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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*. Federal Defendants.	Case No. CV-18-110-GF-BMM **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Plaintiff WildEarth Guardians ("Guardians") hereby moves for summary judgment the claim at issue in this litigation – Defendants' failure to perform their mandatory duty under Section 185(w)(3) of the Mineral Leasing Act. 30 U.S.C. § 185(w)(3). In support of this motion, Guardians is concurrently filing a Memorandum of Law. For the reasons provided in the supporting Memorandum, Guardians is entitled to judgment as a matter of law on its claim. Consequently, Guardians respectfully request that this Court grant summary judgment in its favor and (1) declare that Federal Defendants have violated the Mineral Leasing Act, 30 U.S.C. § 185(w)(3); and (2) compel Federal Defendants unlawfully withheld action.

Respectfully submitted on the 28th day of October 2019,

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CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I electronically filed the foregoing Motion 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WILDEARTH GUARDIANS, Plaintiff, v. **ELAINE L. CHAO**, *et al*. Federal Defendants.	Case No. CV-18-110-GF-BMM **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This is an important case, but a relatively straightforward one. Plaintiff WildEarth Guardians ("Guardians") challenges the Department of Transportation's and the Pipeline and Hazardous Materials Safety Administration's (collectively "PHMSA's") failure to perform their discrete, legally-required duty under Section 185(w)(3) of the Mineral Leasing Act to cause the examination of all oil and gas pipelines on federal lands at least once per year. 30 U.S.C. § 185(w)(3).

Millions of miles of pipelines transporting oil and gas crisscross the United States. Many of these pipelines snake underneath federal public lands, increasing the risk of harm to those recreating on and near these lands from exposure to unpleasant odors, unsightly infrastructure, and the very real risk of explosions and spills. Many of the pipelines on federal lands are flowlines and gathering lines—the least regulated categories of pipelines. Congress, through the Mineral Leasing Act, has charged PHMSA with ensuring the safety of all pipelines on federal public lands by mandating that PHMSA cause them to be examined annually, at a minimum. Yet, PHMSA cannot produce a single inspection record demonstrating its compliance with this mandatory duty. Instead, PHMSA admits that it does not cause the annual inspection of all pipelines on federal public lands because it believes its compliance with a different statute governing a smaller subset of pipelines—the Pipeline Safety Act—equates to compliance with the Mineral

Leasing Act's more comprehensive requirements. PHMSA's position that the Pipeline Safety Act impliedly repealed Section 185(w)(3) of the Mineral Leasing Act does not withstand scrutiny. The language in Section 185 is clear and unqualified, and has not been repealed by Congress.

As a result, Guardians seeks summary judgment that PHMSA violated the Mineral Leasing Act and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., for failure to perform its mandatory duty to cause the annual examination of all pipelines on federal lands. This case is particularly well-suited for summary judgment because there is only one material fact and it is undisputed: that PHMSA has failed to cause the examination of all pipelines on federal lands on an annual basis. PHMSA has therefore unlawfully withheld action it is required to take. In this Circuit, if an agency fails to comply with an express statutory mandate with deadlines for action, the agency has *per se* violated the law. *See*, *e.g.*, *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177–78 & n.11 (9th Cir. 2002). Thus, Guardians respectfully requests that the Court grant its motion for summary judgment and compel PHMSA's unlawfully withheld action.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. R. of Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Id.* at 323. Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *See id.* at 324. Here, both parties agree that this case can be resolved through cross-motions for summary judgment. Dkt. 34 at 2.

Review of Guardians' failure to act claim is governed by the APA. 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. The APA defines "agency action" to include "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*[.]" *Id.* § 551(13) (emphasis added). Failure to act includes any "*discrete* agency action that [an agency] is *required to take*[,]" including "when an agency is compelled by law to act within a certain time period[.]" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64–65 (2004) ("*Norton v. SUWA*") (emphases in original). Legally-required actions are those described with "a specific, unequivocal command" or "ministerial . . . non-discretionary act[s]." *Id.* at 63–64.

