IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

and

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS and SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff-Intervenors,

v.

ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, in her official capacity,

Defendant,

and

ENBRIDGE ENERGY, Limited Partnership,

Defendant-Intervenor. /

Case No. 2:16-cv-11727

Judge Goldsmith

Magistrate Judge Whalen

PLAINTIFF'S MOTION
FOR LEAVE TO FILE AN AMENDED COMPLAINT

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiff National Wildlife Federation ("NWF") asks the Court for leave to file the attached proposed Second Amended Complaint for Declaratory Judgment and Injunctive Relief in this matter. Pursuant to Local Rule 7.1(a), the undersigned counsel

certifies that counsel communicated in writing with opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief, and three business days have lapsed without opposing counsel expressly agreeing to the relief, orally or in writing.

NWF requests leave to file an amended complaint to add a new claim for relief. The new claim would be based on information NWF discovered for the first time last week, on October 5, 2016, upon reviewing the administrative record filed on September 21, 2016, by Defendant Administrator of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). The record reveals that PHMSA's approval of the facility response plan submitted by Defendant-Intervenor Enbridge Energy, Limited Partnership ("Enbridge"), for the oil pipeline known as Line 5 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Specifically, PHMSA approved the plan without considering the relevant factors or documenting that the plan complies with each of the requirements of 49 C.F.R. Part 194 and the requirements of the Clean Water Act, U.S.C. § 1321(j)(5)(D). On the contrary, PHMSA's only finding in the record was that a version of a plan submitted on January 25, 2013, was "unacceptable." Nothing in the record shows that PHMSA reversed its assessment before it issued a conclusory letter of approval on July 11, 2013. PHMSA did not include in the

record an articulation of a satisfactory explanation for granting approval, including a rational connection between facts found and the decision to approve.

NWF asks the Court to grant its request for leave to file the attached proposed Second Amended Complaint for Declaratory Judgment and Injunctive Relief based upon the brief accompanying this motion, as well as any further written or oral argument properly submitted to the Court.

LOCAL RULE CERTIFIATION: I, Neil S. Kagan, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

WHEREFORE, the Court should grant NWF's motion for leave to file an amended complaint.

Respectfully submitted,

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Dated October 14, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

and

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS and SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

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ENBRIDGE ENERGY, Limited Partnership,

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Case No. 2:16-cv-11727

Judge Goldsmith

Magistrate Judge Whalen

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

ISSUE PRESENTED

Whether the Court should grant leave to Plaintiff National Wildlife Federation ("NWF") to file a Second Amended Complaint for Declaratory Judgment and Injunctive Relief to add a new claim for relief based on information

in the recently-filed administrative record revealing that the approval of the facility response plan for the oil pipeline known as Line 5 by Defendant Administrator of the Pipeline and Hazardous Materials Safety Administration ("PHMSA") was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

MOST CONTROLLING OR APPROPRIATE AUTHORITY

1. *Foman v. Davis,* 371 U.S. 178 (1962)

2. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)

3. *Phelps v. McClellan*, 30 F.3d 658 (6th Cir. 1994)

4. *Shane v. Bunzl Distribution USA, Inc.*, 200 F. App'x 397 (6th Cir. 2006)

5. Fed. R. Civ. P. 15(a)(2)

INTRODUCTION

After strenuously defending the adequacy of the facility response plan submitted by Defendant-Intervenor Enbridge Energy, Limited Partnership ("Enbridge"), for the Line 5 oil pipeline, Defs.' Summ. J. Mem. 21-22, ECF No. 27, PHMSA filed an administrative record showing that the agency never found that the plan is adequate. On the contrary, PHMSA's only finding in the record was that the first iteration of the plan was rife with significant defects, rendering the plan "unacceptable." Nothing in the record shows that PHMSA reversed its assessment before it issued a conclusory letter approving a later version of the plan on July 11, 2013. PHMSA did not consider the relevant factors or articulate an explanation for granting approval, including a rational connection between facts found, the requirements of the Clean Water Act ("CWA"), as amended by the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 1321(j)(5)(D), and the decision to approve.

