

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

SIERRA CLUB,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; Lieutenant General Todd T. Semonite (in his official capacity as Commanding General and Chief of Engineers of the U.S. Army Corps of Engineers); Colonel Kenneth N. Reed (in his official capacity as District Commander of the U.S. Army Corps of Engineers Fort Worth District); Colonel Timothy R. Vail (in his official capacity as District Commander of the U.S. Army Corps of Engineers Galveston District); Brandon W. Mobley (in his official capacity as Chief, Regulatory Division, U.S. Army Corps of Engineers); and Kristi McMillan (in her official capacity as Leader, Central Evaluation Unit, U.S. Army Corps of Engineers).

Defendants.

CIVIL ACTION NO. 1:20-CV-460

**SIERRA CLUB'S MOTION FOR PRELIMINARY INJUNCTION**

Under Federal Rule of Civil Procedure 65(a), Sierra Club respectfully requests that the Court issue a preliminary injunction on Complaint Claims for Relief II and III, staying the U.S. Army Corps of Engineers' Clean Water Act verifications for the Permian Highway Pipeline, and enjoining all dredge and fill and any other ground disturbing activities in the Corps' Action Areas for the project, which includes 129 separate crossings of waters of the United States under the Corps' regulatory authority (*see* App. A to Biological Assessment, Ex. A), for violations of the National Environmental Policy Act.

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## INTRODUCTION

The U.S. Army Corps of Engineers (“the Corps”) approved the construction of the 428-mile natural gas Permian Highway Pipeline (“PHP” or “the pipeline”) across 129 waters of the United States in central Texas without conducting the review required under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(C). If completed, the 42-inch diameter pipeline would transport over 2 billion cubic feet per day of gas from the Permian Basin and would cause (indeed, is already causing) irreparable harm to some of the most environmentally sensitive streams in central Texas, including recharge areas of the Edwards and Edwards-Trinity Aquifers, which provide drinking water for over two million Texans and habitat for many imperiled species. On behalf of its more than 27,000 members in Texas, many of whom use, enjoy, or depend on those resources, Sierra Club seeks an order staying the Corps’ Clean Water Act Nationwide Permit 12 (“NWP 12”) “verifications” for the pipeline and enjoining any further dredge and fill or ground disturbance in the Corps’ Action Areas until the NEPA process is complete.<sup>1</sup>

Sierra Club satisfies the standard for a preliminary injunction. First, Sierra Club is likely to prevail on the merits of its claim that the Corps violated NEPA by failing to conduct the required environmental review before incorporating the terms and conditions of the U.S. Fish and Wildlife Service (“FWS” or the “Service”) February 3, 2020 Biological Opinion and Incidental Take Statement into the Corps’ verifications authorizing dredge and fill activities in 129 separate “waters of the United States.” As discussed more fully below, courts uniformly have held that “the Corps’ action, by way of adopting and incorporating” the terms of an Incidental Take Statement into a

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<sup>1</sup> Sierra Club seeks a preliminary injunction only on Claims II and III of its Complaint alleging violations of NEPA. In this motion, Sierra Club does not seek relief on Claim I, which involves the April 15, 2020 vacatur of NWP 12 by the United States District Court for Montana for the Corps’ failure to consult with the U.S. Fish and Wildlife Service under Endangered Species Act section 7 prior to issuing NWP 12. *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers*, Case No. 19-44-GF- BMM (D. Mont. Apr. 15, 2020). The Ninth Circuit denied the Corps’ motion for a stay of that order pending appeal; on June 15, 2020, however, the United States filed an application to the U.S. Supreme Court for a stay pending appeal. That application for a stay remains pending.



nationwide permit verification “is the functional equivalent of a permit and thus constitutes federal action subject to NEPA.” *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46 (D.C. Cir. 2015).

Second, the Corps’ NEPA violations will cause—indeed, are causing—irreparable harm to the environment, and to the public’s interest in compliance with NEPA’s environmental and public review requirements. Third, those irreparable harms outweigh any potential harm to the Corps. Finally, a preliminary injunction would protect both the public’s interest in the Corps’ compliance with the law and the Court’s ability to issue meaningful relief after a trial on the merits. *Emvtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005 (5th Cir. 1981) (holding “[w]hen a court has found that a party is in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible, consistent with the broader public interest,” and enjoining a highway construction project “so that the relevant decision makers and the public may still have the opportunity to choose among alternatives, as required by NEPA”).

## **FACTUAL AND LEGAL BACKGROUND**

### **A. Overview of the Permian Highway Pipeline and its Environmental Impacts**

Permian Highway Pipeline LLC is constructing a 428.54 mile-long natural gas pipeline from the Waha Interconnect in Reeves County, Texas, through the Texas Hill Country, to a delivery point in Colorado County, Texas. The proposed pipeline will cross numerous permanent and intermittent waters of the United States, resulting in the discharge of dredged or fill material into approximately 449 separate streams and wetlands along the route. The project will require the construction and operation of a variety of ancillary facilities associated with the pipeline at each water crossing. Bulldozers, track hoes, and conventional drilling, boring, and trenching equipment will be used to clear a 125-foot right-of-way across each stream crossing, dig or bore trenches, and construct the pipeline.

The pipeline's route—**which has never been subject to public environmental review or comment by the Corps or FWS**—crosses some of the most environmentally sensitive streams and geological karst formations in central and west Texas, including recharge zones of the Edwards and Edwards-Trinity Aquifers, which provide drinking water for over two million Texans and habitat for many imperiled species listed as “threatened” or “endangered” under the Endangered Species Act. Due to the unique geological karst features in west and central Texas, most of the aquifer recharge occurs where overland flow of surface waters drains into and through streams, drainage channels, sinkholes, and other geological fractures or openings into the groundwater. Hayes Decl., Ex. B at 8. As a result, the dredge and fill activities associated with the Permian Highway Pipeline's dredge and fill activities in numerous water crossings creates a significant risk of harm to the aquifer.

Construction of the pipeline began in late February or March 2020. Almost immediately, the project resulted in a discharge of 36,000 gallons of toxic drilling fluid into the Blanco River during an apparent attempt to bore under the river. The discharge occurred where the river drains into the Trinity Aquifer, resulting in immediate contamination of local drinking water wells. Given the many unique karst geological features of the region, there is a significant risk of similar hazardous discharges to surface waters as the project progresses. Moreover, sedimentation from dredge and fill activities, drilling fluid spills, and any petrochemical spills and leaks from diesel and other equipment will result in direct and immediate loss of irreplaceable surface, groundwater, and aquifer resources. *Id.* at 8-9. Once those contaminants are discharged into surface waters and migrate into the groundwater and aquifer system, they are likely to persist for many months or years, as source of chemical-laden sediment and turbidity. *Id.* at 8-9.

The project will also have long-term adverse impacts on vegetation, soil, water and wildlife in the Corps' Action Areas, including federally threatened and endangered species and their habitats—namely, the Houston toad, Golden Cheeked Warbler and Tobusch fishhook cactus. In

fact, the project will result in a “50-ft permanent easement” across the 428 mile pipeline—totaling 2,604.7 acres—resulting in the permanent destruction of 282 acres of habitat for the endangered golden checked warbler. The project will adversely affect another 1,352.3 acres of warbler habitat, including 393 acres in waters of the United States subject to the Corps’ jurisdiction. *See* February 3, 2020 Biological Opinion (“BiOp”), Ex. C at 36-37. The project will also permanently destroy 153.6 acres of habitat for the endangered Houston toad; and adversely affect another 1,293.3 acres, including 578.9 in waters of the United States subject to the Corps’ oversight. *Id.* at 37-38.

In addition to the environmental impacts associated with the construction of the Permian Highway Pipeline, the planned operation of the pipeline carries significant risks for persons along the route, due to potential leakage and failure of natural gas pipelines, ancillary facilities, and control valves caused by the accumulation of abrasive particles of iron sulfide and iron oxide mixed with concentrated hydrocarbons and other contaminants in the pipelines. Hayes Decl., Ex. B at 8. Accidental spills during pipeline operation and maintenance, or as a result of deteriorating pipelines, would cause long-term, irreversible environmental contamination due to migration of methane or other pollutants into surface and groundwater. *Id.* Natural gas pipelines also contain petrochemical liquids that can result in spills and sometimes explosions. Hayes Decl., Ex. B at 9. In 2000, for example, a 30-inch El Paso Natural Gas Pipeline exploded in Carlsbad, New Mexico, killing 12 people and generating a 5,763 square foot crater. The company had failed to properly decant corrosive and flammable liquids, which accumulated on the lower surface inside the pipe at a low point along the pipeline. *Id.* at 9. The catastrophe occurred within a karst aquifer area supporting federally endangered species, much like the area at issue here. *Id.*

Although the Corps consulted with FWS about the impacts of the project to endangered species, the agency failed to conduct any NEPA analysis or provide for public review of the significant, broader environmental impacts of the project before issuing its Clean Water Act

verifications to Permian Highway Pipeline LLC to conduct dredge and fill activities in 129 sensitive waters of the United States, which are subject to the Corps control.

