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October 16, 2019

Via Certified Mail

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Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act (and Other Federal Laws) in Connection with the Permian Highway Pipeline

Dear Acting Secretary McCarthy, *et al.*,

On behalf of the City of Austin, the City of San Marcos, the City of Kyle, the Barton Springs Edwards Aquifer Conservation District, the Wimberly Valley Watershed Association, and Texas Real Estate Advocacy and Defense Coalition ("Petitioners"), we hereby notify you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, in connection with the Permian Highway Pipeline that Kinder Morgan intends to construct in the near future.[1]

This pipeline and its associated construction and operation activities will result in serious adverse impacts to federally endangered and threatened species and their habitat, including the Golden-cheeked warbler (*Setophagia chrysoparia*, "warbler") and at least seven aquifer-based

[1] Permian Highway Pipeline LLC, is the owner of the Permian Highway Pipeline and the legal entity asserting authority to exercise the power of eminent domain to condemn private property for its pipeline right-of-way. Kinder Morgan Texas Pipeline LLC is the operator of the pipeline. Both companies are subsidiaries of Kinder Morgan, and thus Petitioners use the phrase "Kinder Morgan" in this letter to refer to Kinder Morgan and/or its subsidiaries.

species in the vicinity of the pipeline's proposed route. However, it is the Petitioners' understanding that Kinder Morgan does not intend to seek (let alone obtain) a Section 10 incidental take permit ("ITP") for this pipeline, *see* 16 U.S.C. § 1539(a)(1)(B), nor does Kinder Morgan intend to prepare an accompanying habitat conservation plan ("HCP"). *See id.* § 1539(a)(2)(A). Rather, Kinder Morgan intends for the U.S. Army Corps of Engineers ("Corps") to utilize the Section 7 consultation process of the ESA, *id.* § 1536(a)(2), to address all incidental take associated with the pipeline, including for uplands that are not subject the Corps' Clean Water Act ("CWA") jurisdiction that is expressly limited to "navigable waters," 33 U.S.C. § 1251(a), which includes wetlands and other "waters of the United States" but does not include uplands. *Id.* § 1362(7).

Should the Corps ultimately undertake Section 7 consultation in the manner described above, it would violate various provisions of the ESA for the reasons explained below. It would also impose obligations under other federal laws, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347.

BACKGROUND

A. Statutory and Regulatory Framework

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).[2] Section 9 of the ESA prohibits any "person" from "taking" any member of an endangered or threatened species. 16 U.S.C. § 1538(a). The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 1532(19). By regulation, the Service has defined "harm" to mean "an act which actually kills or injures wildlife," and "include[s] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Likewise, the Service has defined "harass" to include "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering." *Id.*

Pursuant to Section 7 of the ESA, before undertaking any action that may have direct or indirect effects on any listed species, an action agency must engage in consultation with the Service or NMFS (collectively, the "consulting agencies") in order to evaluate the impact of the proposed action. *See id.* § 1536(a)(2). In jointly issued regulations, the consulting agencies defined the term "action" for the purposes of Section 7 broadly to mean "all activities or

[2] The U.S. Fish and Wildlife Service ("Service") and the National Marine Fisheries Service ("NMFS") share responsibilities for implementing the ESA. *See* 16 U.S.C. § 1532(15). Pursuant to a 1974 Memorandum of Understanding, NMFS has primary jurisdiction over marine and anadromous species, including marine mammals (except walruses) and marine turtles, while FWS has primary jurisdiction over land-dwelling and freshwater species. *See* Memorandum of Understanding Regarding Jurisdictional Responsibilities and Listing Procedures Under the ESA of 1973 at 3, 5 (1974).

programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, "in which there is discretionary federal involvement or control." *Id.* § 402.03. An agency may only avoid this consultation requirement for a proposed action if it determines that its action will have "no effect" on threatened or endangered species or critical habitat. *Id.* § 402.14(a).

