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July 15, 2015

U.S. District Judge Kristine G. Baker
500 West Capitol Avenue, Room D444
Little Rock, AR 72201

Re: *United States of America, et al. v. ExxonMobil Pipeline Co., et al.*, Civil Action 4:13-cv-0355, Eastern District of Arkansas

Dear Judge Baker:

I am writing on behalf of Central Arkansas Water (CAW) and the 400,000 citizens we serve in Central Arkansas to express our disappointment in and opposition to the United States' Unopposed Motion to Enter Consent Decree (the "Motion"). We believe the comments we presented within the comment period set forth in the proposed Consent Decree (the "Comments") provided more than adequate and compelling reasons for the United States to reject the proposed Consent Decree. However, many of the statements set forth in the United States' Brief in Support of the Motion (the "Brief") are even more concerning and justify the District Court, on its own initiative, to question whether the proposed Consent Decree is really fair, adequate, reasonable, consistent with the goals and purposes of the Clean Water Act (CWA), and in the best interest of the citizens of Arkansas and the United States.

In summary, CAW does not believe that the proposed Consent Decree is consistent with the goals and purposes of the CWA, including: (1) the elimination of all discharges of pollutants into navigable waters, and (2) the prohibition of the discharge of toxic pollutants.[1] The CWA clearly provides "that it is the policy of the United States that there should be **no discharges** of oil or hazardous substances into or upon the navigable waters of the United States . . . ."[2] (emphasis added). Yet, the United States repeatedly states in the Brief that the proposed Consent Decree will be available as a hammer when the next spill occurs rather than taking meaningful and measurable steps to ensure that another spill is prevented. In fact, by its own admission, the United States believes another pipeline spill will occur in the future. Therefore, this Consent Decree and concession to future oil pipeline spills is unacceptable, inconsistent with the CWA, and not in the best interest of the public.

Comments in Opposition to the Motion

CAW offers the following items for the Court's consideration in opposition to the Motion:

[1] Section 101(a)(1) and (3) of the CWA.
[2] Section 311(b)(1) of the CWA.

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1. *The proposed Consent Decree fails to provide effective relief consistent with the goals and purposes of the CWA.*

The United States suggests that the Court should enter the proposed Consent Decree because its provisions would be considered "in assessing ExxonMobil's response to any future spill." But the proposed Consent Decree is supposed to eliminate any future spill, not just be a factor to consider for remedies in response to a future spill. The proposed Consent Decree presupposes that there will be future spills from the Pegasus pipeline. Thereby, the United States agrees that neither it, nor PHMSA, can prevent future spills. By its own admission, the United States agrees that the proposed Consent Decree does not comply with the purposes of the CWA.

Yes, the proposed Consent Decree requires ExxonMobil to admit that the entire Northern section of the Pegasus pipeline is "susceptible to seam failure" from this date forward. But the "need" for addressing this "central factual issue in dispute" is the equivalent of getting the tobacco companies to admit that cigarettes cause cancer from this date forward, without requiring them to admit that they caused cancer for the last 50 years and without requiring them to admit that they knew cigarettes caused cancer prior to this date.

Our Comments demonstrate that ExxonMobil knew or should have known that the Northern section of the Pegasus pipeline was susceptible to seam failure since 2006 and as early as 1991. Given ExxonMobil's continued claims of an industry-leading integrity management program, we believe it unlikely that they were unaware of the susceptibility to seam failure. Furthermore, their procedural modifications during the 2006 hydrostatic testing where they experienced a large number of early ruptures at high pressures and subsequently reduced pressures to ensure the pipeline would pass testing with fewer ruptures indicate their knowledge of systemic pipeline integrity issues and use of a technical loophole to avoid real and effective pipeline integrity management efforts.[3]

As stated in our Comments, ExxonMobil should have treated the Northern section of the Pegasus pipeline as susceptible to seam failure prior to the Mayflower rupture. As evidenced by the Mayflower spill and ExxonMobil's continued comments (many of which we were unable to view until the United States disclosed them when filing the Brief), ExxonMobil has refused to treat the pipeline as susceptible. As a result, we stand by our Comments that it was grossly negligent for ExxonMobil to fail to treat the Northern section of the Pegasus pipeline as susceptible to seam failure. Yes, ExxonMobil will spend untold amounts of resources and time to fight this allegation, just like the tobacco companies did with the cancer causing nature of cigarettes, but they would not admit to the susceptibility from this date forward if they did not think the government had sufficient evidence to prove this fact.

