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

CITY OF AUSTIN, CITY OF SAN MARCOS, TRAVIS COUNTY, HAYS COUNTY, BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT, LARRY BECKER, ARLENE BECKER, JONNA MURCHISON, AND MARK WEILER Plaintiffs, VS. KINDER MORGAN TEXAS PIPELINE, LLC, PERMIAN HIGHWAY PIPELINE, LLC, UNITED STATES DEPARTMENT OF INTERIOR, DAVID BERNHARDT, in his Official Capacity as Secretary of Interior, UNITED STATES FISH AND WILDLIFE SERVICE and AURELIA SKIPWITH, in her Official Capacity as Director of the U.S. Fish and Wildlife Service, Defendants	§ §	**CASE NO. 1:20-cv-00138** **AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT

COME NOW Plaintiffs City of Austin, City of San Marcos, Travis County, Hays County, Barton Springs Edwards Aquifer Conservation District, Larry Becker, Arlene Becker, Jonna Murchison and Mark Weiler ("Plaintiffs"), and file this complaint against Defendants Kinder Morgan Texas Pipeline, LLC, Permian Highway Pipeline, LLC, United States Department of Interior, David Bernhardt, in his Official Capacity as Secretary of Interior, U.S. Fish and Wildlife

Service, and Aurelia Skipwith, in her Official Capacity as Director of the U.S. Fish and Wildlife Service, and would show the Court as follows:

INTRODUCTION

1. Kinder Morgan Texas Pipeline, LLC and Permian Highway Pipeline, LLC (collectively "Kinder Morgan") are constructing a 42-inch wide, 430-mile long natural gas pipeline (the "Permian Highway Pipeline" or "PHP") through the Central Texas Hill Country, which will transverse sensitive environmental features, including the Edwards and Trinity Aquifer recharge zones as well as habitat for many federally listed species that are protected under the Endangered Species Act ("ESA").

2. Kinder Morgan has failed to apply for or obtain an Incidental Take Permit under Section 10 of the ESA ("Section 10 ITP"), which is required for private construction, operation, maintenance and related activities that will harm the various imperiled species on non-federal property along the PHP route.

3. U.S. Fish and Wildlife Service (the "Service") is the primary federal agency responsible for permitting and authorizing "take" of federally listed species under the ESA. For private actions and projects occurring on private (non-federal) lands, the Service allows "take" of federally listed species through the issuance of an ITP under Section 10 of the ESA.

4. The Service has recently, through a letter exchange with the U.S. Army Corps of Engineers (the "Corps"), agreed to a new consultation process under Section 7 of the ESA when the Corps is considering permitting an action where the Corps' involvement is limited to making a permitting decision for a small component of a larger project. This new process is called the Process for Section 7 Consultation in Small Federal Handle Situations ("Small Handle Process"), and it is being used by the Corps and the Service to expedite the permitting and approval of applications

by private (non-federal) entities such as Kinder Morgan to engage in federally permitted actions (like pipeline construction and operations) that will result in incidental take of endangered species.

5. Adoption of the Small Handle Process for Section 7 consultations occurred through an exchange of memoranda without publication and notice and comment as required by the ESA and the Administrative Procedure Act ("APA").

6. Between June 25, 2019 and January 31, 2020, the Corps and the Service engaged in a formal consultation pursuant to Section 7 of the ESA regarding the PHP project and with respect to the federally listed endangered Golden Cheeked warbler and an informal consultation with respect to the Barton springs salamander. This Section 7 consultation was undertaken pursuant to the Small Handle Process.

7. The consultation between the Corps and the Service was conducted as a result of Kinder Morgan's request to the Corps for Nationwide Permit 12 ("NWP 12") approval of the PHP under the Clean Water Act. The 2017 reissuance of NWP 12 occurred without any consultation between the Corps and the Service in violation of the ESA. On April 15, 2020, United States Chief District Judge Brian Morris vacated NWP 12 in No. CV-19-44-GF-BMM, *Northern Plains Resource Council v. U.S. Army Corps of Engineers* ("*Northern Plains*") in the U.S. District Court for the District of Montana.[1] Because NWP 12 is invalid and of no effect, the initial consultation between the Service and the Corps took place on the basis of an invalid and nonexistent permit and is therefore void and of no effect.

8. On February 3, 2020, the Service issued a Biological Opinion ("BO") with respect to the portion of the PHP that crosses through the Fort Worth and Galveston Districts of the Corps. DKT 12-1. The BO divided the actions it reviewed into Corps' Action Areas and Applicant—that is,

[1] A true and correct copy of Chief Judge Morris's order is attached hereto as **Exhibit A.**

Kinder Morgan—Action Areas, describing those areas that are subject to Corps' jurisdiction and those that are not, respectively. DKT 12-1 at 9-10. The BO covers a total of 32,314.7 acres, of which 2,128 acres are in the Corps' Action Area and 30,186.7 acres are in the Applicant Action Area.

9. The BO contained an Incidental Take Statement ("ITS") that purports to provide Kinder Morgan with a safe harbor for take of endangered species (e.g., an exemption from the prohibitions of Section 9 of the Endangered Species Act ("ESA")) for the 30,186.7 acres of PHP clearing and construction that fall within the Applicant Action Area, as long as Kinder Morgan complied with the mandatory terms and conditions outlined in the BO and ITS. DKT 12-1 at 51-58. Because NWP 12 is invalid and of no effect, the BO and ITS issued to Kinder Morgan are void and of no effect and Kinder Morgan has no ESA exemption or protection in the Corps' Action Area or the Applicant Action Area.

10. The Service expressly stated in the BO that: "This biological opinion and incidental take statement do not become effective for the Corps or the Applicant until the Corps issues all required [Clean Water Act] authorizations for the project." DKT 12-1 at 52.

11. At no time did the Service conduct NEPA review of its decision to issue an ITS for the Applicant Action Area.

12. On February 13, 2020, the Corps' Fort Worth District issued a verification of authorization for Kinder Morgan to proceed with the PHP under NWP 12in the Agency Action Area. DKT 30-8. As of April 15, 2020, both this verification and any others affecting the PHP project are legally ineffective.

13. This verification of authorization was issued without NEPA review.

14. Pursuant to the authorization purportedly granted by the Corps' verification and the Service's BO and ITS, Kinder Morgan has proceeded to clear almost 300 acres of warbler habitat in the Texas Hill Country. While doing so, it extensively failed to comply with the mandatory terms and conditions of the BO and ITS concerning the mitigation of oak wilt. Kinder Morgan continues to clear vegetation in the Hill Country, and has begun trenching, drilling, and constructing the PHP in that region.

15. Following this Court's order on March 19, 2020 (Dkt. 59), the Service reinitiated consultation due to Kinder Morgan's failure to comply with the requirements of the BO and ITS. Because NWP 12 is invalid and of no effect, the currently reinitiated consultation for the PHP has no basis because there is no valid permit or approval application pending with Corps.

16. Plaintiffs are local governmental entities, a groundwater conservation district, and affected landowners who seek relief from the Court to: a) prevent unlawful harm to protected species and habitat modification that will harm those species; and b) require the Service to comply with the ESA, APA, NEPA, and all other federal laws and regulations in its review and approval of Kinder Morgan's activities associated with the PHP.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c); *see also id.* § 1540(g)(1)(C) (citizen suit provision). The Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346, because this action involves the United States as a defendant and arises under the laws of the United States, including the ESA and the APA. The requested relief is proper under 16 U.S.C. § 1540(g)(1); 28 U.S.C. §§ 2201–02, 1361; and 5 U.S.C. §§ 704–06.

18. Pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702, sovereign immunity as to Defendants U.S. Department of the Interior, the U.S. Fish and Wildlife Service, Secretary Bernhardt, and Director Skipwith has been waived.

19. In compliance with 16 U.S.C. § 1540(g)(2)(C), plaintiffs gave notice to defendants of the plaintiffs' intent to file suit under the ESA for the violations described in this complaint, including the insufficiency of the Section 7 consultation process to provide a safe harbor from Section 9 liability, more than 60 days ago. The violations complained of in the notice have not been remedied, nor have Defendants remedied these violations.

20. Venue is proper in this district pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(a)(2) and (e)(1)(B) because a substantial part of the events or omissions giving rise to the claims occurred in this district and a substantial part of the property that is the subject of this action is situated in this district. Furthermore, Kinder Morgan's actions that have resulted in and will result in the "take" of federally listed species are occurring in this district and the Service's failure to provide an opportunity for notice and comment on the Small Handle Process occurred in this district.

PARTIES

21. The City of Austin. Plaintiff City of Austin ("Austin") is a home rule city and political subdivision of Texas. To ensure protection of water quality and endangered species such as the Barton Springs salamander and Austin blind salamander, which will be harmed or harassed by the PHP construction, operation, and maintenance, Austin has approved more than $150 million in funding over the past 20 years to conserve sensitive lands over the Edwards Aquifer, creating Water Quality Protection Lands. These permanently protected lands comprise 25% of the recharge zone of the Barton Springs Segment of the Edwards Aquifer and more than 28,000 total acres of

land. Austin is obligated, under an existing Habitat Conservation Plan approved by the Service, to ensure that its actions have minimal impact on the federally listed salamanders and to mitigate any incidental take of federally listed species, in part through advocating for water quality and quantity protection in the Barton Springs Segment of the Edwards Aquifer. Moreover, the Edwards Aquifer is a component of Austin's long-range water supply plan. Without adequate safeguards to protect the sensitive, complex karst features of the Edwards Aquifer, Kinder Morgan's actions in constructing and operating the PHP will harm Austin's financial, recreation, and conservation interests in Barton Springs, the Barton Springs salamander, and the Austin blind salamander, as well as compromise its long-range water plan. In addition, Austin has partnered with Travis County to develop and implement the Balcones Canyonland Conservation Plan ("BCCP") to mitigate development impacts on endangered karst invertebrates and the endangered Golden Cheeked Warbler ("GCW"). Kinder Morgan's actions in constructing and operating the PHP in endangered species habitat and the recharge zone of the Barton Springs Segment, without adequate safeguards, will adversely affect the extensive investment of the City of Austin in the preservation of protected species and water resources.

