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.	§	**CASE NO. 1:20-cv-00138-RP**
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	§	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

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 Memorandum in Support of Plaintiffs' Application for Preliminary Injunction, and would show the Court as follows:

INTRODUCTION

This case concerns Kinder Morgan's rush to construct the Permian Highway Pipeline ("PHP" of "Pipeline") through some of the most sensitive environmental features in Central Texas and the Texas Hill Country without engaging in the extensive public planning and review processes that Congress explicitly designed to protect these resources in the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Plaintiffs are local governmental entities, a groundwater conservation district, and affected landowners who have consistently objected to Kinder Morgan's precipitous rush to construct the pipeline without adequate process and protections for imperiled species and their essential, fragile habitat. If Kinder Morgan proceeds as planned, Plaintiffs' legally protected interests will be irreparably harmed.

And the need for emergency relief is particularly urgent. Kinder Morgan is publicly proclaiming that it intends to start the activities to which this preliminary injunction request is directed by February 15—if not earlier.

The PHP is a proposed 430-mile natural gas pipeline, 42 inches in diameter, which is designed to transport about 2 billion cubic feet of natural gas per day. Kinder Morgan plans to route the PHP through the Central Texas Hill Country, traversing sensitive environmental features, including the Edwards and Trinity Aquifer recharge zones as well as habitat for many endangered species. The current plan entails destroying hundreds of acres of habitat for the endangered Golden-cheeked warbler ("GCW" or "warbler") and cutting and clearing through the Central Texas oak forest during the period when all relevant experts recommend against cutting or pruning oak trees to prevent the spread of oak wilt. Kinder Morgan has made various public statements about its progress on PHP construction, but has provided very little information to affected landowners and local governments regarding the final route, timing, construction methods, and

mitigation plans to protect vulnerable aquatic and land-based species that will be affected, despite Plaintiffs' frequent requests for more information and public hearings. In short, the public—affected landowners and local governments included—have been largely frozen out of the interactions of Kinder Morgan and the federal Defendants.

Plaintiffs are seeking emergency injunctive relief from the Court at this time because Kinder Morgan has publicly declared its imminent plans to begin clearing and construction activities in the Texas Hill Country, despite Plaintiffs' repeated and detailed notice to Kinder Morgan that these activities constitute violations of the ESA and NEPA. Kinder Morgan is contacting landowners in the Pipeline's path and informing them that clearing and construction will begin imminently, and has announced publicly that as of January 29, 2020 it has secured the legal right under Texas law to take those actions along the *entire* pipeline route.

The timing of Kinder Morgan's Hill Country construction activities could not be worse—February marks the start of the period when experts recommend against cutting or pruning oak trees to prevent the spread of oak wilt, a devastating epidemic in the Central Texas oak forest, and nesting pairs of endangered Golden-cheeked warblers will return to Central Texas for their annual nesting and mating activities late February. *See* Golden-cheeked warbler (*Setophaga chrysoparia*), 5-Year Review: Summary and Evaluation, U.S. Fish and Wildlife Service, at 2 (August 26, 2014).

As set forth below, plaintiffs clearly satisfy the standards for a preliminary injunction. Myriad studies highlight the risk to endangered warblers and their habitat from clearing and construction on the proposed PHP route as well as the risks to sensitive aquifers and federally listed aquatic species from the trenching and blasting activities required to construct the pipeline. The extensive harm to these endangered and highly imperiled species, and to Plaintiffs' aesthetic,

recreational, conservation, and financial interests in these species and their habitat, will be irreparable. Moreover, if Kinder Morgan is permitted to rush to start clearing and trenching for its construction and installation of the PHP, this Court's ability to render any meaningful relief on the merits of Plaintiffs' substantial claims would almost certainly become moot.

The public interest will also plainly be served by issuance of a preliminary injunction. The U.S. Supreme Court has held that the public interest tips heavily in favor of protecting endangered and threatened species. In addition, the public interest will be served by an injunction because it will allow the parties and this Court to explore how to harmonize two laudable goals: the congressionally mandated protection of endangered species pursuant to the ESA, and the transportation of natural gas from its source to processing and transportation terminals to help move it into commerce. Without an injunction that will permit this Court to fully consider the merits of plaintiffs' claims, the PHP will become a *fait accompli*, thereby making enforcement of the ESA and harmonizing of those goals an impossibility. Only Kinder Morgan's commercial goal would be served, and the ESA's goals would be completely subverted.

In sum, Plaintiffs seek a temporary halt to Kinder Morgan's clearing and construction activities in the environmentally sensitive Hill Country ecosystem to allow for resolution on the merits of the important legal issues before this Court.[1]

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[1] Recognizing Kinder Morgan's interest in resolving the merits of this case in an expeditious fashion, Plaintiffs are amenable to a reasonable time frame for litigating the merits of this case after issuance of a preliminary injunction. In other words, Plaintiffs will not seek to unnecessarily protract this litigation should the Court grant the relief sought herein.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK

A. The Endangered Species Act

For purposes of this lawsuit and the motion for a preliminary injunction, the relevant sections of the Endangered Species Act are Section 9 (the prohibition on "take") and Section 10 (the exception to that prohibition for lawfully permitted incidental take resulting from non-federal projects). But, as explained below, Kinder Morgan appears to be privately enlisting the cooperation of the U.S. Army Corps of Engineers ("Corps") and the U.S. Fish and Wildlife Service ("Service") to manipulate the Section 7 process (the consultation process for "action agencies" and "consulting agencies") to shield the PHP's Hill Country construction and operation activity from the deep and rich environmental review demanded by the ESA. This subterfuge cannot withstand scrutiny.

As explained by the Supreme Court, the "plain intent of Congress [in enacting the ESA] was to halt and reverse the trend towards species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Section 9 of the ESA embodies this plain intent by making it unlawful for "any" person to "take" any endangered species without a permit issued by the Service. *See Gibbs v. Babbitt*, 214F.3d 483, 487 (4th Cir. 2000) (citing 16 U.S.C. § 1538(a)(1)(B) ("it is unlawful for any person . . . to . . . take any [endangered] species within the United States . . . .")). An endangered species—such as the warbler, the Austin blind salamander, the Barton Springs salamander, and the other listed aquatic species at issue here—is one that has been determined by the Service to be "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

The ESA broadly defines "take" to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19); *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687, 704-05 (1995). Thus, the ESA defines "take" in the "broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (citation omitted).

In addition, the Service's regulations further define "harm" as:

> [A]n action which actually kills or injures wildlife. Such act may include 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. The Service's regulations also broadly define "harass" to mean any:

> 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 which include, but are not limited to, breeding, feeding, or sheltering.

Id. Every take, in every form defined above, is prohibited by the ESA. 16 U.S.C. § 1538(a)(1)(B).

However, that a party's actions will "take" a listed species does not necessarily mean that the action may not proceed. There are two narrow mechanisms through which a party may secure a safe harbor from ESA take liability: by seeking and obtaining a Section 10 Incidental Take Permit ("Section 10 ITP") from the Service for projects not dependent on a federal permit (and therefore lacking a federal action agency); or, for projects requiring a federal permit, through Section 7 consultation between the federal action agency and the Service, which results in an Incidental Take Statement ("ITS") from the Service that must be fully incorporated in and enforceable under the action agency's permit.

Under Section 10, the Service may provide incidental take coverage under the ESA for private projects (or portions of private projects) that are not subject to the jurisdiction of any federal action. Specifically, the Service may issue a permit allowing the taking of a listed species where such take is "incidental to, and not the purpose of, carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). The Section 10 application process entails rigorous study of the impacts of a proposed project, substantial public participation, and strict controls on the project if approved.

For example, an applicant seeking a Section 10 ITP must submit a detailed Habitat Conservation Plan ("HCP") describing, among other things:

(1) the impacts of the proposed taking;
(2) procedures the applicant will use to mitigate, monitor, and minimize such impacts;
(3) an explanation of why there are no feasible alternatives to the proposed taking; and
(4) information establishing that sufficient funding exists to implement the plan.
Id. § 1539(a)(2)(A); see also 50 C.F.R. § 17.22.

In addition, before issuing a Section 10 ITP, the Service must determine that the applicant's 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).

Moreover, because the Service's issuance of a Section 10 ITP for a private project is itself a major Federal action, the Service must subject its decision whether to issue the Section 10 ITP to analysis under NEPA in an Environmental Impact Statement ("EIS") or, at bare minimum, an Environmental Assessment ("EA"). Both of these environmental studies are subject to public comment. *See* FWS & NMFS Habitat Conservation Planning Handbook ("HCP Handbook") at

Chapter 13 (2016), https://www.fws.gov/endangered/esalibrary/pdf/HCP_ Handbook.pdf. The Service's issuance of a Section 10 ITP also imposes legal obligations on the Service under the National Historic Preservation Act ("NHPA"). *See id.* at Chapters 12 & 17.