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[3] This information can be found through a review of the hydrostatic test results available on PHMSA's Mayflower spill webpage under the 2006 Hydrotest Summary Reports. Further, CAW has heard that evidence exists where ExxonMobil management instructs a reduction in test pressures following early ruptures in the testing. CAW has not been provided a copy of this evidence to date, and has been denied access to such documents if they exist.

2. *The United States cannot know if the proposed Consent Decree is fair, adequate and reasonable because the United States, by its own admission, does not know all of the facts.*

On page 6 of the Brief, the United States says the proposed penalty will "deter ExxonMobil and others from violating the CWA in the future" and that the amount of the "penalty assessment was based on consideration of the **available facts**." (emphasis added). Furthermore, the United States notes on page 9 of the Brief that "[t]his settlement has been reached **before completing discovery** . . . ." (emphasis added).

In short, the United States wants the Court and the public to accept that the settlement is fair when the parties do not even have all of the facts. ExxonMobil's attempts to delay disclosure and obscure the facts regarding the causes of the Mayflower spill have been well documented in the press and other court proceedings related to the spill. The citizens of the United States and the State of Arkansas should not be deprived of the opportunity of a fair settlement simply because the United States did not gather and analyze all of the facts. In fact, CAW believes that we made a sufficient case for rejection of the Consent Decree with a mere fraction of the facts available to the United States.

3. *Contrary to the United States' position, the proposed Consent Decree does not reasonably expect ExxonMobil to fulfill its obligations under the law to comply with PHMSA's orders, directives, and regulations.*

In the proposed Consent Decree, ExxonMobil merely represents that it intends to comply with PHMSA's requirements, but the Consent Decree does not require ExxonMobil to comply with PHMSA's requirements. Paraphrasing an old adage about roadways and good intentions - good intentions are meaningless unless followed through.

CAW continues to contend that ExxonMobil's failure to comply with PHMSA's requirements should result in a breach of the Consent Decree. The United States says on page 13 of the Brief, "if a provision or provisions were included in the Decree to make a violation of the [Corrective Action Order (CAO)] a violation of the Consent Decree, the Court would then unnecessarily be put in PHMSA's role with respect to oversight of the administrative CAO." This is precisely the reason that CAW offered this comment. Given the repeated ruptures of ExxonMobil's pipelines and ExxonMobil's refusal to provide information related to those ruptures or its pipeline integrity management efforts, federal District Court oversight is reasonable and in the public interest. On page 15 of the Brief, the United States says that the District Court should not open itself up to perpetual oversight of injunctive relief. The Court, however, could exercise oversight of meaningful injunctive relief until ExxonMobil demonstrates a reasonable history of compliance and safe, rupture-free pipeline operations. Furthermore, there are numerous instances where federal courts have retained long-standing jurisdiction over cases in the public interest, including the 1969 civil rights lawsuit against the Hartford police department and the 1982 Little Rock School District desegregation case.

4. *The United States fails to exercise the broad latitude in preventing future pills given to it under the authority of the CWA and fails to achieve meaningful change with respect to the pipeline's location and the risks that it poses to the public.*

The United States has broad latitude to interpret and enforce the CWA in furtherance of the goals of the CWA, but it appears that the United States is reluctant to do so in this situation.

On page 13 of the Brief, the United States says, "to negotiate relocation of the pipeline is not a reasonable alternative in this situation" because of "the current long-term idling of the pipeline, the uncertainty of future operations, and the immense cost and effort that would be involved in ExxonMobil re-routing the existing pipeline." The United States, however, ignores the long-term risks and impacts of allowing an aging, decrepit, and flawed pipeline to remain and potentially operate in the drinking water supply for over 400,000 people, only 8 miles from where the Mayflower rupture occurred. If the Mayflower rupture (or the future rupture that the Brief presupposes) had occurred within the Lake Maumelle watershed, the results would have been (or will be) catastrophic. The long-term costs and impacts on the affected communities were apparently not considered by the United States in their negotiation of the Consent Decree.

