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Sent via U.S. Certified Mail, Return Receipt Requested, and Email to:

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Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Regarding Nationwide Permit 12 and the Keystone XL Pipeline

Dear Sirs/Madams:

This letter serves as formal notice by the Center for Biological Diversity, Natural Resources Defense Council, Friends of the Earth, the Sierra Club, Bold Alliance, and Northern Plains Resource Council (“Conservation Groups”) of their intent to sue the U.S. Army Corps of Engineers (“Corps”) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), in connection with the reissuance of nationwide permit 12 (“NWP 12”) under Section 404 of the Clean Water Act (“CWA”), and for failing to ensure that its verification, approval, or

permitting of the Keystone XL pipeline (or the “Project”) under NWP 12 will not jeopardize the continued existence of listed species in violation of Section 7 of the ESA.¹

The Corps has failed to initiate formal programmatic consultation with the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (together, the “Services”) regarding the effects of NWP 12 on terrestrial and aquatic species, in direct violation of the requirements of Section 7 of the ESA.² NWP 12 allows for an unquantified and virtually limitless number of “discharges” of dredged or fill material to the nation’s waters and wetlands in connection with utility projects, such as transmission lines and pipelines. Yet, the Corps has reauthorized NWP 12 without considering or even disclosing the cumulative, adverse environmental consequences of the impacts of discharges under NWP 12 on protected species or their critical habitat. Indeed, the Corps reauthorized NWP 12 without having even basic procedures in place that would allow the agency to know the full extent of the harm to listed species from activities permitted under NWP 12. The Corps has therefore failed to ensure that discharges resulting from NWP 12-authorized activities are not likely to jeopardize the continued existence of listed species, and/or destroy or adversely modify any such species’ designated critical habitat, in violation of the ESA.³

Furthermore, the Corps has verified, approved, or permitted activities under NWP 12 for the Keystone XL pipeline in Montana, South Dakota, and Nebraska absent compliance with the ESA. The pipeline would make more than 1,000 water crossings in these states, including rivers, wetlands, small tributary creeks, and dry stream beds that fill during periods of heavy precipitation. The Corps’ responses to our requests under the Freedom of Information Act indicate that TransCanada (now TC Energy) submitted preconstruction notifications (“PCNs”)

¹ See Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860 (Jan. 6, 2017). The Corps has reauthorized NWP 12 for a five-year period, effective March 19, 2017. *Id.* at 1860. NWP 12 allows for the discharge of dredge or fill material resulting in the loss of up to ½ acre of jurisdictional waters (for each separate and distant crossing) for the construction, maintenance, repair, and removal of utility lines (including transmission lines and pipelines). *Id.* at 1985. It further authorizes the construction or maintenance of foundations for overhead utility line towers, and the construction of access roads for the construction and maintenance of utility lines. *Id.*

² Pursuant to the Services’ revised regulations defining “framework programmatic action,” programmatic consultation generally does not result in the issuance of an incidental take statement (“ITS”). Rather any incidental take should be subsequently authorized under a project-specific Section 7 or Section 10 process. See 80 Fed. Reg. 26,832, 26,844 (May 11, 2015) (adding definition of “framework programmatic action” to 50 C.F.R. § 402.02 and adding 50 C.F.R. § 402.14(i)(6) on ITSs not being required at the programmatic level because subsequent actions resulting in incidental take will be separately consulted on). While the Corps has acknowledged that it must undertake a “nation-scale” cumulative impacts analysis under NEPA and CWA, 82 Fed. Reg. at 1860, the Corps has failed to undertake a national-scale programmatic ESA consultation with the Services on NWP 12, as set forth herein.

³ 16 U.S.C. § 1536(a)(2).

for these states, but the Corps has not completed a Section 7 consultation for its authorization of the application of NWP 12 to any of these waterbodies.