22. The City of San Marcos. Plaintiff City of San Marcos ("San Marcos") is a home rule city and political subdivision of Texas located in Hays County. The San Marcos Springs ecosystem, which flows directly from the Edwards Aquifer, provides recreational and tourism benefits to San Marcos. San Marcos undertook a lengthy, public, deliberative process to generate the Edwards Aquifer Recovery Implementation Program to protect the federally listed species affected by the management and use of the Edwards Aquifer. Kinder Morgan's actions in constructing and operating the PHP over the Edwards Aquifer will impair the San Marcos Springs and the protected

species that depend on the aquifer, and harm the San Marcos's financial, recreation, and conservation interest in the Springs.

23. Travis County. Plaintiff Travis County is a political subdivision of Texas. The Edwards Aquifer, which extends through Travis County, is a source of drinking water for many Travis County residents. It also supplies the water for many of Travis County's renowned springs, including Barton Springs, which is the only known habitat for the endangered Barton Springs and Texas blind salamanders. The Edwards Aquifer and the Edwards Aquifer Recharge Zone extend into Hays County, where Kinder Morgan's proposed PHP will be routed. Without adequate safeguards, Kinder Morgan's actions in constructing and operating the PHP over the Edwards Aquifer and the Edwards Aquifer Recharge Zone will cause erosion and sedimentation that will impair drinking water in Travis County, as well as adversely affect Barton Springs and the protected species in that Spring. These impacts will harm Travis County's financial, recreation, and conservation interest in the Edwards Aquifer, Barton Springs, and the endangered species in Barton Springs. In addition, Travis County has partnered with Austin to develop and implement the BCCP, a 32,000 acre preserve that provides habitat to the endangered GCW as well as six endangered karst invertebrates found in caves, and 27 species of concern. The BCCP is an important recreation and conservation asset in Travis County. To date, Travis County has invested more than $200,000,000 in preserving land in the BCCP. Kinder Morgan's actions in constructing and operating the PHP in GCW habitat will harm Travis County's financial, conservation, and recreational interests in the continued viability of the GCW.

24. Hays County. Plaintiff Hays County is a political subdivision of Texas. The proposed route of the PHP runs through Hays County for approximately 30 miles and will have a substantial adverse impact on Hays County's conservation investments to protect water resources, GCW, and

57 additional rare or threatened species. The Hays County Regional Habitat Conservation Plan ("RHCP") protects 776 acres of GCW habitat and has approximately 152 acres of conservation credits available for mitigation. Among other water resources affected by the PHP, Hays County created an 81-acre natural area for the protection of Jacob's Well (a karst spring originating in the Middle Trinity Aquifer), which is approximately one mile from the currently proposed PHP route. The proposed PHP construction will adversely affect Hays County's financial, recreation, and conservation interests in the preservation of protected species and water resources.

25. BSEACD. Plaintiff Barton Springs Edwards Aquifer Conservation District ("BSEACD") is a groundwater conservation district created by the Texas legislature covering 247 square miles in Caldwell, Hays, and Travis Counties overlaying substantial portions of the Trinity and Edwards aquifer recharge zones. Among other responsibilities, BSEACD maintains a Habitat Conservation Plan for the protection of the Barton Springs and Austin blind salamanders, which will be harmed by the construction and operation of the PHP. The harm to these species will undermine BSEACD's conservation efforts and impair its mission.

26. Arlene and Larry Becker. Plaintiffs Arlene and Larry Becker ("the Beckers") own and reside on 10 acres of land in Hays County Texas. The original proposed route of the PHP was directly through the Beckers' property; however, the current proposed route is immediately adjacent to their property line. The Beckers' property contains high quality GCW breeding habitat, including mature Ashe juniper trees and various oak and other native hardwood species. The Beckers enjoy bird watching, including sightings of GCWs on their property. The current proposed PHP route is approximately 500 feet from the Beckers' front porch and 600 feet from their water well. The construction and operation of the PHP will adversely affect the Beckers' property by: a) causing adverse edge effects to, and fragmentation of, GCW habitat; b) the increased risk of

spreading oak wilt; c) the risk of leak or explosion affecting their safety, their home, and their water well; and d) diminishing the market value of their home and land due to the pipeline's proximity. These impacts will permanently harm the Beckers' recreational, aesthetic, economic, and other interests.

27. Jonna Murchison. Plaintiff Jonna Murchison owns and resides on 26 acres in Hays County Texas. The original proposed route of the PHP was directly through Ms. Murchison's property; however, the current proposed route is immediately adjacent to her property line. Ms. Murchison's property contains high quality GCW breeding habitat, including mature Ashe juniper trees and various oak and other native hardwood species. Ms. Murchison has enjoyed sightings of GCWs on her property. The current proposed PHP route is close to Ms. Murchison's home and her water well. The construction and operation of the PHP will adversely affect Ms. Murchison's property by: a) causing adverse edge effects to and fragmentation of GCW habitat; b) the increased risk of spreading oak wilt; c) the risk of leak or explosion affecting her safety, her home, and her water well; and d) diminishing the market value of her home and land due to the pipeline's proximity. These impacts will permanently harm Ms. Murchison's recreational, aesthetic, economic, and other interests.

28. Mark Weiler. Plaintiff Mark Weiler owns 12 ½ acres in Blanco County Texas. The proposed route of the PHP runs directly through Mr. Weiler's property. He purchased this property in 2014 with the intent to build a rustic home, collect rainwater, and live off-grid and away from development on his acreage. Mr. Weiler's property contains high quality GCW breeding habitat, including mature Ashe juniper trees, mature oaks (some of which are 100 to 150 years old), and other native hardwood species. Mr. Weiler has consulted with an arborist to ensure that his oaks are free from oak wilt. Mr. Weiler has sought and obtained a Wildlife Exemption for his property

under the Texas Tax Code, which requires him to maintain habitat and water sources for indigenous birds and other wildlife. Mr. Weiler enjoys watching birds on his property, and although he has not yet sighted a GCW he hopes to do so in the future. The construction and operation of the PHP will adversely affect Mr. Weiler's property by: a) clearing known GCW habitat; b) increasing the risk of spreading oak wilt to all his oaks, and especially the irreplaceable oaks that are more than a century old; c) interfering with his plans to live off-grid and away from all development; and d) diminishing the market value of his land due to the pipeline's location on the property. These impacts will permanently harm Mr. Weiler's recreational, aesthetic, economic, and other interests.

29. Kinder Morgan Texas Pipeline, LLC. Defendant Kinder Morgan Texas Pipeline, LLC is a Delaware limited liability corporation, with its principal offices located at 1001 Louisiana Street, Houston, Texas 77002. KMTP is identified in filings with the Railroad Commission of Texas as the "operator" of the Permian Highway Pipeline. KMTP has appeared in this lawsuit by and through its counsel of record.

30. Permian Highway Pipeline, LLC. Defendant Permian Highway Pipeline, LLC, is a Delaware limited liability corporation with its principal offices located at 1001 Louisiana Street, Suite 1000, Houston, Texas 77002. Permian Highway Pipeline, LLC is identified in filings with the Railroad Commission of Texas as the "owner" of the Permian Highway Pipeline. Permian Highway Pipeline, LLC has appeared in this lawsuit by and through its counsel of record.

31. U.S. Secretary of the Interior David Bernhardt. Defendant David Bernhardt, sued only in his official capacity, is the U.S. Secretary of the Interior and has the ultimate responsibility for implementing the ESA, including the responsibility to provide public notice of, and the opportunity

to submit written comments on, any guidelines or regulations, including any amendment thereto, established to ensure that the purposes of the ESA are achieved efficiently and effectively.

32. U.S. Department of the Interior. Defendant U.S. Department of the Interior is an agency of the United States charged with administering the ESA for most terrestrial and non-marine species.

33. Aurelia Skipwith, Director of the United States Fish and Wildlife Service. The Secretary of the Interior has delegated his authority for terrestrial and non-marine species to the Fish and Wildlife Service. 50 C.F.R. § 402.01(b). Defendant Aurelia Skipwith, sued solely in her official capacity, is the Director of the United States Fish and Wildlife Service. As Director, Defendant Skipwith is the federal official with the responsibility for implementing and enforcing the ESA and its regulations.

34. U.S. Fish and Wildlife Service. Defendant U.S. Fish and Wildlife Service is the federal agency within the Department of the Interior that is authorized and required by law to protect and manage the fish, wildlife, and native plant resource of the United States, including enforcing and implementing the ESA.

STATUTORY AND REGULATORY FRAMEWORK

National Environmental Policy Act

35. The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., establishes mandatory procedures designed to ensure that federal agency decisionmakers are fully informed of the impact of their decisions on the natural environment before those decisions are made. NEPA procedures "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

36. To that end, NEPA requires federal agencies to prepare an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

37. The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The EIS also must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14.

