



July 1, 2019

*Sent via Certified Mail, Return Receipt Requested, and Email to:*

President Donald J. Trump  
White House  
1600 Pennsylvania Ave NE  
Washington, DC 20500

**CC:**

David Bernhardt, Secretary  
U.S. Department of the Interior  
1849 C Street NW  
Washington, DC 20240-0001  
exsec@ios.doi.gov

Margaret Everson, Principal Deputy  
Director  
U.S. Fish and Wildlife Service  
Office of the Director

Main Interior  
1849 C Street NW, Room 3331  
Washington, DC 20240-0001  
Margaret\_Everson@fws.gov

**Re: 60-Day notice of intent to sue: Violations of the Endangered Species Act regarding  
Keystone XL pipeline**

President Trump:

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 President Donald J. Trump for the unlawful take of listed species regarding permitting of the Keystone XL pipeline and its ancillary facilities (the “Project”) in violation of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544.

As explained below, the Conservation Groups are prepared to demonstrate that construction, operation, and maintenance of the Project, including its substantial transmission line infrastructure, will proximately cause the unauthorized take of listed species, including the whooping crane, American burying beetle, pallid sturgeon, interior least tern, and piping plover. Impacts to these endangered wildlife have never been subjected to a complete and adequate formal consultation with the U.S. Fish and Wildlife Service (“Service”) pursuant to Section 7(a)(2) of the ESA.<sup>1</sup> Consequently, there is no valid biological opinion with an incidental take statement (“ITS”) from the Service that might permit such adverse effects to occur lawfully.

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<sup>1</sup> 16 U.S.C. § 1536(a)(2).

On March 29, 2019, President Trump issued a permit authorizing TransCanada (now TC Energy) to build the Keystone XL pipeline. The new permit purports to revoke and supersede the 2017 permit issued by the State Department, and to replace it with a new “Presidential Permit,” thereby invalidating the State Department’s prior review of the Project under the ESA. The State Department has since confirmed that its prior review has been withdrawn.<sup>2</sup> The new permit also comes before the completion of the reinitiated Section 7 ESA consultation, which must assess, among other things, the impacts of the modified route through Nebraska.<sup>3</sup> Therefore, the consultation process has not been completed, and there is currently no valid take coverage for the Project. The President has thereby authorized actions that will result in the unpermitted take of listed species in violation of Section 9 of the ESA.<sup>4</sup>

If the violations described in this letter are carried out, the Conservation Groups intend to bring a lawsuit in U.S. District Court and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys’ fees for your violations of the ESA.<sup>5</sup>

## **I. IMPACTS TO LISTED SPECIES FROM CONSTRUCTION AND OPERATION OF KEYSTONE XL**

Many endangered and threatened species, including species with critical habitat, occur within the Project’s action area. These include the whooping crane, interior least tern, piping plover, American burying beetle, and pallid sturgeon. Each of these listed species will be adversely affected by the Project as described below.

### **A. Take of whooping cranes, interior least terns, and piping plovers through power line collisions**

The Service and State Department previously acknowledged that the Project may negatively impact species protected under the ESA, including whooping cranes (*Grus Americana*), interior least terns (*Sternula antillarum*), and piping plovers (*Charadrius melodus*), through collisions

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<sup>2</sup> Even if the new permit did not specifically invalidate the prior ESA consultation, the State Department 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, rendering the prior consultation obsolete. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1113 (9th Cir. 2012) (conservation measures need to be specifically included as part of the Project such that they are enforceable). Moreover, it is the Conservation Groups’ understanding that following the issuance of the permit for Keystone XL by President Trump, the prior State Department consultation has been rescinded.

<sup>3</sup> It remains unclear whether the State Department or another agency intends to complete the reinitiated consultation.

<sup>4</sup> 16 U.S.C. § 1538(a)(1)(B). Nor has the President sought an incidental take permit (“ITP”) through the preparation of a habitat conservation plan (“HCP”) that would minimize and mitigate the impacts of the Project to endangered wildlife in accordance with Section 10(a)(1)(B) of the ESA.

