 5, disclose the environmental consequences of approving both the FRPs submitted for the onshore sections of Line 5 and alternatives to the FRPs, and by providing the public with an opportunity to comment on a draft EIS.

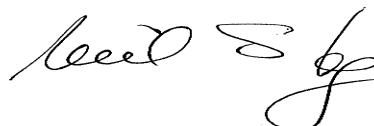
PHMSA must remedy its violation of the ESA by conducting a biological assessment and initiating consultation with FWS regarding the FRPs for the onshore sections of Line 5. PHMSA and FWS must use this consultation to (1) identify reasonable and prudent alternatives FWS believes would not violate the ESA, if FWS makes a jeopardy or adverse modification finding, and (2) mandate any amendments to the FRPs required to ensure that Enbridge has the necessary resources to take actions necessary to prevent, minimize, or mitigate damage to listed species and critical habitat.

PHMSA must remedy its violation of the OPA and Executive Order 12777 by informing the owner and operator of the inland offshore sections of Line 5 that the agency's approvals of the FRPs for those sections were invalid, and by formally revoking its approval of the FRPs for the inland offshore sections of Line 5.

If PHMSA does not take these steps within sixty days, NWF will initiate a lawsuit against the agency for violating NEPA, the ESA, and the OPA, 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,



Neil S. Kagan  
Senior Counsel