38. After preparing a draft EIS and before preparing a final EIS, the agency must request comments from State and local agencies authorized to develop and enforce environmental standards as well as from members of the public, "affirmatively soliciting comments from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(a)(4). The agency must then "assess and consider comments both individually and collectively" and state "its response [to these comments] in the final [EIS]." 40 C.F.R. § 1503.4(a). The notice and comment process in the preparation of the EIS is essential to its information forcing role in federal agency decisions.

Endangered Species Act

39. Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of [such species]." 16 U.S.C. § 1531(b). The Supreme Court has described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" and stated that the "plain intent of Congress in enacting th[e]

statute was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

40. 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*.

41. Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the "take" of endangered or threatened species where there is no federal nexus for all or part of a private project. A section 10(a)(l)(B) Incidental Take Permit is needed in situations where a non-federal project is likely to result in "take" of a listed species of fish or wildlife. Chapter 3 of the Fish and Wildlife Service's Habitat Conservation Plan Handbook explains that an incidental take permit is needed if a non-federal party's activity is "in an area where ESA-listed species are known to occur and where their activity or activities are reasonably certain to result in incidental take." Specifically, the Service may issue an Incidental Take 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).

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

b. procedures the applicant will use to mitigate, monitor, and minimize such impacts;

c. an explanation of why there are no feasible alternatives to the proposed taking; and

d. information establishing that sufficient funding exists to implement the plan. *Id*. § 1539(a)(2)(A); see also 50 C.F.R. § 17.22.

42. The application for a Section 10 ITP and the proposed HCP is subject to public comment. And before granting a Section 10 ITP, the Service must independently find that the HCP ensures that (i) the taking authorized by the Section 10 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; and (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).

43. "Issuance of an incidental take permit is a Federal action subject to NEPA compliance. Although section 10 and NEPA requirements overlap considerably, the scope of NEPA goes beyond that of the ESA by considering the impacts of a Federal action on other resources, such as water quality, air quality, and cultural resources." USFWS and NOAA, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 1-10 (December 21, 2016).[2]

44. Section 7 of the ESA provides another limited exception to the otherwise strict prohibition against the "take" of endangered or threatened species in cases in which a federal agency is

[2]https://www.fws.gov/guidance/sites/default/files/documents/Habitat_Conservation_Planning_and_Incidental_Take_Permit_Processing_Handbook_December%2021%2C%202016.pdf

undertaking or authorizing the action that will result in an incidental take. Section 7(a)(1) of the ESA makes clear that all Federal agencies shall "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to … this Act." 16 U.S.C. §1536(a)(1).

45. Section 7 of the ESA establishes a consultation process pursuant to which '[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction of or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). This consultation must take place "[s]ubject to such guidelines as the Secretary [of Interior] may establish." 16 U.S.C. § 1536(a)(3).

46. Pursuant to Section 7 of the ESA, the Service, along with the National Marine Fisheries Service, promulgated, after notice and comment, regulations governing the consultation process ("Joint Regulations"). 50 C.F.R. ch. 402. These regulations provide comprehensive guidelines that dictate how the consultation process must proceed.

47. Under the ESA and these Joint Regulations, once a permit application is submitted to a Federal action agency such as the Corps, the application must be reviewed to determine if a federally-listed species *may be present* in the action area. Upon determining that a federally-listed species *may be present* in the Federal action area, the Federal action agency is then obligated to determine whether the proposed action "may affect" a listed species. 50 C.F.R. §402.14(a) (providing that agencies should review their actions at the "earliest possible time to determine whether an action may affect listed species or critical habitat."). The term "*may affect*" is not defined in the ESA or the Joint Consultation Regulations, but the Service and NMFS Consultation

Handbook defines it as: "the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat." Consultation Handbook at xvi.

48. 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).

49. If the Federal action agency determines that the activity in the permit application may affect and is likely to adversely affect an endangered or threatened species or their critical habitat, the Federal action agency must initiate formal consultation procedures with the Service. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.14 (a) and (b). The formal consultation process begins with a written request from the Federal action agency to the Service, and ends with issuance by the Service of a biological opinion ("BO"). 50 C.F.R. § 402.02 (definition of formal consultation).

Nationwide Permit 12

50. Congress enacted the Clean Water Act ("CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To that end, the Corps regulates the discharge of any pollutant, including dredged or fill material, into waters of the United States ("WOTUS"). 33 U.S.C §§1311, 1362(6)(7)(12). Section 404 of the CWA requires any party seeking to construct a project that will discharge dredged or fill material into WOTUS to obtain a permit from the Corps. 33 U.S.C. § 1344(a)(e).

51. The Corps is authorized to issue individual permits on a case-by-case basis. The Corps is also authorized to issue general nationwide permits to streamline the permitting process for certain categories of activities. 33 U.S.C. § 1344(e). The Corps issues nationwide permits for categories of activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."

52. The Corps issued NWP 12 for the first time in 1977 and reissued it most recently in 2017. 82 Fed. Reg. 1860, 1860, 1985-86 (January 6, 2017). NWP 12 authorizes discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair, and removal of utility lines and associated facilities. 82 Fed. Reg. at 1985-86. Utility lines include electric, telephone, internet, radio, and television cables, lines, and wires, as well as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, including oil and gas pipelines. 82 Fed. Reg. at 1985.

53. All nationwide permits, including NWP 12, remain subject to 32 General Conditions contained in the Federal Regulations. 82 Fed. Reg. 1998-2005. General Condition 18 prohibits the use of any nationwide permit for activities that are likely to directly or indirectly jeopardize

threatened or endangered species under the ESA or destroy or adversely modify designated critical habitat for such species. 82 Fed. Reg. at 1999-2000.

54. The ESA requires the Corps to consider the environmental impacts of its actions. Section 7(a)(2) of the ESA requires the Corps to determine "at the earliest possible time" whether any action it takes "may affect" listed species and critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). If the Corps' action "may affect" listed species or critical habitat, the Corps must consult with the Service and/or National Marine Fisheries Service ("NMFS"). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

55. A federal district court in 2005 held that the Corps should have consulted with the Service when it reissued NWP 12 in 2002. *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1, 9-11 (D.D.C. 2005). The Corps initiated formal programmatic consultation with the Services when it reissued NWP 12 in 2007, and again when it reissued NWP 12 in 2012. See 81 Fed. Reg. 3513-3515.

56. However, the Corps did not initiate a programmatic consultation with the Service when it reissued NWP 12 in 2017, claiming instead that the prior programmatic consultations in 2007 and 2012 had been "voluntary." See 81 Fed. Reg. 3514.

57. On April 15, 2020, in *Northern Plains*, the Montana federal district court held that the Corps' failure to initiate a programmatic consultation prior to its reissuance of NWP 12 violated the ESA. The Court vacated NWP 12 "pending the completion of the consultation process and compliance with all environmental statutes and regulations." *Northern Plains* at 21. The Court concluded by enjoining the Corps from "authoring [sic] any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations." *Id.* at 26.

Administrative Procedure Act

58. Section 553 of the APA requires notice and comment before an agency can adopt a new federal rule. In particular, Section 553 requires that general notice of all proposed federal rules be published in the Federal Register and that "interested persons be afforded an opportunity to participate in the rulemaking by submission of written data, views, or argument." 5 U.S.C. § 553(b), (c). Section 553 also requires that, "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

59. Section 402.04 of the Joint Regulations implementing Section 7 of the ESA provides a mechanism for tailoring the consultation process to the specific needs of specific federal agencies. 50 C.F.R. §402.04. In particular, "[t]he consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service." Notably, this provision also mandates that "such counterpart regulation shall be published in the Federal Register in proposed form and shall be subject to public comment for at least 60 days before final rules are published." 50 C.F.R. §402.04. Section 402.04 of the Joint Regulations makes clear that rules and guidelines implementing the consultation requirement of the ESA are not exempt from the notice and comment procedures of the APA, 5 U.S.C. § 553.

60. The Small Federal Handle Process represents a new rule or regulation tailoring the Section 7 consultation process for the specific needs of the Corps and the Service in circumstances in which the Corps' jurisdiction is a small portion of a larger project. This new rule was adopted through the exchange or memoranda in 2017, in violation of the requirements of the APA and the ESA.

61. This lawsuit seeks relief from the Court to remedy Defendants' failure to comply with the requirements of NEPA, the ESA, and the APA, with regard to the proposed construction of the PHP.

STATEMENT OF FACTS

62. The PHP is designed to transport about 2 billion cubic feet of natural gas a day. The planned pipeline will originate near Coyanosa in Pecos County, Texas—in an area known as the "Waha Hub"—and run approximately 430 miles across more than a thousand tracts of private property in sixteen or seventeen (depending on the latest route shifts by Kinder Morgan) Texas counties to a termination point near Sheridan, Texas.

63. 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 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.

64. According to news reports, as of December 29, 2019, Kinder Morgan had made substantial progress on the western portion of the PHP, having built more than half of the initial 100-mile route starting in Pecos County. Also, in December 2019, Kinder Morgan stated that it was "in the final stages of the permitting process" for the remainder of the pipeline route and that it was expecting final permits to issue early in 2020. On January 29, 2020, Kinder Morgan announced that it had secured all legal rights-of-way necessary to build out the PHP across Texas. Kinder

Morgan has informed reporters that by mobilizing contractors, setting up staging areas, and delivering pipe, it plans to "be ready to go literally when [they] get the permit."

65. The PHP construction will entail clearing a 125-foot wide swath across thousands of acres of private land and trenching and excavating on or near sensitive karst features (such as caves, fissures and voids) of the Edwards Aquifer. There are many federally endangered and threatened species, as well as essential habitat for those species, within the footprint of the pipeline's route and within the immediate vicinity surrounding the pipeline's route. These include birds, salamanders, and aquifer-based species.