In suits alleging a failure to comply with a mandatory duty according to a prescribed statutory deadline, the proper standard is whether agency action was "unlawfully withheld." 5 U.S.C. § 706(1); *Badgley*, 309 F.3d at 1177 n.11 (declining to apply the "unreasonably delayed" factors where Congress imposed a firm statutory deadline to perform a mandatory duty). The distinction between the "unlawfully withheld" and "unreasonably delayed" standards turns on whether Congress imposed a date certain deadline on agency action. *Id.*; *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1998) (citing *Sierra Club v. Thomas*, 828 F.2d 783, 794–95 & nn. 77–80 (D.C. Cir. 1987)). Here, Congress imposed a series of one-year deadlines on PHMSA to cause the examination of all pipelines on federal lands. This Court has already declared that Guardians "asserts properly a failure to act claim pursuant to § 706(1)." Dkt. 30 at 11.

To remedy a failure to act under the APA, "the reviewing court shall compel agency action unlawfully withheld[.]" 5 U.S.C. § 706(1); *see Forest Guardians*, 174 F.3d at 1190–91 (holding where an agency withholds timely action under a specific statutory deadline, "a reviewing court must compel the action unlawfully withheld."). To hold otherwise would be "an affront to our tradition of legislative supremacy and constitutionally separated powers." *Id.* at 1190. Additionally, where, as here, an injunction is the only means of compliance, the Court should

order PHMSA to comply with the terms of the statute. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).

ARGUMENT

I. Guardians Has Standing.

Guardians has organizational standing because its members have standing, the claims are germane to Guardians' organizational purpose,[1] and participation by individual members is not required to secure the relief sought. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Guardians has members with standing to challenge PHMSA's failure to cause the annual examination of pipelines on federal lands because the members have demonstrated: (1) injury in fact; that is (2) fairly traceable to the challenged action; and (3) 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).

The Supreme Court has long recognized that harm to a plaintiff's aesthetic, recreational, or environmental interests is sufficient to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Importantly, a plaintiff need not establish actual harm to the environment to support standing; it is enough that a

[1] Decl. of Michael Eisenfeld, (Eisenfeld Decl.) (Ex. 1), ¶ 3; Decl. of Jeremy Nichols (Nichols Decl.) (Ex. 2), ¶ 3; Declaration of Erik Molvar (Molvar Decl.) (Ex. 3), ¶ 3.

plaintiff's members "use the affected area" and have "reasonable concerns" that their recreational and aesthetic interests in the area will be lessened. *Laidlaw*, 528 U.S. at 183–84. 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). Finally, it is improper to "raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw*, 528 U.S. at 181.

Guardians has demonstrated standing to bring this action through the declarations of its members. Guardians' members are directly harmed by PHMSA's failure to cause the annual examination of all pipelines on federal lands as required by Section 185(w)(3) of the Mineral Leasing Act.[2] Guardians' members live, work and recreate on and near federal public lands that are traversed by surface and subsurface oil and gas pipelines.[3, 4] Guardians' members' regular

[2] *See* Eisenfeld Decl. ¶¶ 8-13; Nichols Decl. ¶¶ 18-24; Molvar Decl. ¶¶ 10-14.
[3] *See* Eisenfeld Decl. ¶¶ 3-10; Nichols Decl. ¶¶ 5-12, 16-18; Molvar Decl. ¶¶ 4-5, 7-11.
[4] 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

use and enjoyment of these areas includes various recreational uses, such as hiking, camping, backpacking, wildlife viewing, birding, hunting, fishing, floating, mountain biking, experiencing archaeology, rockhounding, photography, and research.[5] While using federal public lands, Guardians' members have observed several oil and gas pipelines and 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 their recreational enjoyment and caused them concerns about the health effects from exposure to leaking pipelines.[6] Guardians' members plan to continue recreating in these areas in the future, with specific return trips planned for different federal lands in November 2019, March 2020, April 2020, May 2020, and July 2020.[7] However, PHMSA's failure to cause the inspection of all pipelines on federal lands causes Guardians' members significant concern and diminishes their enjoyment when recreating on these and other federal lands.[8] Moreover, more than a dozen pipeline rights-of-way approved by BLM on federal lands are located

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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.

[5] *See* Eisenfeld Decl. ¶¶ 3-5; Nichols Decl. ¶¶ 5-7, 16; Molvar Decl. ¶¶ 7-13.

[6] *See* Eisenfeld Decl. ¶¶ 6-10; Nichols Decl. ¶¶ 8-11, 16, 18-19, 21; Molvar Decl. ¶¶ 5-11.

[7] *See* Eisenfeld Decl. ¶ 5; Nichols Decl. ¶¶ 16, 20; Molvar Decl. ¶¶ 6.