<sup>5</sup> 16 U.S.C. § 1540(g).

with the hundreds of miles of new electrical power transmission lines and distribution lines that would serve pump stations along the route.<sup>6</sup>

This increased collision risk is especially dangerous for the whooping crane, a critically imperiled bird that was listed as endangered on March 11, 1967.<sup>7</sup> 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 Project route across the Great Plains.<sup>8</sup> The population of whooping cranes has grown from just 15 birds in 1940 to an estimated 338 birds today following decades of recovery efforts; however, studies have found that in order to be genetically viable, the population needs to be at least 1,000 individuals.<sup>9</sup>

The primary known cause of whooping crane mortality is collisions with power lines, 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.<sup>10</sup> Moreover, none of the Power Companies 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.<sup>11</sup> 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% effective at reducing crane collisions. Therefore, while they can partially mitigate this hazard, bird diverters can only *reduce* the threat of collisions, but *they cannot eliminate the likelihood of take*.<sup>12</sup>

Take of whooping cranes, terns, and plovers is therefore reasonably certain to occur as a result of construction and operation of the Project. And, given the low numbers and genetic bottleneck as

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<sup>6</sup> See, e.g., State Department, Biological Assessment for the Keystone XL Project (2012) (“2012 Biological Assessment”) at 3.0-11 (acknowledging that the transmission lines for the Project create a “[c]umulative collision mortality” risk that “would be most detrimental to the whooping crane, interior least tern, and piping plover”).

<sup>7</sup> 32 Fed. Reg. 4001 (Mar. 11, 1967).

<sup>8</sup> See 2012 Biological Assessment at 3.0-13, 3.0-17.

<sup>9</sup> See Stehn, Thomas V. and Wassenich, Tom, “Whooping Crane Collisions with Power Lines: an Issue Paper” (2008). *North American Crane Workshop Proceedings*. Paper 203. <http://digitalcommons.unl.edu/nacwgproc/203>

<sup>10</sup> See *id.*; 2012 Biological Assessment at 3.0-11 to 3.0-12; State Department, Final Environmental Impact Statement for the Keystone XL Project (“2014 FEIS”) at 4.8-18 to 4.8-19, 4.8-48.

<sup>11</sup> 2014 FEIS at 4.8-52 to 4.8-53.

<sup>12</sup> See *id.* at 4.8-50 to 4.8-51.

well as the slow reproduction of the crane, many in the scientific community believe that the loss of a few, and even one, breeding adult could jeopardize the continued existence of this iconic species.

### **B. Take of interior least terns and piping plovers through increased predation**

The agencies have also acknowledged that the Project's power line infrastructure will present new perching opportunities for raptors, such as owls, falcons, and hawks, thereby increasing predation of ground-nesting interior least terns and piping plovers. Indeed, the State Department previously acknowledged that "perches provided by towers and poles could increase the cumulative predation mortality for ground nesting birds, including the . . . interior least tern [and] piping plover."<sup>13</sup> Both of these species were listed under the ESA in 1985, in part due to the ongoing threat of over-predation.<sup>14</sup>

As described above, Keystone XL would require hundreds of miles of powerlines, thereby increasing opportunities for raptor perching across the Project area and resulting in take of members of these protected species.

### **C. Take of endangered and threatened wildlife from spills, leaks, and frac-outs**

Keystone XL will inevitably result in oil spills over the 50-year life of the Project, presenting another threat to whooping cranes, interior least terns, and piping plovers. These spill events pose a high risk of take and even jeopardy to these and other listed species, including pallid sturgeon (*Scaphirhynchus albus*), and the habitat they depend on for survival.<sup>15</sup> Other spill risks include horizontal directional drilling ("HDD") beneath waterbodies, which presents a threat of "frac-out," 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.<sup>16</sup>

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<sup>13</sup> See, e.g., 2012 Biological Assessment at 3.0-68.

<sup>14</sup> 50 Fed. Reg. 21,784, 21,790 (May 28, 1985) (interior least tern); 50 Fed. Reg. 50,726, 50,732 (Dec. 11, 1985) (piping plover).

