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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WildEarth Guardians, Plaintiff, v. **Elaine L. Chao**, et al., Defendants.	Case No. 4:18-cv-110-BMM **Memorandum in Support of Federal Defendants' Motion to Dismiss**

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INTRODUCTION

This case involves a Mineral Leasing Act provision requiring the Secretary of Transportation to "cause the examination" of pipelines located on federal lands. *See* 30 U.S.C. § 185(w)(3). For more than four decades, the Department of Transportation's Pipeline and Hazardous Material Safety Administration (PHMSA) and its predecessors have "caused" those examinations through comprehensive pipeline safety regulations. Plaintiff WildEarth Guardians nonetheless claims PHMSA is not fulfilling its duties under the Mineral Leasing Act and asks the Court to compel PHMSA to ensure examinations are occurring.

Plaintiff's legal theory is incorrect. But that is beside the point because the Complaint fails to meet several threshold requirements. First, Plaintiff filed suit in the wrong court. The courts of appeals have exclusive jurisdiction over challenges to PHMSA regulations. Plaintiff makes such a challenge here, contending that PHMSA is violating the Mineral Leasing Act because its regulations allegedly do not require examinations of certain pipelines. Second, Plaintiff does not have a viable claim in district court to compel its desired agency actions. Third, given that third parties (not PHMSA) operate and maintain the

pipelines, the Complaint fails to allege facts sufficient to allege standing under Article III. The Complaint should be dismissed.

FACTUAL AND REGULATORY BACKGROUND

I. Regulatory Requirements for Pipeline Examinations

For nearly fifty years, Congress and the Department of Transportation have regulated natural gas and hazardous liquid pipelines for safety, including those on federal lands. *See* Establishment of Minimum Standards, 35 Fed. Reg. 13,248 (Aug. 19, 1970) (gas pipelines); Requirements for Design, Construction, Operation, & Maintenance, 34 Fed. Reg. 15,473 (Oct. 4, 1969) (hazardous liquid pipelines, including oil pipelines); *see also* Pipeline Safety Act of 1979, Pub. L. 96-129, 93 Stat. 989 (centralizing regulation of both pipeline categories). The most relevant authorities and regulations are currently found in 49 U.S.C. Chapter 601, and 49 C.F.R. Parts 191 and 192 (gas pipelines), and 195 (hazardous liquid pipelines).[1]

[1] If a State has adopted PHMSA's regulations, it is generally the State (rather than PHMSA) that is responsible for enforcing pipeline safety requirements with respect to wholly intrastate pipelines. *See* 49 U.S.C. § 60105.

Since 2005, PHMSA has held the Department of Transportation's delegated authority for pipeline safety. *See* 49 C.F.R. § 1.97(a)(1).[2]

PHMSA's regulations cover both gathering lines (which move gas and liquids from production facilities to transmission lines) and transmission lines (which transport gas from a storage facility or gathering line to a distribution line or storage facility).[3] *See* 49 U.S.C. § 60101(a)(21)–(22); 49 C.F.R. §§ 192.3, 195.2. The regulations place the burden on the operators of these pipelines to undertake at least annual pipeline examinations. For example, operators of gas transmission lines and regulated gas gathering lines must survey

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[2] Congress established PHMSA in late-2004. *See* Norman Y. Mineta Research and Special Programs Improvement Act, § 2, Pub. L. 108-426, 118 Stat. 2423 (2004). PHMSA's responsibilities were previously held by the Material Transportation Bureau (until 1978) and the Research and Special Program Administration (through 2004). *See* 40 Fed. Reg. 43,901 (Sept. 24, 1975); 43 Fed. Reg. 5,516 (Feb. 9, 1978).

[3] PHSMA regulations also cover gas distribution lines, which move gas from transmission lines to customers. The Complaint does not make a claim as to distribution lines. The Complaint does bring a claim as to flow lines, which move gas or liquids during the production process. *See* Compl. ¶¶ 43, 88, 94. But Congress has long excluded flow lines from PHMSA's regulating authorities. *See* 49 U.S.C. § 60101(a)(21)(A)(i) (defining "transportation of gas" to include only "the gathering, transmission or distribution of gas by pipeline or its storage in or affecting interstate or foreign commerce"); § 60101(a)(22)(B)(ii) (defining "hazardous liquid transmission" to exclude "onshore production, refining, or manufacturing facilities or storage").