**B. The Corps' Nationwide Permit 12 Verifications Under the Clean Water Act**

Because the Permian Highway Pipeline will result in the discharge of fill material into 449 distinct waters of the United States, it was required to obtain a “dredge and fill” permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a). There are two basic pathways to obtaining a section 404 “dredge and fill” permit. First, the Corps may issue an individual permit, provided that there are no practicable alternatives, the discharge does not cause violations of water quality standards or significant degradation of the environment, and all appropriate steps have been taken to minimize adverse impacts. 40 C.F.R. § 230.10. When issuing an individual section 404 permit, the Corps must comply with the requirements of NEPA.

Alternatively, section 404(e) allows the Corps to, issue general or nationwide permits for categories of dredge and fill activity, which “cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). When the Corps issues a nationwide permit, it conducts a “national-scale” NEPA analysis; and, in most circumstances, subsequent project-specific authorizations under the nationwide permit do not typically require separate NEPA documentation. 82 Fed. Reg. 1860, 1861 (Jan. 6, 2017).

Rather than apply for a project-specific permit, Permian Highway Pipeline LLC opted to proceed under NWP 12, which authorizes dredge and fill discharges associated with the construction of utility lines, including gas pipelines, “provided the activity does not result in the loss

of greater than 1/2-acre of waters of the United States for each single and complete project.” 82 Fed. Reg. at 1985.<sup>2</sup>

Under NWP 12’s “self-certification” process, Permian Highway Pipeline LLC would be authorized to proceed with construction activities in hundreds of those water crossings—specifically, 330 of the approximately 449 different water crossings—without notifying the Corps. See 33 C.F.R. §§ 330.1(e)(1), 330.6(a). For the water crossings that “might affect” any species listed under the Endangered Species Act (“ESA”), however, NWP 12’s General Condition 18 prohibits any construction activity until the Corps issues a “verification” ensuring that the project complies with the ESA. 82 Fed. Reg. at 1999-2000. Because approximately 129 of the Permian Highway Pipeline’s water crossings “might affect” several endangered species—including Golden Cheeked Warbler, the Houston toad, the Tobusch fishhook cactus, the Austin blind salamander, the Barton Springs salamander—Permian Highway Pipeline LLC was required to obtain NWP 12 verifications from the Corps for those water crossings.

### **C. The Corps’ Endangered Species Act Consultation with the Fish and Wildlife Service**

To avoid liability under the Endangered Species Act for any “taking” that results from the authorization of a specific project under NWP 12,<sup>3</sup> the Corps must “insure that any action authorized, funded, or carried out by [the] agency...is not likely to jeopardize the continued existence of” any listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2).

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<sup>2</sup> On April 15, 2020, the United States District Court for Montana vacated NWP 12 for the Corps’ failure to consult with the U.S. Fish and Wildlife Service under Endangered Species Act (“ESA”) section 7 prior to issuing the nationwide permit. *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers*, D. Mont. no. 19-44-GF- BMM (Apr. 15, 2020). As noted, the Ninth Circuit Court of Appeals denied a stay of that order pending appeal; the Corps has requested a stay from the U.S. Supreme Court.

<sup>3</sup> The ESA prohibits “any” person, including federal agencies, from “taking” any listed endangered species, defining “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §§ 1532(19), 1538(a)(1)(B).

“Action” is defined broadly to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including the issuance of federal permits. 50 C.F.R. § 402.02.

To comply with its obligations under the ESA and NWP 12, the Corps prepared a biological assessment evaluating whether its authorization of the Permian Highway Pipeline “may affect” any listed species or designated critical habitat, and whether the agency must therefore initiate formal Section 7 consultation.<sup>4</sup> After determining that approximately 129 of the Permian Highway Pipeline’s water crossings “may affect” several endangered species, the Corps initiated formal consultation under Section 7 with FWS.

On February 3, 2020, FWS issued a Biological Opinion concluding that the proposed action—*i.e.*, the Corps’ proposed verifications—is not likely to jeopardize the continued existence of any listed species, or adversely modify any designated critical habitat is within the Corps’ “Action Area” designated by the Service. The Biological Opinion defines the Corps’ “Action Area” as those portions of the Permian Highway Project that (1) fall under the Corps’ regulatory authority—*i.e.*, waters of the United States for which NWP 12 authorization is required—and (2) where the Corps’ proposed NWP 12 verification may affect listed species. BiOp, Ex. C at 10. There are 64 such Action Areas in the Fort Worth District and 30 such areas in the Galveston district. *See* Apps. A and B to Biological Assessment, Ex. A. The Corps’ Action Areas include the crossing and dredge and fill of approximately 86 Corps’ jurisdictional waters, also known as “waters of the United States,” within the Fort Worth District and 43 waters of the United States crossings within the Galveston District. *Id.* at iii. Together the Action Areas include approximately 2,127 acres in waters of the United States

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<sup>4</sup> If, after preparing a biological assessment, the action agency finds that the proposed action “may affect, but is not likely to adversely affect” any listed species or critical habitat and the consulting agency concurs with this finding, then the informal consultation process is terminated and no formal consultation is required. 50 C.F.R. § 402.14(b).

under Corps' oversight, where the proposed Permian Highway Pipeline is likely to affect endangered species.

FWS also issued an "Incidental Take Statement" to the Corps, authorizing the "take" of listed species, subject to "reasonable and prudent measures" that are "necessary or appropriate to minimize" the impact on the species, and "terms and conditions" that *the Corps* must comply with to implement those reasonable and prudent measures. 16 U.S.C. § 1536(b)(4)(i), (ii), (iv); 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv); *see also* BiOp, Ex. C at 54-57. Specifically, to obtain protection against any unlawful "taking," FWS required the Corps to incorporate the "terms and conditions" of the Incidental Take Statement into its Clean Water Act NWP 12 verifications for the Permian Highway Pipeline. In fact, FWS's Biological Opinion and accompanying Incidental Take Statement are not effective unless and until the Corps issues all required Clean Water Act authorizations for the project. BiOp, Ex. C at 52.

On February 13, 2020 the Corps issued its final verifications for Project Numbers SWF-2018-00227 (Fort Worth District verification, Ex. D) and SWG-2018-00737 (Galveston District verification, Ex. E). To obtain protection against any unlawful taking, the Corps complied with the Biological Opinion and incorporated the terms and conditions into its final verifications. In fact, the Corps' verifications are explicitly conditioned on compliance with "all project elements" and "compliance with all of the mandatory terms and conditions" in the Biological Opinion and Incidental Take Statement, as well as the incorporated biological assessment.<sup>5</sup>

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<sup>5</sup> *See* Fort Worth District verification, Ex. D at 2 ("The terms and conditions of the [Biological Opinion] that are applicable to [the Corps'] Action Area(s) in the Fort Worth District are incorporated by reference in this permit. Failure to comply with the terms and conditions that are applicable to the [Corps'] action area within the Fort Worth District would constitute non-compliance with your . . . permit."); *see also* Galveston District verification, Ex. E at 2 ("Your authorization under this Corps permit is conditional upon your implementing and abiding by all project elements identified in the enclosed FWS [Biological Opinion] that are subject to the [Corps'] Action Area(s) and your compliance with all of the mandatory terms and conditions associated with incidental take of the attached FWS [Biological Opinion] pertaining to the [Corps'] Action Area(s),

FWS's "terms and conditions" include numerous measures that will have environmental impacts to Corps jurisdictional waters. Specifically, the terms and conditions include incorporation of "all" conservation measures described within the Permian Highway biological assessment. The terms and conditions also incorporate all of the conservation measures included in the Biological Opinion, such as herbicide and pesticide application measures, oil spill prevention and response measures, an inadvertent return mitigation plan for horizontal directional drilling, and environmental awareness training. In addition, the Biological Opinion's conservation measures include extensive "void mitigation" measures to protect against impacts to the Edwards aquifer (and the two species of endangered salamanders), and provides that construction vehicles may cross waters, provides for bypass pumping and culverts and other measures applicable to water crossings.