The record thus supports a claim that PHMSA's approval of the plan was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. NWF therefore requests leave to file an amended complaint to add a new claim to this effect.

Leave to amend the complaint to add this claim should be freely given because it would be in the interest of justice. NWF discovered the lack of

documentation for the first time on October 5, 2016, upon reviewing the administrative record PHMSA filed on September 21, 2016. Granting leave to amend will not cause prejudice to PHMSA or Enbridge because the contents of the record have yet to be settled. Consequently, the parties have not begun to address the merits of the claims for relief that are tied to a review of the administrative record.

THE STANDARD FOR AMENDING PLEADINGS

When a party seeks leave of court to file an amended pleading, "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). This rule is to be interpreted liberally. *Foman v. Davis,* 371 U.S. 178, 182 (1962).

"In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis,* 371 U.S. at 182; *Shane v. Bunzl Distribution USA, Inc.*, 200 F. App'x 397, 406 (6th Cir. 2006). "In determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from

bringing a timely action in another jurisdiction." *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994).

THE CLEAN WATER ACT's REQUIREMENTS

On August 18, 1990, Congress enacted the OPA, amending the CWA, § 311(j), 33 U.S.C. § 1321(j). OPA, Pub. L. No. 101-380, § 4202(a)(6), 104 Stat. 484 (1990). The OPA amended the CWA to prohibit the handling, storage, or transport of oil until operators of certain facilities receive a determination from the government that the operators have an adequate plan to prevent and respond to a discharge of oil from their facilities. 33 U.S.C. § 1321(j)(5)(F).

The government must determine that a facility response plan (1) is consistent with the requirements of the National Contingency Plan and Area Contingency Plans for the prevention and removal of a worst case discharge of oil; (2) identifies the qualified individual having full authority to implement removal actions; (3) ensures the availability of resources necessary to prevent or remove a worst case discharge of oil; and (4) describes the training, equipment testing, periodic unannounced drills, and response actions that will be taken to prevent or remove a worst case discharge of oil. 33 U.S.C. § 1321(d)(1), (j)(4)(C), (j)(5)(D)(i)-(iv) & (E).

The government must make this determination both for facilities located in proximity to navigable waters located in, on, or under land, other than submerged

land ("onshore facilities"), and facilities located in, on, or under any navigable waters ("offshore facilities"). 33 U.S.C. § 1321(a)(10)-(11), (j)(5)(A), (C)(iii)-(iv)

Following a series of delegations, the Secretary of the U.S. Department of Transportation ("the Secretary") was authorized to review and approve plans for onshore and offshore pipelines. 40 C.F.R. § Pt. 112, App. B; Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990, Executive Order 12,777, 56 Fed. Reg. 54,757 (Oct. 18, 1991).

The Secretary delegated his authority to regulate onshore pipelines to the Research and Special Programs Administration ("RSPA"), PHMSA's predecessor, and later to PHMSA. 49 C.F.R. § 1.97(c)(2); Organization and Delegation of Powers and Duties, 57 Fed. Reg. 62,483 (Dec. 31, 1992). RSPA subsequently issued regulations that applied then and now to onshore pipelines only. 49 C.F.R. Part 194; Response Plans for Onshore Oil Pipelines, 58 Fed. Reg. 244 (Jan. 5, 1993).

With one significant difference, PHMSA's regulations specifying the requirements of plans for onshore pipelines are mostly consistent with the requirements of the CWA. The difference is that, unlike the CWA, the regulations do not require PHMSA itself to determine whether a plan is "consistent with the requirements of the National Contingency Plan and Area Contingency Plans." 33

U.S.C. § 1321(j)(5)(D)(i) & (E)(iii). Rather, the regulations cede the determination that PHMSA is required to make to operators. 49 C.F.R. § 194.107(b) (requiring only that "[a]n *operator* … certify in the response plan that it reviewed the NCP and each applicable ACP and that its response plan is consistent with the NCP and each applicable ACP") (emphasis added); *see* 49 C.F.R. § 194.119 (PHMSA's Office of Pipeline Safety ("OPS") "will approve the response plan if OPS determines that the response plan meets all requirements of this part.").