pipelines for leaks "at least once each calendar year."[4] § 192.706 (transmission lines); § 192.9(b), (c), (d)(7) (extending requirements to regulated gathering lines). In addition, many of these operators must "at least once each calendar year" patrol those pipelines to "observe surface conditions on and adjacent to the . . . right-of-way for indications of leaks, construction activity, and other factors affecting safety and operation" (*id.* §§ 192.705, 192.9(b), (c)). Operators of hazardous liquid transmission lines and non-rural hazardous liquid gathering lines must similarly conduct surface condition inspections at least twenty-six times per year. *See id.* §§ 195.412(a), 195.1(a)(3)–(4). And this is only a broad brush. Many other PHMSA regulations require operators to examine, at least annually, significant subsets of regulated pipelines. *See, e.g.*, §§ 192.465, 195.573 (annual examination of external corrosion protection); § 192.731 (annual inspection of remote-

[4] Part 192 excludes from its requirements certain gathering lines located offshore or in locations with ten or fewer buildings intended for human occupancy. *See* 49 C.F.R. §§ 192.6(b)(1), 192.8(b), 192.9. Congress has long excepted all or most rural gathering lines from regulation. *See* Natural Gas Pipeline Safety Act, § 2(3), Pub. L. No. 09-481, 82 Stat. 720; Pipeline Safety Act, § 202(3), Pub. L. No. 96-129, 93 Stat. 989, 1003. Indeed, in 1968, the House rejected an amendment that would have covered rural gathering lines. *See* 114 Cong. Rec. 19,722–27 (July 2, 1968).

control shutdown devices); §§ 192.739, 195.428 (annual inspection of pressure regulating devices); § 192.745 (annual inspection of certain valves).[5]

PHMSA regulations also require operators to report leaks and safety problems to PHMSA by submitting incident, annual, and safety-related reports. *See* 49 C.F.R. § 191.5 (incident reports for gas pipelines); § 191.15 (incident reports for gas transmission and gathering systems); § 191.17 (annual reports for gas transmission and gathering systems); §§ 191.23, 191.25 (safety-related condition reports for gas pipelines); § 195.49 (annual reports for hazardous liquid pipelines); §§ 195.50, 195.52, 195.54 (accident reports for hazardous liquid pipelines); §§ 195.55, 195.56 (safety-related condition reports for hazardous liquid pipelines). In most cases, operators submit those reports to PHMSA electronically. *See id.* §§ 191.7, 195.58.

[5] PHMSA has proposed regulatory amendments for both natural gas and hazardous liquid pipelines. *See* Notice of Proposed Rulemaking, 80 Fed. Reg. 61610 (Oct. 13, 2015) (to amend 49 C.F.R. Part 195); Notice of Proposed Rulemaking, 81 Fed. Reg. 20,722 (Apr. 8, 2016) (to amend 49 C.F.R. Parts 191 and 192). As of this filing, no final rules have issued.

II. The Mineral Leasing Act and Pipelines on Federal Lands

Plaintiff's Complaint focuses on a 1973 revision to the Mineral Leasing Act. *See* Compl. ¶ 2. Those amendments authorized federal agencies—primarily, the Department of the Interior's Bureau of Land Management—to approve rights of way across public lands for oil and gas pipelines. *See* Pub. L. No. 93-153, § 101, 87 Stat. 576 (1973) (codified at 30 U.S.C. § 185(a)). Congress required such approvals to include "requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline," and required the agencies that would be granting rights of way to "issue regulations or impose stipulations" to protect the environment. 30 U.S.C. § 185(g), (h); *see also* 43 C.F.R. pt. 2880 (BLM regulations governing rights of way for pipelines); 43 C.F.R. pt. 1600 (BLM regulations governing land use management planning).

PHMSA, however, has no statutory or regulatory role with respect to right of way approvals for pipelines, on federal lands or otherwise. Accordingly, the Complaint does not take issue with the Mineral Leasing Act's safety and environmental provisions (nor the Bureau of

Land Management regulations), and does not challenge any specific right of way.