For example, the Corps verified the use of NWP 12 for the Yellowstone River crossing in Montana and the Cheyenne River crossing in South Dakota, yet never consulted to ensure against jeopardy and to minimize and monitor the adverse effects to listed species at those river crossings, from the pipeline crossings of tributaries that flow into those rivers, or the direct, indirect, and cumulative impacts associated with the hundreds of other wetlands, stream and river crossings throughout Montana and South Dakota.⁴ In addition, the Corps has not ensured through a site-specific consultation and incidental take statement that the pending Section 408 permit for Keystone XL to cross the Missouri River near Fort Peck will not result in jeopardy to listed species or to implement appropriate measures to minimize adverse effects on listed species at this river crossing.⁵

While the Corps purportedly relied on the State Department's 2012-2013 consultation with FWS for Section 7 ESA compliance, those consultation documents did not adequately address the take of listed species, nor did they ensure that jeopardy will not result from construction and operation of Keystone XL, and were subsequently enjoined by the Montana District Court.⁶ Moreover, following the issuance of a permit for Keystone XL by President Trump, the State Department confirmed that its consultation has been rescinded, and therefore there is no existing ESA Section 7 consultation that sufficiently analyzes the impacts of water crossings for Keystone XL.

Likewise, the Corps has failed to undertake ESA Section 7 consultation to ensure against jeopardy and unlawful take of listed species from construction and operation of Keystone XL in Nebraska. The State Department reinitiated but has not yet completed consultation on the Nebraska route after it was modified, and it remains unclear whether or when the Corps will complete the required consultation on the Nebraska route.⁷ However, TC Energy previously submitted a PCN to the Corps pursuant to NWP General Condition 18 due to potential impacts to

⁴ For example, Keystone XL would use HDD to cross under the Milk River (milepost 83.41) and the Missouri River (milepost 89.66), two locations where endangered pallid sturgeon are present. However, in the span of ten miles on either side of these two crossings (i.e., between milepost 73 and 100), the pipeline would cross 41 other waterways using conventional trenching methods. Discharges and/or oil spills into those 41 waterways during construction or operation could flow into the Missouri and Milk Rivers and harm pallid sturgeon. Similar concerns exist with respect to HDD crossings in South Dakota and Nebraska.

⁵ Although the Montana PCN covered all water crossings in Montana, the Corps issued a verification that was limited to the Yellowstone River. Similarly, while the South Dakota PCN covered all water crossings in South Dakota, the Corps issued a verification that was limited to the Cheyenne River. It appears that the Corps intended these verifications to constitute a tacit verification of all other crossings addressed by the PCNs; but regardless, the Corps did not conduct any section 7 consultation on any of the Montana or South Dakota water crossings.

⁶ *Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018).

⁷ On information and belief, TC Energy has not submitted a revised PCN for the new route through Nebraska.

listed species from the Platte and Niobrara River crossings. The Corps responded to TC Energy by letter, stating that because TC Energy intends to use horizontal directional drilling (“HDD”) for the Platte and Niobrara River crossings, it could proceed under NWP 12 without submitting a PCN or waiting for NWP 12 verification. This ignores the impacts from the dozens of other wetland and stream crossings in Nebraska that may affect listed species. And, as set forth in more detail below, the use of HDD does not avoid all impacts to listed species at these river crossings, which may be adversely affected by “frac-outs” of drilling fluids, and/or discharges or oil spills into tributaries that flow into those river crossings—to the contrary, it presents these and additional risks of its own. Thus, the Corps’ determination regarding the water crossings in Nebraska is erroneous, and the Corps has failed to comply with Section 7 of the ESA.

As explained below, construction, operation, and maintenance of Keystone XL will proximately cause the unauthorized take of listed species, including the whooping crane, American burying beetle, pallid sturgeon, interior least tern, and piping plover, by killing, injuring, harming, and harassing these species without any form of take coverage or adequate Section 7 consultation. In particular, the placement of hundreds of miles of new transmission lines in the whooping crane migratory corridor to power pump stations for the Project will result in take of these critically endangered birds through collisions, which are the primary known cause of death for the species, thereby presenting a classic “death-by-a-thousand-cuts” scenario that would jeopardize this sole wild population of whooping cranes. Further, the Project will result in spills and leaks of oil or other toxic contaminants and diluted bitumen, which will cause take of whooping cranes as well as other endangered and threatened species including American burying beetle, pallid sturgeon, interior least tern, and piping plover.