Finally because the Service's issuance of a Section 10 ITP is itself an action subject to the consultation requirements of Section 7 of the ESA, the Service must "self-consult" with itself to ensure that the action will not jeopardize any listed species or destroy or modify any critical habitat. *See id.* at 14-29 (discussing "intra-Service consultation").

The Section 7 process is quite different from the Section 10 process. Section 7 requires federal agencies to engage in consultation with the Service before undertaking any action that may have direct or indirect effects on any listed species, in order to evaluate the impact of the proposed action. *See id.* § 1536(a)(2). The term "action" is broadly defined to cover the issuance of federal permits. *See* 50 C.F.R. § 402.02(c) ("*Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," including "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid."). Because a very small portion of the PHP will cross some "Waters of the United States" in the form of ponds and streams (perennial, intermittent and ephemeral), Kinder Morgan must receive authorization from the Corps in the form of a Clean Water Act ("CWA") Section 404 permit for those crossings. 33 U.S.C. § 1344. Issuing a Section 404 permit is an "action" that triggers the ESA's Section 7 consultation process.

Under Section 7, before a federal agency may issue a permit for a proposed project that "may affect" listed species or critical habitat it must undertake formal consultation[2] with the

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[2] There is also an optional process called informal consultation 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. If, after preparing a biological assessment, the action agency

Service.[3] 50 C.F.R. § 402.14; see also FWS & NMFS, Endangered Species Consultation Handbook ("Consultation Handbook") at 3-13 (1998), https://www.fws.gov/endangered/esalibrary/pdf/esa_section7_ handbook.pdf. One of the primary purposes of consultation is to ensure that the action at issue "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated] habitat of such species." 16 U.S.C. § 1536(a)(2). To accomplish this goal, the Service must prepare a biological opinion, which provides the Service's analysis of the best available scientific data on the status of each affected species and how it would be affected by the proposed action. At the end of the formal consultation process, the Service must determine whether the proposed action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify any designated critical habitat.

If the Service determines that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat, but that the proposed action will nevertheless result in the incidental taking of listed species, then the Service must provide the action agency with a written ITS specifying the "impact of such incidental taking on the species" and "any reasonable and prudent measures that the [consulting agency] considers necessary or appropriate to minimize such impact" and setting forth "the terms and conditions . . . that must be complied with by the [action] agency . . . to implement [those measures]." 16 U.S.C. § 1536(b)(4).

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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 and no formal consultation is required. 50 C.F.R. § 402.14(b).

[3] The National Marine Fisheries Service, rather than the U.S. Fish and Wildlife Service, serves as a consulting agency for federal actions that may jeopardize endangered marine species. But for purposes of this Memorandum we will refer to the Service as the consulting agency, since no marine species or habitat is affected by the PHP.

On the other hand, if the Service determines that the action will jeopardize a listed species or will destroy or adversely modify designated critical habitat, then the Service must offer the action agency reasonable and prudent alternatives to the proposed action that will avoid jeopardy to listed species or adverse habitat modification, if such alternatives exist. *Id.* § 1536(b)(3)(A).

The Service cannot authorize incidental takes through Section 7 consultation. Neither a Biological Opinion nor an ITS are a permit for the incidental take of federally listed species, because under the Section 7 consultation process the Service is a consulting agency, not a permitting or authorizing agency. Thus, an ITS is not a safe harbor from take liability until it is incorporated into an action agency's permit and fully enforceable under that permit. As the Section 7 Handbook makes clear, "when writing incidental take statements, [Service staff must] use only the phrase "anticipated" rather than "allowable" or "authorized," as the [Service] do[es] not allow or authorize (formally permit) incidental take under section 7." Section 7 Handbook, *supra,* at x. Without a legally adequate biological opinion and ITS in place and fully enforceable under the federal action agency's permit, any activities likely to result in incidental take of members of listed species are unlawful. *Id.* § 1538(a)(1)(B). Accordingly, anyone who undertakes such activities, or who authorizes such activities, *id.* § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens or others for declaratory and injunctive relief. *See id.* § 1540.

Often, Section 7 consultation and the resulting ITS will cover the entire scope of take associated with a federally authorized project because the action agency exerts jurisdiction and exercises authority over the entire project. However, in other circumstances—as is the case here—a project proponent will need federal authorization for only a portion of its project, and the action agency for consultation purposes cannot exert lawful jurisdiction over the entire project. In those

circumstances, a Section 7 ITS cannot insulate the project proponent from take liability in the areas outside the action agency's jurisdiction. In such scenarios, either: (1) the project proponent can seek a Section 10 ITP (and prepare an accompanying HCP) for the entire project in the absence of any Section 7 consultation by the action agency with limited jurisdiction; or (2) the action agency can consult with the Service over the portions of the project where the action agency exerts jurisdiction, but the project proponent must separately seek a Section 10 ITP (and prepare an HCP) to "supplement coverage of a project's incidental take when another Federal agency does not exert jurisdiction over a project's full scope of interrelated and interdependent effects." HCP Handbook at 3-21.

Finally, the Section 7 of the ESA contains an important provision designed to stall the progress of proposed projects during the pendency of a consultation. Under this provision, after the initiation of Section 7 consultation (and before the issuance of a lawful ITS by the consulting agency), the action agency and any permit applicant are prohibited from making "any irreversible or irretrievable commitment[s] of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." *Id.* § 1536(d).

The ESA authorizes any person to bring a civil suit to "enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." *Id.* §1540(g)(1). Congress further provided that the "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation . . . ." *Id.* Hence, as the Supreme Court has unanimously held, the ESA citizen suit provision creates an "authorization of remarkable breadth when compared with the language Congress ordinarily uses," and this plain language must be taken "at face value" and as a reflection

of the "obvious purpose" of Congress to "encourage enforcement by so-called 'private attorneys general.'" *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997).

In this action, plaintiffs seek to enforce the ESA through an injunction preventing any further clearing and construction of the PHP in the sensitive Hill Country ecosystems supporting endangered bird and aquatic species until Kinder Morgan applies for and obtains a Section 10 ITP from the Service (or is granted incidental take coverage through participation in a regional HCP by a local government, a conservation districts, or other entity authorized to approve participation), which is the specific procedure Congress created in Section 10 of the ESA whenever an action will "take" a listed species. In short, Plaintiffs are simply asking this Court to compel Kinder Morgan to avoid harm to highly imperiled species until and unless it has complied with the plain terms of the ESA that Congress deemed necessary to avoid unlawful take of listed species.

B. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., establishes procedures designed to fully inform agency decisionmakers of the environmental impact of their decisions. NEPA was adopted to implement Congressional belief that "decisions that are based on understanding of the environmental consequences" will "protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). "NEPA exists to ensure a process, not a result." *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 539, 575 (9th Cir. 1998). Thus, NEPA does not forbid harm to the environment but requires government decisionmakers to evaluate that harm and explain why the action is justified despite the harm:

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account.
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> *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir.1983).

To that end, NEPA requires the preparation of an Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The issuance of a Section 10 ITP that authorizes a project to proceed is a "major federal action" for purposes of NEPA. *Cf., Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) (holding that issuance of a BiOp and ITS is a major federal action because the project could not proceed without the ITS).

An agency considering whether an action would require preparation of an EIS must prepare a brief, preliminary evaluation, called an environmental assessment ("EA"). EAs are intended to be concise documents that "briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a 'finding of no significant impact' ("FONSI")." 40 C.F.R. § 1508.9. An agency must prepare an EIS if "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir.1992) (emphasis in original).

An EIS shall thoroughly discuss the environmental impacts of a proposed alternative, including direct and indirect effects, and shall "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14. 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 and also request comments from 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 then must "assess and consider comments both individually and collectively" and state "its response in the final [EIS]." This notice and comment period for the preparation of the EIS is essential to its information forcing role in agency decisions. 40 C.F.R. § 1503.3(a).

C. The Administrative Procedure Act

Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., 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). In addition, Section 553 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).

II. FACTUAL AND SCIENTIFIC BACKGROUND

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

The pipeline's chosen route—which has never been reviewed or approved by a state agency—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. The pipeline will cut a 125-foot wide swath across thousands of acres of private land, disturbing the peace, solitude, and quiet enjoyment of their land by more than one thousand private landowners throughout its length.