[8] *See* Eisenfeld Decl. ¶¶ 11-13; Nichols Decl. ¶¶ 8-11, 16, 18-19, 21, 23-24; Molvar Decl. ¶¶ 5-14.

within a mile of the home of one Guardians' member living in Farmington, New Mexico.[9] In light of the close proximity of his home to such oil and gas pipelines—some within just hundreds of feet from his home—and the visible disrepair of many of the pipelines he has personally observed on public lands, this Guardians' member is reasonably concerned for his personal safety and health in his own home.[10] Thus, through its members, Guardians has met the injury in fact requirement for standing.[11]

Guardians' members' injuries can be traced to PHMSA's failure to perform its mandatory duty under Section 185 (w)(3) of the Mineral Leasing Act.[12] If PHMSA regularly caused the annual examination of all pipelines on federal lands, the sights, sounds, smells, and risk of injury to Guardians' members posed by the extensive web of pipelines would be diminished.[13] The allegations of Guardians' members have sufficiently established "a line of causation between defendants' action and [Guardians'] alleged harm that is more than attenuated." *Maya v.*

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[9] *See* Eisenfeld Decl. ¶ 9.
[10] *See id*. ¶ 9-11.
[11] Guardians injuries also fall within the "zone of interests" that Section 185(w)(3) of the Mineral Leasing Act seeks to protect. *See Lujan v. Natl. Wildlife Fed'n*, 497 U.S 871, 883, 886 (1990). The legislative history of the Mineral Leasing Act 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* 93 Cong. Rec. H 9799, H 9817 (daily ed. Nov. 12, 1973) (Ex. 8, *infra*); *see also* Compl. ¶ 33 (Dkt. 1).
[12] *See* Eisenfeld Decl. ¶¶ 14-15; Nichols Decl. ¶¶ 21-24; Molvar Decl. ¶¶ 12-14.
[13] *See* Eisenfeld Decl. ¶¶ 11-12; Nichols Decl. ¶¶ 25-26; Molvar Decl. ¶¶ 15-16.

Centex Corp., 658 F.3d 1060, 1070 (9th Cir. 2011) (internal quotation marks and citation omitted). If PHMSA were to comply with its mandatory duty to cause pipeline examinations, such action would redress Guardians' members' injuries. Given that PHMSA has provided no record evidence that it has ever caused the annual examination of any pipelines on federal lands, a favorable ruling from this Court is the only means of redressing Guardians' members' injuries.

II. PHMSA is Failing to Perform Its Discrete, Legally-Required Duty to Cause the Annual Examination of All Pipelines on Federal Lands.

The seminal case governing failure to act claims under Section 706(1) of the APA is the Supreme Court's decision in *Norton v. SUWA*. There the Court found that a failure to act under APA 706(1) was properly understood to be limited to "a discrete agency action that [the agency] is required to take." *Norton v. SUWA*, 542 U.S. at 64. As discussed below, the language used in Section 185(w)(3) falls cleanly within this structure, giving rise to a discrete, legally-required duty for PHMSA to perform (or cause to be performed) on a specific timeline.

A. Annual Pipeline Examinations are Discrete Acts Within the Meaning of APA 706(1).

Norton v. SUWA first concluded that the term "failure to act" is "properly understood to be limited . . . to a discrete action." 542 U.S. at 63. The Court then provided a number of examples of discrete versus non-discrete actions, noting that "broad programmatic" claims of "general deficiencies" would not satisfy this

standard but that actions such as "the failure to promulgate a rule or take some decision by a statutory deadline" would suffice. *Id.* at 63, 64, 66. The Court specifically explained that a provision requiring the Federal Communications Commission "'to establish regulations to implement' interconnection requirements '[w]ithin 6 months' of the date of the enactment of the Telecommunications Act, would have supported a judicial decree under the APA requiring the prompt issuance of regulations[.]" *Id.* at 65.

Relying on *Norton v. SUWA*, the Ninth Circuit has also discussed what qualifies as a discrete agency action for failure-to-act cases. *Vietnam Veterans of America v. Central Intelligence Agency*, found a discrete duty for an APA 706(1) claim where an Army regulation imposed a "duty to warn" requiring Army commanders to warn volunteers of the risks of participating in experiments and provide relevant information as it became available. 811 F.3d 1068, 1075–76, 1078–79 (9th Cir. 2016). Although the regulation at issue did not specify particular timing for performance of the mandatory duty, the Court found that the regulation mandated a sufficiently specific *action* to sustain a claim under Section 706(1).[14]

[14] Similarly, in an unpublished, but analogous, decision from the District of New Mexico, the court held that statutory language mandating "[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary[,]" was sufficiently discrete to give rise to a mandatory duty enforceable under Section 706(1) of the APA. *W. Energy All. v. Jewell*, No. 1:16-CV-00912-WJ-KBM, 2017 WL 3600740, at *13 (D.N.M. Jan. 13, 2017).

