July 1, 2019

Via Certified Mail, Return Receipt Requested

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Re: 60-Day notice of intent to sue: Violations of the Endangered Species Act from the Keystone XL pipeline – take of listed species in violation of Section 9

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") that if the violations described in this letter are carried out, the Conservation Groups intend to bring a lawsuit in U.S. District Court against the following parties for violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 ("ESA"), from the unlawful take of listed species caused by the Keystone XL Pipeline and its ancillary facilities, including power line infrastructure (or the "Project").[1] These parties are:

1. TC Energy (formerly, TransCanada Corporation) and its subsidiaries, including TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations Incorporated (together "TC Energy")
2. Big Flat Electric Cooperative, Incorporated
3. Rosebud Electric Cooperative, Incorporated
4. NorVal Electric Cooperative, Incorporated
5. Tongue River Electric Cooperative, Incorporated
6. McCone Electric Cooperative, Incorporated
7. West Central Electric Cooperative, Incorporated
8. Westar Energy, Incorporated
9. Nebraska Public Power District
10. Clay Center Public Utilities Commission
11. Basin Electric Power Cooperative
12. Grand Electric Cooperative, Incorporated
13. Montana-Dakota Utilities Company
14. Perennial Public Power District[2]

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. For example, the construction 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. Further, the Project will result in spills and leaks of oil or other contaminants (including heat pollution), which will contaminate habitat for the whooping crane, American burying beetle, piping plover, interior least tern, and pallid sturgeon, and construction activities will result in take of these listed species.

[1] This notice is provided pursuant to 16 U.S.C. § 1540(g).

[2] These utility entities, hereafter the "Power Companies," are responsible for the construction of power lines for the Keystone XL pump stations.

These impacts to 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.[3] 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. Nor have TC Energy and the Power Companies 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.[4]

Instead, TC Energy and the Power Companies have evidently relied on the federal agencies' ESA consultation conducted in 2012-2013 to provide them with incidental take coverage. However, a U.S. District Court in Montana previously enjoined the Project and remanded to the federal agencies for further analysis, finding that the prior ESA consultation was inadequate and incomplete. *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018). The federal agencies in that litigation have conceded that they are conducting further ESA-required consultation with the Service, and there is a reinitiated consultation on the new portion of the Project's route through Nebraska called the Mainline Alternative Route, which has not been completed. It is therefore apparent that the ESA consultation process for the Project has not been adequately completed.

Moreover, on March 29, 2019, President Trump signed a "presidential permit" that purported to revoke the previously issued permit from the U.S. Department of State ("State Department"), and to authorize TC Energy to proceed with constructing the Keystone XL pipeline. President Trump is not empowered by Congress under the ESA or any other statute to issue permits for take of endangered wildlife, nor has he purported to issue any such permits. Therefore, without any valid take coverage for the Project, TC Energy and the Power Companies are liable under ESA Section 9 and must not undertake any activities that will violate the ESA.[5]

You are further hereby notified that until a valid Section 7(a)(2) formal consultation is completed that rigorously examines the risks posed by the Project to listed species, you must not commence, undertake, or otherwise engage in any construction or operation of the Project pursuant to ESA Section 7(d).[6]

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.

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[3] 16 U.S.C. § 1536(a)(2).

[4] *Id*. § 1539(a)(1)(B)

[5] *See id.* § 1532(13).

[6] *Id*. § 1536(d).

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

The Service and State Department have 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 with the hundreds of miles of new electrical power transmission lines and distribution lines that would serve pump stations along the route.[7]

This increased collision risk is especially dangerous for the whooping crane, a critically imperiled bird that was listed as endangered on March 11, 1967.[8] 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.[9] 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.[10]

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.[11] 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.[12] 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

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

[8] 32 Fed. Reg. 4001 (Mar. 11, 1967).

[9] *See* 2012 Biological Assessment at 3.0-13, 3.0-17.

[10] *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

[11] *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.

[12] 2014 FEIS at 4.8-52 to 4.8-53.

hazard, bird diverters can *reduce* the threat of collisions, but *they cannot eliminate the likelihood of take*.[13]

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 well as the slow reproduction of the whooping crane, many in the scientific community believe that the loss of even 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.[14] Indeed, both of these species were listed under the ESA in 1985, in part due to the ongoing threat of over-predation.[15]

Interior least terns and piping plovers spend much of their lives on rivers and sandbars, particularly during breeding and nesting.[16] These species are very sensitive to the presence of humans; activities on rivers and sandbars can cause them to abandon their nests.[17] Moreover, they are highly susceptible to predation, and 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 . . . ."[18]

As described above, Keystone XL would require hundreds of miles of power lines, thereby increasing opportunities for raptor perching across the Project area, 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 (*Scaphirhjrnchus albus*), and the habitat they depend on for survival.[19] Other spill risks

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[13] *See id.* at 4.8-50 to 4.8-51.