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

And there is more. 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 seven federally listed, entirely aquatic species whose only habitat is in the vicinity of this project. These species rely on clean, well-oxygenated spring water with sediment-free substrates to survive (City of Austin 2013; McKinney and Sharp 1995; Schenck and Whiteside 1977a; USFWS 1996b, Longley 1978; Berkhouse and Fries 1995; USFWS 2013). This water is

likely to be adversely affected (or contaminated) by the construction, operation, and maintenance of the pipeline. More specifically, groundwater contamination can occur from construction activities, catastrophic hazardous material spills, chronic leakage or acute spills of petroleum and petroleum products, and pipeline ruptures. The degradation in groundwater quality that is likely to occur from the construction, operation, and maintenance of the pipeline will result in the "take" of federally listed species in violation of Section 9 of the ESA.

With respect to the Barton Springs salamander, the porous structure of the Barton Springs Segment of the Edwards Aquifer creates conduits large enough to allow for rapid subterranean flow of water underground from the recharge zone to Barton Springs, as documented by multiple dye tracing studies (Hauwert et al. 2014). Water recharging the Edwards Aquifer from the Blanco River can discharge at either San Marcos Springs or Barton Springs, and the Blanco River is a critical source of water to maintain flow for the endangered salamanders at Barton and San Marcos Springs during periods of extreme drought (Smith et al. 2015). The principal threat to these salamander species is degraded water quality and quantity. This degradation can occur when siltation of its habitat results from sediment release by construction activities. The siltation can clog gills, smother eggs, and reduce water circulation and oxygen availability. It can also occur when there are illegal discharges of pollutants, pipeline ruptures, or chronic leakage and acute spills of petroleum and petroleum products, into the Edwards Aquifer. These activities could kill, harm, and/or harass the Barton Springs salamander, the Austin blind salamander, the San Marcos salamander, the Texas blind salamander, the fountain darter, the Comal Springs dryopid beetle, and the Comal Springs riffle beetle and their habitat resulting in take in violation of Section 9—absent a federal permit which fully incorporates and enforces an ITS or a Section 10 ITP, neither of which appears to exist.

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 potential significant threat to the species. According to the Service, "energy pipelines are [a] source of potential hazardous material spills." 78 Fed. Reg. 161, 51302 (August 20, 2013). If the water quality is degraded because of an energy pipeline, the degradation "could by itself cause irreversible declines, extirpation, or significant declines in habitat quality" for the Austin Blind salamander. 78 Fed. Reg. 161, 51302 (August 20, 2013). In addition to hazardous material spills, the Austin blind salamander's habitat could be impacted by tunneling for underground pipelines. The degradation that could result from the construction and operation of the pipeline could harm or harass the Austin Blind salamander and its habitat resulting in take in violation of Section 9 of the Act.

Although Kinder Morgan has relentlessly pursued the PHP project in a vacuum of public information, Plaintiffs have good reason to believe that it is currently consulting with the Corps to utilize a series of individual Nationwide Permit 12 ("NWP 12") verifications to authorize individual stream crossings, rather than seeking a more rigorous project-specific and comprehensive individual Section 404 permit that would cover the entire pipeline project. It is also Plaintiffs' understanding that Kinder Morgan intends to proceed through the Section 7 consultation process in a thinly-veiled effort to improperly claim the benefit of an ITS, which will be written by the Service as part of the federal agency to agency consultation process under Section 7. While this option is available to Kinder Morgan for a portion of the PHP route (i.e., the limited locations of the project route where the Corps has federal jurisdiction over PHP stream crossings), the Section 7 consultation process cannot provide legally binding protection against unlawful takes of

listed species for the vast majority of the route in the Hill Country that falls outside of federal jurisdiction or authority.

Nonetheless, it is Plaintiffs' understanding that Kinder Morgan does not intend to seek (let alone obtain) a Section 10 ITP, nor prepare an HCP subject to public comment and scrutiny, for the entire project or even the upland portions of the project that are outside of the Corps' jurisdiction. By declining to apply for a Section 10 ITP to cover the extensive private, non-federally permitted portions of the PHP in the fragile ecosystems of the Hill Country, Kinder Morgan is seeking to clear sensitive habitat and blast and trench through the complex and porous karst system that sustains sensitive aquifer resources and species without undergoing the important environmental reviews, transparency, and public comment opportunities that are crucial to the effective enforcement of the ESA and other federal environmental laws (and thus the conservation of endangered species and their habitat).

STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

"A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision after a trial on the merits." *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). The decision to grant or deny a motion for preliminary injunction "rests in the discretion of the district court." *Id.* Nonetheless, as with all equitable relief, a preliminary injunction is an "extraordinary remedy" that should be granted only if the movant establishes: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536–37 (5th Cir. 2013) (quoting *Byrum v.*

Landreth, 566 F.3d 442, 445 (5th Cir. 2009)). As shown below, Plaintiffs amply establish each of these prerequisites to injunctive relief.

The preliminary injunction is a particularly important tool in enforcing the ESA. As courts have long recognized, injuries to endangered species are seldom remedied by monetary relief and are therefore more likely to be irreparable. Such injuries generally suffice to demonstrate both standing and irreparable harm. *See, e.g*., *Lujan v. Defenders of Wildlife*, 504 U.S.555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); *Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable. . . [thus] constitut[ing] an imminent, irreparable injury warranting the grant of a preliminary injunction.").

Indeed, many courts have held that the deliberate balance struck by Congress in the ESA has "removed from courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests." *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994). At the very least, the Supreme Court has made clear that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has

been struck in favor of affording endangered species the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *id.* at 185 (the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies").

In addition, "the mere fact that economic damages may be available does not always mean that a remedy at law is 'adequate.'" *Janey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). Instead, "[a]n irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be 'especially difficult to calculate.'" *Heil Trailer Intern. Co. v. Kula*, 542 Fed.Appx. 329, 335 (5th Cir. 2013). Injuries for which damages would be "especially difficult to calculate" include cases in which trade secrets have been misappropriated and may be used to the detriment of owner of the trade secrets, see *Heil Trailer,* 542 Fed.Appx. at 336, or when trademark infringement might lead to loss of goodwill and damage to reputation. *See, e.g., Emerald City Management, L.L.C. v. Kahn*, 624 Fed.Appx. 223 (5th Cir. 2015). In such cases the difficulty of calculating the full amount of injury inflicted by the unlawful conduct renders that injury irreparable. *See Emerald City Management, L.L.C. v. Kahn*, 624 Fed.Appx. at 224-25 (explaining that the most corrosive and irreparable harm attributable trademark infringement is the inability of the victim to control the nature and quality of the infringer's goods, and that such injury cannot be quantified"). Similarly, the full extent of the loss of future tourist income from the despoiling of Barton Springs, Jacob's Well, and other valuable water resources dependent on the Edwards Aquifer would be "especially difficult to calculate" and therefore irreparable.

Finally, while a preliminary injunction is an extraordinary remedy, it remains an important and essential tool in a district court's arsenal, enabling a court "to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 627 (5th Cir. 1985). Thus, "[a]lthough the

fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Callaway*, 489 F.2d at 573 (citing Wright & Miller, Federal Practice and Procedure: Civil § 2947). As the Fifth Circuit has stated, "where a district court has determined that a meaningful decision on the merits would be impossible without an injunction, the district court may maintain the status quo and issue a preliminary injunction to protect a remedy, including a damages remedy . . . ." *Janey v. Alguire, 647 F.3d 585, 600 (5th Cir. 2011) (quoting Productos Carnic, S.A. v. Cent. Amer. Beef & Seafood Trading Co.*, 621 F.2d 683, 686–87 (5th Cir.1980)).

Here, Kinder Morgan hopes to both begin its clearing and construction activity in these four Counties imminently (indeed, within the next week) and finish as soon as they can, notwithstanding Plaintiffs' credible allegations that those actions will violate the ESA, NEPA, the APA and other federal laws, resulting in irreparable harm to Plaintiffs. If this Court declines to issue an injunction, Kinder Morgan will complete these likely illegal actions before the Court can rule on the merits of Plaintiffs' claims, rendering the judicial process futile.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS THAT KINDER MORGAN'S PROPOSED ACTIONS WILL LIKELY VIOLATE THE ESA AND NEPA.