<sup>15</sup> The Service's most recent five-year review for the pallid sturgeon notes that the lower portions of the Missouri River provide essential habitat for pallid sturgeon, and that the "lower Platte River may be an important tributary for spawning." FWS, 5-Year Review: Summary and Evaluation of Pallid Sturgeon (*Scaphirhynchus albus*) 31 (2005). The five-year review states that "[t]he importance of the lower Platte River for pallid sturgeon has been documented (Snook 2002, Swigle 2003)." *Id.* at 41. Keystone XL would cross the lower Platte River and the Missouri River, risking take of this highly imperiled species from spills, leaks, and frac-outs. See 2014 FEIS at 3.8-20. Pallid sturgeon may also occur within the Project area in Montana at the crossing of the Milk River above Fort Peck Reservoir, and the crossing of the Yellowstone River downstream of Fallon, Montana. *Id.*

<sup>16</sup> 2012 Biological Assessment at 3.0-66 ("Frac-outs that may release drilling fluids into aquatic environments are difficult to contain primarily because bentonite readily disperses in flowing water and quickly settles in standing water.").

Oil spills adversely affect listed birds by soiling their plumage with crude, toxic tar sands oil sludge, and causes individual birds to ingest oil from contaminated plumage and prey and transfer it to eggs and their young.<sup>17</sup> Oil spills— particularly along the Platte River in Nebraska, the Missouri River in Montana, and the tributaries that flow into those rivers—would also be devastating to the endangered pallid sturgeon in the Platte River, which are very sensitive to spills or other contamination that smothers the benthic habitat they rely on for feeding and breeding.<sup>18</sup> The populations of pallid sturgeon in the Missouri and Platte Rivers are some of the last remaining pallid sturgeon populations left 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.<sup>19</sup>

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 oil spills, leaks, or frac-outs caused by Keystone XL.<sup>20</sup> Although the Ninth Circuit has since vacated that decision as moot, the fact remains that the previous consultations never properly addressed the risks of oil spills.

#### **D. Take of American burying beetles from construction and underground heat pollution**

The State Department and the Service have previously admitted that Keystone XL will adversely affect remaining occupied habitat of the American burying beetle in Nebraska and South Dakota,<sup>21</sup> a species that was listed as endangered in 1989.<sup>22</sup> Take of beetles will occur from construction activities (i.e., habitat loss and crushing of beetles) and mortality if beetles are trapped and moved.<sup>23</sup> The Service’s 2013 ITS for Keystone XL found that the Project would

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<sup>17</sup> *Id.* at 3.0-10, 3.0-20, 3.0-67.

<sup>18</sup> *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).

<sup>19</sup> While the project would use HDD for the Platte and Missouri River crossings, this still presents a threat of “frac-out,” as described above. Therefore, the use of HDD may still adversely affect listed species. *See* 2012 Biological Assessment at 3.0-30.

<sup>20</sup> *See Indigenous Env’tl. Network*, 347 F. Supp. 3d 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”).

<sup>21</sup> *See, e.g.*, 2012 Biological Assessment at 3.0-62 to 3.0-63.

<sup>22</sup> 54 Fed. Reg. 29,652 (July 13, 1989).

<sup>23</sup> *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

result in take of over 350 American burying beetles, mostly through construction-related impacts in South Dakota and Nebraska.<sup>24</sup>

American burying beetles will also be subject to take from heat emanating from the pipeline during operation.<sup>25</sup> This species has 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 they emerge above-ground in late May or early June.<sup>26</sup> 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.<sup>27</sup>

It is therefore readily apparent that construction and operation of Keystone XL will result in take of American burying beetles through permanent thermal effects that would make the surrounding overwinter habitat unsuitable, and construction activities that will cause take of individual beetles by killing, injuring, harming, and/or harassing them.<sup>28</sup> While the Service issued an ITS to the State Department regarding take of American burying beetles, that ITS has been withdrawn. The permit issued by President Trump contains no conservation measures to prevent or mitigate take of listed species from the construction and operation of the Project. Therefore, the reasonable and prudent measures that the Service included in the prior ITS are no longer enforceable, and the unlawful take of American burying beetles is reasonably certain to occur from construction and operation of the Project.

