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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, in her official capacity as Secretary of the U.S. Department of Transportation, et al.

Federal Defendants.

Case No. CV-18-110-GF-BMM

PLAINTIFF'S RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff WildEarth Guardians ("Guardians") hereby opposes the Motion to Dismiss filed by Federal Defendants U.S. Department of Transportation and the Pipeline and Hazardous Materials Safety Administration (collectively "PHMSA"). Defs.' Mot. (Dkt. 19). For more than four decades, PHMSA has failed to cause the examination of *all* oil and gas pipelines on federal lands contrary to a clear legal mandate in the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181–287. As a result, this case is not about the adequacy of PHMSA's existing Pipeline Safety Act ("PSA") regulations, but about PHMSA's failure to perform a nondiscretionary duty under the MLA that, if the agency is compelled to act, will result in the examination of all pipelines on federal lands regardless of location or size. Because Guardians is not challenging the adequacy or implementation of specific PSA regulations but rather PHMSA's failure to act as required by the MLA, Guardians' claim does not fall within the purview of 49 U.S.C. § 60119, which requires review of substantive challenges to PSA regulations in the courts of appeals. Accordingly, Guardians' failure to act case under 5 U.S.C. § 706(1) of the Administrative Procedure Act ("APA") is properly before the district court.

PHMSA also claims that Guardians has failed to allege facts sufficient to support standing at the Complaint stage. But PHMSA ignores the standard for sufficiently alleging standing at the pleading stage, instead pressing the Court to

apply the more rigorous test for standing appropriate at the summary judgment stage. In its Complaint, Guardians provided sufficient facts to demonstrate standing, and has also provide a member declaration to further assist the Court in assessing standing.

LEGAL BACKGROUND

I. THE MINERAL LEASING ACT

The MLA requires that "[p]eriodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all [oil and gas] 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). Although this is the Department of Transportation's ("DOT's") only duty within the MLA, the legislative history indicates that Congress purposefully gave DOT oversight over oil and gas pipelines on federal lands to prevent environmental harm. *See* H.R. Conf. Rep. No. 93-617, at 1, 8 (Oct. 31, 1973) (reconciling language of S. 1081, which did not include the "cause the examination" language, with H.R. 9130, which did include the language); *see also* 93 Cong. Rec. H 9799, H 9817 (daily ed. Nov. 12, 1973) (outlining Rep. Dingell's comments supporting changes in H.R. Conf. Rep. No. 93-617, including "cause the examination" language). The legislative history also indicates that Congress purposefully did not remove this language during subsequent MLA revisions prompted by the Pipeline

Safety Act of 1979 (S. 411), despite DOT's requests. *See* Sen. Rep. 96-182, at 16 (1979) (noting "the committee struck out th[e] provision" which had removed what is now 185(w)(3)). Thus, under the MLA, PHMSA is required to cause the annual examination of all pipelines on federal lands.

II. THE ADMINISTRATIVE PROCEDURE ACT

Because the MLA does not provide for a cause of action, the APA applies here. *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 851 (9th Cir. 1989). The APA provides a right to judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" 5 U.S.C. § 702. Agency action includes the failure to act. *Id.* § 551(13).

APA review is limited to agency actions "for which there is no other adequate remedy in a court." *Id.* § 704. Review is "properly understood to be limited . . . to a *discrete* action." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in original). "[F]ailure to promulgate a rule or take some decision by a statutory deadline" is considered a discrete action. *Id.* at 63.

To remedy a failure to act, "the reviewing court shall compel agency action unlawfully withheld[.]" 5 U.S.C. § 706(1). "[W]hen 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." *Norton*, 542 U.S. at 65.

FACTUAL BACKGROUND

The United States is crossed by more than 2.6 million miles of pipelines, the vast majority of which are used to transport natural gas and hazardous liquids, including oil. Compl. ¶ 40 (Dkt. 1). Approximately 120,000 miles of these pipelines are located underneath federal public lands. *Id*. ¶ 41.

Pipelines can explode, leak, and spill. *Id*. ¶ 55. Since 1997, approximately 11,460 pipeline incidents have occurred across the U.S. resulting in 333 fatalities, 1,293 injuries, and over $7.2 billion in damages. *Id*. ¶ 56. In particular, a total of 810 pipeline incidents, including 24 fatalities and 76 injuries, have occurred in Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming over this time period. *Id*.