In the absence of an Section 10 ITP or other federal permit expressly authorizing take of federally listed species—which Kinder Morgan is not seeking at this time and has no intention to obtain before engaging in ground disturbing activities in connection with the PHP—Kinder Morgan's actions are likely to result in unlawful take of endangered species in violation of Section 9 of the ESA. To the extent the Service intends to treat its Section 7 consultation process as providing a safe harbor for Kinder Morgan's incidental takes in the non-federal portions of the

PHP, it's actions violate Section 10 of the EPA and NEPA. Thus, Plaintiffs are likely to prevail on the merits of these claims.

A. Kinder Morgan's clearing and construction activity for the PHP will likely result in unlawful "take" under Section 9 of the ESA.

Section 9 of the ESA prohibits all persons from "taking" federally listed species. By regulation, the Service defines "harm" in the definition of "take" to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering or which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include breeding, feeding, or sheltering. 50 C.F.R. § 17.3(c). Clearing for and construction of the PHP will likely result in take of endangered warblers and may result in take of listed aquatic species that depend on clear strong flows of groundwater through the Edwards and Trinity Aquifers. If Kinder Morgan proceeds with clearing and construction for the PHP without a Section 10 ITP or other federal permit authorizing the take of federally listed species, every single take of an individual of these species will be unlawful under Section 9 of the ESA.

In contrast to Kinder Morgan's lack of publicly available analysis of the effects of its actions in connection with the PHP, Plaintiffs have conducted extensive studies examining the impacts to listed species and their habitat. Although these detailed evaluations are necessarily limited by Kinder Morgan's refusal to provide information on the timing, methods, and mitigations measures it envisions for the PHP, these assessments constitute the best available scientific evidence regarding the likely impacts to myriad endangered species residing in the vicinity of the PHP route. The clear import of these scientific analyses is that Kinder Morgan's proposed activities, undertaken during prime oak wilt spreading season and either just before or within the

nesting and breeding season for the warbler, will inevitably result in takes of the warbler through direct and indirect effects.

For example, according to Plaintiffs' expert, Jennifer Blair, Certified Wildlife Biologist, "the proposed PHP will cross through the southern third of the GCWs range in Kimble, Gillespie, Blanco and Hays counties, Texas. GCW habitat lies within the project boundaries and 300 feet buffer zones, with an estimated 548 acres of GCW habitat occurring within the PHP's footprint and an estimated 2,355 acres of GCW habitat within 300 feet of the PHP footprint." Exhibit 4, Attachment A (Blair Report 2019) at 10 (henceforth, "Blair Report"). Moreover, the proposed PHP route will cross directly through 44 confirmed oak wilt centers," with over "403 additional oak wilt centers located within the immediate vicinity of the proposed route." *Id.* at 11.

Blair concludes that the PHP will "take" GCWs by both direct and indirect adverse effects. Direct effects are likely because warblers "are highly territorial and show strong fidelity to breeding sites. . . . Thus, habitat that is used by these species during the breeding season is still considered occupied when the species is on the wintering grounds. The removal of suitable breeding habitat for these species is a direct effect if the species is seasonally occupying the habitat." Blair Report 2019, at 12. In addition, habitat loss can result in direct takes: "The removal of woody vegetation from occupied habitats reduces the necessary components to support the species' essential life history needs. Depending on the extent of vegetation removal, such actions would limit the available resources for the species, may result in reduced fitness, and may result in extirpation of the species from the affected area. The ultimate result of adverse effects to individuals may be impossible to calculate, but it is very likely that the effects would result in 'take' to individuals in some capacity (e.g., reduced fitness, territory abandonment, increased

predation or exposure) due to modification and/or degradation of habitat previously utilized by the species." Blair Report at 12.

Kinder Morgan's clearing and construction along the proposed PHP will also result in significant adverse indirect effects on the warbler. Blair explains that "[i]ndirect effects are anticipated in suitable habitats adjacent to cleared ROW. Because the habitat directly affected could be cleared outside of the majority of breeding season, indirect effects may occur upon the arrival of returning birds to the affected habitat. These effects include edge effects, habitat fragmentation, and displacement." Blair Report at 12. Indeed, edge effects are particularly detrimental to the warbler, as "increased edge density within GCW habitat has been shown to result in a decline in nest survival (Peak et al. 2007b)." Blair Report at 12. The Service considers edge effects from habitat removal to extend 300-ft into adjacent warbler habitat. Blair Report at 12. This is because, "depending on the size and configuration of the affected habitat patch with respect to the cleared ROW, adjacent habitat patches may be rendered too small to support the [warbler], or may support the species but at reduced densities and/or result in eventual extirpation." Blair Report at 12. Blair explains that "[f]ragmentation of habitat resulting from the ROW is also particularly harmful to the warbler, which may not cross cleared corridors >10 meters (32 feet) in width (Horne 2000) and may result in reduced productivity associated with smaller habitat patches (Maas-Burleigh 1998, Coldren 1998)." Blair Report at 12 Finally, the 125-wide clearing for the PHP in warbler habitat is likely to have adverse displacement effects. Depending on the present density of birds in the cleared habitat and available habitat remaining after the clearing, warblers attempting to return to the cleared habitat will be forced to try to nest in adjacent habitats. These warblers may be unable to find suitable habitat for nesting and mating and may therefore suffer loss of productivity. Blair Report at 12.

In sum, Blair concludes that the "significant impairment to feeding, sheltering, and breeding activities will undoubtedly result in the actual death or injury to GCW through elimination of feeding and sheltering habitat, significant fragmentation of high quality habitat created by a 125-foot scar on the landscape, and the loss of reproductive success due to the elimination of breeding habitat, nesting areas, and nest abandonment due to disturbance related to construction, operation, and maintenance of the PHP." Blair Declaration, Exh. 4, ¶ 7.

In addition to the destruction of warbler habitat, the presence of oak wilt in and near the proposed PHP route and the imminent threat of its spread by Kinder Morgan's clearing and construction activity will further adversely affect the endangered warbler. David Vaughan, a Certified Arborist and oak wilt specialist, states that "Oak Wilt is a major destructive vascular disease of Oak trees caused by the fungus *Bretzillia fagacearum* formally known as *Ceratosystis fagacearum.* It is moved from location to location by sap feeding beetles known as Nitidulid Beetles . . ." Vaughan Declaration, Exhibit 5, ¶ 4. "Oak Wilt is heat sensitive, producing spore mats on Red Oaks during cool, wet periods, generally during winter and early spring in Central Texas. Nitidulid Beetle populations spike during early spring. Spring is a period when disease spore is readily available and beetle populations are high and active. This combination of circumstances results in the period from February 1 until June 30 being the most dangerous period in Central Texas for the spread of Oak Wilt to new locations." *Id.* ¶ 5.

Oak Wilt "has been a major problem in Central Texas and the nearby Hill Country over the last forty years, and is now epidemic. Oak Wilt has spread through and devastated large areas of Central Texas and the Hill Country, leaving thousands of large dead Oaks in its wake. The disease is difficult to control, and it continues to spread across the Central Texas Oak forest, destroying new, previously un-infected stands of oak trees." *Id.* ¶ 8.

Kinder Morgan's proposed clearing and construction activity between February 1 and June 30 is contrary to all expert recommendations, and is likely to exacerbate the spread of oak wilt in the Texas Hill Country, further affecting warbler habitat. As Vaughan states, "[t]he spread of Oak Wilt is greatly accelerated by activities such as removing, pruning, or wounding oaks. These activities produce fresh wounds that attract Nitidulid Beetles. This is the reason that Texas A&M Extension, The Texas Forest Service, and the Texas Chapter of International Society of Arboriculture produced Oak Wilt Guidelines suggesting not wounding Oaks in Oak Wilt areas in Texas from February 1 thru June 30." *Id.* ¶ 9. Vaughan, a member of the committee that developed these Guidelines, is "in agreement with their recommendations." *Id.*

The universal recommendations against wounding (e.g., clearing, cutting, pruning) oak trees between February 1 and June 30 are based, in part, on the difficulty entailed in ensuring that all oak tree wounds are treated correctly and expeditiously during pruning and cutting, especially in complex construction projects being completed on a pressing deadline. As Vaughan observes:

> "[t]he equipment used in the [clearing] process often damages oak trees in the vicinity of the trenching and clearing activities. Large equipment accidently hits trees that are to remain, pushed over trees can break limbs on trees just beyond the easement boundaries, tub grinders can fling large wood debris and wound trees that are to remain. All of these types of wounds need to be treated as soon as they occur. Broken branches need to be properly pruned and treated as soon as they happen. This type of aggressive, vigilant, consistent treatment of secondary and unanticipated (and often unnoticed) oak wounds usually does not occur on construction sites, making it even more important to avoid those activities 1 February-30 June."
>
> *Id.* ¶ 10.