Id. at 1078–79. The Court contrasted the specific action mandated in the "duty to warn" regulation with the general obligation to prevent impairment to wilderness study areas in the statute at issue in *Norton v. SUWA*, and found that the Army regulation had the requisite specificity for agency action that could be compelled by the Court. *Id*.

The Ninth Circuit has found a discrete duty in a number of additional cases as well. In *Natural Resources Defense Council, Inc. v. James R. Perry*, the Court found a discrete duty where the statute required the Department of Energy to submit energy standards to the Federal Register but failed to do so. No. 18-15380, 2019 WL 5076950 at *4 (9th Cir. Oct. 10, 2019) ("*NRDC*"). Additionally, in *Oregon Nat. Desert Association v. U.S. Forest Service*, the Court concluded that the "annual operating instructions" implementing grazing permits that plaintiffs challenged were discrete actions under the APA. 465 F.3d 977, 983 (9th Cir. 2006) ("*ONDA*").

Here, similar to *NRDC* and *ONDA*, the language of Section 185(w)(3) prescribes both a discrete action—causing the examination of pipelines—and a discrete timeline for that action—"periodically, but at least once per year[.]" 30 U.S.C. § 185(w)(3). Although PHMSA has discretion to determine the "precise efforts" it must take to come into compliance with Section 185(w)(3), this "does not mean that [PHMSA] does not have a duty to perform a 'discrete action' within

the meaning of § 706(a) and *SUWA*." *Vietnam Veterans*, 811 F.3d at 1079 (citing *Norton v. SUWA*, 542 U.S. at 65). Indeed, the language in the Mineral Leasing Act arguably provides more specificity than the language at issue in *Vietnam Veterans*; it not only prescribes a discrete action (as in *Vietnam Veterans*), it also provides a specific time frame by which PHMSA must perform that action. *Compare Vietnam Veterans*, 811 F.3d at 1076, *with* 30 U.S.C. § 185(w)(3). Accordingly, Section 185(w)(3) imposes a discrete agency action that PHMSA is required to take within a specific time period.

B. PHMSA is "Legally Required" to Cause Annual Pipeline Examinations.

A party must also demonstrate that an agency action is "legally required" for a successful failure to act claim under APA 706(1). *Norton v. SUWA*, 542 U.S. at 63. Legally-required actions are those described with "a specific, unequivocal command" or "ministerial . . . non-discretionary act[s]." *Id.* at 63–64. A duty can be considered "legally-required" where Congress has used the term "shall." *See id.* at 66 (finding the duty in 43 U.S.C § 1782(c) to be mandatory where it used such language); *NRDC*, 2019 WL 5076950 at *4. Here, Congress's use of the word "shall" in Section 185(w)(3) of the Mineral Leasing Act signals that Congress intended PHMSA's duty to cause annual examinations of all pipelines on federal lands to be mandatory or "legally-required."

Because no court has construed Section 185(w)(3)'s legal mandate, the canons of statutory construction should guide interpretation of this provision. The "starting point for any issue of statutory construction is the plain language of the statute." *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1175 (9th Cir. 2007) (citing *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). The plain language of the statute is given effect unless there is good reason to believe Congress intended the language to have some more restrictive meaning. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 562 (9th Cir. 2016). Although the general rule is that where a statute's meaning is clear, a court need not look into the legislative history of the statute, this rule does not act as a bar to considering legislative history where it is probative of Congress's intent. *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981).

"The term 'shall' is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary." *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 574 (9th Cir. 2000). Similarly, "'all' means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998); *accord Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 831 (9th Cir. 1996).

Here, the plain language of Section 185(w)(3) is unambiguous. It provides:

> Periodically, but at least once a year, the Secretary of the Department of Transportation *shall* cause the examination of *all* pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential lea or safety problems.