Instead, Plaintiff focuses on 30 U.S.C. § 185(w). Compl. ¶¶ 2–4. Two provisions in that subsection applied to the Department of Transportation. In the first—the one at issue here—Congress provided that "[p]eriodically, but at least once a year, the [Transportation Secretary] shall cause the examination of all pipelines and associated facilities on federal lands and shall cause the prompt reporting of any potential leaks or safety problems." 30 U.S.C. § 185(w)(3). The Department of Transportation has delegated responsibility for this provision to PHMSA. 49 C.F.R. § 1.97(a)(2). In the second provision, Congress required the Secretary to file an annual report detailing potential or actual explosions or spills on federal lands. Pub. L. No. 93-153, § 101(w)(4), 87 Stat. at 583 (previously codified at 30 U.S.C. § 185(w)(4)). Congress repealed this requirement in 1995. *See* Federal Reports Elimination Sunset Act of 1995, Pub. L. No. 104-66, § 1121(k), 109 Stat. 707.

Several years after its enactment, the Secretary of Transportation reported to Congress that Section 185(w)(3) was duplicative; it "[was]

already carried out or provided for under the mandates of other Federal law and regulation. Federal gas and liquid pipeline safety regulations (contained in 49 CFR Parts 191, 192, and 195), which are applicable to private operators . . . [,] require the annual examination of and reporting on all privately owned or operated pipeline facilities, including those on Federal lands." 125 Cong. Rec. 2,405 (Feb. 9, 1979) (statement from Secretary of Transportation); *see supra* at 3–5; *see also* 128 Cong. Rec. 5,172–73 (Mar. 23, 1982) (statement from Office of Management and Budget).

III. The Present Complaint

Plaintiff WildEarth Guardians has sued the Department of Transportation and PHMSA alleging a failure under 30 U.S.C. § 185(w)(3) "to ensure annual examination and inspection of an extensive network of oil and gas pipelines and associated facilities on publicly-owned, federally-managed lands . . . ." Compl. ¶¶ 1–3, ECF No. 1.[6] The Complaint references PHMSA's existing regulations and alleges that those regulations do not require examination of every

[6] The Complaint does not allege a violation of Section 185(w)(3)'s separate requirement that the Secretary "cause the prompt reporting of any potential leaks or safety problems." *See* Compl. ¶¶ 3, 100–102.

pipeline covered by Section 185(w)(3). *Id.* ¶¶ 88–96; 100–101. The Complaint then goes further, asserting—based upon several Freedom of Information Act requests Plaintiff sent to PHMSA—that PHMSA is "failing to meet [its] duties under the Mineral Leasing Act with regards to every single oil and gas pipeline on federal lands in the United States."[7] Compl. ¶ 102. WildEarth Guardians requests declaratory relief and an injunction "requiring Defendants to immediately identify all oil and gas pipelines and associated facilities on federal lands, catalogue when they have last been examined, and ensure that each segment and associated facility is examined at least annually in the future." *See* Compl. Prayer for Relief.

[7] Given PHMSA regulations and what the Complaint provides regarding the FOIA requests, it is easy to see why the requests did not uncover the information Plaintiff sought. In addition to being based upon Bureau of Land Management (rather than PHMSA) record locators, the requests treated the issue as if PHMSA itself examines pipelines. But PHMSA regulations require the *operators* to undertake the examinations and to maintain records associated with those examinations. Even if PHMSA does not have a record of a given operator examination—or does not have a way to tie such a record to Bureau of Land Management record locators—that does not mean PHMSA has failed to "cause the examinations" under 30 U.S.C. § 185(w)(3).

STANDARD OF REVIEW

Federal Defendants move to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted.

A threshold issue in every federal case is whether the court maintains jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). Federal jurisdiction exists only where authorized by statute or the Constitution. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The party invoking federal jurisdiction has the burden to prove jurisdiction exists. *See Kokkonen*, 511 U.S. at 377; *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010). A court considering its own jurisdiction is not limited to the facts in the complaint, and may consider outside evidence. *See Land v. Dollar*, 330 U.S. 731, 735 (1947); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555).

ARGUMENT

The Complaint should be dismissed. First, because the Complaint challenges PHMSA's regulations, the courts of appeals have exclusive jurisdiction under 49 U.S.C. § 60119(a). Second, even if court of appeals jurisdiction were not exclusive, Plaintiff would not have a viable claim in district court. Third, the Complaint does not allege facts that would allow the Court to conclude that Plaintiff has standing under Article III.