Additionally, the Biological Opinion's "conservation measures" requires Permian Highway Pipeline to purchase 1,363 acres for mitigation habitat for the golden checked warbler and transfer it to the Service; to avoid construction activities in the warbler habitat between March 1, 2020 and July 31, 2020, but allowing construction activities adjacent to it; and to implement Oak wilt prevention measures such as not cutting oak trees from February through June. It also involves fencing and monitoring for the Houston toad and collection and translocation of the Tobusch fishhook cactus before construction.<sup>6</sup>

Despite these environmental impacts and risks, the Corps did not conduct any NEPA analysis for its decision to adopt and incorporate the terms and conditions of the Biological Opinion into the Clean Water Act NWP 12 verifications for the Permian Highway Pipeline. Nor did the

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which terms and conditions are incorporated by reference in this permit. Failure to comply with the terms and conditions that are applicable to the [Corps'] action area within the Galveston District would constitute non-compliance with your . . . permit."

<sup>6</sup> On May 4, 2020, the Service issued an Addendum to the Biological Opinion with additional terms and conditions. *See* Addendum to BiOp, Ex. J.



agency disclose any of those impacts to the public or invite comment on alternatives or other measures that would avoid or further mitigate any environmental impacts.

### **PRELIMINARY INJUNCTION STANDARD**

“A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court’s power to render a meaningful decision after a trial on the merits.” *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). To obtain a preliminary injunction, the movant must establish “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 536-37 (5th Cir. 2013).

### **ARGUMENT**

#### **A. Sierra Club is Likely to Succeed on the Merits of Its Claim that the Corps’ Implementation of a Biological Opinion and Incidental Take Statement Through Clean Water Act Verifications is Subject to NEPA.**

To protect, restore, and enhance the quality of the human environment, NEPA requires all federal agencies government to identify and fully assess the impacts of any “major Federal actions significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(2)(C), “before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added). Major federal actions include projects that are “potentially subject to Federal control and responsibility” or “regulated, or approved by federal agencies,” including construction projects that are “approved by permit or other regulatory decision as well as federal and federally assisted activities.” 40 C.F.R. § 1508.18. A major Federal action occurs “whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.” *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 22 (D.D.C. 2007).

NEPA's mandate, which incorporates detailed notice and comment procedures, serves the "twin purposes of ensuring that (1) agency decisions include informed and careful consideration of any environmental impact, and (2) agencies inform the public of that impact and enable interested persons to participate in deciding what projects agencies should approve and under what terms." *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 36-37 (citation omitted).

At the heart of NEPA is a requirement that the agency take a "hard look" at all relevant environmental impacts and potential alternatives to the proposed action, and it must provide public notice and an opportunity to comment *before* the agency decides whether and how to proceed. 40 C.F.R. § 1508.9; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (The NEPA analysis "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."); *see also Env'tl. Def. Fund v. Marsh*, 651 F.2d at 997 ("NEPA requires the discussion of all significant environmental impacts, not just adverse ones.").

Indeed, "public scrutiny [is] essential," 40 C.F.R. § 1500.1(b), and the agency must "[m]ake diligent efforts to involve the public" in preparing the relevant environmental documents by disclosing sufficient information to meaningfully understand and comment on any environmental impacts, and help develop alternatives that may mitigate or avoid impacts of the proposed federal action. 40 C.F.R. §§ 1500.2(d), 1501.4, 1506.6; *see also Methow Valley*, 490 U.S. at 349 (NEPA "gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," . . . and, perhaps more significantly, provides a springboard for public comment.") (citation omitted).

Here, there is no dispute that the Corps failed to conduct any NEPA analysis before adopting and incorporating the terms and conditions of the February 3, 2020 Biological Opinion into the Clean Water Act NWP 12 verifications, which authorize the Permian Highway Pipeline to

conduct dredge and fill activities in 129 discrete segments of the “waters of the United States” and associated Action Areas within the Corps’ jurisdiction. The Corps therefore failed to evaluate the direct, indirect, and cumulative environmental impacts of these terms and conditions. This includes a failure to evaluate any alternatives, including a “no action” alternative, or mitigation measures that might avoid those risks. Perhaps more significantly, the Corps failed to disclose any of those risks to the public, or engage in any public review process, as required NEPA.

Although the issuance of a NWP 12 verification, *standing alone*, does not typically require separate NEPA documentation (because the Corps conducted an environmental assessment when the agency issued the nationwide permit), 82 Fed. Reg. at 1861, courts have uniformly held that a federal action agency’s discretionary decision to “implement[]” a biological opinion itself, or its decision “adopting and incorporating” the terms of a biological opinion “through its Clean Water Act verification constitutes federal action subject to NEPA.” *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 46; *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 642 (9th Cir. 2014) (holding that the Bureau of Reclamation’s “implementation” of a biological opinion issued by the National Marine Fisheries Service was a major federal action pursuant to 40 C.F.R. § 1508.18); *In re Consolidated Salmonid Cases*, 688 F. Supp. 2d 1013, 1025 (E.D. Cal 2010) (same); *Wyoming Outdoor Council v. U.S. Corps of Engineers*, 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005) (in a challenge to the Corps’ issuance of a general dredge and fill permit under the Clean Water Act, concluding that NEPA analysis was required because the Corps’ was the “gatekeeper for approval of the project,” and the agency’s approval was “essential to completion of the project”); *Fath v. Texas Dep’t of Transp.*, 2016 WL 7442868 at \*6 (W.D. Tex. Sept. 6, 2016) (citing *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 40 with approval and concluding that plaintiffs sufficiently stated a NEPA claim against Texas Department of Transportation where the state agency was “acting in the

capacity of a federal agency” in implementing the terms of a Biological Opinion in the construction of a federally-approved, federally-funded highway).

The D.C. Circuit’s opinion in *Sierra Club v. U.S. Army Corps of Engineers* is instructive. In that case, the plaintiffs argued that FWS’s issuance of an incidental take statement, or alternatively, the Corps’ implementation of that incidental take statement into the NWP 12 verifications for the “Flanagan South” oil pipeline, required a NEPA analysis for the entirety of the entire 593-mile-long project. 803 F.3d 31. The court rejected the plaintiffs’ first argument, concluding the “development and issuance of the Section 7 [Incidental Take Statement], standing alone, was not federal action” subject to NEPA. Instead,

[i]t was only when the Corps formally incorporated the [incidental take statement] into its Clean Water Act verifications that it gave [the permittee] permission to take species free from the threat of ESA liability. The Corps-implemented [incidental take statement] is the functional equivalent of a permit and thus constitutes federal action subject to NEPA.

*Id.* at 45. Thus, under the plain terms of 40 C.F.R. § 1508.18, the Corps final action “adopting and incorporating” the terms and conditions of an incidental take statement into a Clean Water Act verification (as the agency did here with the Permian Highway) constitutes a major federal action subject to review under NEPA. The agency’s NEPA obligations arising out of that action, however, “extend[] only to the segments under the Corps’ asserted Clean Water Act jurisdiction.” *Id.* at 46-47 (emphasis added).

That is precisely the claim Sierra Club advances here: The Corps’ decision to implement and incorporate the terms and conditions of the February 3, 2020 Biological Opinion into the Permian Highway’s Clean Water Act NWP 12 verifications was a major federal action triggering NEPA. The verifications, on their face, constitute a regulatory “authorization”—indeed, a requirement—to implement the “all project elements” outlined in the Biological Opinion and Incidental Take Statement, Galveston Verification at 2, many of which are “specific projects” requiring additional

“construction or management activities located in a defined geographic area.” 18 U.S.C § 1508.18; *see also* Galveston Verification, Ex. E at 2 (Permian Highway Pipeline’s Clean Water Act “authorization under this [Corps’] permit is conditioned upon you implementing and abiding by all project elements” in the Biological Opinion and Incidental Take Statement in the Corps’ Action Areas). The Biological Opinion additionally requires the implementation of all measures included in the underlying Biological Assessment. BiOp, Ex. C at 56. And the Permian Highway Pipeline’s “failure to comply with” those mandatory terms and conditions “would constitute non-compliance” with the verifications and “invalidate[] the incidental take authorization.” *Id.* at 2. Because the Corps’ verifications are “the functional equivalent” of the final federal authorization of the specific projects identified in the Biological Opinion, Incidental Take Statement, and Biological Assessment, the Corps was required to comply with NEPA. *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 45.