30 U.S.C. § 185(w)(3) (emphases added). This language includes the terms "shall" and "all" without any exemptions or exclusions either in Section 185 or elsewhere in the Mineral Leasing Act.[15] Thus, the Court should afford the terms "shall" and "all" their plain meaning, and find that Section 185(w)(3) imposes a clear, legally-required duty on PHMSA without exceptions. *Nw. Forest Res. Council*, 82 F.3d at 833.

Finally, although it is not necessary to reach the legislative history when the language of the statute is clear, the legislative history resoundingly supports the plain meaning of the statute. As this Court noted in its Order Denying Defendants' Motion to Dismiss, Congress purposefully assigned the Department of Transportation the duty to "cause the examination of all pipelines . . . on federal lands" in Section 185(w)(3) when it passed the Mineral Leasing Act. *See* Dkt. 30

[15] Courts have found use of the term "shall" to not denote a mandatory duty where the term is accompanied by a qualifying clause such as "to the maximum extent practicable." *See*, *e.g.*, *Badgley*, 309 F.3d at 1175–76 (finding "maximum extent practicable" language attached to a 90-day finding deadline in the Endangered Species Act provided some flexibility to the agency to exceed that deadline). Section 185(w)(3) has no such qualifying language attached to the mandatory duty to cause annual pipeline examinations.

(citing Sen. Rep. 96-182, at 16 (1979)). Congress also purposefully declined to remove this language during subsequent revisions of the Mineral Leasing Act despite the Department of Transportation's requests. *Id.* Thus, Congress's intent is clear: to require the Department of Transportation, and ultimately PHMSA, to regularly ensure the safety of ongoing pipeline operations on federal lands. This Court must give effect to Congress's intent by upholding the plain language of Section 185(w)(3) and requiring PHMSA to cause the annual examination of all pipelines on federal lands.

C. PHMSA Concedes That it is Not Causing the Inspection of All Pipelines on Federal Lands.

During the hearing for the motion to dismiss, PHMSA conceded that it is not causing annual examination of all pipelines on federal lands. Tr. 17:23–25 to 18:1 (Dkt. 37). In PHMSA's motion to dismiss, where PHMSA asserted it was meeting its mandatory duty under Section 185(w)(3) of the Mineral Leasing Act through the Pipeline Safety Act regulations, the agency also recognized that Congress had excluded flow lines and most rural gathering lines from regulation under the Pipeline Safety Act. Dkt. 19 at 3, n.3 and 4, n.4. Accordingly, because there is no dispute over the key material fact in this case—PHMSA is not causing the annual examination of all pipelines on federal lands—Guardians is entitled to summary judgment on liability.

Even if PHMSA's admissions alone are not sufficient to grant Guardians' motion, the complete absence of any record evidence demonstrating that PHMSA has met its mandatory duty under the Mineral Leasing Act supports a grant of summary judgment in Guardians' favor. *Celotex Corp.*, 477 U.S. at 323 (once a movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the defendant to show at least one disputed material fact). PHMSA provided administrative records that are entirely void of any documents related to pipeline inspections. The records solely consist of documents related to various proposals for Pipeline Safety Act rulemaking and public comments received in response to proposed rules under that particular Act. For the hazardous liquids record, none of the records post-date July 17, 2008, *see* AR002693, and none are relevant to the issue of whether PHMSA is ensuring the safety of pipelines on federal lands or elsewhere by causing annual examinations. Similarly, for the natural gas record, none of the records post-date September 7, 2006, *see* AR001590, and none are relevant to PHMSA's mandatory duty at issue here.

Nor did PHMSA produce evidence of annual inspections for the pipelines requested in response to Guardians' multiple Freedom of Information Act ("FOIA") requests. Compl. ¶¶ 69–87; Exs. 4–7.[16] For example, in response to

[16] These extra record documents are properly before the Court because, as the Ninth Circuit has held, "when a court considers a claim that an agency has *failed* to act in violation of a legal obligation, 'review is not limited to the record as it

Guardians' appeal of its first FOIA request submitted on December 8, 2014, PHMSA provided accident reports but no inspection reports. Ex. 4, Mar. 12, 2015 PHMSA Resp. to Guardians' Appeal; Compl. ¶¶ 70–71 (Dkt. 1). For the second FOIA request, Guardians provided PHMSA with the Bureau of Land Management serial number, the date of authorization, and the location of the right-of-way for a subset of 35 oil and gas pipelines rights-of-way. Ex. 5, April 1, 2015 Guardians' Modified FOIA Request; Compl. ¶ 76 (Dkt. 1). PHMSA ultimately provided records, including one-time (but not annual) inspection reports for seven pipelines, but admitted that it had no inspection records for the remaining 28 pipelines. Ex. 6, April 23, 2015 PHMSA Resp. Letter; Ex. 7, May 4, 2015 PHMSA Final Resp. Letter; Compl. ¶ 77–78 (Dkt. 1).