FACTS

Enbridge operates an oil pipeline known as Line 5. Line 5 runs from Superior, Wisconsin, through the Upper Peninsula of Michigan, across the Straits of Mackinac, through the Lower Peninsula of Michigan, across the St. Clair River, and then to Sarnia, Ontario.

On January 25, 2013, Enbridge submitted a response plan to the Secretary and PHMSA for a number of pipelines, including Line 5, consisting of an Integrated Contingency Plan ("ICP") and Annexes for the Superior Region (#866) and Chicago Region (#867) Response Zones. Admin. R. 000104-001290, ECF No. 34. The Superior Region Response Zone includes the part of Line 5 that extends from Superior, Wisconsin, across Michigan's Upper Peninsula, 4.1 miles under the Straits of Mackinac to Michigan's Lower Peninsula, to a point south of Indian River, Michigan. *Id.* 000482 (A1-8), 000490 (A1-16), 000493 (A1-19). The

Chicago Region Response Zone includes the part of Line 5 extending from a pump station near Lewiston, Michigan, through Michigan's Lower Peninsula, across the St. Clair River, to Sarnia, Ontario. *Id.* 001057 (A1-8), 1066 (A1-17).

In February 2013, using a 71-point checklist, PHMSA conducted a detailed review of the annexes for the Superior region and Chicago region response zones. PHMSA found many significant defects. These defects led the agency to conclude that both annexes were "unacceptable." *Id.* 003728-29 (Item #71), 003758 (Item #71). These defects represented a failure to meet all of the CWA's requirements for a plan. 33 U.S.C. § 1321(j)(5)(D)(i)-(iv).

In particular, the defects in the annex for the Superior region response zone included failures (1) to certify that the plan is consistent with the requirements of the National Contingency Plan; (2) to identify the resources available to respond within the appropriate time after the discovery of a worst case discharge, or to mitigate the substantial threat of such a discharge; and (3) to describe the training program. Admin. R. 003706-07 (Item #20), 003709-10 (Item #29), 003710-11 (Item #30), 003714-18 (Item ##39-46), 003720 (Item #49), 003721 (Item # 52), 003725-26 (Item #64), 003726 (Item #66), 003728 (Item #69), ECF No. 34. This annex also failed to provide the worst case discharge for breakout tanks and the proximity of the pipeline to environmentally sensitive areas. *Id.* 003699 (Item #2), 003700-01 (Item #4), 003701 (Item #6), 003722 (Item #56).

The defects in the annex for the Chicago region response zone included failures (1) to identify the resources available to respond within the appropriate time after the discovery of a worst case discharge, or to mitigate the substantial threat of such a discharge; and (2) to describe the training program. *Id.* 003744-49 (Item ##39-47), 003749 (Item #49), 003751 (Item # 52), 003755 (Item #64), 003756 (Item #66), 003758 (Item #69), 003771-73. This annex also failed to provide the worst case discharge based on maximum historic discharge or for the largest breakout tank in the system. *Id.* 003730 (Item #2), 003731-32 (Item #4), 003752-53 (Item ##56-57), 003760, 003762-70.

The record does not document a finding by PHMSA that these defects had been cured in the second or third versions of the ICP or the annexes that Enbridge submitted later. The record is devoid of a detailed review of the second or third versions of the ICP and the annexes.

On July 11, 2013, PHMSA notified Enbridge that the ICP and the annexes for the Superior and Chicago region response zones "comply with the requirements of PHMSA's regulations concerning onshore oil pipelines, found at 49 Code of Federal Regulations (CFR) Part 194." *Id.* 003774. However, the record does not contain an explanation of PHMSA's basis for reaching this conclusion. PHMSA approved the plan and the annexes. *Id.*

THE NEW CLAIM NWF PROPOSES TO ADD IN AN AMENDED COMPLAINT

The Administrative Procedure Act ("APA") provides that a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A). Under the arbitrary or capricious standard of review, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). "In reviewing that explanation, the court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).