Pipeline explosions, leaks, and spills can result in both short and long-term exposures to certain chemicals. *Id*. ¶ 53. A 2011 study on the health effects from oil and gas development found that of the 353 identified chemicals used by the industry, more than 75% can affect the skin, eyes, other sensory organs, the respiratory system, the gastrointestinal system, and the liver. *Id*. ¶ 50. More than 50% of these chemicals also affect the brain and nervous system, and more than 25% of chemicals used in oil and gas operations can cause cancer and mutations.

Id. There is also a growing body of research on the mental health community impacts from oil spills as well, including anxiety, post-traumatic stress disorder, and depression. *Id*. ¶ 54.

Evidence demonstrates that when pipelines are inspected regularly, the risk posed by pipeline failure is reduced. *Id*. ¶ 68. But the PSA only requires annual inspections for certain categories of pipelines, resulting in PHMSA's failure to cause the annual inspection of *all* pipelines on federal lands as required by the MLA. *Id.* ¶¶ 88–96. For example, the Natural Gas Pipeline Safety Act, and its implementing regulations, specifically exempts non-regulated gas gathering lines. 49 U.S.C. § 60101(a)(21); 49 C.F.R. § 192.8 (differentiating between Type A and Type B regulated gas gathering lines); § 192.9 (applying transmission line regulations, which require annual inspections in some cases, to Type A but not Type B regulated gas gathering lines). Indeed, according to a report from the Congressional Review Service, 93% of all gathering lines are completely unregulated. Compl. ¶ 45.

PHMSA's statutory and regulatory requirements regarding hazardous liquids, including oil pipelines, present similar gaps. *Id.* ¶¶ 94–96. The Hazardous Liquid Pipeline Safety Act specifically excludes flow lines from the definitions of "transporting hazardous liquid." 49 U.S.C. § 60101(a)(22). The Act's implementing regulations also generally exempt rural regulated oil gathering lines,

low-stress pipelines, and transmission pipelines that do not affect a "high consequence area" from annual inspection. *See id.* at § 60109(g) (requiring the Secretary of Transportation to prescribe standards for oil pipelines at crossings of navigable waters, in high-density population areas, and in areas unusually sensitive to oil spills); *see also* 49 C.F.R. § 195.1(b) (defining which pipelines are covered by PHMSA's regulations); § 195.11 (defining hazardous liquids rural regulated gathering lines to include only those of a certain size, located within a quarter mile of an unusually sensitive area, and operating at a certain pressure); § 195.12(b)(3) (defining category 1, 2, and 3 low-stress rural pipelines to be those of a certain size and pressure and within a half mile of an unusually sensitive area).

Because of a boom in domestically-produced oil and gas, the network of uninspected pipelines is growing. Compl. ¶ 46. Thus, PHMSA's duty to cause the annual examination of pipelines on federal land, is more important now than ever before.

STANDARD OF REVIEW

PHMSA moves to dismiss Guardians' Complaint, in part, pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing, asserting that allegations in the complaint are facially insufficient to invoke federal jurisdiction. Under Fed. R. Civ. P. 12(b)(1), unless the moving party introduces additional evidence disputing the allegations in the complaint, a court will assume that all of the non-moving party's

allegations in the complaint are true and draw all reasonable inferences in their favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Indeed, in the Ninth Circuit, when a "plaintiff defends against a motion to dismiss at the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice,' because [courts] 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

PHMSA also moves to dismiss Guardians' Complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under rule 12(b)(6), a plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The facts in the complaint must be accepted as true and construed in the light most favorable to the plaintiff. *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citing *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990)).