In sum, PHMSA has not provided any record evidence demonstrating that it has *ever* caused the *annual examination* of *any* pipelines on federal lands at any time since Congress added Section 185 to the Mineral Leasing Act in 1973. And, PHMSA has conceded that existing pipeline regulations under a different statute do not cause the annual examination of all pipelines on federal lands. When the evidence is "so one-sided that one party must prevail as a matter of law," summary

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existed at any single point in time because there is no final agency action to demarcate the limits of the record.'" *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) (emphasis in original) (quoting *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000)).

judgment is appropriate. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986). Thus, Guardians is entitled to summary judgment in its favor.

III. Regulations Implementing a Different Statute Do Not Excuse PHMSA From Its Duty to Comply with the Mineral Leasing Act.

Based on statements in PHMSA's Answer to the Complaint, and briefing and argument in the motion to dismiss, PHMSA mistakenly believes that it is complying with Section 185(w)(3) through actions taken under the Pipeline Safety Act regulations. *See*, *e.g.*, Dkt. 19 at 19 ("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."). But this defense lacks merit. The mere existence of regulations implementing a different statute that regulate some pipelines (and exclude others) cannot be a defense to PHMSA's failure to perform a mandatory duty under a completely different statute, especially where those regulations exempt those pipelines most likely to be located on federal lands. *See* Pl.'s Compl. ¶ 15; Fed. Defs.' Answer ¶ 15.

Indeed, the Pipeline Safety Act *excludes* flow lines and most rural gathering lines from regulation. *See* 49 U.S.C. § 60101(a)(21-22)(A-B)(i-ii); 49 C.F.R. §§ 192.6(b)(1), 192.8 (b), 192.9. Although Section 185 of the Mineral Leasing Act deals with subject matter—*i.e.*, pipelines—that is also governed by the Pipeline Safety Act, Section 185 does not exempt *any* pipelines on federal lands from the examination requirement. Thus, whether PHMSA is complying with the Pipeline

Safety Act and its implementing regulations, with less stringent provisions than the Mineral Leasing Act, is not relevant to the issue here—whether PHMSA is complying with Section 185(w)(3) of the Mineral Leasing Act.

The Ninth Circuit has rejected analogous equivalency arguments where there are "material differences" between two statutes dealing with similar subject matter. In *K.M. ex rel. Bright v. Tustin Unified School District*, 725 F.3d 1088, 1092, 1100 (9th Cir. 2013), the Ninth Circuit reversed a district court's grant of summary judgment to a school district where the district court held because the school district had complied with the Individuals with Disabilities Act ("IDEA"), it also *per se* complied with the Americans with Disabilities Act ("ADA") where both statutes dealt with similar subject matter. The Ninth Circuit found that the two statutes, although "worded similarly," contained "material differences." *Id.* at 1099. First, while the statutes had "overlapping" jurisdiction, they were "not coextensive," or exactly the same. *Id.* Second, each statute imposed differing factors and standards by which to establish liability. *Id.* The Court then compared the particular provisions of each statute to determine whether "the ADA requirements [we]re sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA[.]" *Id.* at 1100. The Court ultimately concluded the statutes were sufficiently different to preclude tying the success or failure of an IDEA claim to the success or failure of an ADA claim. *Id.* at 1101.

The situation here is analogous to *K.M. ex rel. Bright*. The purpose of the Pipeline Safety Act is to ensure the safety of pipelines, including development of standards for inspections. *See* 49 U.S.C. § 60102(a)(2)(B). The mandate of Section 185 of the Mineral Leasing Act shares the pipeline safety goal but imposes a more inclusive pipeline examination requirement pertaining to *all* pipelines on federal public lands regardless of the type of pipeline. *See* 30 U.S.C. § 185(w)(3). Although there may be some subject matter overlap between Section 185(w)(3) of the Mineral Leasing Act and the Pipeline Safety Act, because the former is more expansive, compliance with the latter cannot equate to compliance with the Mineral Leasing Act, particularly when the Pipeline Safety Act exempts those categories of pipelines—*i.e.*, flow lines and unregulated gathering lines—that are the most prolific types of pipelines on federal lands. *See K.M. ex rel. Bright*, 725 F.3d at 1099.