The primary purpose of consultation is to ensure that the action at issue "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated] habitat of such species." 16 U.S.C. § 1536(a)(2). As defined by the ESA's implementing regulations, an action will cause jeopardy to a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. The evaluation of the effects of the proposed action on listed species during consultation must use "the best scientific . . . data available." 16 U.S.C. § 1536(a)(2). Moreover, after the initiation of consultation, the action agency is prohibited from making "any irreversible or irretrievable commitment[s] 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." *Id.* § 1536(d).

Consultation under Section 7 may be "formal" or "informal" in nature. Informal consultation is "an optional process" consisting of all correspondence between the action agency and the consulting agency, which is designed to assist the action agency, rather than the consulting agency, in determining whether formal consultation is required. *See* 50 C.F.R. § 402.02. During an informal consultation, the action agency requests information from the consulting agency as to whether any listed species may be present in the action area or located proximately enough that the project may result in impacts to the species. If listed species may be present, the action agency is required by Section 7(c) of the ESA to prepare and submit to the consulting agency a "biological assessment" that evaluates the potential effects of the action on listed species and critical habitat in the area. As part of the biological assessment, the action agency must make a finding as to whether the proposed action may affect listed species and submit the biological assessment to the consulting agency for review and potential concurrence with its finding. *See* 16 U.S.C. § 1536(c). If 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. 50 C.F.R. § 402.14(b).

If, on the other hand, the action agency finds that the proposed action "may affect" listed species or critical habitat, then the action agency must undertake formal consultation. 50 C.F.R. § 402.14; *see also* FWS & NMFS, Endangered Species Consultation Handbook ("Consultation Handbook") at 3-13 (1998). The result of formal consultation is the preparation of a biological opinion ("BiOp") by the consulting agency, which provides the consulting agency's analysis of the best available scientific data on the status of the species and how it would be affected by the proposed action. Additionally, a BiOp must include a description of the proposed action, a review of the status of the species and its critical habitat, a discussion of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action and the

cumulative effects of reasonably certain future state, tribal, local, and private actions. *See* Consultation Handbook at 4-14 to 4-31.[3]

At the end of the formal consultation process, the consulting agency determines whether the proposed action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify any designated critical habitat. If the consulting agency determines that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat, but that the proposed action will nevertheless result in the incidental taking of listed species, then the consulting agency must provide the action agency with a written incidental take statement ("ITS") specifying the "impact of such incidental taking on the species" and "any reasonable and prudent measures that the [consulting agency] considers necessary or appropriate to minimize such impact" and setting forth "the terms and conditions . . . that must be complied with by the [action] agency . . . to implement [those measures]." 16 U.S.C. § 1536(b)(4). If the consulting agency determines that the action will jeopardize a listed species or will destroy or adversely modify designated critical habitat, then the consulting agency must offer the action agency reasonable and prudent alternatives to the proposed action that will avoid jeopardy to listed species or adverse habitat modification, if such alternatives exist. *Id.* § 1536(b)(3)(A).

Without a legally adequate biological opinion and ITS in place, any activities likely to result in incidental take of members of listed species are unlawful. *Id.* § 1538(a)(1)(B). Accordingly, anyone who undertakes such activities, or who authorizes such activities, *id.* § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens or others for declaratory and injunctive relief, *see id.* § 1540.

Separate from the Section 7 consultation process, there is another mechanism by which the Service may provide incidental take coverage under the ESA. Pursuant to Section 10 of the Act, Congress provided a limited exception to the otherwise strict prohibition against the taking of endangered or threatened species where there is no federal nexus for all or part of a project that may adversely affect listed species and/or their critical habitat, meaning that Section 7 consultation is not available for that project (or a portion of it). Specifically, the Service may issue a permit allowing the taking of a listed species where such taking is "incidental to, and not the purpose of, carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

An applicant seeking an ITP under Section 10 of the ESA must submit a detailed "conservation plan," referred to as an HCP, describing, among other things:

[3] When preparing a biological opinion, the consulting agency must (1) "review all relevant information," (2) "evaluate the current status of the listed species," and (3) "evaluate the effects of the action and cumulative effects on the listed species," 50 C.F.R. § 402.14, using "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2); *see also Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149-50 (W. D. Wash. 2000) (remanding biological opinion where agency failed to "meaningfully analyze" the risks to the species and the key issues).