I. The Courts of Appeals Have Exclusive Jurisdiction Over the Complaint

The Complaint should be dismissed because Plaintiff brought suit in the wrong court. Congress has provided that:

> a person adversely affected by a regulation prescribed under [Title 49, chapter 601] . . . may apply for review of the regulation . . . by filing a petition for review in the United States Court of Appeals for the District of Columbia or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 60119(a)(1). The "statute leaves no room to doubt the congressional purpose and intent" of providing for review of the regulations in the court of appeals. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335–36 (1958). Such "jurisdiction over a specific class of claims which Congress has committed to the court of appeals generally is exclusive, even in the absence of an express statutory command of exclusiveness." *Pub. Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 627 (9th Cir. 1985) (citations omitted); *see also United Steelworkers of Am., Local 12431 v. Skinner*, 768 F. Supp. 30, 33 (D.R.I. 1991) (finding prior version of Section 60119(a) provided for exclusive jurisdiction); *Arjmand v. U.S. Dep't of Homeland Security*, 745 F.3d 1300, 1302 (9th Cir. 2014) (noting exclusive circuit court jurisdiction under similar provision in 49 U.S.C. § 46110(a), which also says person "may apply for review" with the circuit courts).

Plaintiff—perhaps noting Section 60119(a)—has styled its complaint as one to compel agency action under 5 U.S.C. § 706(1), rather than as a challenge to PHMSA's regulations. *See* Compl. ¶ 103. But Plaintiff cannot plead around Congress's jurisdictional limitations by simply styling its case as one to compel agency action. *See Hells*

Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923, 933–34 (9th Cir. 2010). There are two reasons why this case can only be brought in the courts of appeals.[8]

First, and despite its artful pleading, Plaintiff does in fact challenge PHMSA's regulations. *See* Compl. ¶¶ 88–96. Plaintiff asserts that PHMSA is not complying with 30 U.S.C. § 185(w)(3) because the existing Part 192 and 195 regulations purportedly do not require examinations for certain flow (Compl. ¶¶ 88, 94), gathering (*id.* ¶¶ 89–92, 95, 96), and transmission (*id.* ¶¶ 93, 95) lines. *See id.* ¶¶ 100–101. The Part 192 and 195 regulations were promulgated under Title 49, chapter 601. *See, e.g.,* 35 Fed. Reg. 13,257 (Aug. 19, 1970) (noting source of authority as 1968 Natural Gas Pipeline Safety Act); 47 Fed. Reg. 13,818 (Apr. 1, 1982) (noting source of authority as prior codification of Natural Gas Pipeline Safety Act). This case therefore

[8] Of course, even in the courts of appeals, Plaintiff would need to demonstrate standing and meet any other threshold requirements for justiciability. For example, Section 60119(a) requires that the petition for review be filed within 89 days of the regulation's issuance. 49 U.S.C. § 60119(a)(1). It does not appear Plaintiff would have met that requirement here. But that and any other questions regarding circuit court justiciability are properly addressed in the circuit courts.

falls squarely under Section 60119(a)'s judicial review provision and must be brought in the courts of appeals. *See* 49 U.S.C. § 60119(a).

It is irrelevant that Plaintiff alleges that the regulations violate the Mineral Leasing Act rather than the Pipeline Safety Act. The Ninth Circuit has concluded that direct-review provisions similar to that in Section 60119(a) apply to claims asserting a violation of law other than the authorizing statute in which the jurisdictional provision appears. *See Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp.*, 457 F.3d 956, 958–59 (9th Cir. 2006) (noting that, although "[d]istrict courts generally have jurisdiction over NEPA claims pursuant to 28 U.S.C. § 1331, . . . specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts"). "[Plaintiff] may not avoid section [60119(a)'s] mandate of exclusive jurisdiction by alleging a separate statutory APA claim." *Pub. Utility Comm'r of Or.*, 767 F.2d at 627.

Second, the Complaint's other allegation—that, ignoring the regulations, PHMSA is failing to cause any examinations at all—does not change the jurisdictional conclusion. The court of appeals may consider that issue as part of a petition for review brought directly in

that court because it is . *Rudd v. Dep't of Labor*, 347 F.3d 1086, 1089–90 (9th Cir. 2003) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). The question of whether PHMSA is causing the required examinations cannot be decided—and, indeed, turns entirely on—a determination as to whether PHMSA's regulations cause those examinations. *See* Compl. ¶ 75 (acknowledging PHSMA's position that it causes examinations through the regulations). As such, the appellate court—rather than a district court in a separate suit—should consider the question as part of its review under Section 60119(a). "The point of creating a special review procedure in the first place is to avoid duplication and inconsistency. It provides a single and expeditious procedure for resolving . . . disputes." *Cal. Save Our Streams Council v. Yeutter*, 887 F.2d 908, 912 (9th Cir. 1989). The courts of appeals have exclusive jurisdiction over the Complaint.