Finally, the legislative history suggests that Congress, through the passage of Section 185(w)(3) in 1973, intended to protect the environment and provide a check on the Interior Department. The passage of Section 185 occurred during discussions about a bill amending the Mineral Leasing Act to allow for development of the Trans-Alaska Pipeline. Ex. 8, 93 Cong. Rec. H 9799, H 9812 (daily ed. Nov. 12, 1973). A number of legislators who supported the conference report reconciling the final language of the Act, which included Section 185(w)(3)

as it remains today, explained that although the passage of the bill was necessary to alleviate the "energy crisis," Congress, through the bill, "ha[d] also taken some giant steps to protect the public interest and our environment[,]" instead of allowing "the oil-industry-dominated Interior Department" to rush approval of the pipeline through. *Id.* at 9816 (statement from Rep. Dingell in support of the conference report). Put another way, Congress intended, through the passage of Section 185(w)(3) of the Mineral Leasing Act, for the Department of Transportation to provide a check on the Interior Department in order to protect the environment from pipeline leaks, spills, and other accidents.

As a result, PHMSA's regulations under the Pipeline Safety Act cannot automatically result in compliance with the distinct requirement under the Mineral Leasing Act because they do not satisfy the Mineral Leasing Act's mandate or its specific purpose. Thus, Guardians asks this Court to give effect to Congress's intent and conclude that PHMSA has failed to comply with its mandatory duty under the Mineral Leasing Act.

REMEDY

In a "failure to act" case like this one, this Court can "compel agency action unlawfully withheld" pursuant to APA § 706(1). As discussed above, PHMSA concedes liability under Section 185(w)(3) of the Mineral Leasing Act. Tr. 17:23–25 to 18:1 (Dkt. 37). It is a well-established principle in this Circuit and others that

courts must issue an injunction upon finding that an agency violated a mandatory duty and deadline.[17] *See*, *e.g.*, *Badgley*, 309 F.3d at 1177 (Congress foreclosed courts' equitable discretion to decide whether an injunction should issue for violation of a mandatory duty in Endangered Species Act); *accord Nat. Resources Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000) (violation of a Clean Water Act mandatory duty); *accord Sierra Club v. Browner*, 130 F. Supp. 2d 78, 82 (D.D.C. 2001), *aff'd sub nom*. *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002) (violation of Clean Air Act mandatory duty). Additionally, where an injunction is the only means of compliance, the Court should order PHMSA to comply with the terms of Section 185(w)(3) of the Mineral Leasing Act. *Weinberger v. Romero-Barcelona*, 456 U.S. 305, 314 (1982). An injunction directing PHMSA to perform a mandatory duty "expressly preserves" PHMSA's ability to act in its discretion to determine the means of compliance, and "does not amount to programmatic oversight" of the agency with respect to implementation of Section 185(w)(3) compliance measures. *Vietnam Veterans*, 811 F.3d at 1080.

[17] Where a court finds, or an agency concedes, that the agency has failed to perform a nondiscretionary duty, the factors in *Monsanto v. Geertson Seed*, 561 U.S. 139 (2010) are not applicable. *Audubon Socy. of Portland v. Jewell*, 104 F. Supp. 3d 1099, 1102 (D. Or. 2015).

If the Court determines that PHMSA has failed to perform its nondiscretionary duty to annually cause the examination of all pipelines on federal lands, the Court has "broad equitable discretion to fix an appropriate deadline" for compliance. *State of California v. U.S. Envtl. Prot. Agency*, 385 F. Supp. 3d 903, 908 (N.D. Cal. 2019). In determining the appropriate timeline for agency action, the Ninth Circuit has instructed district courts to follow a standard of reasonableness. *Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995); *see also Ctr. for Biological Diversity v. Norton*, 304 F.Supp.2d 1174, 1184 (D. Ariz. 2003). Where Congress imposes strict statutory deadlines (such as the annual examination requirement at issue in this case), courts have fashioned relief and set schedules based on how quickly the agency can come into compliance with the its nondiscretionary duty. *See*, *e.g.*, *Alaska Center for the Envt. v. Reilly*, 796 F. Supp. 1374, 1377–81 (W.D. Wash. 1992) (for failure to act under Clean Water Act, setting schedule for developing water quality standards and completing water quality monitoring); *State of Calif.*, 385 F. Supp. 3d at 911–16 (for failure to act under Clean Air Act, setting schedule for EPA to perform nondiscretionary duties and file status reports with court).