These impacts to endangered wildlife from Keystone XL have never been subjected to a complete and adequate formal consultation pursuant to Section 7(a)(2) of the ESA to ensure that any actions that the Corps authorizes are “not likely to jeopardize the continued existence of any endangered species or threatened species” or “result in the destruction or adverse modification” of their critical habitat.⁸

The Corps is therefore in violation of the ESA regarding its failure to initiate formal programmatic consultation with the Services on the reissuance of NWP 12 and on its issuance of verifications for Keystone XL’s crossings of the Yellowstone and Cheyenne rivers, as well as its failure to ensure that Keystone XL’s other water crossings in Montana, South Dakota, and Nebraska are not likely to jeopardize any listed species. Unless the violations described in this letter are remedied within 60 days, we intend to bring suit and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys’ fees for your violations of the ESA.⁹

⁸ 16 U.S.C. § 1536(a)(2).

⁹ *Id.* § 1540(g).

I. IMPACTS TO LISTED SPECIES

A. Adverse Effects to listed species from NWP 12 activities

Activities authorized under NWP 12 “may affect,” and are “likely to adversely affect,” species listed under the ESA and/or destroy or adversely modify any such species’ designated critical habitat.¹⁰ For example, pipelines constructed in U.S. waters pursuant to NWP 12, including the Keystone XL pipeline, have the potential to leak and spill into the Corps’ jurisdictional waterways, with disastrous impacts on aquatic resources.

In its Decision Document for NWP 12, the Corps acknowledged the potential for harm to the environment and the species that rely on areas affected by NWP 12-authorized activities, including from inadvertent returns of drilling fluids; fragmentation of terrestrial and aquatic ecosystems; leaks and spills of transformer fluids or petroleum products; conversion of wetlands resulting in loss of wetland functions as well as permanent loss of wetland habitat and alteration of natural drainage patterns; and adverse effects on water quality from increases in sediments and pollutants in the water that impair the quality of fish and wildlife habitat by modifying or eliminating areas used for nesting, foraging, resting, and reproduction.¹¹ Other impacts include power line collisions for migratory birds (the greatest known cause of mortality for whooping cranes, as discussed below), predation of imperiled species by raptors perching on power lines, and increased greenhouse gas emissions associated with pipeline development, which will exacerbate the climate crisis that continues to threaten listed species.

More than one-third of the United States’ endangered and threatened species live only in wetlands, including several snake, salamander, frog, and turtle species, as well as many endangered or threatened plants. Nearly half of listed species require rivers and wetlands at some point in their lives for feeding, breeding, and shelter, including migratory birds like the whooping crane and piping plover. Other such species live in and rely on rivers and streams that may be crossed by power lines or pipelines, such as imperiled salmon, sturgeon, and freshwater mussels. Many other endangered and threatened animals and plants depend on wetlands and other aquatic resources for their survival or recovery—for instance, Indiana bats which feed on water-dependent insects.

Pipelines and power lines cause immediate and irreparable impacts to ecosystem functions of streams and adjacent wetlands through several means, including: spreading of invasive species; damaging soils; degrading water quality and harming fish; causing cumulative impacts to bank stability and floodplain vegetation leading to erosion, sedimentation, release of toxic substances, reduced biodiversity and productivity; conversion of forested wetlands to scrub wetlands; and cumulative adverse impacts from forest fragmentation, habitat loss, erosion and sedimentation,

¹⁰ 50 C.F.R. § 402.14.

¹¹ For a discussion of the potential harm to listed species under NMFS jurisdiction from NWP activities, see National Marine Fisheries Service, Biological Opinion on U.S. Army Corps of Engineers’ Nationwide Permit Program (2014) (“2014 NMFS BiOp”) at 304-17.

and soil nutrient loss.¹² These impacts could adversely affect hundreds of listed species that rely on rivers, streams, and wetland habitats and other aquatic resources across the country.