The Corps’ adoption of the Biological Opinion’s terms and conditions constitutes a major federal action for an additional and independent reason. The Biological Opinion sets out the terms and conditions with which *the Corps* must comply to avoid any unlawful taking under the ESA, BiOp, Ex. C at 52; and by incorporating “all project elements” of the BiOp into the verifications, the Corps committed itself to implement and comply with those terms. Specifically, the Corps “has a continuing duty to regulate” the Permian Highway Pipeline activities in the Action Areas, *id.* at 52, and “shall” ensure that the measures identified in the BiOp—including, water conservation measures, sediment control, construction and clearing restrictions, and compliance with “all” species and conservation measures—are actually implemented. *Id.* at 55-56. The Corps was not obligated to take final action issuing the verifications; but in doing so, the Corps took a discretionary major federal action subject to NEPA.

In sum, the Corps’ adoption and “incorporat[ion]” of FWS’s February 3, 2020 Biological Opinion’s “mandatory terms and conditions” into the Permian Highway Pipeline’s Clean Water Act

NWP 12 verifications constitutes a major federal action within the plain meaning of 40 C.F.R. § 1508.18. Accordingly, the agency was required to fully evaluate the environmental impacts authorizing the Permian Highway Pipeline to conduct dredge and fill activities in discrete “waters of the United States,” that comprise the Corps’ Action Area.<sup>7</sup>

**B. There Will Be Immediate and Irreparable Harm to the Environment, Sierra Club’s Members’ Interests, and the Public in the Absence of an Injunction.**

Plaintiffs must demonstrate “that [it] is likely to suffer irreparable harm in the absence of preliminary relief.” *Software Dev. Techs. v. TriZetto Corp.*, 590 F.App’x 342, 344 (5th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In this case the injury is not only likely, it is underway. Permian Highway Pipeline, LLC (“PHP LLC”) began clearing and construction of the pipeline in February 2020. *City of Austin v. Kinder Morgan Texas Pipeline, LLC*, No. 1:20-CV-138-RP, 2020 WL 1324071, at \*6 (W.D. Tex. Mar. 19, 2020).

The impacts of this clearing and construction constitute irreparable harm and support a preliminary injunction. *See U.S. v. Marine Shale Processors*, 81 F.3d 1329, 1360 (5th Cir. 1996) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Sierra Club v. Peterson*, 185 F.3d 349, 374 (5th Cir. 2000), *vacated on other grounds* 228 F. 3d 559 (5th Cir. 2000) (granting preliminary injunction to stop Forest Service even-aged timber management practices threatening the environment).

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<sup>7</sup> Sierra Club’s limited request for relief in the instant case on the Corps’ water crossings only distinguishes this from the Flanagan South case where the plaintiffs were denied relief because they sought to enjoin the pipeline “as a whole.” *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d at 46-47.

**1. *The Corps' NEPA Violation and Lack of Public Participation Constitute Continuing Irreparable Harm***

A “procedural injury” arising from a NEPA violation, coupled with concrete injury to aesthetic, environmental, property, or other protected interests, is sufficient to demonstrate irreparable harm. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998); and see *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.) (“[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.”). “[T]he ‘risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation’ by the acting federal agency.” *Catron Cty. Bd. of Commissioners v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996) (quoting *Marsh*, 872 F.2d at 504); see also *Found. On Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (“the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury”).

The harm from the Corps’ NEPA violation in this case is real. Because it did no analysis on implementation of the Services’ terms and conditions, the Corps did not consider the direct, indirect, and cumulative impacts of its action or take the “hard look” at these impacts that NEPA requires. See 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.7, 1508.25(c). And, the Corps did not provide the public notice and opportunity to comment on its action that NEPA requires under 40 C.F.R. §§ 1503.1(4) and 1506.6. Had the Corps done so, the public could have provided comments leading the agency to modify its decision or adopt alternatives that could mitigate or eliminate environmental harm. 40 C.F.R. §1503.4(a); see also *Methow Valley*, 490 U.S. at 349 (NEPA “gives the public the assurance that the agency “has indeed considered environmental concerns in its decisionmaking

process,” . . . and, perhaps more significantly, provides a springboard for public comment.”) (citation omitted).<sup>8</sup>

Plaintiffs’ members would have participated in the NEPA process given the chance, and would participate the future. *See* Frantzen Decl., Ex. F ¶ 4; Gates Decl., Ex. G ¶ 3; *see also* Hayes Decl., Ex. B ¶¶ 55-56 (describing information that could have been provided to the Corps through public participation in the NWP 12 verification and NEPA processes if allowed).

The ongoing harm from the Corps failure to provide for public participation impacts not just Plaintiffs, but the public at large. *Cf. Sierra Club v. Johnson*, 436 F.3d 1269, 1279 (11th Cir. 2006) (finding procedural injury standing where agency use of required mailing list could have led to additional public input and improvements in the project); and *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 212-15 (5th Cir. 1979) (failure to follow public participation requirements of the Administrative Procedure Act renders agency action invalid). In sum, the Corps’ NEPA violations, its uninformed decision on its verifications, and its denial of public participation and comment constitute continuing irreparable harm.<sup>9</sup>

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<sup>8</sup> The Council on Environmental Quality regulations require a give and take between an agency and members of the public in the NEPA process. *See* 40 C.F.R. §§ 1500.1(b) (2010) (“public scrutiny [is] essential”), 1500.2(d) (2010) (the agency must “encourage and facilitate public involvement”), 1506.6 (2010) (the agency must “[m]ake diligent efforts to involve the public” in preparing environmental documents, give “public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected,” and “solicit appropriate information from the public.”). The regulations require federal agencies to give the public as much information as is practicable, so that the public has a sufficient basis to comment on, and address, the factors that the agency must consider in preparing an environmental assessment. 40 C.F.R. § 1501.4 (2010).

<sup>9</sup> The Services’ Biological Opinion does not excuse the Corps’ violations. No notice or opportunity for comment is given on the BiOp. And because the Services’ ESA analysis is narrower than a NEPA analysis, it is no substitute for a NEPA analysis. *Ramsey v. Kantor*, 96 F.3d 434, 443 (9th Cir. 1996); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 649-50 (9th Cir. 2014); *Malama Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) (a “no jeopardy” finding is not the equivalent of a no significant impact finding under NEPA).



## 2. *Irreparable Harm from Construction*

### a. Construction impacts throughout route including the Corps Action Areas

The Service’s Biological Opinion makes clear that there will be irreparable harm to the environment from the permanent clearing, construction, and operation of the pipeline right-of-way along its 428.54-mile route, including clearing and constructing the right-of-way through the project’s hundreds of water crossings, as authorized by the Permian Highway Pipeline verifications. *See* BiOp, Ex. C at 37-40. The typical right-of-way is 125 feet and is comprised of a 50-foot *permanent* easement, and a 75-foot temporary construction easement, with 330-foot, 500-foot, and 984-foot offsets for the golden cheeked warbler and Tobusch fishhook cactus, Houston toad, and the Austin blind salamander and the Barton Springs salamander, respectively. *Id.* at 9. The project will also require the construction of permanent pump-related facilities, grading, excavation, the clearing of trees, vegetation and ground cover, mulching, pesticide and herbicide application, topsoil stripping, digging, dewatering, and modifications to existing private roads and stream crossings. *Id.* at 7-15.<sup>10</sup>

The Corps’ Biological Assessment describes additional permanent impacts. *See* Biological Assessment, Ex. A. Specifically, a “50-ft permanent easement” will be established and maintained upon completion of construction and during operation, with regular removal of brush and trees to prevent it from growing back. *Id.* at 69; BiOp, Ex. C at 12, 14. The right-of-way for the project will involve the total permanent disturbance of 2,604.7 acres. Biological Assessment, Ex. A at 5.

Permanent ancillary facilities will permanently disturb 178.1 additional acres. *Id.* at 6.