## II. VIOLATIONS

### A. The construction and operation of the Keystone XL pipeline will result in take of listed species in violation of ESA Section 9

As explained above, the Conservation Groups are prepared to show that construction and operation of 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, construction activities, and heat

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potential mortality to eggs, larvae, and adults through construction vehicle traffic and exposure during excavation.”); 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).

<sup>24</sup> 2013 Biological Opinion at 62, 74.

<sup>25</sup> 2012 Biological Assessment at 3.0-59; 2013 Biological Opinion at 63-65.

<sup>26</sup> 2012 Biological Assessment at 3.0-32.

<sup>27</sup> *Id.* at 3.0-39, 3.0-50.

<sup>28</sup> *Id.* at 3.0-60 (concluding that American burying beetles “could likely experience some direct mortality during construction with reduced habitat causing long-term impacts and a delay in population recovery”).

pollution. Hundreds of miles of new electrical power lines will increase the collision hazard for migrating whooping cranes, terns, and plovers, and also result in increased predation of terns and plovers. Oil spills threaten habitat all along the pipeline's path, and construction activities and heat pollution will result in take of American burying beetles. The President has therefore permitted activities that will result in unlawful take of listed species in violation of ESA Section 9.<sup>29</sup>

Persons subject to the prohibition on take include "any officer, employee, agent, department, or instrumentality of the Federal Government . . . ."<sup>30</sup> There is currently no valid incidental take coverage for the Project. The prior ESA process was invalidated by the President when he purported to revoke the permit issued by the State Department, and has otherwise been withdrawn. Regardless, even if the State Department's prior consultation were not invalidated, the District Court determined that the prior consultation was inadequate because it did not fully consider the risk of oil spills on listed species.<sup>31</sup> Furthermore, the permit issued by President Trump contains no conservation measures to prevent or mitigate take of listed species. As such, take is reasonably certain to occur, and the President remains liable for any take of listed species that occurs as a result of the construction and operation of Keystone XL.<sup>32</sup>

### **III. CONCLUSION**

For the forgoing reasons, the President will be in violation of section 9 of the ESA for permitting the Keystone XL Project should project construction commence absent compliance with 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,

/s/ Jared Margolis

Jared Margolis

/s/ Amy Atwood

Amy R. Atwood

Center for Biological Diversity

P.O. Box 11374

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<sup>29</sup> 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31.

<sup>30</sup> 16 U.S.C. § 1532(13). *See Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (holding that the permitting authority may be held liable for the take of listed species).

<sup>31</sup> *Indigenous Env'tl. Network*, 347 F. Supp. 3d at 587 (ordering State Department to consider "new information regarding oil spills" and in particular their "potential effects on listed species").

<sup>32</sup> Since TC Energy has stated that it intends to commence construction activities, including the preparation of the right of way and worker camps, as soon as possible and the District Court's injunction against construction has been dissolved, this unlawful take of listed species is imminent.

Portland, OR 97211  
(971) 717-6401  
jmargolis@biologicaldiversity.org  
atwood@biologicaldiversity.org  
*Attorneys for Center for Biological Diversity  
and Friends of the Earth*

/s/ Doug Hayes  
Doug Hayes  
Sierra Club Environmental Law Program  
1650 38th Street, Suite 102W  
Boulder, CO 80301  
(303) 449-5595  
doug.hayes@sierraclub.org  
*Attorney for Sierra Club and Northern  
Plains Resource Council*

/s/ Jaclyn Prange  
Jaclyn Prange  
/s/ Cecilia Segal  
Cecilia Segal  
Natural Resources Defense Council  
111 Sutter Street, Floor 21  
San Francisco, CA 94104  
(415) 875-6100  
prange@nrdc.org  
csegal@nrdc.org  
*Attorneys for Bold Alliance and Natural  
Resources Defense Council*