66. The Golden Cheeked Warbler ("GCW") 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 GCW's narrow habitat requirements, and its site fidelity of returning to the same area every year, habitat destruction often leads to local population extirpation. Occupied GCW habitat lies within the PHP construction boundaries and its buffer zones, with an estimated 548 acres of GCW habitat occurring within the pipeline's footprint, and an estimated 2,355 acres of habitat within 300 feet of the project's footprint. Although Kinder Morgan has not provided public information about the precise, periodically shifting route of the PHP, it is expected that a minimum of 548 acres of GCW habitat will be cleared for the pipeline.

67. GCWs are highly territorial and show strong fidelity to breeding sites—i.e., birds often return to their previous breeding territory after the winter season. Clearing habitat even while no members of a species are present is expected to result in a direct take if individuals later return to

their territorial nesting range and the clearing has removed the vegetation they need for shelter, food, and nesting materials. Clearing wide swaths of vegetation near GCW habitat will also result in indirect effects to adjacent habitat that rise to the level of take. These effects include edge effects, habitat fragmentation, and displacement.

68. Mature oaks are a crucial component of GCW habitat, and are important ecosystem resources in other ways. Oak wilt is one of the most destructive tree diseases in the United States and is currently killing oak trees in Central Texas at epidemic proportions. Oak wilt is a highly infectious fungal disease spread in part by beetles who carry diseased spores from tree to tree. This transmission is exacerbated by cutting and pruning oak trees, particularly in the spring. Accordingly, experts strongly advise against cutting or pruning oak trees between February 1 and June 1.

69. 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 (Stygoparnus comalensis), and the Comal Springs riffle beetle (Heterelmis comalensis) are all listed by the Service as endangered, entirely aquatic species whose only habitat is in the vicinity of the PHP. These species rely on clean, well-oxygenated spring water with sediment-free substrates to survive. The water these species rely on to survive is likely to be adversely affected (or contaminated) by the construction, operation, and ongoing maintenance of the pipeline.

70. 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 is likely to "take" many members of

these species, and may well jeopardize the continued existence and/or recovery efforts of these listed species and significantly modify critical habitat for these species.

71. The Austin blind salamander resides in only one spring system, Barton Springs, which is a feature of the Edwards Aquifer. When the Service listed this salamander as endangered, it determined that hazardous material spills pose a potentially significant threat to the species. According to the Service, energy pipelines are a source of potential hazardous material spills. If the water quality in the spring system 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 affected by tunneling for underground pipelines. The degradation imminently threatened by construction and operation of the pipeline could kill, injure, harm, harass or otherwise take the Austin blind salamander and its habitat in violation of Section 9 of the ESA. The construction and operation of the pipeline could similarly kill, injure, harm, harass or otherwise take the Barton Springs salamander and its habitat.

72. Between June 25, 2019 and January 31, 2020, the Corps and the Service engaged in a formal consultation pursuant to Section 7 of the ESA regarding the PHP project and with respect to the federally listed endangered GCW and an informal consultation with respect to the Barton springs salamander.

73. This Section 7 consultation was undertaken pursuant to the Small Handle Process adopted by the Corps and the Service in a series of letters in 2017, without publication or notice and comment as required by the ESA and the APA. The Small Handle Process purports to amend the jointly issued regulations governing the consultation process under Section 7 of the ESA (*see* 50

C.F.R. § 402) and has wide-ranging effects, especially including the potential to negatively affect numerous federally listed species nationwide.

74. On February 3, 2020, the Service issued a Biological Opinion ("BO") with respect to the portion of the PHP that crosses through the Fort Worth and Galveston Districts of the United States Army Corps of Engineers ("the Corps"). DKT 12-1. The Fort Worth District portion of this BO covers the PHP as it passes through the Texas Hill Country, in particular Kimble, Gillespie, Blanco, and Hays Counties.

75. The BO divided the actions it reviewed into Corps' Action Areas and Applicant Action Areas, describing those areas that are subject to Corps' jurisdiction and those that are not, respectively. DKT 12-1 at 9-10. The BO covers a total of 32,314.7 acres, of which 2,128 acres are in the Corps' Action Area and 30,186.7 acres are in the Applicant Action Area.

76. The BO contained an Incidental Take Statement ("ITS") that purported to provide Kinder Morgan with a safe harbor for take of endangered species (e.g., an exemption from the prohibitions of Section 9 of the Endangered Species Act ("ESA")) for the 30,186.7 acres of PHP clearing and construction that fall within the Applicant Action Area, as long as Kinder Morgan complied with the mandatory terms and conditions outlined in the BO and ITS. DKT 12-1 at 51-58. According to the ITS, "to be exempt from the prohibition of section 9 of the [ESA], . . . the Applicant . . . must comply with the following terms and conditions that implement the reasonable and prudent measure (sic) described above. . . . These terms and conditions are non-discretionary. " DKT 12-1 at 55. Further, "any failure by the Applicant to comply with the terms and conditions stated herein will result in loss of Section 9 take coverage for activities occurring outside of the Corps' jurisdiction, if not remedied within a reasonable period of time to the satisfaction of the Service." DKT 12-1 at 56.

77. In addition, the BO/ITS expressly provides that "[t]his biological opinion and incidental take statement do not become effective for the Corps or the Applicant until the Corps issues all required CWA authorizations for the project."

78. The Service did not comply with NEPA before issuing the BO and ITS purporting to offer Kinder Morgan an exemption from Section 9 liability for prohibited take, even though the granting of such a safe harbor is a "major federal action[] significantly affecting the quality of the human environment."

79. As relevant here, the mandatory terms and conditions in the BO and ITS provide that: (1) "Within GCWA habitat occurring in the Applicant Action Area, vegetation clearing shall not occur from March 1 to July 31. Vegetation clearing within defined project workspaces shall be cleared prior to GCWA arrival with construction occurring immediately after to effectively be continuous, minimizing disturbance to nesting GCWA." DKT 12-1 at 56; and (2) "*Oak Wilt Prevention*: "The Applicant will avoid, to the extent practicable, wounding (e.g., cutting, trimming, and pruning) oak trees from February through June. . . Regardless of season, all trimming cuts or other wounds to oak trees, including freshly-cut stumps and damaged surface roots, will be treated immediately with a wound or latex paint to prevent exposure to contaminated insect vectors." DKT 12-1 at 12.

80. On February 13, 2020, the Corps' Fort Worth District issued a verification of authorization for Kinder Morgan to proceed with the PHP under NWP 12 in the Agency Action Area. DKT 30-8. This verification incorporated the mandatory terms and conditions in the BO and ITS. The authorization verified in the February 13 letter is "conditional upon . . . [Kinder Morgan's] compliance with all the mandatory terms and conditions associated with incidental take identified in the enclosed BO . . . . Further, failure to comply with the applicable terms and conditions for the USACE action area within the Fort Worth District invalidates the incidental take authorization

and any take of a listed species would constitute an unauthorized take, and it would also constitute noncompliance with your Corps permit." DKT 30-8 at 2.

81. On February 5, 2020, before Plaintiffs had obtained copies of the February 3 BO, Plaintiffs filed this action seeking to enjoin Kinder Morgan from proceeding with clearing and construction activity for the PHP in the four counties listed above.

82. On February 14, 2020, this Court held a hearing on Plaintiffs' motion for Temporary Restraining Order. The Court denied Plaintiffs' motion later that day. DKT 31.

83. On February 15, 2020, Kinder Morgan began clearing warbler habitat in the Texas Hill Country. This clearing continued through March 1, 2020.

84. On March 4, 2020, this Court held a hearing on Plaintiffs' application for preliminary injunction, during which Plaintiffs provided extensive and essentially unrefuted evidence of Kinder Morgan's failure to comply with the mandatory oak wilt prevention terms and conditions in the BO during its mad rush to clear all the warbler habitat in two weeks.

85. On March 19, 2020, the Court denied the Plaintiffs' application, noting however that: (1) Kinder Morgan's oak wilt mitigation protocol "is fundamentally at odds with the immediacy requirement mandated in the biological opinion;" (2) the "Service could not provide a meaningful metric for when a violation of an express mitigation measure would trigger a reassessment of the no jeopardy conclusion;" and (3) "the Service . . . failed to provide a concrete definition of continuous activity or a metric by which good-faith implementation of the term might be measured." DKT 59 at 21-29. The Court further questioned why, if the Small Federal Handle Policy "were indeed an old, commonplace process, . . . the Service and the Corps exchanged letters in 2017 'clarifying the consultation process under section 7' [in these circumstances], . . . needed to develop 'training materials and tools to assist section 7 practitioners from both agencies' . . . or

why neither Defendant could provide the Court with a single case referring to the legitimate use of the Section 7 consultation process by a private applicant to secure a safe harbor from take liability for project areas beyond the Corps' limited jurisdiction." DKT 59 at 21 n.10.

86. Following this Court's March 19, 2017 Order, the Service reinitiated consultation on Kinder Morgan's application for approval under NWP 12. That reinitiated consultation is continuing at the time of this amended complaint and, upon information and belief, in deliberate disregard to the fact that use of NWP12 is enjoined.

87. Kinder Morgan still has not obtained a Section 10 ITP pursuant to 16 U.S.C. §1539(a)(1)(B). By moving forward with construction and other activities associated with the PHP project without obtaining a Section 10 ITP, Kinder Morgan has caused and will cause unpermitted "take" of federally listed species, and will continue to unlawfully "take," endangered species in numerous ways, including killing, harming, wounding, and harassing members of those species, as those terms are defined by the ESA. 16 U.S.C. § 1532(19).