[14] *Id.* at 4.15-62.

[15] 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).

[16] *See* 50 Fed. Reg. at 21,784; 50 Fed. Reg. at 50,726.

[17] *See* 50 Fed. Reg. at 21,790; 50 Fed. Reg. at 50,731.

[18] *See, e.g.*, 2012 Biological Assessment at 3.0-68.

[19] 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

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.[20]

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.[21] Oil spills—particularly along the Platte River in Nebraska, the Missouri River in Montana, and tributaries that flow into those rivers—would also be devastating to the endangered pallid sturgeon, which are very sensitive to spills or other contamination that smothers the benthic habitat they rely on for feeding and breeding.[22] 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.[23]

Oil spills are an impact that the District Court specifically directed the agencies to address on remand. *Indigenous Envtl. 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"). 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. *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"). 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.

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 and even jeopardy 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.*

[20] 2012 Biological Assessment at 3.0-66; *id*. ("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.").

[21] *Id.* at 3.0-10, 3.0-20, 3.0-67.

[22] *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).

[23] 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.

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,[24] a species that was listed as endangered in 1989.[25] Take of beetles will occur from construction activities (i.e., habitat loss and crushing of beetles) and mortality if beetles are trapped and moved.[26] The Service's 2013 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.[27]

American burying beetles will also be subject to take by heat emanating from the pipeline during operation.[28] 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.[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]

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.[31] While the Service issued an ITS to the State Department regarding the take of American burying beetles, that ITS has been

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[24] *See, e.g.*, 2012 Biological Assessment at 3.0-62 to 3.0-63.

[25] 54 Fed. Reg. 29,652 (July 13, 1989).

[26] *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."); 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).

[27] 2013 Biological Opinion at 62, 74.

[28] 2012 Biological Assessment at 3.0-59; 2013 Biological Opinion at 63-65.

[29] 2012 Biological Assessment at 3.0-32.

[30] *Id.* at 3.0-39, 3.0-50.

[31] *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").

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 Keystone XL pipeline and related power lines will result in take of listed species in violation of ESA Section 9

As explained above, the Conservation Groups are prepared to show that 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 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 and heat pollution will result in take of American burying beetles. It is therefore readily apparent that contamination and take of listed species and their habitats will result from the construction and operation of the Project, in violation of ESA Section 9.[32]

Persons subject to the prohibition on take include individuals and corporations.[33] The Project is not covered by a valid incidental take statement for these listed species, and neither TC Energy nor the Power Companies have prepared an HCP to obtain an ITP pursuant to 16 U.S.C. § 1539(a)(1)(B). Therefore, TC Energy and the Power Companies remain liable for any take that occurs from the Project and/or its related infrastructure.

B. Construction activities may not commence until consultation is complete or TC Energy and the Power Companies otherwise comply with the ESA

Construction activities cannot commence absent compliance with the requirements of the ESA pursuant to Section 7(d), which prevents any "irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent measures" to minimize take of listed species pending the completion of consultation.[34]

Section 7(a)(2) consultation on Keystone XL has not been completed; therefore, there is currently no valid take coverage for the Project. The government has acknowledged that federal action agencies, including the Bureau of Land Management and the Army Corps of Engineers, may reinitiate and complete further ESA consultation, yet that consultation has yet to take place,

[32] 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31.

[33] 16 U.S.C. § 1532(13).

[34] *Id.* § 1536(d).

and the reinitiated consultation on the Nebraska route has not been completed. As set forth above, the only way for TC Energy and the Power Companies to avoid take liability is to develop an HCP and apply for an ITP, which will ensure that none of the adversely affected species are jeopardized as a result of the Project through the Service's internal formal consultation.

Therefore, commencing construction of Keystone XL would violate ESA Section 7(d), as it would take listed species, eradicate habitats that the listed species depend upon for survival, and limit available measures to minimize take of the species from power line collisions, predation, and oil spills, including foreclosing any alternative, potentially less harmful routes for the Project and the burying of problematic power lines. Until the BLM, Army Corps, and the Service comply with their duties under the ESA—or TC Energy and the Power Companies obtain a Section 10 permit—no construction activities may commence in order to preserve the current habitat status quo.[35]

III. Conclusion

For the forgoing reasons, construction and operation of Keystone XL and related infrastructure by TC Energy and the Power Companies would violate Sections 9 and 7(d) 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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[35] The only alternative way for TC Energy and the Power Companies to avoid take liability at this time is to develop an HCP and apply for an ITP pursuant to ESA Section 10, 16 U.S.C. § 1539

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