II. Even if Circuit Court Jurisdiction Were Not Exclusive, Plaintiff Has No Viable APA Claim

Plaintiff cannot rely upon the Administrative Procedure Act (APA) as a basis for review in district court because the Complaint does not state a claim under the APA.

A. The Availability of Circuit Court Review Means Plaintiff Cannot Bring its Case in District Court

Even if Section 60119(a)'s jurisdictional grant were not exclusive, the availability of that review means Plaintiff cannot bring this case in district court. The Complaint bases district court jurisdiction on the APA. *See* Compl. ¶ 7 (citing 5 U.S.C. §§ 701–706). APA review, however, is only available when "there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also id.* § 703 ("The form or proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . ."). Section 704's "other adequate remedy" provision applies equally to cases seeking to compel agency action under 5 U.S.C. § 706(1).[9] *Californians for Renewable Energy v. EPA*, No. 15-cv-3292, 2018 WL 1586211, at *11 (N.D. Cal. Mar. 30, 2018) (citing *Coos County Bd. of County Comm'rs v. Kempthorne*, 531 F.3d 792, 819 (9th Cir. 2008) ("[W]e hold that Coos

[9] Even if Section 704 did not apply to claims brought under Section 706(1), the "other adequate remedy" provision would still apply here. Plaintiff's case is actually a challenge to final agency action under 5 U.S.C. § 706(2), rather than one to compel an agency to act under 5 U.S.C. § 706(1). *See Hells Canyon*, 593 F.3d at 932–94. Because PHMSA has acted to cause examinations (via its regulations), it is that action that Plaintiff must challenge. *See id.*

County's 5 U.S.C. § 706(1) cause of action is precluded because it is identical in all relevant respects to the ESA cause of action, which provides Coos County with an 'adequate remedy.'")); *accord Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995) (reciting standard that mandamus may only issue where, among other things, "no other adequate remedy is available").

Here, even if appellate court jurisdiction under Section 60119(a) were not exclusive, Plaintiff—again assuming the other threshold requirements for justiciability are met—*could* have brought its case in the courts of appeals. In such a challenge, the circuit court would assess, just as a district court would, PHMSA's action under the APA's standards for judicial review. *See* 5 U.S.C. § 706; 49 U.S.C. § 60119(a)(3) ("A judicial review of agency action under this section shall apply the standards or review established in section 706 of title 5."). As noted above (at 14–15)—and assuming there are no separate jurisdictional defects—that review could address whether PHMSA's regulations are contrary to 30 U.S.C. § 185(w)(3), and whether the agency, in spite of the regulations, is failing to cause examinations altogether.

The availability of direct review in the courts of appeals means that the APA is not available to Plaintiff in district court. *See Bowen v. Massachusetts*, 487 U.S. 879, 901–04 (1988) (5 U.S.C. § 704 forecloses review where an "adequate remedy" is available in another court); *cf. Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (concluding § 704 precluded APA review where review was available under the Endangered Species Act's citizen-suit provision), *abrogated on other grounds by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 798 F.3d 1075, 1088–92 (9th Cir. 2015).

B. The Complaint Fails to State a Claim to Compel the Desired Agency Actions

Plaintiff also does not properly invoke 5 U.S.C. § 706(1). The Complaint asks the Court to compel PHMSA to: "[1] identify all oil and gas pipelines and associated facilities on federal lands, [2] catalogue when they have last been examined, and [3] ensure that each segment and associated facility is examined at least annually in the future." Compl. Prayer for Relief ¶ B. None of those three requests can be compelled here.

"Failures to act are sometimes remediable under the APA, but not always." *Norton v. So. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55,

61 (2004). For one, "the only agency action that can be compelled under the APA is action legally *required*." *Id.* at 63. "[Section] 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'" *Id.* Further, compelling agency action necessarily requires that there be "an ongoing failure to act." *Hells Canyon*, 593 F.3d at 932.

Plaintiff's request to compel PHMSA to identify all pipelines and catalogue prior examinations does not state a claim because PHMSA is not required to undertake those actions. Identification and cataloguing are not mentioned in, much less mandated by 30 U.S.C. § 185(w)(3). Because the statute imposes no statutory obligation to identify and catalogue pipelines on federal lands, such actions cannot be compelled under 5 U.S.C. § 706(1). *See Hells Canyon*, 593 F.3d at 932 (courts can only compel agencies to act where they have "ignored a specific legislative command").