Courts routinely bifurcate the liability and relief phases of failure to act cases, and upon granting injunctive relief for failure to perform a nondiscretionary duty, order the parties to meet and confer and/or submit briefing addressing the

appropriate scope of injunctive relief. *See*, *e.g.*, *Center for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 972 (N.D. Cal. 2013). Guardians requests that, if the Court grants Guardians' Motion for Summary Judgment, the Court consider a similar approach here for the scope of injunctive relief. For example, the Court could order the parties to meet and confer to develop a plan to ensure that PHMSA begins causing the annual examination of all pipelines on federal lands in an expeditious manner, and submit a joint stipulated plan to the Court; or the Court could require PHMSA to supply the Court with the agency's own plan, and allow Guardians the opportunity to oppose, amend, or support the plan. *See*, *e.g.*, *Hells Canyon Pres. Council v. Richmond*, 841 F. Supp. 1039, 1048-50 (D. Or. 1993) (adopting parties' proposed schedule for compliance with nondiscretionary duty); *Nat. Res. Def. Council v. Evans*, 290 F. Supp. 2d 1051, 1051–52, 1056 (N.D. Cal. 2003) (granting plaintiffs' motion for an order for deadlines after parties were unable to stipulate to a new schedule by which agency must comply with statutory obligations).

Guardians further requests that, in light of PHMSA's failure to have ever complied with Section 185(w)(3), the Court retain jurisdiction to ensure agency compliance with any Court-mandated injunctive relief until PHMSA has implemented a plan to cause the examination of all pipelines on federal lands. *See*, *e.g.*, *Alaska Center for the Envt.*, 796 F. Supp. at 1382 (retaining jurisdiction for an

initial two-year period to assess compliance with remedy order). Retention of jurisdiction is also necessary in this instance to ensure that once a plan is in place to begin causing annual examinations of all pipelines on federal lands, PHMSA follows through and keeps records indicating implementation of the plan.

CONCLUSION

In sum, this Court should grant Guardians' requested relief, because Section 185(w)(3) gives rise to a discrete, legally-required duty mandating the annual examination of all pipelines on federal lands. The evidence before the Court supports the conclusion that PHMSA is failing to meet this mandatory duty; PHMSA has not provided any records showing it has caused all pipelines on federal lands to be examined on an annual basis. There is no excuse for the failure. The language of Mineral Leasing Act is clear, the legislative history demonstrates Congress considered but declined to repeal Section 185(w)(3), and Pipeline Safety Act regulations do not equate to compliance with the Mineral Leasing Act. As a result, Guardians respectfully requests that the Court grant Guardians' motion for summary judgment and declare that Defendants have violated Section 185(w)(3) of the Mineral Leasing Act and compel Defendants' unlawfully withheld actions.

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Respectfully submitted on the 28th day of October 2019,

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EXHIBIT INDEX

Exhibit 1	Declaration of Michael Eisenfeld
Exhibit 2	Declaration of Jeremy Nichols
Exhibit 3	Declaration of Erik Molvar
Exhibit 4	March 12, 2015 PHMSA Response Letter to Guardians' FOIA Appeal
Exhibit 5	April 1, 2015 Guardians' Modified FOIA Request
Exhibit 6	April 23, 2015 PHMSA Response Letter to Guardians' FOIA
Exhibit 7	May 4, 2015 PHMSA Final Response Letter
Exhibit 8	House Discussion of Conference Report on S. 1081, 93 Cong. Rec. H 9799, H 9812 (daily ed. Nov. 12, 1973)

CERTIFICATE OF COMPLIANCE

I certify that this response is in compliance with L.R. 7.1 and the Court's June 13, 2019 Scheduling Order (Dkt. 35). The response is 6,244 words, as counted using the word count feature in Microsoft Word and excluding the caption, table of contents, table of authorities, exhibit index, certificate of compliance, and certificate of service.

/s/ Rebecca Fischer
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I electronically filed the foregoing and accompanying exhibits 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.

/s/ Rebecca Fischer
Counsel for Plaintiff