Furthermore, the United States has no problem requiring wastewater providers to replace entire systems to eliminate sanitary sewer overflows in order to improve public health and protect the environment, regardless of the costs to local government and taxpayers. But for some reason, the United States refuses to require publically-traded oil pipeline transport operators to replace defective pipelines in order to prevent catastrophic toxic spills and improve public health and protect the environment. This discrepancy is concerning, to say the least, and is a clear indication of how this proposed Consent Decree is not in the best interest of the public.

This Consent Decree, like so many other consent decrees before it, follows a defined template commonly used by the United States. In our Comments, we identified at least 8 other instances where a consent decree was used to settle issues related to a rupture of an oil or gas pipeline, many of which exercised much broader latitude than in this case. Despite these prior consent decrees and fines from the EPA, PHMSA, and other state and federal agencies, pipeline ruptures continue to occur. In this instance, the United States can and should do much more under its broad jurisdiction and authority under the CWA to prevent a future rupture of the Pegasus pipeline, rather than simply utilize an extremely weak version of a commonly used consent decree template.

5. *The public cannot know if the proposed Consent Decree is fair, adequate, and reasonable because the United States relies upon information and documents it has refused to disclose to the public.*

The United States mentions and relies heavily upon numerous undisclosed documents in reaching its decision related to the Consent Decree and the Motion[4] and suggests that CAW can request these documents from ExxonMobil or PHMSA through "formal or informal mechanisms." CAW has repeatedly requested a wide range of documents, including, but not limited to, those mentioned by the United States as well as the 2010 and 2013 in-line-inspection test on the Pegasus pipeline and numerous other documents that are necessary

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[4] These documents, include, but are not limited to, filings related to the appeal of the PHMSA Notice of Probable Violation and Proposed Compliance Order as well as PHMSA's rejection of ExxonMobil's remedial workplan, etc.

for CAW to assess the on-going risks, appropriately respond for the safety of public drinking water, and provide informed comments to the United States in instances such as this. Quite frankly, the United States is being a bit disingenuous as it has repeatedly denied or delayed CAW's numerous requests for information from PHMSA and the EPA. Likewise, ExxonMobil has not been forthcoming. If CAW had been able to obtain the documents by another means, it would not have had to seek their disclosure under the court approved Consent Decree.

Preventing the public disclosure of documents and information central to the decision of the United States in reaching its settlement decision would be akin to preventing any epidemiological or other research related to the health impacts of cigarette smoking from being disclosed to the public under the guise of protecting the propriety information of cigarette manufacturers from disclosure. As seen with landmark changes to automobile safety standards (see *Unsafe at Any Speed*), the meatpacking industry (see *The Jungle*), use of DDT in the environment (see *Silent Spring*), child labor (see *The Bitter Cry of Children* and *Children in Bondage*), and numerous other public health and safety achievements over the last century, information transparency is critical for ensuring meaningful and lasting change in the best interest of the public. Oil pipeline safety is no exception, particularly in situations where public documents already suggest a history of regulatory non-compliance and lack of accountability. As noted by Evan Vokes, a former pipeline industry safety inspector, "I find it unusual the landowners, journalists and activists can document more non-compliance than a regulator that is supposed to serve the public interest."[5]

6. *The Brief contains numerous inaccuracies and misstatements of facts, signifying the importance of Court oversight and intervening parties in the continued efforts to further the goals of the CWA.*