(1) the impacts of the proposed taking;
(2) procedures the applicant will use to mitigate, monitor, and minimize such impacts;
(3) an explanation of why there are no feasible alternatives to the proposed taking; and
(4) information establishing that sufficient funding exists to implement the plan. *Id.*

§ 1539(a)(2)(A); *see also* 50 C.F.R. § 17.22.

Before granting an ITP, the Service must independently find that the HCP ensures that (i) the taking authorized by the ITP will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. *See* 16 U.S.C. § 1539(a)(2)(B). The Service, not the applicant, must make the statutory determination that measures adopted in the HCP have minimized and mitigated the impacts of the taking to the maximum extent practicable. *See, e.g.*, *Gerber v. Norton*, 294 F.3d 174, 184-86 (D.C. Cir. 2002).

Because the Service's issuance of an ITP to a private person or entity is itself a major Federal action, the Service must subject its proposed action of whether to issue the ITP to analysis under NEPA in an Environmental Impact Statement ("EIS") or, at bare minimum, an Environmental Assessment ("EA"), subject to public comment. *See* FWS & NMFS, Habitat Conservation Planning Handbook ("HCP Handbook") at Chapter 13. In addition, the Service's issuance of an ITP imposes legal obligations on the Service under the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101, 306101-306114, because "implementation of an HCP and issuance of an [ITP] are an undertaking and subject to compliance with section 106 of the NHPA." HCP Handbook at 1-10. Moreover, because the Service's issuance of an ITP is itself an action subject to the consultation requirements of Section 7 of the ESA, the Service must "self-consult" with itself to ensure that the action will not jeopardize any listed species or destroy or modify any critical habitat. *See id.* at 14-29 (discussing "intra-Service consultation").

Although Section 7 consultation and the resulting ITS often cover the entire scope of take associated with a federally authorized project, in certain circumstances the action agency for consultation purposes cannot exert jurisdiction over the entire project and thus a Section 7 ITS cannot insulate the project proponent from take liability as a result. Thus, in such scenarios, either: (1) the project proponent can seek a Section 10 ITP (and prepare an accompanying HCP) for the entire project in the absence of any Section 7 consultation by the action agency with limited jurisdiction; or (2) the action agency can consult with the Service over the portions of the project where the action agency exerts jurisdiction, but the project proponent must separately seek an ITP (and prepare an HCP) to "supplement coverage of a project's incidental take when another Federal agency does not exert jurisdiction over a project's full scope of interrelated and interdependent effects." HCP Handbook at 3-21. In other words, although a project may only avoid take liability through lawful incidental take coverage for the entire scope of take associated with the project, an action agency cannot legally obtain incidental take coverage for actions outside of its jurisdiction, therefore requiring an ITP in such scenarios to cover all or part of the project's activities.

B. Factual Background

The Permian Highway Pipeline is a proposed natural gas pipeline, 42 inches in diameter and designed to transport about 2 billion cubic feet of natural gas a day. The planned pipeline originates near Coyanosa in Pecos County, Texas—in an area known as the "Waha Hub"—and runs approximately 430 miles across over a thousand tracts of private property in seventeen Texas counties to a termination point near Sheridan, Texas.

The pipeline's chosen route crosses some of the most sensitive environmental features in Central Texas and the Texas Hill Country, including the recharge zones of the Edwards and Edwards-Trinity Aquifers (which provide the drinking water supply for over two million Texas residents, including towns and cities such as Fredericksburg and Blanco) and habitat for many ESA-listed species. It will transect sites that contain artifacts of substantial cultural and historical significance. Its path will bring massive volumes of pressurized, combustible natural gas near residential subdivisions every day. The pipeline will cut a 125-foot wide swath across thousands of acres of private land, disturbing the peace, solitude, and quiet enjoyment of their land by more than one thousand private landowners throughout its length.