ARGUMENT

I. THE COURT OF APPEALS DOES NOT HAVE EXCLUSIVE JURISDICTION OVER GUARDIANS' APA CLAIM.

To start, Guardians is not challenging the adequacy of PHMSA's existing regulations, contrary to PHMSA's characterization of the nature of Guardians' claim in the Complaint. Defs.' Mot. at 12. Rather, Guardians is challenging PHMSA's failure to perform its non-discretionary duty under MLA Section 185(w)(3) to cause the inspection of all oil and gas pipelines on federal lands.[1] Compl. ¶¶ 98-103. An agency's failure to act is justiciable under APA § 706(1), *Norton*, 542 U.S. at 64, and jurisdiction over failure to act claims properly lies with the district courts. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1342 (9th Cir. 1995). Thus, both PHMSA's attempt to reframe Guardians' claim as a collateral challenge to the PSA regulations and its connected argument that those regulations can only be challenged in the courts of appeal fail as a basis for dismissal.

Guardians references the PSA regulations only to illustrate that the annual inspection provisions for oil and gas pipelines in these regulations cover a subset of all pipelines. As discussed in the Factual Background, the PSA regulations do not encompass flow lines and certain gathering lines, so these pipelines are not being inspected pursuant to existing regulations. Compl. ¶¶ 88–96. PHMSA

[1] Specifically, Guardians is challenging PHMSA's failure to act with regard to specific pipelines outlined in its Complaint. *See* Compl. at App'x A.

acknowledges this straightforward reasoning, but then posits an erroneous and unsupported assertion that acknowledging regulatory gaps is the equivalent of a facial challenge to the regulations. Defs.' Mot. at 13. PHMSA offer no explanation for this assertion, just an accusation that Guardians has engaged in "artful pleading" to "challenge PHMSA's regulations." *Id.*

A closer examination of the cases PHMSA cites for support demonstrates that they are inapplicable here. All but one involve challenges to agency action, rather than a failure to act. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335–36 (1958) (challenging a Federal Power Commission order allowing condemnation of state fish hatchery); *Pub. Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (challenging utility commission rate-making proceeding); *United Steelworkers of Am., Local 12431 v. Skinner*, 768 F. Supp. 30, 31–32 (D.R.I. 1991) (challenging constitutionality of existing PSA regulations requiring drug testing of pipeline operators); *Arjmand v. U.S. Dep't of Homeland Sec.*, 745 F.3d 1300, 1301 (9th Cir. 2014) (challenging Department of Homeland Security determination letter); *Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp.*, 457 F.3d 956, 958 (9th Cir. 2006) (challenging DOT rule amending existing hazardous materials regulations). These cases do not support PHMSA's argument that Guardians' claim can be read as challenging existing PSA regulations.

Finally, although *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010), involved a failure to act claim under 5 U.S.C. § 706(1), it is distinguishable. There, environmental plaintiffs challenged the Forest Service's failure to close certain trails in wilderness areas to motorized use, as required by statute. *Id.* The Ninth Circuit rejected this claim because it found that the Forest Service did in fact close portions of trails in wilderness areas and relocate the trails outside wilderness area boundaries, and plaintiffs' issue was not with a failure to follow the statute's requirement to close the trails but rather with the Forest Service's wilderness area boundary definitions. *Id*. Thus, plaintiffs' claim was based on alleged arbitrary and capricious action under 5 U.S.C. § 706(2), which was barred by the statute of limitations. *Id*. at 933. Although both the failure to close trails to motorized travel and define wilderness boundaries could constitute the types of discrete agency actions (or failure to act) reviewable under 5 U.S.C. § 706(1), the agency had not failed to take either of these nondiscretionary actions. *Id*. at 932–33.

Here, Guardians is alleging a failure to act similar to the examples that *Hells Canyon* found appropriate for 706(1) review. As discussed throughout this brief, Guardians is challenging a discrete agency action—PHMSA's failure to cause the annual examination of all pipelines on federal lands, as required by the MLA. In *Norton*, 542 U.S. at 63, the Supreme Court specifically stated that "the failure to. . .

take some decision by a statutory deadline" was a nondiscretionary action. Thus, *Hells Canyon* supports Guardians' argument that PHMSA's failure to act is cognizable under 5 U.S.C. § 706(1), rather than PHMSA's argument that it is not.

In sum, it is not PHMSA's action "prescribing a regulation" implementing the PSA that is at issue here. Instead, it is PHMSA's failure to comply with the MLA requirements which gives rise to Guardians' claim.