Vaughan concludes that "right-of-way activity (*i.e.*, clearing, trenching, and related earth-moving actions), in the Central Texas and nearby Hill Country area any time during the February

1-June 30 time frame is likely to increase the spread of Oak Wilt in the area and damage and reduce the critical Oak-Juniper habitat required by the Golden Cheeked Warbler." *Id.* ¶ 11.

While the spread of oak wilt to nearby oak stands, and the resulting death of those trees, including heritage trees more than a century old, constitutes irreparable injury in its own right, it also will increase the likelihood of unlawful harm and take of the endangered warbler. As Blair explains, "[t]he further spread of oak wilt within and to [warbler] habitat, is a significant threat to the species from the proposed PHP route. The proposed PHP will cross directly through 44 confirmed oak wilt centers, with over an additional 403 oak wilt centers located within the immediate vicinity of the proposed route (Attachment C). The presence of oak wilt in Ashe juniper–oak woodland has a negative effect on [warbler] habitat selection and quality (Stewart et al. 2013 and 2014)." Blair Report at 10-11.

In addition to likely take of endangered warblers, Kinder Morgan's construction and operation of the PHP "present significant risks to Barton Springs and its continued existence as endangered species habitat . . . ." Herrington Declaration, Exhibit 6, ¶ 7. Christopher Herrington, a Professional Engineer and City of Austin Environmental Officer, has extensively studied and managed the groundwaters of the Edwards Plateau for almost 25 years. Herrington explains that "[t]he Edwards Aquifer, including the Barton Springs segment, is both a significant and a highly sensitive environmental resource. They are karst limestone aquifers, which means that they are highly transmissive." *Id.* ¶ 5. Dye studies conclusively demonstrate that "a release of contaminants from the PHP could adversely impact Barton Springs." *Id.*

Herrington further notes that "Barton Springs is habitat for two endangered salamander species, the Barton Springs salamander (*Eurycea sosorum*) and the Austin blind salamander (*Eurycea waterlooensis*). These salamander populations are fully aquatic, and are highly

sensitive to sedimentation of habitat and contaminants in water. . . . Because the range of these species is severely restricted to isolated spring and subterranean habitats, a single exposure event could cause irreversible impacts to this species in the wild." *Id.* ¶¶ 6, 8.

Herrington believes that both the construction and the operation phases of the PHP present significant risks to Barton Springs and the endangered salamanders, by reducing both the quality and the quantity of the water flow to the Springs. "[I]t is highly likely that trenching for the PHP will intersect fissures, void, or conduits, altering flow pathways and allowing contaminants to spread along underground conduits and altering endangered species habitat." *Id.* ¶ 7. In addition, "[t]unneling for underground pipelines can further impact these populations by intercepting and severing flow conduits in the aquifer reducing the quantity of discharge at Barton Springs." *Id.* ¶ 8.

In sum, Herrington concludes that "[t]he construction and operation of the PHP is highly likely to damage Barton Springs and the aquifer [and] [t]he harm outlined above to the springs as endangered species habitat is essentially *irreversible* if salamander populations decline below sustainable levels." *Id.* ¶ 10.

Accordingly, the best available evidence clearly establishes that Kinder Morgan's actions in connection with PHP construction, operation, and maintenance are likely to result in take of at least one, and perhaps many, individual federally listed endangered species.

B. Any take that occurs as a result of clearing and construction activities in the vast portion of the PHP that falls outside the Corps' jurisdiction will not be protected by the legal safe harbor afforded by an ITS.

Even if Kinder Morgan can demonstrate a Section 7 ITS safe harbor for those portions of the PHP that fall within the Corps' permitting jurisdiction, Plaintiffs are likely to prevail on their claim that any take occurring outside that jurisdiction is a violation of the ESA. The vast majority of Kinder Morgan's clearing, construction, and operation activities for the PHP in the Hill Country

is subject to the Section 10 ITP process, not the Section 7 consultation process. Slightly more than 5% of the PHP will traverse the jurisdiction of the Corps and will therefore be subject to Section 7 consultation. The rest, almost 95% of the PHP, will run across private land not subject to federal jurisdiction or federal permitting requirements.[4] Thus, in order to lawfully take endangered species in the extensive non-federal portions of the PHP route, Kinder Morgan must apply for and obtain a Section 10 ITP from the Service.

The Section 404 of the Clean Water Act confers on the Corps the authority to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. §1344. The CWA further defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Although the definition of waters of the United States ("WOTUS") has been the subject of much judicial and administrative attention over the years, one thing is abundantly clear—the definition is limited and shrinking. *See Rapanos v. United States*, 547 U.S. 715, 731-32 (2006).

As the definition of WOTUS shrinks, so too does the jurisdiction of the Corps with respect to permitting development projects under the CWA and obtaining ITS coverage for project applicants under Section 7 of the ESA. There is no credible claim that the Corps has CWA jurisdiction over more than 5% or 6% of the PHP. The fact that the pipeline will cross scattered streams and ponds on its 430-mile course across Texas does not convey wide-ranging, unlimited jurisdiction to the Corps to authorize otherwise unlawful takes on sensitive habitat outside of its jurisdiction. The Corps' claim to such expansive jurisdiction—in effect, a *big* federal handle—is insupportable and clashes with its insistence in other settings that its jurisdiction is limited.

[4] Plaintiffs note that there is a pending law suit against Kinder Morgan claiming that the PHP must be permitted through the Federal Energy Regulatory Commission process applicable to interstate pipelines, but that is not the type of federal permit referred to here.

Therefore, as explained above, whether or not the Corps engages in Section 7 consultation with the Service in connection with the limited activities authorized by the Corps' NWP 12 for this pipeline—i.e., actions relating to affected stream and/or pond crossings under the Corps' statutory jurisdiction—the only legal mechanism by which Kinder Morgan can obtain incidental take coverage for activities in uplands outside the Corps' jurisdiction is through a lawfully issued Section 10 ITP and accompanying HCP. Thus, any clearing or construction activities undertaken by Kinder Morgan in purported reliance on an NWP 12 and an accompanying ITS will be unauthorized and will constitute unlawful take under the ESA.

C. Any attempt by the Service to offer Kinder Morgan a safe harbor from take liability in the nonfederal portion of the PHP without undergoing NEPA review will violate NEPA.

In addition, Plaintiffs are likely to succeed on their claim that the Service will violate NEPA if it fails to prepare an EIS to evaluate the environmental impacts of Kinder Morgan's incidental takes in the vast majority of the PHP that is not subject to the Corps' permitting jurisdiction.

An EIS is required for every "major Federal action[]," 42 U.S.C. § 4332(2)(C), when there is a "substantial possibility" that such action "may have a significant impact on the environment," *Friends of Back Bay*, 681 F.3d at 590. Significance considers both the context and intensity of an action. 40 C.F.R. § 1508.27. NEPA regulations list numerous factors that may make an action significant, including cumulatively significant impacts, impacts on endangered species, and highly controversial or uncertain environmental impacts. Id. § 1508.27(b).

That the PHP will have a significant impact on the environment is patently obvious. If Kinder Morgan had sought a Section 10 ITP for that portion of the PHP outside the Corps' permitting jurisdiction, there is no question that the Service would have to engage in NEPA review before issuing the ITP. But it appears that Kinder Morgan, the Service, and the Corps have

contrived to treat the Section 7 consultation process and resulting ITS as sufficient to provide a safe harbor for takes outside the Corps' jurisdiction. If so, the BiOp and ITS are themselves "major federal actions" requiring an EIS under NEPA.

The Ninth Circuit faced just this question in *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), where it held that the agency issuing a BiOp and ITS was "required to comply with NEPA" because the "incidental take statement in this case is functionally equivalent to a permit." *Ramsey v. Kantor*, 96 F.3d at 444. In contrast, if the BiOp and ITS are advisory to an action agency, the Service is not required to comply with NEPA because the action agency must, if it is permitting a major federal action. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 644 (9th Cir. 2014). But there is no indication that the Corps intends to undertake NEPA review of its NWP 12 authorizations—buttressed by Kinder Morgan's recent public warnings that it is ready to fire up its engines. Therefore, the Service's BiOp and ITS are in reality, the "functional equivalent to a permit" and therefore are subject to the EIS requirements in NEPA.

By subverting the Section 7 process to attempt to evade NEPA environmental review, Kinder Morgan and the Service have violated NEPA.