Agency action is arbitrary or capricious "if 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Meister v.*

U.S. Dep't of Agric., 623 F.3d 363, 371 (6th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

The administrative record in this case establishes that PHMSA not only failed to articulate a satisfactory explanation for its approval of the Enbridge plan, it failed to articulate any explanation at all. Consequently, PHMSA failed to provide a rational connection between the contents of the plan, the requirements of 49 C.F.R. Part 194 and CWA § 1321(j)(5)(D), and the decision to approve the plan.

The record also establishes that PHMSA ignored the relevant factors in granting approval – namely, the requirements set forth in 49 C.F.R. Part 194 and CWA § 1321(j)(5)(D). PHMSA measured the original iteration of the plan against the requirements in Part 194 and found that the plan was well short of meeting all of them. PHMSA then proceeded to approve the final iteration of the plan without any indication in the record of a finding that these deficiencies had been corrected, of any further consideration of the requirements, or of any determination that the plan complies with the requirements.

These facts and circumstances are a proper subject of relief under the APA. Accordingly, NWF "ought to be afforded an opportunity to test … [its] claim on the merits" by amending the complaint. *Foman v. Davis,* 371 U.S. at 182.

Before NWF received and reviewed the record, it did not have the good-faith basis it has now for claiming that PHMSA's approval of the Enbridge plan was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. NWF now seeks leave to amend its complaint just over three weeks after PHMSA filed the record.

Granting leave to amend will cause no prejudice to PHMSA or Enbridge. The parties have not yet begun to address the merits of claims two through five in the first amended complaint, which must be decided based on a review of the administrative record. They will not begin to do so until the contents of the record are settled. The earliest the record can be settled is November 14, 2016. *See* Order Regarding Intervention, Briefing Schedule and Amendment to Case Management Plan para. IV.1, ECF No. 25. The earliest PHMSA or Enbridge has to address the merits of the claims is December 12, 2016. *Id.* para. IV.3-4.

For these reasons, in the interest of justice, the Court should grant NWF's motion for leave to amend the complaint. *See Phelps*, 30 F.3d at 663 (finding the district court did not abuse its discretion in granting leave to amend where "(1) the delay [in seeking leave to amend] here was so short [two months], (2) Phelps has failed to demonstrate prejudice, (3) this was the first and only amendment the defendant sought, and (4) perhaps, most importantly, the amendment embodies a legally valid defense"); *Phillippi v. Jim Phillippi, Inc.*, No. 2:07-CV-0916, 2009

WL 943558, at *1 (S.D. Ohio Apr. 3, 2009) ("The Court may also consider whether the matters contained in the amended complaint could have been advanced previously so that the disposition of the case would not have been disrupted by a later, untimely amendment.").

CONCLUSION

For the foregoing reasons, the Court should grant NWF's motion for leave to file the attached proposed Second Amended Complaint for Declaratory Judgment and Injunctive Relief in this matter, which adds a claim that PHMSA's approval of the facility response plan for the oil pipeline known as Line 5 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The proposed amendment adds or makes conforming revisions in paragraphs 2, 3, 14, 18, 19, 66, 76, 95-97, and paragraphs B, G, and H in the Prayer for Relief.

Respectfully submitted,

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Dated October 14, 2016

CERTIFICATE OF SERVICE

I certify that on October 14, 2016, I electronically filed the foregoing Plaintiff's Motion for Leave to File an Amended Complaint, Plaintiff's Brief in Support of Plaintiff's Motion for Leave to File an Amended Complaint, and Plaintiff's Proposed Second Amended Complaint for Declaratory Judgment and Injunctive Relief with the Clerk of the Court using the electronic filing system, which will send notification of such filing to the registered CM/ECF users at the following e-mail addresses:

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