II. GUARDIANS' APA CLAIM STATES A VALID CLAIM FOR RELIEF.

PHMSA also argues this Court should grant its motion to dismiss because Guardians has failed to state a viable APA claim under 5 U.S.C. § 704. Defs.' Mot. at 15–17. Under Section 704 of the APA, judicial review is only available when "there is no other adequate remedy in a court." 5 U.S.C. § 704. According to PHMSA, because Guardians could have brought a case in the court of appeals under the judicial review provision in 49 U.S.C. § 60119, an adequate remedy was available, thereby precluding an APA claim and district court review. But this argument depends wholly on PHMSA's erroneous characterization of Guardians' claim as a substantive attack on existing PSA regulations. Defs.' Mot. at 16–17. As discussed above, because Guardians is not challenging existing PSA regulations but rather PHMSA's failure to perform its nondiscretionary duty to cause the examination of certain pipelines on public lands under the MLA, Guardians' APA claim is valid. *See Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1036 (D.C.

Cir. 2008) (reviewing a MLA claim under the APA). Thus, Guardians has stated a cognizable APA failure-to-act claim, and review is this Court is proper.[2]

PHMSA also includes, in a footnote, an alternative argument contending that because the agency allegedly causes the annual examination of pipelines under its existing regulations, it has acted within the meaning of 5 U.S.C. § 706(2), thus Guardians is challenging final agency action rather than a failure to act under 5 U.S.C. § 706(1). Defs.' Mot. at 16, n.9. This argument relies on PHMSA's erroneous characterization of Guardians' case as a challenge to PSA regulations discussed above, and therefore, it, too, fails as a basis for dismissal. As detailed in Guardians' Complaint, PHMSA's existing regulations do not encompass all oil and gas pipelines; therefore, annual inspection requirements apply to only a subset of pipelines and do not include non-regulated rural gas gathering lines, some rural regulated gas gathering lines, oil flow lines, and certain oil gathering and transmissions lines outside of high consequence areas. 49 C.F.R. §§ 192.8, 192.9, 192.705, 192.706, 195.1(b), 195.11, 195.12. Guardians' failure-to-act claim under 5 U.S.C. § 706(1) is premised on PHMSA's failure to cause inspection of pipelines

[2] PHMSA's ancillary argument that review of PHMSA's failure to act is available in the court of appeals as part of a challenge to PSA regulations alleging the regulations are inconsistent with the MLA is a red herring. Def. Mot. at 17. Guardians' claim is not premised on an argument that existing PSA regulations are inconsistent with MLA requirements. PSA regulations were promulgated to implement the provisions of the PSA, not the MLA.

not already covered by existing regulations, rather than challenging an explicit decision by PHMSA not to take action. The Supreme Court explained this distinction:

> A "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request . . .

Norton, 542 U.S. at 63. Because PHMSA has neither taken action to cause inspection of the pipelines not covered by existing PSA regulations, nor announced a decision that it is declining to do so, there is no final agency action as contemplated by 5 U.S.C. § 706(2). Therefore, Guardians' challenge to PHMSA's failure to act states a claim for relief under 5 U.S.C. § 706(1).

PHMSA builds on this footnote argument in Part II.B of its Motion by arguing that this Court has no agency action to compel because (1) the relief Guardians requests is not mandated by Section 185(w)(3) of the MLA, and (2) PHMSA's regulations already cause the examination of pipelines. Defs.' Mot. at 18–19. As discussed above, the latter argument is incorrect as a matter of law. Existing PSA regulations cause the examination of some, but not all, pipelines. *See* 49 C.F.R. §§ 192.8, 192.9, 192.705, 192.706, 195.1(b), 195.11, 195.12. Guardians challenges PHMSA's failure to cause annual inspection of pipelines on federal lands that are not covered under PSA regulations. The fact that existing regulations purportedly require inspections of a subset of all pipelines does not divest

Guardians of a "cognizable legal theory" for failure to act necessary to survive dismissal under Fed. R. Civ. P. 12(b)(6). *Mendiondo*, 521 F.3d at 1104.