III. KINDER MORGAN'S ACTIVITIES WILL LIKELY CAUSE IRREPARABLE HARM TO ENDANGERED SPECIES, HABITAT, AND PLAINTIFFS' INTERESTS IN THESE SPECIES AND THEIR ESSENTIAL HABITAT

The prospect of irreparable injury is a crucial consideration in determining whether to grant a preliminary injunction. As noted above, the taking of a member of an endangered species is perhaps the quintessential irreparable injury since money damages cannot remedy harm to a highly imperiled species or its habitat, and cannot compensate Plaintiffs for the harm to their ability to observe and appreciate these species in the future. Moreover, the likely harm to the City of Austin's and the City of San Marcos' interests in tourism related to the pristine springs that rely

on clean clear groundwater from the Edwards Aquifer, in the event of damage from trenching or an operational failure, will be especially difficult to calculate and therefore irreparable.

A. Kinder Morgan's clearing and construction activity will cause irreparable harm to members of endangered species, their sensitive habitat, and Plaintiffs' aesthetic, recreational, conservation, and economic interests in the species and the habitat.

A showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. *New Mexico Dept. of Game and Fish v. US Dept. of Interior*, 854 F.3d 1236 (10th Cir. 2017). An irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be "especially difficult to calculate." *Heil Trailer Intern. Co. v. Kula*, 542 Fed.Appx. 329, 335 (5th Cir. 2013). The party seeking a preliminary injunction faces a high bar – to constitute irreparable harm an injury must be certain, great, actual and not theoretical. *Heideman*, 348 F.3d at 1189. The injuries Kinder Morgan seeks to inflict on the environment and Plaintiffs by the construction of the PHP in the Hill Country cannot be remedied with money, or, at the very least, any damages a court may need to award would be especially difficult to calculate. If Kinder Morgan succeeds in clearing a 125-foot swath of important warbler habitat and digging and blasting a trench through the heart of some of the most ecologically-sensitive karst features in Central Texas, the injuries it inflicts will be certain, great, actual, and irreparable.

As set forth above, if Kinder Morgan proceeds—as it is now proclaiming it is imminently poised to do—with its plans to clear a 125-foot swath of occupied GCW habitat to construct its pipeline, it will cause immediate, permanent, and irreparable harm to warblers by destroying large swaths of habitat that is used by the species for essential biological functions such as breeding, feeding, and sheltering. In addition, the fact that Kinder Morgan evidently intends to conduct these

activities so close to the late February or early March start of the warbler nesting period significantly increases the probability that these actions will cause direct takes of nesting birds.

This imminent threat to the warbler and its habitat, and the likely spread of devastating Oak Wilt throughout the area, is the direct and foreseeable consequence of Kinder Morgan's clearing and construction activities, unlike the more attenuated threats that were insufficient to justify injunctive relief in *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014) and *Friends of Lydia Ann Channel v. United States Army Corps of Engineers*, 701 Fed. Appx. 352 (5th Cir. 2017). In *Aransas Project*, the U.S. Court of Appeals for the Fifth Circuit made clear that ESA take "liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem." 775 F.3d at 657-58. Thus, the court held that the State of Texas was not liable for takes under the ESA when those takes were attenuated from the State's actions by a "chain of causation" that included "multiple, natural, independent, unpredictable and interrelated forces." *Aransas Project*, 775 F.3d at 663. Similarly, in *Friends of Lydia Ann Channel*, the Fifth Circuit vacated the district court's preliminary injunction because it found that plaintiffs had not proven that there was "a reasonably certain threat of imminent harm to a protected species." *Friends of Lydia Ann Channel*, 701 Fed. Appx. at 355 (quoting *Aransas Project*, 775 F.3d at 663-64). In that case, the plaintiff's allegation of harm entailed rare cold temperatures in the channel that would render the endangered turtles lethargic and unable to react to passing barge traffic, increasing the chances of death or injury by barge impact. *Friends of Lydia Ann Channel*, 701 Fed. Appx. at 355.

There is no such attenuated causal chain in this case. Kinder Morgan proposes to clear a 125-foot wide swath of warbler habitat through sensitive Hill Country ecosystems either in or just before the birds' annual nesting season, when species members are particularly vulnerable, and during the period when experts strongly recommend against pruning or cutting oak trees to help

contain the epidemic spread of Oak Wilt. In addition, Kinder Morgan plans to blast and trench a ditch to house its pipeline in sensitive karst features of the Edwards and Trinity Aquifers. The connection to, and risk to, endangered species and their habitat from Kinder Morgan's actions is direct and acutely foreseeable.

Nor can Kinder Morgan overcome these allegations of imminent injury by claiming uncertainty about the extent of damage their clearing and construction activities will do to warbler habitat or to karst features in the aquifers when any lack of information in this regard is the direct result of Kinder Morgan's refusal to engage with Plaintiffs' extensive expertise on the relevant species, habitat, and sensitive karst features and refusal to seek and obtain a Section 10 ITP of other federal project authorizing incidental take for the entire PHP which would subject their plans to public scrutiny and comment opportunities.

Even if Plaintiffs could not demonstrate that Kinder Morgan's clearing and construction will result in a direct take of warblers—which they can—the modification, degradation, and impairment of habitat for ESA-listed species is undeniable, and it is beyond legitimate dispute that this constitutes an irreparable injury to Plaintiffs' interests in observing and protecting the endangered warbler and its habitat. Plaintiffs have invested substantial time and resources in protecting warbler habitat and derive aesthetic, recreational and conservation benefit from the continued preservation of the bird and its habitat. Kinder Morgan's destruction of warbler habitat will directly and irreversibly harm these interests and frustrate, if not negate, their efforts.

Several Plaintiffs have provided declarations demonstrating that they will be irreparably injured by Kinder Morgan's clearing, construction and operation of the PHP. Jonna Murchison is 70 years old and she has settled for her retirement years on 26 acres that she owns in Hays County Texas with her husband. Murchison Declaration, Exhibit 2. Her son and grandson live on the

property as well, in a separate house. Ms. Murchison's land contains mature warbler breeding habitat, and she has enjoyed sightings of the warbler in the past and hopes to see them again in the future. *Id*. The proposed PHP route is directly adjacent to her property, close to her home, her son and grandson's home, and their water wells. She will be irreparably injured by the PHP because it will: a) destroy trees and other foliage of warbler habitat adjacent to the warbler habitat on my property, making it less likely that I will see and hear endangered warblers on my property in the future; b) increase the risk of spreading oak wilt on my property which will destroy my oak trees, which cannot be replaced in my lifetime; c) create a risk of a leak or explosion that affects my safety as well as the safety of my home, my family, and my water well, the economic impact of which is incalculable; and d) diminish the market value of my home and land, as well as the peace and enjoyment of my retirement years with my husband, my son and my grandson, due to the pipeline's proximity. *Id.*

Similarly, Larry and Arlene Becker own and reside on 10 acres in Hays County Texas. Becker Declaration, Exhibit 1. They bought their property as their retirement home, and have lived there for eight years and had hoped to enjoy their retirement here. Their acreage is on a private road that provides the only method of ingress and egress to the property. Their property contains high quality warbler breeding habitat, including mature Ashe juniper trees and various oak and other native hardwood species, and they enjoy bird watching, including sightings of endangered warblers on our property. They hope to see more endangered warblers in the future. *Id*. They keep bees on the property and produce honey from those bees. They also keep an organic vegetable garden. The proposed PHP route is directly adjacent to her property. *Id*. Kinder Morgan's clearing, construction and operation of the PHP will irreparably injure them because it will: a) destroy trees and other foliage of warbler habitat adjacent to the warbler habitat on our

property, making it less likely that we will observe and enjoy endangered warblers in the future; b) increase the risk of spreading oak wilt on our property and destroying our oak trees, which cannot be replaced in our lifetimes; c) create a risk of a leak or explosion that affects our safety as well as the safety of our home and water well, and potentially trapping us on our property with no way out, the economic impact of which is incalculable; d) risk the spread of herbicides from the PHP right of way maintenance to our property, endangering the health and life of our bee colonies and the integrity of our organic garden; and e) diminish the market value of our home and land, as well as the peace and enjoyment of our retirement years, due to the pipeline's proximity. *Id*.

Finally, Mark Weiler owns 12 ½ acres in Blanco County Texas. The proposed route of the Permian Highway Pipeline ("PHP") runs directly through his Blanco County property. Weiler Declaration, Exhibit 3. Mr. Weiler purchased his property in 2014 planning to build a rustic home, collect rain-water, and live off-grid and away from development. His property contains high quality Golden Cheek Warbler ("warbler") breeding habitat including mature Ashe juniper trees, mature oaks (some of which are 100 to 150 years old), and other native hardwood species. He has consulted with an arborist to ensure that the oaks on his property are free from oak wilt. Mr. Weiler has 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. He enjoys watching birds on my property. Although he has not yet sighted a warbler on his property, thinks he heard one when he did a bird survey in the past. He plans to do bird surveys regularly in the future and hopes to see and hear an endangered warbler during those surveys. *Id*.