In a 2014 Biological Opinion regarding the Corps' NWP program, NMFS determined that activities undertaken pursuant to NWP 12 could permanently change "impervious surface cover" of the nation's wetlands and waterbodies, and when such changes are taken in the aggregate, they correspond to "large scale hydrologic phenomena that are critical to the survival and recovery of threatened and endangered species under NMFS' jurisdiction and their critical habitat."¹³ However, the extent of the impacts remains unknown: NMFS found that "numerous studies have identified cumulative impacts resulting from activities historically authorized by Nationwide Permits," but that the "Corps' assessments generally failed to consider the cumulative impacts of its authorizations."¹⁴

B. Adverse effects to listed species from construction and operation of Keystone XL

As set forth above, the Corps issued NWP 12 verifications for the Keystone XL river crossings at the Yellowstone and Cheyenne rivers without completing a legally valid Section 7 consultation or addressing the adverse effects of river crossings in Montana, South Dakota, and Nebraska. Keystone XL and related power line infrastructure will cause take of American burying beetles, pallid sturgeon, whooping cranes, interior least terns and piping plovers through habitat loss, power line collisions, increased predation, oil spills, and construction activities.

For example, the FWS and State Department have acknowledged that the Project will negatively impact whooping cranes (*Grus Americana*), interior least terns (*Sternula antillarum*), and piping plovers (*Charadrius melodus*) through collisions with the hundreds of miles of new electrical power transmission lines and distribution lines that would serve pump stations along the route.¹⁵

¹² See Princeton Hydro, LLC, *The Short and Long-Term Consequences of the Construction of the PennEast Pipeline* (July 2015) (study examining the short and long-term consequences of the construction of the PennEast Gas Pipeline, which found that it will "irreversibly disturb and alter the ecological properties of natural waterways including high quality waters, a variety of habitats, preserved farmland and preserved, public open-space." Long-term impacts identified by the study include, but are not limited to: destabilization of the traversed ecosystem, increased predation/loss of native forest core species, introduction and colonization of invasive species, reduction in water quality, fragmentation of habitat, increased pollutant loading to wetlands and streams, and increased erosion); See generally, e.g., Newcombe, C. P., & Jensen, J. O. (1996). Channel suspended sediment and fisheries: a synthesis for quantitative assessment of risk and impact. *North American Journal of Fisheries Management*, 16(4), 693-727; Newcombe, C. P., & MacDonald, D. D. (1991). Effects of suspended sediments on aquatic ecosystems. *North American Journal of Fisheries Management*, 11(1), 72-82.

¹³ 2014 NMFS BiOp at 302.

¹⁴ *Id.* at 261.

¹⁵ See, e.g., State Department, *Final Biological Assessment for the Keystone XL Project* (2012) ("2012 Biological Assessment") at 3.0-11 (acknowledging that the transmission lines for the

This increased collision risk is especially dangerous for the survival and recovery of the whooping crane, a critically imperiled bird that was listed as endangered on March 11, 1967.¹⁶ The only self-sustaining population of whooping cranes has an annual migration path that spans the Central Flyway of North America, from Canada to the Gulf of Mexico, largely tracking the proposed Keystone XL route across the Great Plains.¹⁷ The primary cause of whooping crane mortality is collisions with power lines,¹⁸ and “[p]ower lines associated with the proposed Project” would present new “collision hazards to migrant whooping cranes” as well as to interior least terns and piping plovers.¹⁹ Moreover, none of the power companies that will erect the lines have agreed to implement the conservation measures set forth in the Service’s “Region 6 Guidance for Minimizing Effects from Power Line Projects within the Whooping Crane Migration Corridor” (the “Region 6 Guidance”), which include a five-mile buffer for documented high-use whooping crane areas, burying lines within one mile of potentially suitable habitat where feasible, and otherwise marking existing lines as well as proposed new lines.²⁰ Rather, the power companies have only consented to marking the proposed new lines with bird flight diverters. But bird flight diverters are known to be less than 50 percent effective at reducing crane collisions. Therefore, while they can partially mitigate this hazard, bird diverters can *reduce* the threat of collisions, but *they cannot eliminate the likelihood of take or the possibility of jeopardy.*²¹

Take of whooping cranes, terns, and plovers is therefore reasonably certain to occur as a result of construction and operation of the Project. Given the low numbers and genetic bottleneck as well as the slow reproduction of the whooping crane in particular, many whooping crane experts believe that the loss of a few, and even one, breeding adult could jeopardize the continued existence of this iconic species.