In the footnote on page 16, the United States says CAW's statement that the oil in the pipeline sinks "is inaccurate and rests on unfounded assumptions." Unless the United States is relying on access to documents not available to the public or CAW, we fail to see how this statement can be made. It is uncontested that the pipeline contained diluted bitumen (also called dilbit). It is likewise uncontested that observations from both the Mayflower and the Kalamazoo River spills are that dilbit sinks. ExxonMobil's own MSDS for Wabasca Heavy Crude Oil (the specific type of dilbit being transported at the time of the Mayflower rupture), dated January 9, 2013, lists the relative density of the dilbit as ranging from 0.661 – 1.013. The basic physical properties, disclosed by ExxonMobil, are evidence that the product transported in the pipeline at the time of the Mayflower rupture has the ability to sink. To deny this fact or to dismiss it as "inaccurate" or "unfounded" ignores the basic physical properties of the product itself.[6]

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[5] See http://www.tarsandsblockade.org/abysmal-inspections/ and http://www.huffingtonpost.com/2013/06/11/transcanada-whistleblower-pipeline_n_3415701.html

[6] This is but one of many items within the Brief where CAW believes we presented sufficient reasoning to reject the proposed Consent Decree, even with the limited information available to us (see item 5 above). Were we provided access to the plethora of additional information available to the United States, we are confident that we could have made an even stronger case for rejection of the proposed Decree as not being in the best interest for the citizens of Arkansas and the United States.

If the United States is indirectly stating that the pipeline did not contain the dilbit crude that ExxonMobil stated that it was carrying at the time of the rupture, then ExxonMobil's past representations to CAW and the public about what material was transported inside the pipeline were false and provide further evidence for denying the Consent Decree, especially because all of the facts are not yet disclosed.

The United States also dismisses CAW's Comments regarding the need to require ExxonMobil to provide for and train state and local first responders as part of the training requirement in the Consent Decree. The assertion that "the most likely spill responders [are] ExxonMobil's pump station employees" ignores the fact that the nearest pump stations to the Lake Maumelle Watershed are more than 30 miles away as the crow flies, and much farther by road. This statement ignores the well-documented fact that local and state personnel were the first to arrive on scene and take immediate action to prevent the significant spread of the dilbit in Mayflower and, therefore, single-handedly prevent contamination of the main body of Lake Conway. To state that ExxonMobil employees will respond prior to any fire department, police department, or other emergency response personnel ignores both recent history as well as the simple logic related to travel time of personnel located within a community as compared to personnel located 30+ pipeline miles away. Even the most recent spill on the California coastline reinforces the conclusion that local personnel, not pipeline company employees, are the first on the scene and the first to respond. In that instance, local volunteer firefighters were on the scene for hours before the pipeline company employees finally arrived.

The United States also states that "the Decree appropriately requires ExxonMobil to acknowledge that it will comply with the CAO as a condition of this settlement." This statement is incorrect. As noted in our Comments and in this letter, ExxonMobil merely "represents" that it will comply with the CAO and other PHMSA requirements. Compliance is not a ***condition*** of this settlement; rather, stating that ExxonMobil intends to comply is an ***introductory statement*** within the settlement. A representation or intention is not a binding commitment, nor is it enforceable, and numerous statements by the United States in the media and in the Brief will not change this factual reading of the Consent Decree.

The varying interpretations of the Consent Decree and the factual inaccuracies further support the need for continued Court jurisdiction to resolve the questions of interpretation that will arise from the application and enforcement of the Consent Decree. It is specifically because of these varying interpretations and inaccuracies that CAW requested third-party enforcement status of the Consent Decree.

Even if the Consent Decree did not contain numerous conditions open to varying interpretation and even if the Brief did not waffle on such basic premises as physical properties of the product spilled from the Pegasus pipeline or as to whether or not compliance with the CAO is a condition of the settlement, CAW would still contend that it would be able to provide a valuable level of attention and detail to monitoring compliance with the Consent Decree in addition to that of the United States and, therefore, should be granted third-party enforcement status. Namely, CAW and the 10 other governmental entities supporting our Comments are focused on the Pegasus pipeline in Arkansas rather than every mile of over 2,500,000 miles of oil and gas pipelines throughout the entire United States.

The Pegasus pipeline spill in Mayflower, Arkansas, was the inciting incident for the underlying suit and, by extension, the Consent Decree. Therefore, providing CAW and other interested entities throughout Arkansas the jurisdiction to ensure the long-term integrity of Pegasus pipeline within Arkansas through detailed attention to enforcement and application of the Consent Decree and associated CAO is fair, reasonable, and in the public interest.