Mr. Weiler's connection to his land is more spiritual than most. As he says,

> I have a spiritual connection to my land and to the flora and fauna that lives on it with me. When I bought the land, the land and I made an agreement to take care of each other. Although I don't live there, I am out at the property often, and the land and I have developed a relationship over the years. It is more than being a good steward of the land. I believe that

> every rock, tree and even blade of grass has a soul. Trees talk to us, and I talk back. Last December, after I received the letter from Kinder Morgan informing me that they were going to start construction this January, I went out to the land and held each of the big oaks that will come down and apologized to them for not being able to save them.
> *Id*.

Kinder Morgan's clearing, construction and operation of the PHP will cause Mr. Weiler to suffer irreparable injury because it will: a) clear known warbler habitat, making it less likely that I'll observe a warbler in the future; b) cut down irreplaceable century old oak trees that are of great aesthetic and conservation interest to me; c) increase the risk of spreading oak wilt spreading oak wilt on my property and destroying my oak trees, which cannot be replaced in my lifetime; d) interfere with my plans to live off-grid and away from all development; and e) diminish the market value of my land, as well as its spiritual value, due to the pipeline's location on the property.

These injuries cannot be remedied with a monetary judgement. Plaintiffs cannot simply "buy" more warblers or more mature, majestic oak trees. And while money may help Plaintiffs conserve or cultivate more warbler habitat, acceptable warbler habitat is in limited and diminishing supply, and cultivating the mature Ashe juniper and oaks on which warblers depend for their survival would take more than half a century, making it impossible for Plaintiffs to enjoy them during their lifetime.

Similarly, Plaintiffs' interests in protecting the Barton Springs Edwards Aquifer, Trinity Aquifer, their caves and recharge zones, the endangered Barton Springs and Austin blind salamander and listed aquatic species, will also be irreparably injured by Kinder Morgan's construction of the PHP. Trenching and blasting over sensitive karst features will cause serious and irreversible harm to the local government Plaintiffs whose taxpayers, residents, and tourists enjoy the natural resources (including endangered species) dependent on the clear, fresh water flowing through the Edwards and Trinity aquifers. The fragile karst system of the Edwards and

Trinity Aquifers recharge zones cannot be reconstructed if they are damaged or destroyed by Kinder Morgan's trenching and blasting. Money cannot put clean water in Barton Springs Pool or Jacob's Well if the Edwards Aquifer is contaminated. The injuries Kinder Morgan will inflict by constructing its pipeline in these environmentally sensitive areas without sufficient safeguards will be permanent and irreparable, and to the extent some of these injuries are economic, they will be "especially difficult to calculate."

As Chris Herrington said of the likely damage to Barton Springs, "[t]he harm outlined above to the springs as endangered species habitat is essentially *irreversible* if salamander populations decline below sustainable levels." Herrington Declaration, Exhibit 6, ¶ 11. "Because salamander habitat includes subterranean components that are not accessible, and given the complexity of working within the springs habitats . . . complete remediation of salamander habitat may not be possible making the impacts of the PHP essentially irreparable." *Id*.

Similarly, the City of San Marcos will suffer irreparable injury if Kinder Morgan's construction and operation of the PHP cause contamination of the Edwards Aquifer. San Marcos prides itself in its public reputation as a place with a clean, healthy environment and abundant outdoor recreation opportunities. In particular, the San Marcos Springs and the San Marcos river (which runs through the middle of the town) are essential components of the City's outdoor recreation possibilities. They are a prime draw for residents and visitors. San Marcos Springs is the second largest natural spring in Texas and it is fed directly by the Edwards Aquifer. If the Aquifer is contaminated by PHP construction activities, the Springs will be contaminated. As Rebecca Ybarra, Director of the Convention and Visitor Bureau for the City of San Marcos states, "[i]t is not possible to calculate in monetary terms the damage that would be done to the City if the springs and river are contaminated by the construction activities of the pipeline. The damage

would be huge and would take years and years, if ever, to remedy." Ybarra Declaration, Exhibit 7, ¶ 6.

In sum, Kinder Morgan's activities will cause irreparable harm in various forms to myriad endangered species, essential habitat for these species, and Plaintiffs' cognizable interests in those species and the habitats in which they reside.

B. Without a preliminary injunction, Kinder Morgan's clearing and construction activity will undermine the Court's ability to render meaningful relief.

A preliminary injunction is also necessary to protect the Court's ability to render meaningful relief. The Fifth Circuit has stated that the primary justification for granting a preliminary injunction is "to preserve the court's ability to render a meaningful decision on the merits." *Callaway*, 489 F.2d at 573. Thus, "[a]lthough the fundamental fairness of preventing irremediable harm to a party is an important factor . . ., the most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Id.* (citing Wright & Miller, Federal Practice & Procedure § 2947). Therefore, only injuries that cannot be redressed by a favorable judicial remedy after a hearing on the merits can properly justify a preliminary injunction. *Id.*

Kinder Morgan is using every artifice to deflect and delay Plaintiffs' attempts to gather information and have meaningful input on the pathway of the pipeline, construction methods for protecting sensitive habitat, and its plans for mitigating the unavoidable habitat destruction the PHP construction will cause. Unless the Court grants preliminary injunctive relief, Kinder Morgan will be able to clear warbler habitat and construct its pipeline over sensitive Hill Country karst features pending a determination on the merits. In that situation, even if the Court ultimately finds that Kinder Morgan violated the ESA by failing to obtain a valid Section 10 ITP, or that the Service violated NEPA by failing to prepare an EIS, or that the Service violated the APA by adopting the

Small Handle Process without notice and comment, Plaintiffs will be irreparably injured without any prospects for judicial relief.

IV. THE PERMANENT AND IRREVERSIBLE HARM TO PLAINTIFFS AND ENDANGERED SPECIES OUTWEIGHS ANY TEMPORARY HARM THAT A PRELIMINARY INJUNCTION WILL CAUSE TO KINDER MORGAN

This much is clear—Kinder Morgan is in a hurry to ravage the Texas Hill Country for economic gain. In fact, it is in too much of a hurry to apply to the Corps for an individual permit under Section 404 of the CWA for the entire PHP project, rather than seek numerous individual NWP 12 verifications for isolated stream and pond crossings. And it is in too much of a hurry to seek a Section 10 ITP from the Service or seek participation in a Regional HCP from the cities and counties authorized authorize participation (and extend incidental take coverage) through their own regional HCPs, which is the exclusive mechanism Congress designed in Section 10 of the ESA for authorizing take on non-federal lands. Indeed, Kinder Morgan is in too much of a hurry to coordinate with the cities, counties, and conservation groups that have spent decades and hundreds of millions of dollars studying and conserving the fragile ecosystem of the Texas Hill Country and the endangered species that depend on this ecosystem to minimize the impact of their clearing and construction on the species and their habitat. But time pressures of Kinder Morgan's own making cannot outweigh the timeless interest in protecting and preserving endangered species, especially where courts have uniformly recognized that self-inflicted injuries cannot avoid the imposition of equitable relief. *See, e.g.*, *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970) (finding it "elementary that a party may not claim equity in his own defaults"); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 116-117 (D.D.C. 2003) (refusing to grant equitable relief where party's actions were "disingenuous at best," and finding that "any economic or emotional harm . . . falls squarely on the defendants' shoulders").

Kinder Morgan will likely suggest that the delay entailed in a maintaining the status quo to protect this court's jurisdiction and authority to review Plaintiffs' claims on the merits is a substantial financial harm, but economic harm cannot outweigh the risks of irreparable injury to protected species and sensitive ecosystems. As the Supreme Court has made clear, where violations of the ESA are concerned, such countervailing economic considerations are irrelevant:

> [T]he plain language of the [ESA], buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable." Quite obviously, it would be difficult for a court to balance the loss of a sum certain –even $ 100 million—against a congressionally declared "incalculable" value, *even assuming we had the power to engage in such a weighing process, which we emphatically do not.*

Tenn. Valley Auth., 437 U.S. at 187-88 (emphasis added); *see also Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("[Defendant-Intervenor's] loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment.").