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<sup>10</sup> The project began clearing warbler habitat shortly after this court denied a temporary restraining order on February 14, 2020 in *City of Austin v. Kinder Morgan Texas Pipeline LLC*, No. 1:20-CV-138-RP (Doc. 31). *See* Order Denying Preliminary Injunction at 10, *City of Austin v. Kinder Morgan Texas Pipeline LLC*, No. 1:20-CV-138-RP (Mar. 19, 2020) (Doc. 59). Based on the BiOp, this means the pipeline construction would not be completed until February, 2021. Permian Highway Pipeline LLC stated three warbler areas had not been cleared by the March 1, 2020 shut-down date for the habitat. (*Id.* at Doc. 54-1). Habitat clearing in these locations will not occur until after the August 1, 2020 limitation on warbler habitat clearing and “shall be completed by February 28, 2021.” *See* Addendum to BiOp, Ex. J at 2.

The construction of the pipeline will also cause irreparable harm to the aquatic environment, including the discharge of dredged or fill material into 449 waters of the United States. Biological Assessment, Ex. A at 1. Of those proposed crossings, 129 are in the Corps' designated "Action Areas" and require verifications from the Corps under Nationwide Permit 12. *Id.* at 1. As a result of the project, and the incorporation of the biological assessment and BiOp, construction vehicles will cross waters, which will cause rutting and sedimentation, and that construction through the waters involves bypass pumping, diverting water from streams, building culverts and other measures adversely affecting water quality and quantity. *See* App. C to Biological Assessment, Ex. A at 192; *see also* Hayes Decl., Ex. B ¶¶ 22-23, 25. These water crossings will result in numerous and significant environmental impacts, including adverse impacts to riparian productivity, water quality, disruption of flow pathways that link groundwater and surface water, alteration of the hydrostatic equilibrium, subsidence, bank destabilization, erosion, sedimentation, and boating and swimming hazards. Hayes Decl., Ex. B ¶¶ 21-22; *see also* Blair Decl., Ex. H ¶ 7.

In addition, the project would use horizontal directional drilling in ten areas, including the crossing of seven major Texas rivers, including two crossings of the pristine Blanco River in the "interconnected contributing recharge zones of the Trinity and Edwards Aquifers." Biological Assessment, Ex. A at 2, 24.<sup>11</sup> Horizontal directional drilling is a method by which the pipeline company drills under the river and runs the pipeline through it. It can result in an inadvertent return of drilling fluid to the overlying water and result in increased sedimentation and turbidity, which would affect aquatic biota. *See* Hayes Decl., Ex. B ¶¶ 34-36; Watson Decl., Ex. I ¶ 4. The unique karst geological features of the Trinity and Edwards Aquifers allow for the "rapid infiltration" from surface waters, which "strongly influences the flow of water within major springs," such as Barton, San Marcos, and Jacob's Well Springs. Biological Assessment, Ex. A at 24.

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<sup>11</sup> Of these seven crossings, six are in the Fort Worth District, and one is in the Galveston District. Biological Assessment, Ex. A at 2.

A portion of the Permian Highway Pipeline will also traverse the Balcones Escarpment including the interconnected contributing and recharge zones of the Trinity and Edwards aquifers. App. C to Biological Assessment, Ex. A at 191. Both aquifers are of conservation concern due to their hydrologic function, ecological significance, and vulnerability to contamination. *Id.* The project crosses, and will require permanent dredge and fill activity, through 23 miles in the Trinity Aquifer recharge zone and 12 miles in the Barton Springs Segment of the Edwards Aquifer. BiOp, Ex. C at 2. Rapid recharge to the aquifers occurs through sensitive karst features such as caves, solution cavities, and sinkholes. App. C to Biological Assessment, Ex. A at 191. These features also provide recharge to springs, recreational opportunities for swimmers, or a source of drinking water. *Id.* Damage to these sensitive karst features could result in interruption to groundwater flow paths that contribute to aquatic habitat and minimize the potential for sediment and other pollutants to enter the Edwards Aquifer and degrade aquatic habitat. *Id.* In fact, the project has already resulted in spilled drilling fluid in the karst areas, which led to the contamination of local drinking water wells. *See* Blair Decl., Ex. H ¶ 7; Watson Decl., Ex. I ¶ 5.

As a result of the permanent clearing and construction of the pipeline and associated permanent right-of-way, which crosses 129 waters of the United States in the Action Areas subject to the Corps' jurisdiction, the Permian Highway Pipeline is already causing, and will continue to cause, irreparable harm to surface, groundwater, and drinking water resources, forests, soils, and vegetation, and wildlife and habitat *See* BiOp, Ex. C at 37-40.

b. Additional impacts specific to the Corps' Action Areas including impacts of implementing the Service's Terms and Conditions

In addition to harms associated with the permanent impacts to the Corps' Action Areas from the construction of the pipeline and right of way, the implementation of the Biological Opinion and its associated terms will result in additional, permanent impacts to the environment that have never been subject to NEPA review. The Service's Biological Opinion defines the Corps'

“Action Areas” as those where the Corps is basing its water crossings on General Condition 18 of NWP 12, which applies where threatened and endangered species will be impacted, and the surrounding impacted areas. BiOp at 10. There are 64 such areas in the Fort Worth District and 30 such areas in the Galveston district. *See* App. B to Biological Assessment, Ex. A. These Action Areas include the crossing and dredge and fill of 86 distinct waters of the United States within the Fort Worth District, and another 43 distinct water segments or wetlands under the Corps’ jurisdiction in the Galveston District. *See* Biological Assessment, Ex. A at iii.<sup>12</sup>

As noted, the Biological Opinion identifies numerous environmental impacts from construction in the Corps’ Action Areas including vegetation clearing (including maintaining the permanent right-of-way), herbicide application, machinery oil spills and water crossings, in addition to the trenching, blasting and general construction impacts. *Id.* FWS’s Addendum to the Biological Opinion includes a description of additional environmental consequences of the project, including the sustained extreme noise of the pipeline construction from blasting, engines and excavating. *See* May 4, 2020 FWS Addendum to BiOp, Ex. J. None of these impacts have been subject to NEPA review.

Moreover, to address the project’s impacts to *endangered species* in these Action Areas, the Service’s Incidental Take Statement includes numerous terms and conditions that will have *additional* environmental impacts, which, like the impacts of the pipeline itself, have likewise never undergone NEPA review. To avoid liability for unlawful taking of endangered species associated with the issuance of the verifications, the Service required the Corps to incorporate these “terms and conditions” of the Incidental Take Statement into its verifications. BiOp at 52. And to obtain

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<sup>12</sup> For identification of the water crossings in the Galveston Corps’ Action Areas, *see* App. B, sheets 77-92 to Biological Assessment, Ex. A; and for the Fort Worth Corps’ Action Areas, *see* sheets 1-77. The water crossing where Permian Highway Pipeline intends to use horizontal directional drilling methods are in sheets 33, 37, 48, 58, 59, 67, 71, 79 and 88.

Section 7 protection, the Corps decided to incorporate the terms and conditions into its final February 13, 2020 verifications. Fort Worth Verification, Ex. D at 2; Galveston Verification, Ex. E at 2.

The Incidental Take Statement also provides that “[a]ll conservation measures described within the [Biological Assessment] dated August 2019, and this [BiOp] shall be fully implemented.” BiOp, Ex. C at 55. Those measures include “vegetation clearing” “[w]ithin [golden checked warbler] habitat in [the Corps’] Action Area.” *Id.* at 55. Vegetation clearing includes cutting down trees, shrubs and all vegetation in the right-of-way down to the soil, and maintaining this right-of-way permanently so it does not grow back. *Id.* at 14; *see also* Blair Decl., Ex. H ¶ 4 (describing irreparable harm to forest, soil and wildlife from vegetation clearing).

The Biological Opinion identifies numerous additional adverse impacts, including herbicide and pesticide application; oil spills from heavy machinery impacting soil and water; and “inadvertent return” of drilling fluids impacting soil and water in the horizontal directional drilling process. BiOp, Ex. C at 10. The BiOp also discusses potential “void” harm, *e.g.* release of fluids into the karst formation. *Id.* at 3. Indeed, such a spill occurred on March 28, 2020, contaminating nearby wells and prompting Hill County to halt construction to protect public health and the environment. *See* Attach. B to Blair Decl., Ex. H; Watson Decl., Ex. I at 4, 5. The toxic and chemical-laden sediment resulting from that spill are likely persist for months, if not years, and threaten to permanently degrade water quality in the Edwards aquifer (and the two species of endangered salamanders). Hayes Decl., Ex. B ¶¶ 27, 36, 41; Blair Decl., Ex. H ¶ 7; Watson Decl., Ex. I ¶¶ 4, 5; *see also* BiOp, Ex. C at 3 (referencing App. C to Biological Assessment). These conservation measures purport to “minimize” those impacts, but they do not ensure there will be *no* harm. BiOp, Ex. C at 3.