There are many federally endangered and threatened species (as well as essential habitat for those species) within the vicinity of the pipeline's route, including birds, salamanders, and aquifer-based species. For example, the warbler is a small insectivorous songbird that breeds only in central Texas where mature Ashe juniper-oak woodlands occur. Due to accelerating loss of breeding habitat, the warbler was emergency listed as endangered in 1990. The principal threats to the species and the reasons for its listing are habitat destruction, modification, and fragmentation from urbanization and range management practices. Because of the warbler's narrow habitat requirements, and its site fidelity of returning to the same area every year, habitat destruction often leads to local population extirpation. Warbler habitat lies within the project boundaries and its buffer zones, with an estimated 548 acres of golden-cheeked warbler habitat occurring within the pipeline's footprint, and an estimated 2,355 acres of habitat within 300 feet of the project's footprint. Although it is expected that a minimum of 548 acres of warbler habitat will be cleared for the pipeline, Petitioners are not aware of Kinder Morgan or the Corps conducting any presence-absence surveys for the warbler along the pipeline's route.

Moreover, the Barton Springs salamander (*Eurycea sosorum*), the Austin Blind salamander (*Eurycea waterlooensis*), the San Marcos salamander *(Eurycea nana*), the Texas Blind salamander (*Eurycea rathbuni*), the Fountain darter (*Etheostoma fonticola*), the Comal Springs dryopid beetle (S*tygoparnus comalensis*), and the Comal Springs riffle beetle (*Heterelmis comalensis*) are seven federally-listed, entirely aquatic species whose only habitat is in the vicinity of this project. These species rely on clean, well-oxygenated spring water with sediment-free substrates to survive (City of Austin 2013; McKinney and Sharp 1995; Schenck and Whiteside 1977a; USFWS 1996b, Longley 1978; Berkhouse and Fries 1995; USFWS 2013). This water is likely to be adversely impacted (or contaminated) by the construction, operation, and maintenance of the pipeline. More specifically, groundwater contamination can occur from construction activities, catastrophic hazardous material spills, chronic leakage or acute spills of petroleum and petroleum products, and pipeline ruptures. The degradation in groundwater quality that is likely to occur from the construction, operation, and maintenance of the pipeline

any may well jeopardize the continued existence of these listed species and significantly modify critical habitat for these species.[4]

With respect to the Barton Springs salamander, the structure of the Barton Springs Segment of the Edwards Aquifer creates conduits large enough to allow for rapid subterranean flow of water underground from the recharge zone to Barton Springs, as documented by multiple dye tracing studies (Hauwert et al. 2014). Water recharging the Edwards Aquifer from the Blanco River can discharge at either San Marcos Springs or Barton Springs, and the Blanco River is a critical source of water to maintain flow for the endangered salamanders at Barton and San Marcos Springs during periods of extreme drought (Smith et al. 2015). The principal threat to these salamander species is degraded water quality and quantity. This degradation can occur when siltation of its habitat occurs as a result of sediment release from construction activities. The siltation can clog gills, smother eggs, and reduce water circulation and oxygen availability. It can also occur when there are illegal discharges of pollutants, pipeline ruptures, or chronic leakage and acute spills of petroleum and petroleum products, into the Edwards Aquifer. These activities could kill, harm, and/or harass the Barton Springs salamander, the Austin Blind salamander, the San Marcos salamander, the Texas Blind salamander, the fountain darter, the Comal Springs dryopid beetle, and the Comal Springs riffle beetle and their habitat resulting in take in violation of Section 9 absent a lawful ITS.