PHMSA's argument that Guardians' claim is not cognizable under 5 U.S.C. § 706(1) because the requested remedy is not required under Section 185(w)(3) of the MLA should be rejected because PHMSA is conflating standing's redressibility requirement with the Court's authority to compel PHMSA to perform a nondiscretionary duty. Redress of Guardians' injuries from PHMSA's failure to act is addressed in Section III below. Relevant here is the Court's authority to compel agency action—causing inspection of all pipelines on federal lands—required by the MLA. PHMSA is correct that the Court can only compel action that is legally required. Defs.' Mot. at 19; *see also Norton*, 542 U.S. at 61. The MLA requires that "[p]eriodically, but at least once a year, the Secretary of the Department of Transportation *shall* cause the examination of all [oil and gas] pipelines and associated facilities on Federal lands . . ." 30 U.S.C. § 185(w)(3) (emphasis added). The use of the term "shall" signifies a nondiscretionary duty. *See e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187–88 (10th Cir. 1999) (holding "[s]hall means shall."); *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008) (holding "Congress's use of the word 'shall' creates a nondiscretionary duty for [EPA]."); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 549 (D.D.C. 2005) (holding "use of the word 'shall' sets forth a mandatory duty" for agency to take action).

Thus, the Court can compel PHMSA to cause the annual inspection of all pipelines on federal land.

To the extent that Guardians' requested relief is beyond the scope of what the Court can order, Defs.' Mot. at 20, the Court has broad discretion to fashion a suitable remedy. *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (stating "district courts enjoy broad discretion in awarding injunctive relief."); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 645 (9th Cir. 2004) (accord). Here, Guardians is not requesting that this Court dictate *how* PHMSA will cause the annual inspection of pipelines on federal lands, but instead asks the Court compel PHMSA to act in the first place. Ultimately, this Court's remedy will be guided by the language of the Section 185(w)(3) of the MLA. Consequently, dismissal is not compelled on these grounds.

III. GUARDIANS HAS STANDING TO BRING THIS ACTION

PHMSA also asserts that the Court must dismiss this case because Guardians lacks standing. Defs.' Mot. at 21. To establish standing, a plaintiff must demonstrate: (1) it has suffered an "injury in fact" due to defendants' allegedly illegal conduct that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *WildEarth Guardians v. U.S Dep't*

of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180–81 (2000).

"For purposes of ruling on a motion to dismiss for want of standing," the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the [plaintiff]." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "In short, a 12(b)(1) motion to dismiss for lack of standing can only succeed if the plaintiff has failed to make 'general factual allegations of injury resulting from the defendant's conduct.'" *Young v. Crofts*, 64 F. App'x 24, 25–26 (9th Cir. 2003) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).[3]

Here, Guardians has alleged facts that, taken as true and construed in favor of Guardians as they must be in the context of Defendants' motion to dismiss, are sufficient to establish Guardians' standing to bring this action. However, if the Court finds that Guardians has insufficiently pled its basis for standing, Guardians hereby requests leave to amend its Complaint, pursuant to Fed. R. Civ. P. 15(a). The Supreme Court has determined that leave to amend should be "freely given" in

[3] Guardians has standing to bring suit on behalf of its members because, based on the facts alleged in Guardians' Complaint: its members have standing to sue in their own right; the interests at stake are germane to Guardians' purpose; and neither the claim asserted, nor the relief sought requires these members to participate directly in this lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); Compl. ¶¶ 13–23.

the absence of reasons such as undue prejudice, bad faith, undue delay, or dilatory motive by moving party. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Guardians also supplements the allegations in the Complaint with a declaration from one of its members.[4] *See Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 899 (9th Cir. 2011) (reviewing allegations in amended complaint, and two declarations, to determine whether plaintiff had standing). These further particularized allegations are sufficient to establish standing in response to Defendants' Motion to Dismiss. Guardians will file additional declarations at the summary judgment stage.

A. Guardians is Injured by PHMSA's Failure to Act.

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000) (citations omitted). Actual environmental harm from the complained-of activity need not be shown, as "reasonable concerns" that harm will occur are enough. *Id.*; *see also Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002) (noting that when environmental harm is alleged, "a credible threat of harm is sufficient to constitute actual injury for standing purposes.").

[4] The declaration of Jeremy Nichols is attached as Exhibit 1.