The Biological Opinion and addendum also require numerous, additional construction measures designed to reduce impacts to engendered species, including seasonal restrictions on

construction activities, the purchase and transfer of conservation credits and mitigation lands, wilt oak fungus prevention measures, additional vegetation clearing and revegetation measures, and construction of fencing, drive-over gates, and sediment barriers. BiOp, Ex. C at 10-15, 55-57; FWS Addendum to BiOp, Ex. J. These measures not only make clear that pipeline construction in the Action Areas will, *by itself*, result in significant permanent environmental impacts that were never subject to NEPA review, but that the Biological Opinion's *terms and conditions* will themselves have (and are having) additional environmental impacts that also have never been subject to public review. *See, e.g.*, Blair Decl., Ex. H (detailing and memorializing stream, forest, soil, and wildlife impacts from ongoing vegetation clearing and construction).

### 3. ***Irreparable Harm to Plaintiff's Members***

Sierra Club members, including numerous residents of Hill County in central Texas, have property, business, recreational, aesthetic, and environmental interests that are being and will be irreparably harmed by the Corps implementation of the BiOp's terms and conditions, including clearing and construction of the pipeline, associated water crossings, and dredge and fill allowed by the Corps. *See* Decl. of Heath Frantzen, Ex. F; Decl. of Susan Gates, Ex. G; Decl. of John Watson, Ex. I; Decl. of Belinda Pence, Ex. L; Decl. of Lynn Gallimore, Ex. K.<sup>13</sup>

The Permian Highway pipeline will directly cross property owned by Sierra Club member Heath Frantzen. Frantzen Decl., Ex. F ¶ 4. The property has been in his family for generations, and is comprised of a trophy deer hunting ranch with an emphasis on conservation. *Id.* ¶¶ 2, 4. His use and enjoyment of the property will be diminished by the pipeline construction process, and an

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<sup>13</sup> These declarations also demonstrate Plaintiff's standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (member of public living near site for a proposed dam would have procedural standing to challenge the agency's failure to prepare an EIS); *Int'l Broth. of Teamsters v. U.S. Dept. of Transp.*, 714 F.3d 580 (D.C. Cir. 2013); *Onachita Watch League v. Jacobs*, 463 F.3d 1163, 1170-72 (11th Cir. 2006) (cognizable procedural injury exists when NEPA not followed and Plaintiffs' interests are threatened by the action).

explosion or leak during the pipeline operation would damage his land and business. *Id.* ¶ 9. The pipeline will cross the Pedernales River roughly ten miles upstream from Mr. Frantzen's property. *Id.* ¶ 5. The water that Mr. Frantzen relies on for both his household needs and for his herd comes from two wells on his property. *Id.* ¶ 9. He is concerned that damage done to the underlying karst aquifer will impact the wells on his property, as they are easily permeated and damaged, which can lead to contamination of the aquifer. *Id.* If the pipeline is built and there is a gas leak, it could reach the river and harm both water quality and wildlife. *Id.* ¶ 8. In addition, Mr. Frantzen and his family have prioritized maintaining habitat on his land for the golden-cheeked warbler, as they are important to both him and his guests. *Id.* ¶ 7. Mr. Frantzen has also attended local meetings to discuss the damage that could occur to the region if the Permian Highway pipeline is constructed in Hill Country. *Id.* ¶ 11.

Like Mr. Frantzen, John Watson is a landowner along the Pedernales River downstream of the pipeline crossing and is concerned about the impact it will have on his ability to enjoy the river and the many recreational opportunities it creates. Watson Decl., Ex. I ¶ 4, 5. Mr. Watson walks along the river on his property often, spending time fishing, swimming, and recreating with his children and grandchildren on the river. *Id.* The plan to use horizontal directional drilling to go under the Pedernales could cause problems with water quality since the methods they use could cause drilling fluids to reach the water above and below, as evidenced by the construction shut down in Blanco County. *Id.* ¶ 5.

Lynn Gallimore, a resident of Wimberley, Texas, lives along Lone Man Creek, which is crossed by the Permian Highway pipeline less than a mile upstream from her home and business. Gallimore Decl., Ex. K ¶ 2. Like many of the other landowners along the route, Ms. Gallimore is concerned about the construction of the pipeline through the easily damaged karst in the region. *Id.* ¶ 4. If the pipeline were to puncture the karst aquifer upstream, the water that flows into Lone Man

Creek could be diverted underground or contaminated. *Id.* Lone Man Creek is used by Ms. Gallimore and her guests for fishing, swimming, and other recreational pursuits. *Id.*

Susan Gates, a resident of Driftwood, Texas for 21 years, and Belinda Pence, a resident of Fredericksburg, Texas, regularly take walks in their respective neighborhoods that would be greatly diminished by pipeline construction. Gates Decl., Ex. G ¶¶ 1, 6; Pence Decl., Ex. L ¶¶ 1, 4. Ms. Gates lives less than a mile and a half from the pipeline route, with the only entrance to her subdivision less than ¼-mile from the pipeline. Gates Decl., Ex. G ¶ 6. Ms. Pence lives less than 500-feet from the pipeline route. Pence Decl., Ex. L ¶ 4. The clearing, construction, and operation of the pipeline will impact their experience through noise pollution, possible methane leaks, and the permanent maintenance of the pipeline easement, thus diminishing the enjoyment they get from this time spent outdoors. *Id.* ¶¶ 4-6; Gates Decl., Ex. G ¶¶ 6, 7. The clearing and construction will also affect the warbler habitat and scare off individuals, which impacts them since the presence of the golden-cheeked warbler is something that both cite as reasons for their walks, as they can often be spotted along the route. Gates Decl., Ex. G ¶ 6; Pence Decl., Ex. L ¶ 4.

#### **4. Impacts to Endangered Species**

The impacts of the “terms and conditions” that must be considered in the Corps’ NEPA analysis include numerous measures that will have immediate and irreparable impacts to Corps jurisdictional waters, the Corps’ Action Area and Sierra Club members, *in addition to* their effects on the endangered species. This motion is therefore different from the motions for temporary restraining order and preliminary injunction in *City of Austin v. Kinder Morgan Texas Pipeline, LLC*, *supra*, where this Court denied the requested injunction based on a finding of lack of irreparable harm to the endangered species. *See* February 14, 2020 Order Denying Motion for Temporary Restraining Order at 4, 6-7, *City of Austin v. Kinder Morgan Texas Pipeline LLC*, No. 1:20-CV-138-RP (Doc. 31); March 19, 2020 Order Denying Motion for Preliminary Injunction at 8 n.3, 14 n.6, and



15-17, *City of Austin v. Kinder Morgan Texas Pipeline LLC*, No. 1:20-CV-138-RP (Doc. 59). Here, Claims II and III of Sierra Club’s Complaint are based on NEPA, not the ESA, and they involve broader environmental impacts to surface, groundwater, and drinking water resources, forests, soils, and vegetation, wildlife and habitat, and aesthetic and cultural resources—more than just harm to specific endangered species.<sup>14</sup>

Nonetheless, the Corps’ action does have irreparable impacts on threatened and endangered species. The Biological Opinion shows the project “may affect” three endangered species and their habitat with irreparable harm, regardless of whether this rises to the level of “jeopardizing” the species. This includes construction in and adjacent to warbler habitat; cutting down oak trees, fencing Houston toad habitat, and translocation of the Tobusch fishhook cactus. BA at 6-9.

Specifically, the “taking” of golden checked warblers will occur through the permanent destruction of 282 acres of warbler breeding habitat and the degradation of an additional 1,352.3 acres of adjacent habitat, including 393 acres in waters of the United States subject to the Corps’ jurisdiction. BiOp, Ex. C at 36-37, 41, 47, 53. This will result in the “reduction” and increased “fragmentation” of “feeding, breeding, and sheltering resources for the species,” thereby harming individual species. *Id.* at 41-42, 53. Moreover, “impairment of essential behavioral patterns are reasonably certain to occur.” *Id.* at 53.