Plaintiff's request to compel PHMSA to ensure pipeline examinations is faulty because there is nothing to compel—PHMSA regulations already require at least annual examinations. *See supra* at

3–5. Plaintiff alleges that those requirements are inadequate with respect to certain pipelines. *See* Compl. ¶¶ 88–96. But that is a challenge to final agency action (the regulations) under 5 U.S.C. § 706(2), not a request to compel agency action under 5 U.S.C. § 706(1). *See Hells Canyon*, 593 F.3d at 933. To the extent Plaintiff is arguing that, despite the regulatory requirements, no examinations are occurring, that is a dispute with the pipeline operators, not with PHMSA. An agency's decision not to take enforcement action is presumptively immune from judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995).

Further, allowing a Section 706(1) claim against PHMSA to proceed in these circumstances would be contrary to the Supreme Court's holding in *SUWA*: "when an agency is compelled by law to act . . . , but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." 542 U.S. at 65. But that would be exactly the result here. The Court would not be compelling PHMSA to cause pipeline examinations; PHMSA regulations already do that. Instead, the Court

would be compelling PHMSA to undertake Plaintiff's desired pipeline examination program. Courts "have no authority to compel agency action merely because the agency is not doing something [the courts] may think it should do." *Zixiang Li v. Kerry*, 701 F.3d 995, 1004 (9th Cir. 2013). The Complaint should be dismissed for failure to state a claim.

III. Plaintiff Lacks Standing Because its Alleged Injuries Are Not "Fairly Traceable" to PHMSA's Alleged Inaction Nor "Likely" To Be Redressed by a Favorable Ruling

Regardless of whether Plaintiff could bring its Section 706(1) claim in this Court, the claim must be dismissed because Plaintiff has not properly alleged Article III standing. Plaintiff has not pled any facts that tie its alleged injuries—aesthetic harms and health concerns from potential leaks—to PHMSA's purported failure to "cause" pipeline examinations. And Plaintiff has not plausibly alleged that an order compelling PHMSA to cause further examinations would redress the alleged injuries.

At the pleading stage, Article III's case and controversy provision requires that a plaintiff allege that: (1) it has suffered an "injury in fact" that (a) is concrete and particularized, and (b) "actual and imminent,

not conjectural or hypothetical"; (2) the injury is "fairly traceable to the [Federal Defendants'] challenged action" and not the result of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that "a favorable judicial decision will prevent or redress the injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).[10]

Where, as here, the plaintiff's alleged injury arises from the "government's unlawful regulation (or lack of regulation)" of a third party, that third party's choices become relevant to the standing inquiry. *Id.* at 562. The plaintiff holds the additional burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* In those situations, "standing is not precluded, but is 'substantially more difficult' to establish." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

[10] As an organization, Plaintiff's standing rests on its members' ability to individually bring suit. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). For that reason, the Complaint relies upon alleged harms suffered by individual members. *See* Compl. ¶¶ 17–23.

We anticipate that Plaintiff may argue Article III's causation and redressability requirements should be relaxed in this case. Under Ninth Circuit precedent, "[a] showing of procedural injury lessens a plaintiff's burden on the last two prongs of the Article III standing inquiry . . . ." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008). A "procedural injury" is one where a plaintiff alleges the agency to have violated a procedural rule, like the National Environmental Policy Act or certain Endangered Species Act provisions. *See San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1232 (9th Cir. 2017). But Plaintiff here alleges a violation of substantive, rather than procedural, requirements. Plaintiff must therefore meet Article III's normal requirements and allege that its injury is "fairy traceable" to a *PHMSA* action or inaction (rather than that of some third party), and "that its injury would *likely* be redressed by a favorable court decision." *Salmon Spawning*, 545 F.3d at 1227–28 (emphasis added).