The Austin Blind salamander resides in only one spring system. When the Service listed this salamander as endangered, it determined that hazardous material spills pose a potential significant threat to the species. According to the Service, "energy pipelines are [a] source of potential hazardous material spills." If the water quality is degraded because of an energy pipeline, the degradation "could by itself cause irreversible declines, extirpation, or significant declines in habitat quality" for the Austin Blind salamander. In addition to hazardous material spills, the Austin Blind salamander's habitat could be impacted by tunneling for underground pipelines. The degradation that could result from the construction and operation of the pipeline could harm or harass the Austin Blind salamander and its habitat resulting in take in violation of Section 9 of the Act.

Based on information and belief, it is Petitioners' understanding that the Corps intends to utilize Nationwide Permit 12 ("NWP 12") to authorize this project under Section 404 of the CWA, 33 U.S.C. § 1344, rather than a project-specific permit. It is also Petitioners' understanding that Kinder Morgan is urging the Corps to use the Section 7 consultation process under the ESA to obtain incidental take coverage for the entire project, even though the Corps only exerts very limited jurisdiction over this project (i.e., affected stream crossings and

[4] To assist the Corps' and Service's review as part of the ESA process, Petitioners hereby attach two scientific reports (one by the City of Austin and one by Zara Environmental, LLC) providing information about myriad forms of impacts to ESA-listed aquifer-based species that will likely result from construction, operation, and maintenance of this pipeline. Please include this letter and all exhibits in the formal decisionmaking administrative record for the agencies' respective decisions related to this pipeline. *See* Exhibit A (Aug. 28, 2019 City of Austin Report); Exhibit B (Aug. 22, 2019 Zara Report).

wetlands) and the vast majority of the project involves private uplands over which the Corps exerts no legal or regulatory jurisdiction. Accordingly, it is Petitioners' understanding that Kinder Morgan does not intend to seek (let alone obtain) an ITP, nor prepare an HCP, for the entire project or even the upland portions outside of the Corps' jurisdiction.[5]

DISCUSSION

A. The Corps and the Service May Not Utilize Section 7 Consultation to Insulate Kinder Morgan from ESA Liability for its Activities in Uplands over which the Corps Does Not and Cannot Exert Jurisdiction

As explained above, whether or not the Corps engages in Section 7 consultation with the Service in connection with the limited activities authorized by the Corps' NWP 12 for this pipeline—i.e., actions relating to affected stream crossings and/or wetlands under the Corps' statutory jurisdiction—the *only* legal mechanism by which Kinder Morgan can obtain incidental take coverage for activities in uplands outside the Corps' jurisdiction is through a lawfully issued ITP and accompanying HCP. Should the Corps and the Service nevertheless attempt to utilize the Section 7 process—and the resulting BiOp and ITS—to exempt Kinder Morgan's pipeline-related activities on private lands not under Federal control or jurisdiction, it will violate various provisions of the ESA, and will also circumvent other federal laws.[6]

With respect to the ESA, contorting the Section 7 process in this manner would contravene several distinct statutory provisions. Most notably, due to the different legal requirements and standards that Congress imposed in Section 7 and Section 10, attempting to cover private non-Federal activities under Section 7 would arbitrarily and unlawfully deprive the public of its statutory right to review and comment on a Draft HCP, a Draft ITP, a Draft EIS or Draft EA, and ultimately a Final EIS or Final EA, which are all required analyses under Section 10—*none* of which would likely be prepared if the Corps instead sweeps the entire project into the Section 7 consultation process. In addition, whereas Section 7 merely requires an action agency to avoid jeopardy and adverse modification of critical habitat, Section 10 prohibits the Service from issuing an ITP unless the Service both: (1) independently determines that the applicant will, based on the measures adopted in the ITP and HCP, minimize and mitigate the impacts of such taking to the maximum extent practicable, and (2) independently determines that the applicant will ensure adequate funding to carry out the measures adopted in the ITP and

[5] Assuming the Corps and the Service ultimately follow through on this approach, it appears to be a direct application of the agencies' 2017 memorialization of their "small federal handle policy" through an exchange of letters. *See* Exhibit C (May 22, 2017 Letter from the Service to the Corps); Exhibit D (October 2, 2017 Letter from the Corps to the Service); and Exhibit E (November 3, 2017 Service Memorandum to Regional Directors).