PLAINTIFFS' CLAIMS FOR RELIEF

Claim 1 – Violations of ESA Section 9

88. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. Kinder Morgan has not obtained a Section 10 ITP pursuant to 16 U.S.C. § 1539(a)(1)(B). By moving forward with the PHP project without obtaining a Section 10 ITP Kinder Morgan has engaged in and will continue to engage in unlawful "take" of endangered and threatened species in numerous ways, *id.* § 1538(a)(1)(B), including killing, harming, wounding, and harassing members of those species, as those terms are defined by the ESA. 16 U.S.C. § 1532(19). Absent a valid Section 10 ITP, Kinder Morgan lacks lawful authorization to take endangered or threatened species in connection with construction, operation, and maintenance of the PHP, and thus is violating and will continue to

violate Section 9 of the ESA through actions that take federally listed species. 16 U.S.C. § 1538(a)(1)(B).

Claim 2 – Violation of ESA Section 7

89. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. By its terms, the BO and ITS for the PHP project "do not become effective for the . . . Applicant until the Corps issues all required CWA authorizations for the project." On April 15, 2020, a federal court vacated NWP 12 in a nationwide injunction based on the Corps' failure to comply with Section 7 of the ESA when NWP 12 was reissued in 2017. Thus, the NWP 12 verifications provided by the Corps to Kinder Morgan on February 13, 2020, are ineffective and invalid. Because NWP 12 is invalid and ineffective, the Section 7 consultation undertaken by Kinder Morgan, the Corps and the Service violates the Service's obligations under Section 7. The reinitiated Section 7 consultation, which is currently ongoing, is also invalid and a violation of Section 7, because it is premised on an invalid nationwide permit.

Claim 3 – Violation of ESA Section 9

90. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. By its terms, the BO and ITS for the PHP project "do not become effective for the . . . Applicant until the Corps issues all required CWA authorizations for the project." On April 15, 2020, a federal court vacated NWP 12 in a nationwide injunction based on the Corps' failure to comply with Section 7 of the ESA when NWP 12 was reissued in 2017. Thus, the NWP 12 verifications provided by the Corps to Kinder Morgan on February 13, 2020, are ineffective and invalid. Because the BO and ITS is not effective absent valid Corps authorizations under the CWA, Kinder Morgan lacks lawful authorization to take endangered or threatened species in connection with construction, operation,

and maintenance of the PHP, and thus is violating and will continue to violate Section 9 of the ESA through actions that take federally listed species. 16 U.S.C. § 1538(a)(1)(B).

Claim 4 – Violations of ESA Section 7

91. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. The BO and ITS prepared by the Service and purporting to offer Kinder Morgan a safe harbor from ESA Section 9 liability contain mandatory terms and conditions that are vague, imprecise, indeterminate, impossible to comply with, and impossible to monitor and enforce. In particular, the BO and ITS require that "vegetation clearing within defined project workspaces shall be cleared prior [to] GCWA arrival and *with construction occurring immediately after to effectively be continuous*, and minimizing disturbance to nesting GCWA. It is not possible to engage in continuous construction, nor is it possible to provide a workable definition of that term to determine whether Kinder Morgan was incompliance. The mandatory terms and conditions of a BO and ITS must be concrete and determinate so that they can be monitored and enforced. Because this BO and ITS contain important mandatory terms and conditions that cannot be monitored or enforced, the BO and ITS are invalid.

Claim 5 – Violations of NEPA

92. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. In the BO and ITS, the Service purports to offer Kinder Morgan a safe harbor from ESA Section 9 liability in the Applicant Action Area as long as Kinder Morgan complies with the mandatory terms and conditions of the BO and ITS. If this safe harbor is valid, it constitutes a major federal action affecting the quality of the human environment, and therefore the Service must comply with NEPA before issuing the BO and ITS. 42 U.S.C. §§ 4321, *et seq.* Because the Service has not complied with NEPA by preparing an EIS (or at least an EA) subject to public comment, any purported safe

harbor Section 7 coverage in Applicant Action Are of the PHP is a violation of NEPA. 42 U.S.C. 4332 (C).

Claim 6 – Violations of the APA

93. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. The Service and the Corps conducted the ESA Section 7 consultation regarding Kinder Morgan's applications for approval of individual NWP 12 verifications under Section 404 of the Clean Water Act utilizing the Small Handle Process adopted in 2017. The Small Handle Process—which constitutes a significant amendment to the ESA's regulatory framework governing Section 7 consultation between the agencies—was adopted without public notice or comment in violation of the APA. For this reason, the Service's adoption and application of the Small Handle Process is arbitrary, capricious, and not in accordance with law, and the Service adopted this process and policy without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (D).

Claim 7 – Violations of the Mandatory Terms and Conditions of the BO and ITS

94. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. The BO and ITS contain mandatory terms and conditions, failure to comply with which invalidates the claimed safe harbor from Section 9 liability. According to the ITS, "to be exempt from the prohibition of section 9 of the [ESA], . . . the Applicant . . . must comply with the following terms and conditions that implement the reasonable and prudent measure (sic) described above. . . . These terms and conditions are non-discretionary. " DKT 12-1 at 55. Further, "any failure by the Applicant to comply with the terms and conditions stated herein will result in loss of Section 9 take coverage for activities occurring outside of the Corps' jurisdiction, if not remedied within a reasonable period of time to the satisfaction of the Service." DKT 12-1 at 56. The mandatory terms and conditions provide that: "*Oak Wilt Prevention*: "The Applicant will avoid, to the extent practicable,

wounding (e.g., cutting, trimming, and pruning) oak trees from February through June. . . Regardless of season, all trimming cuts or other wounds to oak trees, including freshly-cut stumps and damaged surface roots, will be treated immediately with a wound or latex paint to prevent exposure to contaminated insect vectors." DKT 12-1 at 12. As established at the preliminary injunction hearing, between February 15 and March 1, 2020 Kinder Morgan blatantly and extensively failed to comply with this mandatory term and condition while clearing massive tracts of warbler habitat. In fact, as this Court found, Kinder Morgan adopted an oak wilt protocol that was "fundamentally at odds with the immediacy requirement mandated in the biological opinion." Nor is it possible for the failure to "immediately" treat freshly cut stumps and damaged surface roots with latex paint to be "remedied within a reasonable period of time to the satisfaction of the Service." As a result of this noncompliance, the BO and ITS are invalid and provide no safe harbor or exemption for Kinder Morgan under the ESA.

Claim 8 – Declaration of Invalidity of NWP 12 As Applied, the BO, the ITS, and the Reinitiated Consultation

95. Plaintiffs incorporate the allegations of paragraphs 1-87 by reference. NWP 12 was reissued in 2017 in violation of the ESA and has been vacated, and its continued use enjoined, as determined by the Montana federal district court's ruling in *Northern Plains*. Accordingly, Kinder Morgan's application for approval under NWP 12 seeks approval for a void and invalid permit. The consultation between the Service and the Corps that resulted in the BO and the ITS were conducted pursuant to an invalid application and void permit, therefore such consultation and the resulting BO and ITS are void and of no effect. Furthermore, the currently reinitiated consultation by the Service is based on an invalid application for a nonexistent permit. Plaintiffs seek a declaratory judgment that NWP 12 as applied, the BO, the ITS and the reinitiated consultation are

void, invalid, and of no effect. Plaintiffs seek a declaratory judgment that Kinder Morgan is not exempt from, and enjoys no safe harbor from, liability under the ESA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1) Declare that Kinder Morgan is violating Section 9 of the ESA by engaging in take of endangered species without a valid safe harbor;

2) Declare that the Service adopted the Small Handle Process without notice and comment in violation of the ESA and APA;

3) Declare that any Section 9 safe harbor issued pursuant to the Small Handle Policy constitutes a major federal action subject to NEPA;

4) Declare that the BO and ITS issued by the Service on February 3, 2020 is invalid as issued due to the inclusion of mandatory terms and conditions that are vague, imprecise, indeterminate, impossible to comply with, and therefore impossible to monitor and enforce;

5) Declare that Kinder Morgan's extensive failure to comply with the mandatory terms and conditions in the BO and ITS issued by the Service on February 3, 2020, render that BO and ITS no longer valid;

6) Declare that the Section 7 consultation process for the PHP project is invalid and may not be undertaken in reliance on any NWP 12 verifications under consideration or issued for the PHP project;

7) Declare that NWP 12 is void and of no effect with respect to the Section 7 consultation and reinitiated Section 7 consultation for the PHP;

8) Declare that the BO, the ITS, and the reinitiated consultation for the PHP are void and of no effect because they are premised on an invalid and void NWP 12;

9) Enjoin Kinder Morgan from engaging in any staking, clearing, development, construction, installation or other activities for the PHP in the areas covered by the BO and ITS that are likely to take any individual endangered or threatened species in violation of Section 9 of the ESA unless and until a Section 10 Incidental Take Permit issues under the ESA;

10) Enjoin Kinder Morgan from engaging in any staking, clearing, development, construction, installation or other activities for the PHP in the areas covered by the BO and ITS that are likely to take any individual endangered or threatened species in violation of Section 9 of the ESA unless and until the Service completes NEPA review of any Section 10 Incidental Take Permit it issues for the non-federal portions of the PHP;

11) Enjoin Kinder Morgan from engaging in any staking, clearing, development, construction, installation or other activities for the PHP in the areas covered by the BO and ITS that are likely to take any individual endangered or threatened species in violation of Section 9 of the ESA unless and until the Service completes NEPA review of any Incidental Take Statement it issues under Section 7 for the non-federal portions of the PHP;

12) Set aside and remand the Small Handle Process for further consideration consistent with the substantive and procedural requirements of the ESA and APA;

13) Award Plaintiffs their reasonable attorneys' fees and costs, pursuant to 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412, and any other applicable provision; and

14) Grant Plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 17, 2020, a true and correct copy of the above and foregoing document was filed via the Court's ECF/CM system and will be served as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, et al.,
Plaintiffs,
v.
U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants,
TC ENERGY CORPORATION, et al.,
Intervenor-Defendants,
STATE OF MONTANA,
Intervenor-Defendant,
AMERICAN GAS ASSOCIATION, et al.,
Intervenor-Defendants.