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<sup>14</sup> In NEPA cases like this one, harm to the “species as a whole” is *not* required to demonstrate irreparable harm. See *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (“By adopting the ESA standard, requiring that a plaintiff show damage to an entire species, as the standard for evaluating irreparable harm in a CWA or NEPA challenge, the district court based its decision on an erroneous conclusion of law. We conclude that, to the extent that the district court based its denial of a preliminary injunction on the plaintiffs’ failure to establish harm to the species as a whole, this was an abuse of discretion.”). *Aransas Project v. Shaw*, 775 F.3d 641,663-64 (5th Cir. 2014), does not hold otherwise; instead, the court reversed an injunction because plaintiffs only showed past harm to whooping cranes with no “likely, imminent replication” of that harm. Here, the Permian Highway Pipeline is causing—and will continue to cause—irreparable harm to individual species, permanent destruction of habitat, and irreparable harm to the environment, water resources, and Sierra Club’s members’ protectable interests.

Construction of the Permian Highway Pipeline will also potentially result in the fatal take of eight adult Houston toads, as well as all juvenile Houston toads present in the Corps' Action Areas. *Id.* at 54. Construction will cause “[r]eduction of fitness to individuals by impairing breeding, feeding, and sheltering caused by loss and degradation of habitat.” *Id.* The Service found construction “will ... require significant earth moving activities (trenching) with heavy machinery and other vehicles that have the potential to kill, injure, and otherwise disturb toads . . .” *Id.* at 39. All told, the Permian Highway Pipeline construction will destroy 152.6 acres of Houston toad habitat and adversely impact 1,445.9 acres, 578.9 acres of which are in waters of the United States subject to the Corps' oversight. *Id.* at 37-38. The habitat within this area is not expected to recover to conditions suitable for Houston toad occupancy. *Id.* at 38-39, 45.

Construction of pipeline will also include the removal and relocation of 42 Tobusch fishhook cacti with no guarantee they will survive. *Id.* at 46. The remaining 62 Tobusch fishhook cactus “may experience reduced reproductive potential and gene flow.” *Id.* at 42. Habitat within the 50-foot right-of-way is not anticipated to recover to suitable conditions for the Tobusch fishhook cactus *Id.* at 40. Additional individuals may be impacted or crushed during vegetation management and pipeline maintenance. *Id.* at 40. Although the Corps and the Permian Highway Pipeline have plans to “minimize”—but not eliminate—harm to the endangered species, *id.* at 3, the agency's findings on mitigation are not determinative of irreparable harm. *See, e.g., Greater Yellowstone Coalition*, 321 F.3d 1250, 1259-61 (10th Cir. 2003) (finding irreparable harm from development despite agency mitigation measures); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011).

In sum, the construction of the Permian Highway Pipeline and the implementation of the terms and conditions of the Biological Opinion will result in, and are already causing, permanent environmental impacts to property, water resources, wetlands, wildlife, and forests in and around the Corps' Action Area, which Sierra Club members and the public use and enjoy. Had the Corps

conducted a public environmental review of those wide-ranging impacts, as required by NEPA, the public, environmental experts and engineers, and Sierra Club members would have had the opportunity to identify additional alternatives, including a “no action” alternative or alternative pipeline routes, that could have avoided or further mitigated environmental impacts to waters of the United States. Those irreparable harms to the environment, coupled with the Corps’ deprivation of Sierra Club’s members’ procedural rights under NEPA, establish irreparable harm. *Fund for Animals v. Norton*, 281 F. Supp. 2d at 222.

**C. The Permanent and Irreparable Harms to the Environment and the Public’s Right to Participate in the Corps’ Decision-making Process Outweigh any Temporary Harm that a Preliminary Injunction Might Cause.**

Where, as here, a plaintiff has shown environmental injury is “sufficiently likely,” the Supreme Court has held, “the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (irreparable environmental injuries outweigh temporary economic harms); *Indigenous Env’tl. Network v. State Dep’t*, 369 F. Supp. 3d 1045, 1051-52 (D. Mont. 2018) (concluding potential environmental damage to the public outweighed any energy security and economic benefits provided by Keystone XL pipeline). Applying that principle here, it is clear that the irreparable harms to the environment, plaintiffs, and the public’s right to participate in the Corps’ decision-making process, as discussed *supra*, outweigh any temporary harm that a preliminary injunction may cause the Corps, or the owners of the Permian Highway Pipeline.

As discussed, the continued construction of the Permian Highway Pipeline in the Corps’ Action Area will have significant irreparable environmental impacts. Indeed, the construction of the pipeline has already resulted in the accidental discharge of 36,000 gallons of toxic drilling fluid into the Blanco River, and the contamination of local drinking water wells. Due to the unique geological

features of the region, chemical-laden sediment from that spill (and others like it) will persist in the aquifer system for many months or years, irreparably harming aquatic species and drinking water resources. Hayes Decl., Ex. B at 9.

Clearing, grading, and trenching for the pipeline right-of-way through waters of the United States, will also result in sediment discharges that inundate and permanently destroy aquatic species and their habitat. Moreover, these environmental impacts and the noise, emissions, and visual blight associated with the pipeline will occur on hundreds of miles of private property, including that of Plaintiffs' members.

And as discussed, Plaintiffs and the public will be irreparably harmed by the Corps' failure to provide for public participation and comment before issuing the verifications, as required by the NEPA. This "risk of uninformed decisionmaking regarding ... delicate and intertwined natural resources outweighs any potential harm accruing to Defendants." *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) (finding harm to applicant not compelling because a "delay in drilling the exploratory wells is not irreparable..."). The public's right to participate in the federal agency decision-making processes weighs decidedly in favor of an injunction.

These minimum standards for public review and comment were not met because the Corps arbitrarily failed to disclose material information to the public before issuing its verifications. Indeed, the Corps provided *no* public notice of the NWP 12 verifications. As a result, there was no opportunity for the public to learn of—let alone provide comment on—the individual and cumulative effects of the Corps' decision to allow Permian Highway Pipeline to conduct dredge and fill activities in 129 of the most environmentally sensitive streams and wetlands in central Texas. Nor was there any opportunity for the public to weigh in on alternatives, including a no action alternative, or mitigation measures that might avoid or further reduce any impacts. The Corps'

failure to conduct any environmental or public review is a “serious, immediate, and irreparable injury.” *Heckler*, 756 F.2d at 157.

Meanwhile, there would be no injury to the Corps from an injunction, and any injury to the Permian Highway Pipeline would be purely economic and temporary. As an initial matter, economic harm is not irreparable and does not provide an adequate basis for denying injunctive relief. *See e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable). Moreover, courts have consistently held that the “loss of anticipated revenues . . . does not outweigh irreparable damage to the environment.” *Nat’l Parks Conservation Ass’n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d at 766 (irreparable environmental injuries outweigh temporary economic harms)

That the project might be delayed if the Corps is required to conduct a NEPA analysis is no injury to the Permian Highway Pipeline. *See Alaska Center for the Environment v. West*, 31 F. Supp. 2d 711, 723 (D. Alaska 1998) (noting longer permit processing time was “not of consequence sufficient to outweigh irreversible harm to the environment”); *see Wild Earth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 n.35 (D.D.C. 2019) (citation omitted) (“the risk of economic harm from procedural delay and industrial inconvenience ‘is the nature of doing business, especially in an area fraught with bureaucracy and litigation’”). Similarly, the Fifth Circuit has recognized that, where a plaintiff has demonstrated a clear violation of NEPA, the “remedy should be shaped so as to fulfill the objective of the statute as closely as possible,” and preliminary injunction is often appropriate to protect the public interest, even if the project has already commenced. *Env’tl. Def. Fund v. Marsh*, 651 F.2d at 1005 (enjoining a federal highway project where the Corps refused to prepare an adequate NEPA analysis addressing “significant environmental impacts,” even though the project was “55% complete”).

In any event, Sierra Club's requested injunctive relief would *not* actually require Permian Highway Pipeline to cease all construction activities. Instead, Sierra Club's requests only that the Court stay the Corps' of Engineers' Clean Water Act NWP 12 verifications and enjoin any dredge and fill or other ground disturbing activities in the discrete 129 water crossing that comprise the Corps' *Action Area* until the agency fully evaluates the direct and cumulative impacts of dredge and fill activities in those 129 water crossings. The Corps' Action Area consists of only 2,100 acres of the approximately 31,000 acres impacted by the project—a mere 7% of the entire project. This limited injunction would require the Corps to fully evaluate, and invite public comment on, the direct and cumulative environmental risks and impacts of its decision to incorporate into the Clean Water Act verifications of the terms and conditions of the Biological Opinion *before* reauthorizing the PHP to conduct dredge and fill activities in those discrete Action Areas. Meanwhile, Permian Highway Pipeline is free to continue construction in the areas *outside* the Corps' Action Area.