Plaintiff alleges two injuries. The first is an aesthetic injury stemming from certain "sights, sounds, and smells" that Plaintiff's members have encountered on federal lands and are purportedly

associated with leaking or rusted pipelines. *See* Compl. ¶ 19. The second is related to potential pipeline spills or leaks. *See id.* ¶¶ 20, 21. Plaintiff broadly states that its members "regularly" come in contact with pipelines on federal lands. *Id.* ¶ 18. But the Complaint only identifies six specific pipelines that Plaintiff's members have encountered and only attempts to tie its alleged injuries to one of them. *See id.* ¶¶ 17–19. This is problematic because injuries in the abstract are insufficient. Article III and the APA dictate that Plaintiff articulate actual and concrete aesthetic injuries and health concerns in relation to some actual or imminent agency action. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 492–500 (2008) (rejecting standing because the plaintiff did not link any regulatory application to a particular project that would harm its members); *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 893 (1990) (a plaintiff must challenge an agency action; "flaws in the entire 'program' . . . cannot be laid before the courts for wholesale correction under the APA"). Here, the Complaint only makes the effort with respect to a single pipeline in Colorado. *See* Compl. ¶ 19. Even assuming, however, that the Complaint alleges injuries to have occurred with respect to all six identified pipelines, *see id.* ¶¶ 17, 19, the

Complaint fails to properly allege that PHMSA is the cause of, or that a favorable ruling would be likely to redress, such injuries.

A. Plaintiff Has Failed to Allege Facts Sufficient to Show its Asserted Injuries are "Fairly Traceable" to PHMSA's Alleged Inaction

To demonstrate causation, Plaintiff must allege that its asserted aesthetic and health injuries are "fairly traceable" to PHMSA's allegedly unlawful inaction rather than the third-party operators. *Salmon Spawning*, 545 F.3d at 1227; *accord Renal Physicians Ass'n v. U.S. Dep't of Health*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) (standing could be found despite third-party decisions "where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation") (citation omitted)). The Complaint fails to do so for two reasons.

First, Plaintiff's case is based, in part, upon a theory that, by failing to cause annual examinations of certain flow, gathering, and transmission pipelines, PHMSA is not complying with 30 U.S.C. § 185(w)(3). Compl. ¶¶ 88–96. To meet Article III's causation requirements for claims based on that theory, Plaintiff would need to

allege that: (1) at least one of the pipelines causing the alleged injuries is a flow, gathering, or transmission pipeline, and (2) PHMSA's regulations do not require annual examinations for that pipeline. *See Summers*, 555 U.S. at 492–500. The Complaint makes no such allegation.

Second, and more broadly, the Complaint fails to consider that the causation chain includes decisions and actions of third parties not before the Court. Plaintiff claims that PHMSA's failure "to fulfill [its] duty to ensure oil and gas pipelines on federal lands are inspected at least once annually means that spills, leaks, and general degradation of these facilities are more likely to occur . . . [and] will persist and potentially increase." Compl. ¶ 22. But Plaintiff does not explain how this can be given that PHMSA does not operate or maintain any pipelines. The Complaint asserts no facts to fill this causation gap, as is required when third-party decision-making is implicated. *See Simon*, 426 U.S. at 42–43.

Thus, Plaintiff asks the Court to assume that: (1) PHMSA has not required annual examinations for Plaintiff's identified six pipelines; (2) the operators of those six pipelines are not unilaterally undertaking

examinations; (3) the operators of those six pipelines have structured their operation and maintenance practices solely based upon the already assumed fact that PHMSA has not required examinations, as opposed to other regulatory requirements or factors; and (4) those operations and maintenance practices have led, or will lead, to increased leaks or spills. Such speculation is insufficient, even at the pleading stage. *See Defenders of Wildlife*, 504 U.S. at 560–61. And the speculation here is underscored by the fact that the Mineral Leasing Act requires, separate and apart from the provision applicable to the Secretary of Transportation, that an agency granting a right of way on federal lands include stipulations to protect safety and the environment. *See* 30 U.S.C. § 185(h).

Pritkin v. Department of Energy, 254 F.3d 791 (9th Cir. 2001), is instructive. There, the plaintiff sought to compel the Department of Energy to include funding in its budget for a monitoring program that would be administered by a separate agency, the Agency for Toxic Substances and Disease Register (ATSDR). *Id.* at 792–93. The Ninth Circuit concluded the plaintiff lacked Article III standing. *See id.* at 793. The court found that, regardless of whether the Department of

Energy had a responsibility to fund the program, the alleged injury was "'manifestly the product of the independent action of [ATSDR]'" because ATSDR was not required to await any Department of Energy funding. *Id.* at 798–99 (quoting *Duquesne Light Co. v. EPA*, 166 F.3d 609, 613 (3d Cir. 1999)). The conclusion that ATSDR could not begin the program absent Department of Energy funding (as opposed to some other source) was "highly speculative and dependent on uncertain actions by a [third party]." *Id.* at 799 (quoting *Area Transp., Inc. v. Ettinger*, 219 F.3d 671, 672–74 (7th Cir. 2000)). The same is true here. The Complaint provides no facts that would allow the Court to do anything other than speculate that potential spills or leaks might be caused by PHMSA's alleged failure to cause pipeline examinations rather than some action (or lack thereof) by the pipeline operators. Plaintiff has failed to allege any facts that could demonstrate PHMSA's allegedly unlawful inaction is causing Plaintiff's asserted injuries.