CV-19-44-GF-BMM

ORDER

Northern Plains Resource Council, et al. ("Plaintiffs") filed this action to challenge the decision of the United States Army Corps of Engineers ("Corps") to reissue Nationwide Permit 12 ("NWP 12") in 2017. (Doc. 36.) Plaintiffs allege five claims in their Amended Complaint. (*Id.*) Claims Three and Five relate to the Corps' verification of the Keystone XL Pipeline crossings of the Yellowstone River and the Cheyenne River. (Doc. 36 at 78-81, 85-87.) The Court stayed

Plaintiffs' Claims Three and Five pending further action by the Corps. (Doc. 56 at 1.)

Plaintiffs' Claims One, Two, and Four relate to the Corps' reissuance of NWP 12 in 2017. Plaintiffs allege that the Corps' reissuance of NWP 12 violated the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Clean Water Act ("CWA"). (Doc. 36 at 73-77, 81-84.) Plaintiffs, Defendants the Corps, et al. ("Federal Defendants"), and Intervenor-Defendants TC Energy Corporation, et al. ("TC Energy") filed cross-motions for partial summary judgment regarding Plaintiffs' Claims One, Two, and Four. (Docs. 72, 87, 90.) Intervenor-Defendants the State of Montana and American Gas Association, et al., filed briefs in support of Defendants. (Docs. 92 & 93.) Amici Curiae Edison Electric Institute, et al., and Montana Petroleum Association, et al., also filed briefs in support of Defendants. (Docs. 106 & 122.)

BACKGROUND

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Corps regulates the discharge of any pollutant, including dredged or fill material, into jurisdictional waters. *See* 33 U.S.C. §§ 1311, 1362(6), (7), (12). Section 404 of the CWA requires any party seeking to construct a project that will

discharge dredged or fill material into jurisdictional waters to obtain a permit. *See* 33 U.S.C. § 1344(a), (e).

The Corps oversees the permitting process. The Corps issues individual permits on a case-by-case basis. 33 U.S.C. § 1344(a). The Corps also issues general nationwide permits to streamline the permitting process for certain categories of activities. 33 U.S.C. § 1344(e). The Corps issues nationwide permits for categories of activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). Nationwide permits may last up to five years, at which point they must be reissued or left to expire. 33 U.S.C. § 1344(e)(2).

The Corps issued NWP 12 for the first time in 1977 and reissued it most recently in 2017. 82 Fed. Reg. 1860, 1860, 1985-86 (January 6, 2017). NWP 12 authorizes discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair, and removal of utility lines and associated facilities. 82 Fed. Reg. at 1985-86. Utility lines include electric, telephone, internet, radio, and television cables, lines, and wires, as well as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, including oil and gas pipelines. 82 Fed. Reg. at 1985. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for

each single and complete project. 82 Fed. Reg. at 1985. For linear projects like pipelines that cross a single waterbody several times at separate and distant locations, or cross multiple waterbodies several times, each crossing represents a single and complete project. 82 Fed. Reg. at 2007. Activities meeting NWP 12's conditions may proceed without further interaction with the Corps. *See Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 3 (D.D.C. 2005).

A permittee must submit a preconstruction notification ("PCN") to the Corps' district engineer before beginning a proposed activity if the activity will result in the loss of greater than one-tenth acre of jurisdictional waters. 82 Fed. Reg. at 1986. Additional circumstances exist under which a permittee must submit a PCN to a district engineer. *See* 82 Fed. Reg. at 1986. The PCN for a linear utility line must address the water crossing that triggered the need for a PCN as well as the other separate and distant crossings that did not themselves require a PCN. 82 Fed. Reg. at 1986. The district engineer will evaluate the individual crossings to determine whether each crossing satisfies NWP 12. 82 Fed. Reg. at 2004-05. The district engineer also will evaluate the cumulative effects of the proposed activity caused by all of the crossings authorized by NWP 12. *Id.*

All nationwide permits, including NWP 12, remain subject to 32 General Conditions contained in the Federal Regulations. 82 Fed. Reg. 1998-2005. General Condition 18 prohibits the use of any nationwide permit for activities that are

likely to directly or indirectly jeopardize threatened or endangered species under the ESA or destroy or adversely modify designated critical habitat for such species. 82 Fed. Reg. at 1999-2000.

The ESA and NEPA require the Corps to consider the environmental impacts of its actions. Section 7(a)(2) of the ESA requires the Corps to determine "at the earliest possible time" whether any action it takes "may affect" listed species and critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). If the Corps' action "may affect" listed species or critical habitat, the Corps must consult with U.S. Fish and Wildlife Service ("FWS") and/or National Marine Fisheries Service ("NMFS") (collectively, "the Services"). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Under NEPA, the Corps must produce an environmental impact statement unless it issues a finding of no significant impact (FONSI). 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.9.

The Corps issued a final Decision Document explaining NWP 12's environmental impacts when it reissued NWP 12 in 2017. NWP005262-5349. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA. NWP005340. The Corps also concluded that NWP 12 complied with both the ESA and NEPA. NWP005324, 5340. The Decision Document comprised a FONSI under NEPA. NWP005340.

The Corps explained that its 2017 reissuance of NWP 12 complied with the ESA because NWP 12 would not affect listed species or critical habitat. NWP005324. The Corps did not consult with the Services based on its "no effect" determination. NWP005324-25. A federal district court in 2005 concluded that the Corps should have consulted with FWS when it reissued NWP 12 in 2002. *Brownlee*, 402 F. Supp. 2d at 9-11. The Corps initiated formal programmatic consultation with the Services when it reissued NWP 12 in 2007. NWP031044. The Corps continued the programmatic consultation when it reissued NWP 12 in 2012. *Id.*

LEGAL STANDARD

A court should grant summary judgment where the movant demonstrates that no genuine dispute exists "as to any material fact" and the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment remains appropriate for resolving a challenge to a federal agency's actions when review will be based primarily on the administrative record. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

The Administrative Procedure Act's ("APA") standard of review governs Plaintiffs' claims. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). The APA instructs a reviewing court to "hold unlawful and set

aside" agency action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

DISCUSSION

I. ENDANGERED SPECIES ACT

A. ESA Section 7(a)(2) Consultation

Section 7(a)(2) of the ESA requires the Corps to ensure any action that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). The Corps must review its actions "at the earliest possible time" to determine whether an action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). The Corps must initiate formal consultation with the Services if the Corps determines that an action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14; 16 U.S.C. § 1536(a)(2). The ESA does not require Section 7(a)(2) consultation if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. 50 C.F.R. § 402.14(b)(1).

Formal consultation is a process that occurs between the Services and the Corps. 50 C.F.R. § 402.02. The process begins with the Corps' written request for consultation under ESA Section 7(a)(2) and concludes with the Services' issuance of a biological opinion. 50 C.F.R. § 402.02. A biological opinion states the

Services' opinion as to whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *Id.*

Programmatic consultation involves a type of consultation that addresses multiple agency actions on a programmatic basis. 50 C.F.R. § 402.02. Programmatic consultations allow the Services to consult on the effects of a programmatic action such as a "proposed program, plan, policy, or regulation" that provides a framework for future proposed actions. *Id.*

B. The Corps' Reissuance of NWP 12 in 2017

The Corps concluded that its reissuance of NWP 12 in 2017 would have no effect on listed species or critical habitat. 82 Fed. Reg. at 1873-74; *see also* 81 Fed. Reg. 35186, 35193 (June 1, 2016). General Condition 18 provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." 82 Fed. Reg. at 1999.

A non-federal permittee must submit a PCN to the district engineer if a proposed activity "might" affect any listed species or critical habitat. 82 Fed. Reg. at 1999. The permittee may not begin work on the proposed activity until the district engineer notifies the permittee that the activity complies with the ESA and

that the activity is authorized. *Id.* The Corps determined that General Condition 18 ensures that NWP 12 will have no effect on listed species or critical habitat. NWP005324-26. The Corps declined to initiate Section 7(a)(2) consultation based on that determination. *Id.*

C. The Corps Acted Arbitrarily and Capriciously

Plaintiffs argue that the Corps' failure to initiate Section 7(a)(2) consultation violates the ESA. (Doc. 36 at 6.) Plaintiffs assert that the Corps should have initiated programmatic consultation when it reissued NWP 12 in 2017. (Doc. 36 at 6.) Defendants argue that the Corps properly assessed NWP 12's potential effects and did not need to initiate Section 7(a)(2) consultation. (Doc. 88 at 43.) Defendants assert that the Corps did not need to conduct programmatic consultation because project-level review and General Condition 18 ensure that NWP 12 will not affect listed species or critical habitat. (Doc. 88 at 46.)

To determine whether the Corps' "no effect" determination and resulting failure to initiate programmatic consultation proves arbitrary and capricious, the Court must decide whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983)). The Corps' decisions are entitled to deference. *See Kisor v. Wilkie,* 139 S.