Furthermore, Keystone XL will inevitably result in oil spills over the 50-year life of the Project, presenting another threat to listed species, including whooping cranes, interior least terns, piping plovers, and pallid sturgeon.²²

Project create a “[c]umulative collision mortality” risk that “would be most detrimental to the whooping crane, interior least tern, and piping plover”).

¹⁶ 32 Fed. Reg. 4001 (Mar. 11, 1967).

¹⁷ See 2012 Biological Assessment at 3.0-13, 3.0-17.

¹⁸ See *id.*

¹⁹ Thomas v. Stehn & Tom Wassenich, *Whooping Crane Collisions with Power Lines: an Issue Paper* 25 (2008). 2012 Biological Assessment at 3.0-11 to 3.0-12; State Department, Final Supplemental Environmental Impact Statement for the Keystone XL Project (“2014 FEIS”) at 4.8-18 to 4.8-19, 4.8-48.

²⁰ 2014 FEIS at 4.8-52 to 4.8-53.

²¹ FEIS 4.8-19.

²² Interior least terns breed in the Missouri River system and feed on fish and minnows from the river. 2012 Biological Assessment at 3.0-5 to 3.0-6. The Yellowstone River in Montana, the Cheyenne River in South Dakota, and the Niobrara River in Nebraska currently support breeding

Oil spills along the Platte River in Nebraska or the Missouri River in Montana would be devastating to the endangered pallid sturgeon, which is very sensitive to harm from spills or other contamination that smothers the benthic habitat that it relies on for feeding and breeding.²³ These populations of pallid sturgeon are some of the last pallid sturgeon populations remaining on Earth, and would be decimated should a spill happen along the pipeline's crossing of these rivers or in the many tributaries the pipeline would cross.²⁴ The same risks apply to pallid sturgeon in the Milk, and Yellowstone Rivers.

Oil spills are an impact that the District Court specifically directed the agencies to address on remand. *Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 587 (D. Mont. 2018) (ordering State Department to consider "new information regarding oil spills" and in particular their "potential effects on listed species"). This analysis has not been completed. As a result, the Service has not considered whether oil spills or frac-outs may jeopardize these listed species, and never provided incidental take coverage for listed species that may be harmed from oil spills, leaks, or frac-outs caused by Keystone XL. *See id.* at 582 (observing that "the risk of spills likely would affect Keystone's potential impact on other areas of the [record of decision's] analysis, including risks to water and wildlife").²⁵ Although the Ninth Circuit has vacated that

populations and there is suitable nesting and foraging habitat along the Project route in all three states. *Id.* at 3.0-6 to 3.0-7.

Piping plovers are in the Project area in Montana and Nebraska. *Id.* at 3.0-64 to 3.0-65. They nest on the Platte and Niobrara rivers and in the Fort Peck Reservoir, and are otherwise found in associated rivers and wetlands. *Id.* at 3.0-64. Piping plover critical habitat is designated at the Fort Peck Reservoir (which is downstream of the Project's Milk River crossing), and on the Missouri River downstream of Wolf Point in the vicinity of the Project. *Id.* at 3.0-70.

Pallid sturgeon may occur within the Project area in Montana at the crossing of the Milk River above the Fort Peck Reservoir, at the crossing of the Missouri River below the Fort Peck Dam, and at the crossing of the Yellowstone River downstream of Fallon, Montana. 2014 FEIS at 3.8-20. They may also be present in the Missouri and lower Yellowstone Rivers between Fort Peck Dam (where the pipeline would cross) and Lake Sakakawea, as well as the Niobrara and Platte rivers in Nebraska. *Id.*

²³ *See id.* at 3.0-26, 3.0-30. The pallid sturgeon was listed as endangered on September 6, 1990. 55 Fed. Reg. 36,641 (Sept. 6, 1990).