Moreover, whatever financial or other harm Kinder Morgan can claim from a temporary stay of their construction activities is largely of its own making. Plaintiffs have tried, many times, to engage Kinder Morgan in the public scrutiny and extensive environmental review that the ESA demands for a project of this magnitude in a sensitive environment, but Kinder Morgan has consistently declined to proceed through established, lawful channels to evaluate the project and its environmental impacts.

For example, Plaintiffs sent 60-day notice letters to Kinder Morgan and federal officials on July 17, 2019 and October 16, 2019, alerting them to the imminent violations of the ESA implicated by their clearing and construction activities in GCW habitat and over the Edwards and Trinity Aquifers and urging them to prepare an HCP and obtain a Section 10 ITP. *See* Exhibit 8 (July 17, 2019 Letter); Exhibit 9 (October 16, 2019 Letter). Similarly, Hays County reached out to the Service via letter dated May 14, 2019 to express its concern that Kinder Morgan was using

the truncated NWP 12 process to "avoid fully analyzing the impacts of their project on the human and natural environment, disclosing those impacts to the public or to elected officials, or allowing any sort of public comment on the environmental effects of their project." Exhibit 10 (May 14, 2019 Letter). Despite Plaintiffs' vigorous outreach to Kinder Morgan, the company has not responded to any of these letters nor requested meetings or telephone calls to discuss this matter. Thus, Kinder Morgan had ample notice that its actions threatened imminent and irreparable injury in time to change course and come into compliance with the ESA, but Kinder Morgan refused even to have a meaningful dialogue with Plaintiffs (let alone address the concerns raised by Plaintiffs in their letters). Accordingly, Kinder Morgan cannot now complain that a preliminary injunction would impose a substantial hardship because time is of the essence.

Indeed, Congress addressed this very issue in Section 7 of the ESA, with the balance weighing against Kinder Morgan's claim of injury from delay. Section 7(d) explicitly prohibits "any irreversible or irretrievable commitment of resources" to a project before it has completed the Section 7 consultation process (or the Section 10 ITP process, which itself requires intra-agency Section 7 consultation) and the Service has had an opportunity to determine whether, and the conditions under which, a project impacting listed species may lawfully proceed. 16 U.S.C. § 1536(d); *see also Fla. Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1293 (S.D. Fla. 2005) ("Section 7(d) was not part of the original ESA . . . [r]ather, it was added after the Supreme Court's decision in *TVA* to prevent Federal agencies [and permit applicants] from steamrolling activities in order to secure completion of projects regardless of the impacts on endangered species." (emphasis added) (citations omitted)).

Therefore, any "irreversible or irretrievable commitment of resources" made by Kinder Morgan in light of its imminent ESA violations are not only self-inflicted injuries—especially in

view of Plaintiffs' detailed notices of such violations months ago that have gone unaddressed by Kinder Morgan—but are themselves counter to the legislative scheme crafted by Congress for safeguarding listed species. By the same token, Kinder Morgan's continuation of clearing and construction activities in the Hill Country would constitute precisely the "steam rolling activities in order to secure completion" of the project prior to the completion of the full public consultation process that Congress prohibited. *Fla. Key Deer v. Brown*, 386 F. Supp. 2d at 1293.

The gas in the Permian Basin is not going anywhere. In fact, in October 2019 Kinder Morgan announced that a different Permian Basin pipeline might not be needed as soon as it thought, because "customer activity has slowed . . . ." Joshua Mann, *Kinder Morgan Pushes Back Timeline on Two Permian Gas Pipelines*, **Houston Business Journal** (October 18, 2019). There is ample time for Kinder Morgan to seek appropriate permits, subject it's PHP plans to NEPA review, and consult with the experts from the affected cities and counties. Accordingly, Kinder Morgan cannot identify any harm resulting from a temporary stay of pipeline construction during merits litigation—self-inflicted or otherwise—that comes remotely close to outweighing the PHP's irreversible harm to Plaintiffs and myriad endangered species whose value "Congress viewed . . . as 'incalculable.'" *Tenn Valley Auth.*, 437 U.S. at 187.

V. THE PUBLIC INTEREST WILL BE SERVED BY A PRELIMINARY INJUNCTION

The final factor in considering whether to grant a preliminary injunction is whether the injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, (2008). Here, the public interest tips very heavily in favor of preserving the status quo in order to conserve endangered species and their habitat, and to subject Kinder Morgan's proposed pipeline project to full, comprehensive, public review, as required by the ESA.

As courts have consistently recognized, Congress itself has determined that the "balance of hardships and the public interest tip heavily in favor of endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376,1383 (9th Cir. 1987); see also *Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997), *cert. denied*, 525 U.S.830 (1998) ("[U]nder the ESA . . . the balancing and public interest prongs have been answered by Congress."); *Animal Prot. Inst. v. Martin*, 511 F. Supp. 2d 196, 197 (D. Me. 2007) (finding that the balance of hardships "tips heavily in favor of the protected species"). That alone underscores the public interest in an injunction.

Moreover, granting the relief requested by Plaintiffs—which would allow the Court to maintain the status quo pending a fuller examination of these issues on the merits—serves the public's overriding interest in endangered species and the essential habitat necessary to sustain and recover them. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326-27 (D.C. Cir. 1987) (affirming that injunction was in the public interest to "protect against further illegal action pending resolution of the merits" and to "protect[] the environment from any threat of permanent damage"). In addition, courts have explained that the public has a substantial interest in ensuring that entities such as Kinder Morgan comply with federal environmental laws *before* taking actions that irreversibly impact the environment. *See, e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009) (granting preliminary injunction and finding that "[t]here is no question that the public has an interest in having Congress' mandates in [environmental statutes] carried out accurately and completely").

Finally, it is important to stress that even at the conclusion of this case, the Court will not be called on to determine whether construction and operation of the PHP should ultimately proceed. Rather, if Plaintiffs are correct that "take" is likely to occur in violation of the ESA, the appropriate remedy would be to enjoin Kinder Morgan from further clearing and construction until

the Service has analyzed the pipeline's impacts on federally listed wildlife through the Section 10 process, including NEPA review, and made a determination on whether, and how, the project may lawfully proceed in order to minimize and mitigate impacts to endangered species and sensitive habitat. *See, e.g., Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) ("The [defendant] shall promptly take all action necessary to insure no further taking of threatened Canada Lynx by trapping or snaring activities within the core Canada Lynx ranges, including, but not limited to: applying for an incidental take permit for Canada Lynx on or before [a date set by the court]."); *Animal Welfare Inst. v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540 (D. Md. 2009) (concluding that "there is a virtual certainty that construction and operation of the Beech Ridge Project will take endangered Indiana bats in violation of Section 9 of the ESA," and explaining that "[t]his Court has concluded that the only avenue available to Defendants to resolve the self-imposed plight in which they now find themselves is to do belatedly that which they should have done long ago: apply for an ITP").

VI. THE COURT SHOULD ISSUE NO BOND OR ONLY A MINIMAL ONE

In the event that the Court issues an injunction, Plaintiffs—municipalities, nonprofit organizations, and conservationists—respectfully request that the Court require, at most, a nominal bond. Courts routinely require no bond or only a minimal bond (i.e., $500 or less) in environmental cases of this kind that seek to advance the public interest. The same outcome is appropriate under these circumstances.[5]

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[5] *See, e.g.*, *Nat. Res. Def. Council v. Morton*, 337 F. Supp. 167, 169 (D.D.C. 1971) (ordering $100 bond); *Sierra Club v. Block*, 614 F. Supp. 488, 494 (D.D.C. 1985) (ordering a $20 bond); *W.V. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir. 1971) (ordering $100 bond); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (ordering no bond); *Ala. ex rel. Baxley v. U.S. Army Corps of Eng'rs*, 411 F. Supp. 1261, 1276 (D. Ala. 1976) (ordering $1 bond); *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (ordering $100 bond); *League of Wilderness Defs. v. Zielinski*, 187 F. Supp. 2d 1263, 1272 (D. Or. 2002) (ordering no

CONCLUSION

Plaintiffs have satisfied the standard for issuance of a preliminary injunction, which is necessary to avoid detrimental and irreversible harm to endangered species and their habitat until this Court can resolve the merits of the case. Therefore, Plaintiffs respectfully request that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court invoke its equitable authority and grant preliminary injunctive relief in their favor to maintain the status quo.

Respectfully submitted,

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bond); *Colo. Wild v. U.S. Forest Serv.*, 299 F. Supp. 2d 1184, 1191 (D. Colo. 2004) (ordering no bond); *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1191 (N.D. Cal. 2009) (ordering no bond).

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CERTIFICATE OF SERVICE

This is to certify that on February 7, 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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