Ct. 2400, 2417-18 (2019); *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

Programmatic consultation proves appropriate when an agency's proposed action provides a framework for future proposed actions. 50 C.F.R. § 402.02. Federal actions subject to programmatic consultation include federal agency programs. *See* 80 Fed. Reg. 26832, 26835 (May 11, 2015); 50 C.F.R. 402.02. A federal agency may develop those programs at the national scale. *Id.* The Services specifically have listed the Corps' nationwide permit program as an example of the type of federal program that provides a national-scale framework and that would be subject to programmatic consultation. *See* 80 Fed. Reg. at 26835.

Programmatic consultation considers the effect of an agency's proposed activity as a whole. A biological opinion analyzes whether an agency action likely would jeopardize a listed species or adversely modify designated critical habitat. 50 C.F.R. §§ 402.02, 402.14(h). This type of analysis allows for a broad-scale examination of a nationwide program's potential impacts on listed species and critical habitat. *See* 80 Fed. Reg. at 26836. A biological opinion may rely on qualitative analysis to determine whether a nationwide program and the program's set of measures intended to minimize impacts or conserve listed species adequately protect listed species and critical habitat. *Id.* Programmatic-level biological opinions examine how the overall parameters of a nationwide program align with

the survival and recovery of listed species. *Id.* An agency should analyze those types of potential impacts in the context of the overall framework of a programmatic action. A broad examination may not be conducted as readily at a later date when the subsequent activity would occur. *Id.*

The Ninth Circuit in *Western Watersheds Project v. Kraayenbrink*, 632 F.3d at 472, evaluated amendments that the Bureau of Land Management ("BLM") made to national grazing regulations. BLM viewed the amendments as purely administrative and determined that they had "no effect" on listed species or critical habitat. *Id.* at 496. The Ninth Circuit rejected BLM's position based on "resounding evidence" from experts that the amendments "'may affect' listed species and their habitat." *Id.* at 498. The amendments did not qualify as purely administrative. The amendments altered ownership rights to water on public lands, increased barriers to public involvement in grazing management, and substantially delayed enforcement of failing allotments. *Id.* The amendments would have a substantive effect on listed species. *Id.*

There similarly exists "resounding evidence" in this case that the Corps' reissuance of NWP 12 "may affect" listed species and their habitat. NWP 12 authorizes limited discharges of dredged or fill material into jurisdictional waters. 82 Fed. Reg. at 1985. The Corps itself acknowledged the many risks associated

with the discharges authorized by NWP 12 when it reissued NWP 12 in 2017. NWP005306.

The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources." NWP005306. Discharges of dredged or fill material can have both permanent and temporary consequences. *Id.* The discharges permanently may convert wetlands, streams, and other aquatic resources to upland areas, resulting in permanent losses of aquatic resource functions and services. The discharges also temporarily may fill certain areas, causing short-term or partial losses of aquatic resource functions and services. *Id.*

The Corps examined the effect of human activity on the Earth's ecosystems. NWP005307. Human activities affect all marine ecosystems. *Id.* Human activities alter ecosystem structure and function by changing the ecosystem's interaction with other ecosystems, the ecosystem's biogeochemical cycles, and the ecosystem's species composition. *Id.* "Changes in land use reduce the ability of ecosystems to produce ecosystem services, such as food production, reducing infectious diseases, and regulating climate and air quality." *Id.* Water flow changes, land use changes, and chemical additions alter freshwater ecosystems such as lakes, rivers, and streams. NWP005308. The construction of utility lines "*will* fragment terrestrial and aquatic ecosystems." *Id.* (emphasis added).

The Corps more specifically discussed that land use changes affect rivers and streams through increased sedimentation, larger inputs of nutrients and pollutants, altered stream hydrology, the alteration or removal of riparian vegetation, and the reduction or elimination of inputs of large woody debris. NWP005310. Increased inputs of sediments, nutrients, and pollutants adversely affect stream water quality. *Id.* Fill and excavation activities cause wetland degradation and losses. NWP005310-11. The Corps emphasized that, although "activities regulated by the Corps under Section 404 of the [CWA]" are "common causes of impairment for rivers and streams, habitat alterations and flow alterations," a wide variety of causes and sources impair the Nation's rivers and streams. NWP005311.

The ESA provides a low threshold for Section 7(a)(2) consultation: An agency must initiate formal consultation for any activity that "may affect" listed species and critical habitat. 50 C.F.R. § 402.14; 16 U.S.C. § 1536(a)(2). The Corps itself has stated that discharges authorized by NWP 12 "*will* result in a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources in the United States." NWP005313. The types of discharges that NWP 12 authorizes "may affect" listed species and critical habitat, as evidenced in the Corps' own Decision Document. The Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017.

Plaintiffs' experts' declarations further support the Court's conclusion that the Corps should have initiated Section 7(a)(2) consultation. These expert declarants state that the Corps' issuance of NWP 12 authorizes discharges that may affect endangered species and their habitats. The ESA's citizen suit provision allows the Court to consider evidence outside the administrative record in its review of Plaintiffs' ESA claim. *See* 16 U.S.C. § 1540(g); *W. Watersheds*, 632 F.3d at 497.

Martin J. Hamel, Ph.D., an assistant professor at the University of Georgia who studies anthropogenic and invasive species' impacts on native riverine species, submitted a declaration stating that the discharges authorized by NWP 12 may affect adversely pallid sturgeon, an endangered species. (Doc. 73-4 at 2, 4, 6.) Pallid sturgeon remain susceptible to harm from pollution and sedimentation in rivers and streams because pollution and sedimentation can bury the substrates on which sturgeon rely for feeding and breeding. (*Id.* at 4.) Fine sentiments can lodge between coarse grains of substrate to form a hardpan layer, thereby reducing interstitial flow rates and ultimately reducing available food sources. Construction activities that increase sediment loading pose a significant threat to the pallid sturgeon populations in Nebraska and Montana. (*Id.*)

Dr. Hamel also stated his understanding that the horizontal directional drilling method ("HDD") for crossing waterways may result in less sedimentation

of the waterway than other construction methods, such as open trench cuts. (Doc. 73-4 at 5.) HDD can result, however, in an inadvertent return of drilling fluid. An inadvertent return of drilling fluid would result in increased sedimentation and turbidity, which would affect aquatic biota such as pallid sturgeon and the species sturgeon rely on as food sources. (*Id.*)

Jon C. Bedick, Ph.D., a professor of biology at Shawnee State University who has worked extensively with the endangered American burying beetle, submitted a declaration detailing his concerns regarding the Corps' failure to analyze NWP 12's threat to the American burying beetle. (Doc. 73-1 at 2-3, 5.) Certain construction activities, including those approved by NWP 12, can cause harm to species such as the American burying beetle. (*Id.* at 5.) Dr. Bedick relayed his concern that the Corps failed to undertake a programmatic consultation with FWS regarding its reissuance of NWP 12. (*Id.*)

NWP 12 authorizes actual discharges of dredged or fill material into jurisdictional waters. 82 Fed. Reg. at 1985. Two experts have declared that the discharges authorized by NWP 12 will affect endangered species. (Docs. 71-1 & 71-3.) The Corps itself has acknowledged that the discharges *will* contribute to the cumulative effects to wetlands, streams, and other aquatic resources. NWP005313. There exists "resounding evidence" from experts and from the Corps that the

discharges authorized by NWP 12 may affect listed species and critical habitat. *See W. Watersheds*, 632 F.3d at 498.

The Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review or General Condition 18. *See* 82 Fed. Reg. 1999; *Conner v. Burford*, 848 F.2d 1441, 1457-58 (9th Cir. 1988). Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level. The Corps must consider the effect of the entire agency action. *See Conner*, 848 F.2d at 1453-58 (concluding that biological opinions must be coextensive with an agency's action and rejecting the Services' deferral of an impacts analysis to a project-specific stage). The Federal Regulations make clear that "[a]ny request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan." 50 C.F.R. § 402.14(c)(4). The regulations do "not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole." *Id.*; *see also Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015) (concluding that the Forest Service needed to reinitiate consultation at programmatic level); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1266-

67 (W.D. Wash. 2007) (holding that deferral of analysis to the project level "improperly curtails the discussion of cumulative effects").

The Ninth Circuit in *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), analyzed what had become commonly known as the "Jamison Strategy." Under the Jamison Strategy, BLM would select land for logging consistent with the protection of the spotted owl. *Id.* at 291. BLM would submit individual timber sales for ESA consultation with FWS, but would not submit the overall logging strategy itself. *Id.* at 292. The Ninth Circuit determined that the Jamison Strategy constituted an action that may affect the spotted owl, because the strategy set forth criteria for harvesting owl habitat. *Id.* at 294. BLM needed to submit the Jamison Strategy to FWS for consultation before BLM implemented the strategy through the adoption of individual sale programs. BLM violated the ESA by not consulting with FWS before it implemented the Jamison Strategy. *Id.*

The district court in *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d at 10, relied, in part, on the Ninth Circuit's holding in *Lane County* when it determined that the Corps' reissuance of NWP 12 in 2002 violated the ESA. In *Brownlee*, the Corps had failed to consult with FWS when it reissued NWP 12 and three other nationwide permits in 2002. *Id.* at 2, 10. Two environmental groups challenged the Corps' failure to consult. *Id.* at 2. The environmental groups argued

that the nationwide permits, including NWP 12, authorized development that threatened the endangered Florida panther. *Id.*

The Corps asserted that NWP 12 complied with the ESA because project-level review would ensure that no harm befell Florida panthers and their habitats. *Id.* at 10. The court disagreed. *Id.* NWP 12 and the other nationwide permits authorized development projects that posed a potential threat to the panther. *Id.* at 3. Large portions of panther habitat existed on lands that could not be developed without a permit from the Corps. *Id.* at 3. Project-level review did not relieve the Corps from considering the effects of NWP 12 as a whole. *Id.* at 10 (citing 50 C.F.R. § 402.14(c)). The Corps needed to initiate overall consultation for the nationwide permits "to avoid piece-meal destruction of panther habitat through failure to make a cumulative analysis of the program as a whole." *Id.*

The same holds true here. Programmatic review of NWP 12 in its entirety, as required by the ESA for any project that "may affect" listed species or critical habitat, provides the only way to avoid piecemeal destruction of species and habitat. *See Brownlee*, 402 F. Supp. 2d at 10; 50 C.F.R. § 402.14(c). Project-level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat. The Corps has an ongoing duty under ESA Section 7(a)(2) to ensure that its actions are not likely to jeopardize the continued existence of endangered and threatened species or result

in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The Corps failed to fulfill that duty when it reissued NWP 12 in 2017.