B. Plaintiff Has Failed to Allege Facts Sufficient To Show that a Favorable Ruling is "Likely" to Redress the Asserted Injuries

The Complaint also fails to meet Article III's redressability requirements given the role of third parties not before the Court.

"[E]ven at the pleading stage," a plaintiff must allege facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief plaintiff sought." *Renal Physicians*, 489 F.3d at 1275; *Salmon Spawning*, 545 F.3d at 1228. Plaintiff seeks an order requiring PHMSA to identify, catalogue, and ensure annual examinations of all oil and gas pipelines and associated facilities on federal lands. Compl. Prayer for Relief ¶ B. But the Complaint provides no facts to support a conclusion that such an order would redress the asserted injuries.

Plaintiff alleges that further examinations will decrease undetected spills and leaks. *See* Compl. ¶ 23. But the allegation does not explain how this is "likely" given that third parties (and not PHMSA) operate and maintain the pipelines. The speculation is compounded by the fact that Plaintiff only alleges that one of its six identified pipelines even has a leaking problem. *Id.* ¶ 19.

Presumably, Plaintiff believes that annual examinations, if not already occurring, would encourage operators to implement better maintenance programs. But the Complaint fails to allege any facts

supporting that belief.[11] Further, even assuming that operators base maintenance decisions on the number and extent of required examinations, "[i]t is purely speculative whether the [additional examinations] . . . [could] be traced to [PHMSA's] 'encouragement' or instead result from decisions made by the [operators] without regard to the [examination] implications." *Simon*, 426 U.S. at 42–43. And Plaintiff cannot cure the redressability problem with an assertion that PHMSA has the ability to enforce its regulations. *See Salmon Spawning*, 545 F.3d at 1228 ("discretionary efforts by the agencies are too uncertain to establish redressability"). Plaintiff's theory is even more speculative to the extent is contends that PHMSA should ensure examinations through some method other than its pipeline safety regulations. Plaintiff does not explain how this type of non-regulatory

[11] The problem is amplified with respect to the request for an inventory and cataloging. The Complaint does not allege any facts related to how those actions would remedy the asserted harm.

action, standing alone, would redress the injuries. The Complaint should be dismissed for lack of standing.[12]

CONCLUSION

The Complaint should be dismissed. Plaintiff challenges PHMSA's regulations, and the courts of appeals therefore have exclusive jurisdiction. Even if appellate court jurisdiction were not exclusive, Plaintiff could not state a claim for relief in district court under the APA. The Complaint also does not allege facts that would allow the Court to conclude that PHMSA's alleged failure to cause examinations (rather than actions or decisions by third parties) are causing Plaintiff's alleged injuries, or that a favorable ruling from the Court would be likely to redress those injuries.

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[12] If this case were to proceed in district court (which it should not), there is a question of venue that would need to be addressed. The Complaint bases venue on allegedly unexamined pipelines located within Montana (28 U.S.C. § 1391(e)(1)(B)), and on Plaintiff's in-state membership (§ 1391(e)(1)(C)). Compl. ¶ 11. But "the omission" here—PHMSA's purported failure to "cause" the required examinations—would not have occurred in Montana (where PHMSA has no office), and "property" is not the subject of this suit, as it does not involve the granting of any rights of way. *Compare* § 1391(e)(1)(B). Reliance on § 1391(e)(1)(C) is similarly inappropriate because a plaintiff-organization only "resides" at its principal place of business. *See* § 1391(c)(2). Here, Plaintiff alleges that to be New Mexico. Compl. ¶ 12.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2)(A), I hereby certify that the above memorandum is 6,342 words, exclusive of the caption, certificates of service and compliance, and tables of contents and authorities.

Kristofor R. Swanson
Kristofor R. Swanson

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2018, I filed the above memorandum with the Court's electronic case management system, which cause notice to be sent to all parties.

Kristofor R. Swanson
Kristofor R. Swanson