²⁴ While the project would use HDD for the Platte River crossing, this still presents a threat of "frac-out," which is when pressurized fluids and drilling lubricants escape the active bore, migrate up through the soils, and come to the surface at or near the construction site. *See* 2012 Biological Assessment at 3.0-30. Therefore, the use of HDD may still adversely affect listed species. *Id.*

²⁵ Although the rescinded State Department Biological Assessment mentioned the possibility of oil spill impacts on the pallid sturgeon, it addressed waterbodies only where species are present and HDD would be used. *See* 2012 Biological Assessment at 3.0-9, 3.0-29 to 3.0-30, 3.0-67. It did not analyze the impacts of oil spills at specific crossings using crossing methods other than HDD. *Id.*; *see also* 2014 FSEIS at 4.8-21 (not likely to adversely affect finding for pallid sturgeon based on HDD, screening of water pump intakes and conservation measures).

decision as moot, the fact remains that the previous consultations never properly addressed the risks of oil spills.

In addition, the State Department and the FWS have already admitted that Keystone XL will adversely affect remaining occupied habitat of the American burying beetle in Nebraska and South Dakota.²⁶ Take of beetles will occur from direct harm associated with construction activities (i.e., habitat loss and crushing of beetles) and mortality if beetles are trapped and moved, as well as heat emanating from the pipeline during operation.²⁷ The Service's 2013 incidental take statement ("ITS") for Keystone XL found that the Project would result in take of over 350 American burying beetles, mostly through construction-related impacts in South Dakota and Nebraska.²⁸

Furthermore, American burying beetles have adapted an overwinter survival strategy that requires either freezing or cooling to very near freezing, which slows metabolism to a point that fat reserves are sufficient to last overwinter until emergence in late May or early June.²⁹ Therefore, heat pollution—as would occur from operation of the Keystone XL pipeline—adversely affects the species by increasing the metabolic demand on overwintering beetles, reducing their survival and productivity.³⁰ The Project would result in permanent thermal effects that would make the surrounding overwinter American burying beetle habitat unsuitable and cause take of individual beetles by killing, injuring, harming, and/or harassing them.³¹

However, most of the tributary crossings would not use HDD, and yet the risk of surface pipeline leaks and spills directly into tributaries was never analyzed. A valid consultation must address the use of NWP 12 for these tributaries. Also, while Attachment G to the 2012 Biological Assessment discusses the types of harm to fish and birds from oil spills generally, it does not mention these specific waterbodies or the pallid sturgeon, interior least tern, or piping plover. *See* 2012 Biological Assessment Att. G at 4-5 to 4-6.

²⁶ *See, e.g.*, 2012 Biological Assessment at 3.0-62 to 3.0-63. The American burying beetle was listed as endangered in 1989. 54 Fed. Reg. 29,652 (July 13, 1989).

²⁷ *See* 2012 Biological Assessment at 3.0-56 ("Direct impacts to American burying beetles as a result of construction during vegetation clearing, site grading, and trench excavation would result in temporary habitat loss, potential alteration of suitable habitat to unsuitable habitat, temporary habitat fragmentation where the pipeline is not already co-located with other utilities, and potential mortality to eggs, larvae, and adults through construction vehicle traffic and exposure during excavation."); *id.* at 3.0-59 (describing harm from heat pollution); FWS, Biological Opinion for the Keystone XL Project ("2013 Biological Opinion") at 56 ("[Construction activities] would likely cause direct injury or mortality of [American burying beetle] adults, larvae, and eggs by crushing or exposure to desiccation during soil excavation."); *id.* at 62-63 (describing harm from capture and relocation); *id.* at 63-65 (describing harm from heat pollution).

²⁸ 2013 Biological Opinion at 62, 74.

²⁹ 2012 Biological Assessment at 3.0-32.