In any event, any potential harm to the pipeline owners is largely self-inflicted because they chose to proceed—and continue to engage in dredge and fill activities to this day—knowing that the Corps failed to conduct the environmental and formal public review process required under NEPA. *See Davis v. Mineta*, 302 F.3d 1104, 116 (10th Cir. 2002); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (any alleged harm “resulted from [the agency’s] failure to follow the law in the first instance”). In fact, numerous Texas municipalities, community organizations, property owners, and citizens reached out to Permian Highway Pipeline expressing concern about the Company's failure to conduct required environmental and public reviews before beginning construction. Despite having ample notice of the public concerns about the Company's “effort to avoid fully analyzing the impacts of their project on the human and natural environmental, disclosing these impacts to the public or to elected officials, or allowing any sort of public comment on the environmental effects of their project,” Letter from Lon Shell, Hays County Commissioner,

to Margaret Everson, U.S. Fish and Wildlife, Ex. M, the pipeline proceeded without ensuring the Corps had complied with basic requirements of NEPA. The Company cannot now claim that a preliminary injunction to complete that environmental and public review process would impose irreparable harm. *See, e.g., Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970) (finding it “elementary that a party may not claim equity in his own defaults”); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 116-117 (D.D.C. 2003) (refusing to grant equitable relief where party’s actions were “disingenuous at best,” and finding that “any economic or emotional harm . . . falls squarely on the defendants’ shoulders”).

Additionally, “there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the [project’s] operation.” *See Alaska Conservation Council v. U.S Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006), *rev'd on other grounds*, 129 S. Ct. 2458 (2009). Moreover, any harm to Permian Highway Pipeline from delaying the project sufficiently to ensure compliance with the law is temporary at best. Granting limited preliminary injunctive relief here would only serve to preserve the *status quo* until the Corps completes the public review process, and evaluates the direct and cumulative environmental impacts of allowing dredge and fill activities in 129 individual waters of the United States within the Corps’ Action Area. This modest request, as compared to the alternative—allowing Permian Highway Pipeline to permanently destroy sensitive habitat and irreparably damage public drinking water supplies and aquatic resources across some of the most environmentally sensitive streams and aquifers in central Texas—overrides any arguable harm that the agency could possibly offer in advocating against such relief.

#### **D. The Public Interest Favors Issuance of a Preliminary Injunction.**

The public interest tips in favor of a preliminary injunction staying the Corps’ Clean Water Act verifications for the Permian Highway Pipeline, and enjoining any further ground disturbance in

and around the 129 separate stream crossings that comprise the Corps' Action Areas (*see* App. A to Biological Assessment, Ex. A), until the NEPA process is complete, for several reasons.

First, the public has an “undeniable interest” in ensuring that public officials comply with the law. *Colorado Wild v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1223 (D. Colo. 2007); *see also Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991) (“[t]his invokes a public interest of the highest order: the interest in having government officials act in accordance with the law.”); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) (The “most basic premise of Congress' environmental laws” is that “the public interest is best served when the law is followed.”); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (the public interest is in “meticulous compliance with the law by public officials”); *Fund for Animals, Inc. v. Norton*, 281 F. Supp. 2d at 237 (finding a public interest in “compliance with NEPA”).

Second, and relatedly, courts have recognized that congressional intent and statute's purposes are indicative of the public's interest. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 624 (5th Cir. 1985) (affirming a preliminary injunction under the Utility Reform Act, in part, because the Act “announces the strong public interest involved in the determination” of the legality and fairness of utility rates before passing costs on to consumers). Like the Utility Reform Act in *Mississippi Power*, NEPA reflects an unambiguous mandate that federal agencies “document the potential environmental impacts of significant decisions *before* they are made, thereby ensuring that environmental issues are considered by the agency and that important information is made available to the larger audience that may help to make the decision or will be affected by it.” *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094 (11th Cir. 2004) (emphasis added). To that end, “Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment,” and by extension, the public interest. *Davis v. Mineta*, 302 F.3d



at 1116 *abrogated on other grounds*, *Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F. 3d 1276 (10th Cir. 2016).

“There is no question that the public has an interest in having Congress’ mandates in NEPA carried out accurately and completely.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009) (holding that the public has an interest in ensuring that agency action “does not give way to unintended environmental consequences that have not (but should have) been evaluated by Defendants,” and granting a preliminary injunction); *see also Fund for Animals*, 27 F. Supp. 2d at 15 (“the public interest expressed by Congress [] was frustrated by the federal defendants not complying with NEPA. Therefore, the public interest would be served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements.”).

Third, to give meaning and effect to the public’s interest in fully informed decision-making, as mandated by NEPA, an injunction is warranted “so that the momentum of additional work and investment does not serve further to bind the agency to its initial decision.” *Realty Income Trust v. Eckerd*, 564 F.2d 447, 457 (D.C. Cir. 1977). Although the court cannot turn back time, courts have recognized that fashioning a remedy that restores that choice as much as possible is necessary and appropriate. *Mont. Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1156-57 (D. Mont. 2004). An injunction in this case would give effect to NEPA’s requirement that the Corps conducts a full and complete analysis before completing the project, and before alternatives, “including the option of taking ‘no action,’” are completely foreclosed. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780 (10th Cir. 2006) (quoting 42 U.S.C. § 4332(2)(C)(emphasis added)); *see also Pennaco Energy Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) (“Agencies are required to satisfy the NEPA ‘before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.’”).

Here, the risk of irreparable inundation of sensitive habitat, the documented destruction of irreplaceable drinking water and aquatic resources, the risk of catastrophic pipeline failure, and the public interest in ensuring the Corps fully consider the environmental impacts and alternatives to their actions *before* authorizing the project all outweigh the temporary economic harm of an injunction. Accordingly, the public interest tips heavily in favor of staying the Corps' Clean Water Act verifications for the Permian Highway Pipeline. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326-27 (D.C. Cir. 1987) (affirming district court's finding that an injunction was in the public interest to "protect against further illegal action pending resolution of the merits" and to "protect[] the environment from any threat of permanent damage"); *see also Fund For Animals v. Clark*, 27 F. Supp. 2d at 15 (granting a preliminary injunction, in part, because the public's interest would be "served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA."<sup>15</sup> Finally, the public has a strong interest in "prevent[ing] the judicial process from being rendered futile by defendant's action or refusal to act." *Canal Authority of Fla. State*, 489 F.2d at 573 (citing Wright & Miller, Federal Practice and Procedure: Civil § 2947). Where, as here, a "meaningful decision on the merits would be impossible without an injunction, the district court may maintain the status quo and issue a preliminary injunction to protect a remedy, including a damages remedy." *Janey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (*quoting Productos Carnic, S.A. v. Cent. Amer. Beef & Seafood Trading Co.*, 621 F.2d 683, 686-87 (5th Cir.1980)). As discussed above, the Permian Highway Pipeline has already begun dredge and fill activities in several of the waters of the

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<sup>15</sup> Plaintiffs request that the Court waive the bond requirement or impose a nominal bond under the public interest exception to Fed. R. Civ. P. 65(c). *See e.g. Kansas v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983); *Colo. Wild v. U.S. Forest Serv.*, 299 F. Supp. 2d 1184, 1191 n.31 (D. Colo. 2004). Courts have long declined to impose anything more than a minimal bond in order to avoid frustrating "public-interest" litigation. *See California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971. Plaintiffs' likelihood of success should "tip[] in favor of a minimal bond or no bond at all." *California ex rel. Van De Kamp*, 766 F.2d at 1326.

United States within the Corps' Action Area. Without a preliminary injunction to preserve the status quo, any remedy could render futile the core purposes of any NEPA review process—thorough consideration of impacts and alternatives and public participation *before* the Corps authorizes completion of the pipeline.

### CONCLUSION

For the reasons set forth above, Sierra Club respectfully requests the Court enter a preliminary injunction on Complaint Claims for Relief II and III, to enjoin the Corps' verifications and all actions taken pursuant to them, including any dredge and fill or other ground disturbing activities in the 129 water crossings that comprise the Corps' Action Areas.

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Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 19th day of June, 2020, a true and correct copy of the foregoing document was filed and served using the electronic case filing system (ECF) pursuant to the electronic filing requirements of the United States District Court for the Western District of Texas.

*/s/ Joshua D. Smith* \_\_\_\_\_  
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