Guardians has met this standard. Oil and gas pipelines stretch across federal public lands, particularly in states in the Intermountain West where significant oil and gas production occurs. Compl. ¶ 15. Guardians alleges that its members can see, hear, and smell these pipelines while recreating on public lands, which decreases their recreational enjoyment and causes them concern related to health impacts from exposure to leaky pipelines. *Id*. ¶¶ 17–21. Guardians also alleges that PHMSA's failure to cause the examination of these and other pipelines on public lands means these pipeline-related health concerns, sights, sounds, and smells will persist and potentially increase. *Id*. ¶ 22. These allegations are sufficient for demonstrating injury-in-fact at the pleading stage. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 n.3 (1992) (recognizing "a generalized allegation of injury in fact made at the pleading stage" is sufficient for standing at that stage).

PHMSA concedes that Guardians has sufficiently alleged a concrete injury from the agency's failure to cause the inspection of pipelines on federal lands, but makes this concession only for the five pipelines on federal lands provided as illustrative examples in the Complaint. Defs.' Motion 23–24; Compl. ¶ 17.[5] In so doing, PHMSA ignores the standard articulated by the Ninth Circuit:

[5] The Complaint discusses visits to five specific pipelines, not six as PHMSA states in its Motion. *See* Compl. ¶ 17.

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Defs. of Wildlife*, 504 U.S. at 561) (alteration in original). Guardians has pled a concrete injury from PHMSA's failure to act through general allegations regarding its members' use of federal public lands in several states where oil and gas pipelines are present, exposure to "unsightly oil spills, rusted equipment and installations, sounds of leaking gas, and smells of oil and gas"; and resulting diminishment of recreational enjoyment and concerns with health impacts from exposure to leaking pipelines. Compl. ¶¶ 15–16, 19–20. Guardians has also provided specific examples of visits to five locations on public lands where members observed oil and gas pipelines that are subject to the MLA's inspection requirement. *Id.* ¶ 17. These allegations clearly "embrace those specific facts that are necessary to support [Guardians'] claim" at this stage of the case. *Maya*, 658 F.3d at 1068.[6]

[6] Moreover, standing is not assessed on a pipeline-by-pipeline basis. For example, the Tenth Circuit rejected the notion that declarations must "show its members have visited each of the leases at issue" stating that "[n]either our court nor the Supreme Court has ever required an environmental plaintiff to show it has traversed each bit of land that will be affected by a challenged agency action." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013). Instead, the court found injury where a declarant "traversed through or within view of parcels of land where oil and gas development will occur, and plans to return." *Id.* at 1156.

PHMSA characterizes Guardians' injuries as "abstract" because they are not "relat[ed] to some actual or imminent agency action." Defs.' Mot. 24. But PHMSA's argument mischaracterizes the "actual and imminent" prong of injury-in-fact as applicable to an "agency action" rather than to Guardians' concrete injury from an agency action. An injury is imminent "if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n.5 (2013)). Guardians must allege an *injury* that is actual or imminent stemming from PHMSA's failure to act. Guardians has done that. *See* Compl. ¶ 19 (describing encounters with leaking pipelines on public lands), ¶ 18 (alleging an intent to return to affected lands annually). This is all that is required to demonstrate an actual or imminent injury at the pleading stage.

Finally, PHMSA's argument that Guardians lacks standing because it has not tied its injuries to an agency action ignores both long-standing case law and the APA's recognition that a "failure to act" amounts to "agency action" that can be challenged under the APA when "an agency failed to take a *discrete* agency action that it is *required* to take." *Norton*, 542 U.S. at 64 (emphasis in original); *see also* 5 U.S.C. § 551(13) (defining "agency action" as including "failure to act"). Here, Guardians' injuries stem from PHMSA's *failure* to perform its nondiscretionary