³⁰ *Id.* at 3.0-39, 3.0-50.

³¹ *Id.*

While the FWS issued an ITS to the State Department regarding the harm to American burying beetles, the State Department claims it no longer has authority over the permit for the Project, and therefore cannot enforce any of the reasonable and prudent measures that the Service included with the Biological Opinion and ITS. This, of course, renders the prior consultation obsolete. Likewise, the current permit issued by President Trump contains no conservation measures to prevent or mitigate harm to listed species from the construction and operation of Keystone XL.

II. VIOLATIONS

A. The Corps is in violation of the ESA for failing to complete formal programmatic Section 7 consultation on the issuance of NWP 12

As set forth above, issuance of NWP 12 “may affect” listed species, and therefore programmatic Section 7 consultation is required. NWP 12 allows activities that result in direct harm to listed species from habitat loss, power line collisions, sedimentation and contamination of waters relied on by listed species, as well as indirect impacts associated with climate change. The ESA requires that the Corps consider the cumulative, national-scale programmatic impacts of NWP 12 on listed species.

The Corps, however, has wrongly concluded that the issuance of the NWPs will have “no effect” on species protected under the ESA, averring that:

[B]ecause no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation before the district engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has “no effect” on listed species or critical habitat.³²

This argument has been squarely rejected by the D.C. District Court in *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1, 10 (D.D.C. 2005), where the Court held that “overall consultation for the NWPs is necessary to avoid piece-meal destruction of [] habitat through failure to make a cumulative analysis of the program as a whole.” The *NWF* Court further found that the ESA regulations are clear that “[a]ny request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.” *Id.* (quoting 50 C.F.R. § 402.14(c)).³³

³² 81 Fed. Reg. 35,186, 35,193 (June 1, 2016). This opinion was reiterated in the Final NWP Rule, 82 Fed. Reg. at 1,874.

³³ See also *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1267 (W.D. Wash. 2006) (holding that deferral of analysis to the project level “improperly curtails the discussion of cumulative effects”).

The prospect for project-specific consultation at a future time does not relieve the Corps of its duty to consult on the issuance of NWP 12 on a programmatic level now. While project-specific consultation is clearly required for any project that may affect listed species, the Corps cannot justify a “no effect” determination for the issuance of NWP 12 based on that later, site-specific consultation. Reliance on site-specific consultation fails to capture the cumulative impacts that NWP 12 will have (and is having) on listed species. Moreover, as set forth herein, the Corps’ claims are belied by the fact that it approved the use of NWP 12 for Keystone XL *without* conducting any project-specific ESA consultation.

The only way to ensure that the issuance of NWP 12 will not jeopardize listed species is to consult at a programmatic level; otherwise the Services are not provided the opportunity to identify where NWP 12 may be problematic for listed species or critical habitat, and to provide reasonable and prudent measures to minimize take, such as measures to ensure that the Corps gathers and analyzes sufficient data to prevent jeopardy to listed species, and to ensure that incidental take does not occur at unsustainable levels.

In fact, when the Services issued the 2015 regulations defining framework programmatic consultations (*see* 50 C.F.R. § 402.02), they provided a Questions and Answers document, which used the Corps’ Nationwide Permit Program as a specific example of a federal program where programmatic consultation would be required.³⁴ The Services have therefore already explicitly admonished the Corps to complete programmatic consultation on the NWP program, yet the Corps has unlawfully ignored its clear ESA duties.

The Corps must therefore ensure that the cumulative impacts of NWP 12 do not cause jeopardy to listed species or destroy or adversely modify critical habitat. Such consultation will help to ensure that sufficient data keeping, monitoring, and corrective actions to mitigate impacts are in place. In order to comply with Section 7 of the ESA, the Corps must initiate and complete formal programmatic consultation on NWP 12.