[6] To the extent that the Corps and the Service are applying their joint "small federal handle" policy regarding Section 7 consultation to this pipeline, Petitioners hereby notify the agencies and Kinder Morgan that this policy is both unlawful on its face and as applied to this pipeline for the reasons stated in this letter, and Petitioners are confident that this policy will not withstand judicial scrutiny.

HCP. *See* 16 U.S.C. § 1539(a)(2)(B). Simply put, Congress did not impose these same heightened legal standards in Section 7 of the Act that it included in Section 10, and thus the Corps and the Service would arbitrarily and unlawfully circumvent these statutorily required findings and standards in the event that the Corps uses the Section 7 process to deprive the public of analyses, findings, and comment opportunities to which it is entitled under Section 10 of the ESA for a project of this kind involving non-Federal activities on lands under private ownership and control (and impacts to listed species that will occur on these non-Federal lands).

For the same reasons that this approach would violate Section 10 of the ESA, it would also arbitrarily and capriciously undermine the letter and spirit of Section 7 of the Act. By definition, Section 7 only applies to "any action authorized, funded, or carried out by [a federal] agency," 16 U.S.C. § 1536(a)(2), and it is impossible to reconcile the Corps' treatment of plainly private activities occurring on private lands outside of the Corps' jurisdiction as somehow being "authorized, funded, or carried out" by the Corps or any other federal agency. In short, because the Corps lacks jurisdiction over the vast majority of lands impacted by this pipeline, those portions outside of the Corps' jurisdiction may not lawfully be the subject of any Section 7 consultation between the Corps and the Service because such an approach is an arbitrary and illegal bypassing of the Section 10 process and an unlawful manipulation of the Section 7 process that Congress did not authorize when it enacted the statute and set forth these two very distinct legal processes for obtaining take authorization from the Service.

Moreover, because any BiOp resulting from an approach that stands in flagrant violation of Sections 7 and 10 of the ESA does not confer lawful incidental take coverage for this pipeline, any construction or other activities undertaken by the Corps or Kinder Morgan in furtherance of this pipeline that are likely to "take" or otherwise impact listed species or their habitat would violate Section 9 of the ESA. *See* 16 U.S.C. § 1538(a)(1)(B).

Finally, until Kinder Morgan has ensured compliance with the ESA by obtaining a lawful ITP and preparing an accompanying HCP that satisfies the statutory criteria set forth in Section 10, the Corps and Kinder Morgan are prohibited from making "any irreversible or irretrievable commitment[s] 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." *Id.* § 1536(d). Thus, before any pipeline construction activities commence—which would have the effect of foreclosing the formulation of reasonable routing alternatives or other measures for minimizing and mitigating impacts to listed species and their habitat—Kinder Morgan must obtain an ITP and prepare an HCP, in order to avoid violating Section 7(d) of the ESA.

For all of these reasons, if the Corps and the Service attempt to sweep non-Federal activities on private lands into its Section 7 consultation process for this pipeline, it will violate various provisions of the ESA and would also be arbitrary, capricious, and an abuse of discretion.[7]

[7] Not only would such an approach be legally incompatible with the ESA, but it would also arbitrarily contradict the Corps' longstanding position that it can neither consult with the Service over activities or geographic areas outside of its jurisdiction nor impose enforceable conditions as part of any NWP 12 verification that reach beyond those under the Corps' limited jurisdiction

B. Even if the Corps and the Service Adopt the Legally Deficient Consultation Approach Identified Above, at Minimum the Corps Must Comply with Other Federal Laws that Are Triggered by Such an Approach

Although Petitioners dispute the legality of an approach in which the Corps utilizes the Section 7 consultation process to encompass the vast majority of a pipeline project that is outside of the Corps' jurisdiction and control, at bare minimum the Corps must comply with various legal obligations that would attach to the Corps' adoption of such an approach.