7. *The proposed Consent Decree places much reliance on a yet to be determined pipeline integrity management plan to be determined by PHMSA.*

The justification for approval of the proposed Consent Decree relies heavily on the anticipated outcome of ongoing proceedings related to the Notice of Probable Violation (NOPV) and Proposed Compliance Order (PCO) from PHMSA. The United States notes that "PHMSA is **calling for** improvements in the pending Proposed Compliance Order" (emphasis added). These "improvements" have not been achieved and are not certain.

In fact, a closed-door administrative appeal hearing was held between ExxonMobil and PHMSA on June 11, 2014, related to the NOPV & PCO in which ExxonMobil sought dismissal of all issues. CAW requested attendance at this meeting and was informed that all items related to this administrative hearing were confidential as part of an ongoing proceeding. However, from the discussions in the Brief, it is clear that the United States has access to numerous documents related to this proceeding, including the PHMSA Southwest Region's post-hearing recommendation and the PHMSA accident investigation report from the Mayflower spill with appendices. CAW's first glimpse of any information related to this appeal, however, was in the documents attached to the Brief, further supporting our concerns raised to the lack of transparency associated with the conclusions reached in the Brief.

That said, we do not believe that the United States has more insight into the decision-making process of the PHMSA hearing officer than PHMSA staff who are barred from engaging the hearing officer on matters before them. Therefore, CAW has significant concerns that the United States relies heavily upon the yet to be determined outcome of a closed-door appeal hearing to provide the meaningful integrity improvements and citizen protections that were requested by CAW and others in our Comments. CAW questions the timing and logic of issuing a proposed Consent Decree prior to the release of the decision from the PHMSA hearing officer. Had the United States delayed the release of the proposed Consent Decree until after the decision related to the appeal of the NOPV & PCO, the United States would have been able to eliminate a substantial amount of uncertainty in the Consent Decree.

Regardless of the flawed timing and logic of justifying approval of the proposed Consent Decree on a yet to be determined outcome of an appeal hearing, this Court clearly has the authority to "grant any relief . . . that the public interest and the equities of the case may require."[7] On pages 12-13 of the Brief, the United States argues why it believes that the Court should accept PHMSA's oversight going forward (even if the specific outcomes of the NPOV & PCO proceeding are TBD) as sufficient to accept the proposed Consent Decree.

[7] Section 311(e) of the CWA.

CAW does not believe this is prudent or in the best interest of the public. The Pegasus pipeline in Mayflower was subject to PHMSA's oversight before it ruptured in March of 2013. The Plains All American pipeline in Santa Barbara, CA, was subject to PHMSA's oversight before it ruptured in May of 2015. The ExxonMobil North Line pipeline in Torbert, LA, was subject to PHMSA's oversight before it ruptured in April of 2012. PHMSA's oversight did not prevent these and numerous other pipeline ruptures, despite this being the stated purpose of the CWA.

Conclusion

On page 14 of the Brief, the United States says that CAW "appear[s] to misunderstand the facts and the scope of the injunctive relief." CAW does, however, clearly understand the facts and clearly outlined these facts in our Comments, to the extent that we have been provided access to all relevant documents. CAW, however, simply believes that the United States can, and should, do more in furtherance of their charges under the CWA.

CAW acknowledges that the State of Arkansas is receiving a substantial penalty payment, and additional funds, much to the credit of and a result of the work by the United States Attorneys with the Arkansas Attorney General. However, payments of $1,880,000 to the State of Arkansas and $3,190,000 to the United States are not nearly sufficient to deter any future misconduct on ExxonMobil's behalf, prevent the discharge of pollutants, and achieve the goals of the CWA of preventing future spills.

For the reasons set for above, CAW asks that the Court reject the proposed Consent Decree in whole. Alternatively, CAW asks that the Court delay signing and entering the proposed Consent Decree until after the appeal of the NOPV & PCO is complete and until the public has opportunity to review and evaluate the integrity management improvements and citizen protections that are achieved (if any) through that process.

Respectfully,

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