B. The Corps has failed to ensure through formal ESA Section 7 consultation that permitting, approving, or verifying Keystone XL under NWP 12 will not jeopardize listed species

The ESA requires federal agencies to consider the effects of their actions at the earliest possible time to ensure that they are not likely to jeopardize the continued existence of endangered or threatened species.³⁵ The only way to satisfy the duties in Section 7(a)(2) of the ESA is to complete the procedural requirements set forth in the ESA’s implementing regulations, and in doing so, to rely on the best scientific information available.³⁶

³⁴ FWS & NMFS, ESA Regulatory Reform: Final Rule Governing Incidental Take Statements Questions and Answers (2015) at 3, https://www.fws.gov/endangered/improving_ESA/pdf/ITS%20Final%20Rule%20FAQs%20Final%205-1-15.pdf.

³⁵ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

³⁶ 50 C.F.R. pt. 402.

As set forth in detail above, Keystone XL has the potential to adversely affect listed species through, for example, power line collisions, habitat loss, construction activities, heat pollution, and oil spills. The State Department’s prior consultation has been withdrawn and cannot be relied on by the Corps to fulfill its duties under the ESA.

The Corps has failed to independently analyze these impacts through formal project-specific ESA consultation, and has therefore not satisfied the requirements of Section 7 of the ESA. A biological opinion that meaningfully addresses impacts on listed species through formal ESA consultation is mandated unless it is absolutely clear the proposed action is not likely to adversely affect a particular species.³⁷ Given the foregoing, the Corps has not met that burden, and has thereby failed to ensure that Keystone XL will not jeopardize the continued existence of listed species, in direct violation of Section 7(a)(2) of the ESA.

C. The Corps may not allow activities to proceed under NWP 12 until it complies with the ESA

The Corps cannot lawfully authorize any activities under NWP 12 until it fulfills its obligation to consult under ESA Section 7. Section 7(d) of the ESA provides:

After initiation of consultation required under subsection (a)(2) [of this section], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection(a)(2) of this section.³⁸

Congress included Section 7(d) in the ESA to prevent Federal agencies from “steamrolling” bureaucratic authorizations to secure completion of projects regardless of their impact on endangered species. Section 7(d) clarifies the requirements of Section 7(a)(2) by mandating that the status quo be maintained until the consultation process is complete and a biological opinion is rendered. Therefore, until the Corps completes formal consultation on NWP 12, no utility line activities may be allowed to proceed under that permit, but would require individual CWA 404 permits along with project-specific ESA consultation.

This includes Keystone XL, and the Corps must therefore ensure that construction activities for this project do not commence absent completion of the requirements of the ESA pursuant to Section 7(d). TC Energy or the power companies may not commence Project construction until the Corps ensures that this Keystone XL will not jeopardize listed species or destroy or adversely modify critical habitats that listed species depend upon for survival. If this does not occur, Keystone XL will preclude the ability to minimize or mitigate the adverse consequences of power line collisions and oil spills, including by foreclosing the formulation of any alternatives to the currently proposed route or reasonable measures to minimize impacts such as burying

³⁷ The threshold for triggering formal consultation is very low, indeed, “[a]ny possible effect . . . triggers the formal consultation requirement.” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

³⁸ 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

power lines. To preserve the status quo, construction must be stalled until such time when the Corps complies with its duties pursuant to Section 7 of the ESA.

III. CONCLUSION

For the forgoing reasons, the Corps is in violation of the ESA for: (a) reissuing NWP 12 in 2017 absent compliance with Section 7 of the ESA; and (b) authorizing, permitting, or verifying the use of NWP 12 for the Keystone XL pipeline without completing project-specific ESA consultation. The Corps must consider the cumulative impacts that the issuance of NWP 12 will have on listed species and ensure through national-scale programmatic ESA consultation with both FWS and NMFS that sufficient data keeping, monitoring, and corrective actions to mitigate impacts are in place to prevent jeopardy, and must deny or revoke any permits, verifications, or other authorizations for use of NWP 12, including for Keystone XL, until the Corps has fully complied with the requirements of the ESA.

Please do not hesitate to contact the undersigned if we can provide additional information or otherwise assist in this matter, rather than having to resort to the judicial remedies provided by the ESA. We look forward to your prompt response.

Sincerely,

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