The Court certainly presumes that the Corps, the Services, and permittees will comply with all applicable statutes and regulations. *See, e.g.*, *United States v. Norton*, 97 U.S. 164, 168 (1887) ("It is a presumption of law that officials and citizens obey the law and do their duty."); *Brownlee*, 402 F. Supp. 2d at 5 n.7 (presuming that permittees will comply with the law and seek the Corps' approval before proceeding with activities affecting endangered species). That presumption does not allow the Corps to delegate its duties under the ESA to permittees.

General Condition 18 fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees. The Corps must determine "at the earliest possible time" whether its actions "may affect listed species or critical habitat." *See* 50 C.F.R. § 402.14(a). The Corps decided that NWP 12 does not affect listed species or critical habitat because General Condition 18 ensures adequate protection. NWP005324-26. General Condition 18 instructs a non-federal permittee to submit a PCN to the district engineer if the permittee believes that its activity "might" affect listed species or critical habitat. 82 Fed. Reg. at 1999-2000. In that sense, General Condition 18 turns the ESA's initial effect determination

over to non-federal permittees, even though the Corps must make that initial determination. *See* 50 C.F.R. § 402.14(a). The Corps' attempt to delegate its duty to determine whether NWP 12-authorized activities will affect listed species or critical habitat fails.

The Corps remains well aware that its reauthorization of NWP 12 required Section 7(a)(2) consultation given the fact that it initiated formal consultation when it reissued NWP 12 in 2007 and continued that consultation during the 2012 reissuance. NWP031044. NMFS released a biological opinion, which concluded that the Corps' implementation of the nationwide permit program has had "more than minimal adverse environmental effects on the aquatic environment when performed separately or cumulatively." (Doc. 75-9 at 222-23.) The Corps reinitiated consultation to address NMFS's concerns, and NMFS issued a new biological opinion in 2014. NWP030590. The Corps' prior consultations underscore the need for programmatic consultation when the Corps reissued NWP 12 in 2017.

Substantial evidence exists that the Corps' reissuance of NWP 12 "may affect" listed species and critical habitat. This substantial evidence requires the Corps to initiate consultation under ESA Section 7(a)(2) to ensure that the discharge activities authorized under NWP 12 comply with the ESA. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14. The Corps failed to consider relevant

expert analysis and failed to articulate a rational connection between the facts it found and the choice it made. *See W. Watersheds*, 632 F.3d at 498. The Corps' "no effect" determination and resulting decision to forego programmatic consultation proves arbitrary and capricious in violation of the Corps' obligations under the ESA. The Corps should have initiated ESA Section 7(a)(2) consultation before it reissued NWP 12 in 2017. The Corps' failure to do so violated the ESA.

These failures by the Corps entitle the Plaintiffs to summary judgment regarding their ESA Claim. The Court will remand NWP 12 to the Corps for compliance with the ESA. The Court vacates NWP 12 pending completion of the consultation process. The Court further enjoins the Corps from authorizing any dredge or fill activities under NWP 12.

II. PLAINTIFFS' REMAINING CLAIMS

Plaintiffs further allege that NWP 12 violates both NEPA and the CWA. (Doc. 36 at 73-77, 81-84.) Plaintiffs, the Corps, and TC Energy each have moved for summary judgment regarding Plaintiffs' NEPA and CWA Claims. (Doc. 72 at 2; Doc. 87 at 2; Doc. 90 at 2.) The Court already has determined that the Corps' reissuance of NWP 12 violated the ESA, remanded NWP 12 to the Corps for compliance with the ESA, and vacated NWP 12 pending completion of the consultation process.

The Court anticipates that the Corps may need to modify its NEPA and CWA determinations based on the Corps' ESA Section 7(a)(2) consultation with the Services, as briefly discussed below. The Court will deny without prejudice all parties' motions for summary judgment regarding Plaintiffs' NEPA and CWA claims pending ESA Section 7(a)(2) consultation and any further action by the Corps.

A. The National Environmental Policy Act

Plaintiffs allege that NWP 12 violates NEPA because the Corps failed to evaluate adequately NWP 12's environmental impacts. (Doc. 36 at 4.) Congress enacted NEPA to ensure that the federal government considers the environmental consequences of its actions. *See* 42 U.S.C. 4331(b)(1). NEPA proves, in essence, to be a procedural statute designed to ensure that federal agencies make fully informed and well-considered decisions. *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 18 (D.D.C. 2013). NEPA does not mandate particular results, but instead prescribes a process to ensure that agencies consider, and that the public is informed about, potential environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA requires a federal agency to evaluate the environmental consequences of any major federal action "significantly affecting the quality of the human environment" before undertaking the proposed action. 42 U.S.C. § 4332(C). A

federal agency evaluates the environmental consequences of a major federal action through the preparation of a detailed environmental impact statement ("EIS"). 40 C.F.R. § 1501.4. An agency may opt first to prepare a less-detailed environmental assessment ("EA") to determine whether a proposed action qualifies as a "major federal action significantly affecting the quality of the human environment" that requires an EIS. *Id.* The agency need not provide any further environmental report if the EA shows that the proposed action will not have a significant effect on the quality of the human environment. 40 C.F.R. § 1501.4(e); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757-58 (2004).

The Corps conducted an EA in the process of reissuing NWP 12. NWP005289. The Corps determined that the issuance of NWP 12 would not have a significant impact on the quality of the human environment. NWP005340. The Corps accordingly concluded that it did not need to prepare an EIS. *Id.* Plaintiffs argue that the EA proves insufficient under NEPA for various reasons. (Doc. 73 at 17-34.)

The Decision Document detailed NWP 12's environmental consequences. NWP005303-5317. The Court anticipates that the ESA Section 7(a)(2) consultation will further inform the Corps' NEPA assessment of NWP 12's environmental consequences. Armed with more information, the Corps may decide to prepare an EIS because NWP 12 represents a major federal action that

significantly affects the quality of the human environment. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4.

B. The Clean Water Act

Section 404(e) of the CWA allows the Corps to issue nationwide permits for categories of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The Decision Document evaluated NWP 12's compliance with CWA Section 404 permitting guidelines. NWP005340. The Corps concluded that the discharges authorized by NWP 12 comply with the CWA. *Id.* The Corps specifically noted that the activities authorized by NWP 12 "will result in no more than minimal individual and cumulative adverse effects on the aquatic environment." *Id.*

Plaintiffs allege that NWP 12 violates the CWA because NWP 12 authorizes activities that will cause more than minimal adverse environmental effects. (Doc. 36 at 5.) Plaintiffs note that, although NWP 12 authorizes projects that would result in no more than one-half acre of water loss, linear utility lines may use NWP 12 repeatedly for many water crossings along a project's length. Plaintiffs argue that this repeated use causes more than minimal adverse environmental effects. (*Id.*)

The Court similarly anticipates that the ESA Section 7(a)(2) consultation will inform the Corps' CWA assessment of NWP 12's environmental effects. The

Corps' adverse effects analyses and resulting CWA compliance determination may change after ESA Section 7(a)(2) consultation brings more information to light.

At this point in the litigation, the Court does not need to determine whether the Corps made a fully informed and well-considered decision under NEPA and the CWA when it reissued NWP 12 in 2017. The Court has remanded NWP 12 to the Corps for ESA Section 7(a)(2) consultation. The Court anticipates that the Corps will conduct additional environmental analyzes based on the findings of the consultation.

ORDER

It is hereby **ORDERED** that:

1. Plaintiffs' Motion for Partial Summary Judgment (Doc. 72) is **GRANTED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court grants Plaintiffs' motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice Plaintiffs' motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

2. Federal Defendants' Motion for Partial Summary Judgment (Doc. 87) is **DENIED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court denies Federal Defendants' motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice Federal

Defendants' motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

3. TC Energy's Motion for Partial Summary Judgment (Doc. 90) is **DENIED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART**. The Court denies TC Energy's motion for summary judgment regarding Plaintiffs' ESA Claim, Claim Four. The Court denies without prejudice TC Energy's motions for summary judgment regarding Plaintiffs' NEPA and CWA Claims, Claims One and Two.

4. NWP 12 is remanded to the Corps for compliance with the ESA.

5. NWP 12 is vacated pending completion of the consultation process and compliance with all environmental statutes and regulations.

6. The Corps is enjoined from authoring any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations.

DATED this 15th day of April, 2020.

Brian Morris, Chief District Judge
United States District Court