duty under Section 185(w)(3) of the MLA to cause inspection of all pipelines on federal lands, a failure that results in uninspected pipelines across the public lands that Guardians' members use and enjoy. Compl. ¶¶ 15–21.[7] PHMSA's reliance on *Summers v. Earth Island Institute*, 555 U.S. 488 (2008), and *Lujan v. National Wildlife Fed.*, 497 U.S. 871 (1990) (hereinafter *Lujan v. NWF*), to support its argument is misplaced. First, both cases concerned a plaintiff's evidentiary burden of proving injury at the summary judgment stage, not at the pleading stage. *See Summers*, 555 U.S. at 494; *Lujan v. NWF*, at 881. Second, neither case challenged an agency's failure to act. *Lujan v. NWF* involved a challenge to a "land withdrawal review program" consisting of agency policies and processes for reviewing withdrawal applications rather than an "identifiable agency action" or a failure to act; *Summers* involved a facial challenge to Forest Service planning regulations untethered from any specific application of the regulations. *Lujan v. NWF*, 497 U.S. at 890, *Summers*, 555 U.S. at 493–94. Thus, these cases are not relevant here.

[7] Guardians injuries also fall within the "zone of interests" that Section 185(w)(3) of the MLA seeks to protect. *See Lujan v. NWF*, 497 U.S at 883, 886. The legislative history of the MLA indicates Congress purposefully gave the Department of Transportation oversight over oil and gas pipelines and associated facilities on federal lands to prevent environmental harm. *See* H.R. Conf. Rep. No. 93-617, at 8 (Oct. 31, 1973); 93 Cong. Rec. H 9799, H 9817 (daily ed. Nov. 12, 1973); *see also* Compl. ¶ 33.

To further establish injury-in-fact, Guardians supplements the allegations in the Complaint with a declaration from member Jeremy Nichols. Mr. Nichols has repeatedly recreated on federal public lands in many western states including the Upper Missouri River Breaks National Monument near Fort Benton and Big Sandy, Montana; the West Fork of the Bitterroot River Valley, Montana; the Red Desert of southwestern Wyoming; and the Little Book Cliffs area, Colorado. Nichols Decl. ¶ 6. While recreating in these locations, Mr. Nichols has observed several oil and gas pipelines, including those provided as illustrative examples in the Complaint. *Id*. ¶ 15. Over the years, Mr. Nichols has encountered "oil spills, rusted equipment and installations, sounds of leaking gas, and the smells of oil and gas" when recreating near oil and gas pipelines that are the subject of the Complaint, that have decreased his recreational enjoyment and cause him concerns about the health effects from exposure to leaking pipelines. *Id*. ¶¶ 16–17. With the Complaint's allegations and this declaration, Guardians establishes injury-in-fact.

B. Guardians' Injuries Are Fairly Traceable to PHMSA's Failure to Act.

To show causation, Guardians must show a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008). Further, for traceability, a plaintiff

"need not establish causation with the degree of certainty that would be required for him to succeed on the merits, say, of a tort claim." *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001); *see also Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (stating that a plaintiff need not establish proximate causation to show standing).

Here, Guardians is properly challenging "specifically identifiable Government violations of the law," *i.e.*, PHMSA's failure to comply with its nondiscretionary duty to cause pipeline inspections. *Lujan v. Defs. of Wildlife*, 504 U.S at 568; Compl. ¶¶ 100–103. And Guardians sufficiently alleges that its members' injuries from exposure to leaking pipelines are caused in part by PHMSA's failure to perform its nondiscretionary duty. Compl. ¶¶ 21–22. If PHMSA regularly inspected all pipelines on federal lands, the sights, sounds, smells, and risk of injury posed by the extensive web of pipelines would be diminished. *Id*. at ¶¶ 22, 23, 68. Thus, the Complaint allegations have sufficiently established "a line of causation between defendants' action and [Guardians'] alleged harm that is more than attenuated." *Maya*, 658 F.3d at 1070 (internal quotation marks and citation omitted).

PHMSA first argues that Guardians has insufficiently pled causation because it does not allege the category of pipeline (flow, gathering, or transmission line) causing its injuries nor that the specific pipeline causing the injury falls outside the scope of the Pipeline Safety Act inspection regulations. Defs.' Mot. at 25–26. But

as already discussed above, this level of detail is not required at the pleading stage. Moreover, it can be reasonably inferred from general allegations regarding descriptions of flow and gathering lines (Compl. ¶¶ 43–44), their prevalence on federal lands (*id*. ¶¶ 45–46), and Guardians' exposure to pipelines on federal lands (*id*. ¶¶ 17–19) that Guardians has encountered the categories of pipelines that fall outside the scope the PSA inspection regulations.[8] Plus, Guardians alleges that flow and unregulated gathering lines fall outside the scope PSA inspection regulations. Compl. ¶¶ 36, 45, 100, 101. PHMSA concedes that the PSA regulations cause the annual inspection of a subset of pipelines, but that the Act does not apply to all pipelines that exist on federal lands (specifically, flow lines and unregulated gathering lines). Defs.' Mot. 3 (*citing* 49 U.S.C. § 60101(a)(21–22) and 49 C.F.R §§ 192.3, 192.5).