For example, it is clear that such an approach would significantly broaden the scope of the Corps' NEPA obligations, which ordinarily are limited to the impacts of a project on the narrow portions of the project affecting streams crossings and/or wetlands under the Corps' jurisdiction. *See, e.g.*, *Sierra Club*, 803 F.3d at 46-47 ("The Corps' implementation of the ITS through its Clean Water Act verifications was federal action that required NEPA review, but the NEPA obligations arising out of that action extended only to the segments under the Corps' asserted Clean Water Act jurisdiction."). However, if the Corps decides to substantially broaden the scope of the ITS—i.e., the NEPA-triggering major federal action—to cover all non-Federal uplands activities (in lieu of an ITP obtained under Section 10 by the project proponent), then the Corps must also examine under NEPA the impacts of, and alternatives to, the *entire* pipeline that is encompassed within the Corps' Section 7 ITS incorporated into its NWP 12 verifications and implemented therein.

In addition, by significantly expanding the scope of the ITS sought from the Service, the Corps must also comply with the requirements of Section 106 of the NHPA not only with respect to stream crossings and wetlands but also for all lands affected by this project (and encompassed within the Corps' ITS). *Cf.* HCP Handbook at 1-10 ("[I]mplementation of an HCP and issuance of an [ITP] are an undertaking and subject to compliance with section 106 of the NHPA."). In this instance, Petitioners believe that there may be myriad historic and cultural resources of significant value that would be subject to NHPA analysis and compliance.

Moreover, should the Corps decide to adopt the approach outlined above, it would preclude the application of NWP 12 for this pipeline and would, at minimum, require a project-specific individual permit under Section 404 of the CWA. As explained in the Federal Register

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conferred under the CWA generally and NWP 12 specifically. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 47-48 (D.C. Cir. 2015) (explaining the Corps' position for another pipeline authorized under NWP 12 that "it had authority over 'a very small percentage' of the pipeline and that it would 'only initiate Section 7 ESA consultation, as appropriate, for the limited activities associated with this project that it has sufficient control and responsibility to evaluate,' noting the Service might 'provide authorization for any take . . . outside of the Corps permit area under Section 10'"); *id.* (issuing NWP 12 verifications that "explicitly advised [the project proponent] that the ITS does not constitute authorization . . . to take endangered species beyond the verified crossings," and stating that "in order to legally take a listed species, the Corps emphasized that Enbridge 'must have separate authorization under the Endangered Species Act (e.g. an ESA Section 10 permit, or a Biological Opinion [ ] under ESA 7, with 'incidental take' provisions with which [Enbridge] must comply)").

notice accompanying the most recently reissued NWP 12, the Corps "do[es] not have the legal authority to regulate the construction, maintenance, or repair of upland segments of pipelines or other types of utility lines." 82 Fed. Reg. 1860, 1884 (Jan. 6, 2017); *id.* at 1889 ("Segments of an oil pipeline or other utility line in upland areas [are] outside of the Corps' jurisdiction."). Accordingly, while Petitioners do not believe the Corps *can* lawfully exercise CWA authority over uplands or activities occurring therein, at the very least the Corps must acknowledge the inapplicability of NWP 12 for this purpose and conduct a project-specific permitting process that comes to grips with these legal violations and explains the Corps' basis for nevertheless considering such a request under the CWA as part of its nationwide permit process.

CONCLUSION

While the best course of action would be for Kinder Morgan to abandon a pipeline route that is rife with grave legal and conservation problems and faces intense opposition in the affected local community, at minimum Petitioners urge Kinder Morgan to obtain an ITP and prepare an HCP, and Petitioners respectfully request that the Corps and the Service limit any Section 7 consultation for this pipeline to the activities and geographical areas under the Corps' jurisdiction. Further, Petitioners urge Kinder Morgan to avoid any construction or other project implementation until and unless Kinder Morgan has obtained a lawfully issued ITP accompanied by a final HCP. In any case, Petitioners request a response to this letter within the 60-day notice period provided by the ESA's citizen suit provision.

Sincerely,

William S. Eubanks II

William S. Eubanks II