Second, PHMSA incorrectly argues that Guardians' injuries are solely traceable to the actions of third party pipeline operators rather than to PHMSA because PHMSA does not operate or maintain pipelines. Defs.' Mot. at 26. But this argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett*, 520 U.S. at 168–69 (1997). *Bennett* recognized that "injury produced by

[8] Supporting this reasonable inference, Mr. Nichols identifies the specific type of pipelines he has encountered while recreating on federal public lands. Nichols Decl. ¶ 15.

determinative or coercive effect [of agency action] upon the action of someone else" can be traced to the agency responsible for the coercive effect. *Id*. at 169. Here, PHMSA's statutory duty to cause the inspection of pipelines on federal lands is akin to a regulatory agency which oversees and implements requirements which the pipeline industry must follow. PHMSA has, at a minimum, failed to cause the annual inspection of flow lines and unregulated gathering lines on federal lands. Compl. ¶ 81–96 (describing regulatory gaps). If PHMSA were to comply with its mandatory duty to cause pipeline inspections, it would have a "coercive effect" on pipeline operators to perform the required inspections.

Finally, PHMSA sets up the straw man argument that Guardians is asking the Court to "assume" facts articulating a causal chain between PHMSA's failure to act and Guardians' injuries. Defs.' Mot. at 26–27. However, the Court need not make PHMSA's four proffered assumptions to find that Guardians has sufficiently pled causation. As the Supreme Court recognized, it is improper to "raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw,* 528 U.S. at 181. PHMSA's four assumptions go to the merits of the case, not to assessing standing at the pleading stage.

C. Guardians' Injuries are Redressable.

Declaratory and injunctive relief will redress the injuries PHMSA has caused Guardians from its failure to cause the inspection of all pipelines on federal

lands. To satisfy Article III standing, the plaintiff must demonstrate that a favorable judicial decision will likely prevent or redress the injury. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000). The plaintiff does not need to show that the relief will relieve the injury entirely, just that a favorable decision will progress towards ameliorating the problem. *See Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). Here, requiring PHMSA to cause inspection of all pipelines on federal lands will necessarily redress Guardians' injuries.

PHMSA asserts that Guardians has not met the redressability prong because an order requiring PHMSA to cause the inspection of pipelines on federal lands may not prevent all pipeline leaks and spills. Defs.' Mot. at 29. But a plaintiff can still meet the redressability requirement even where its injuries will not be *entirely* ameliorated by a favorable outcome. Redressability requires only the likelihood that the plaintiff would receive "some" benefit from the requested relief. *Massachusetts*, 549 U.S. at 526 (holding redressability satisfied where the risk of global warming "would be reduced to some extent if petitioners received the relief [sought]"). And additional pipeline inspections will likely decrease undetected spills and leaks. Compl. ¶¶ 23, 68 (citing PHMSA's recognition that serious pipeline incidents have decreased 20 percent since 2009 as a result of inspections). Identification of spills and leaks in flow lines and gathering lines not previously

subject to an inspection requirement under the PSA will redress (even if only partially) Guardians' injuries.

CONCLUSION

For the foregoing reasons, Guardians respectfully requests that this Court deny PHMSA's Motion to Dismiss.

Respectfully submitted on the 20th day of December 2018,

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CERTIFICATE OF COMPLIANCE

I certify that this response is in compliance with L.R. 7.1 and the court's October 15, 2018, scheduling order (Dkt. 17). The response is 6,434 words, as counted using the word count feature in Microsoft Word and excluding the caption, table of contents, table of authorities, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I certify that on December 20, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF filing and transmission service, which caused all ECF-registered counsel to be served by electronic means.

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