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LAW FOR THE PUBLIC INTEREST

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May 22, 2020

**Via ECF Filing**

Molly C. Dwyer  
Clerk of The Court  
Office of The Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

**Re: Support For Plaintiffs' Opposition To Defendants' Motions For Stay Pending Appeal In *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 20-35412 (9th Cir.)**

Dear Ms. Dwyer,

On May 20, 2020, Plaintiffs filed an Opposition to Federal Defendants' and Defendant-Intervenors' Motions for a Stay Pending Appeal. As provided in Circuit Advisory Committee Note to Rule 29-1, I hereby submit this letter in support of Plaintiffs' opposition to the relief sought by Defendants. This letter is submitted on behalf of amici curiae Big Bend Conservation Alliance; Environmental Defense Fund; Greater Edwards Aquifer Alliance; Texas Real Estate Advocacy and Defense Coalition; Trinity Edwards Springs Protection Association; and Wimberley Valley Watershed Association.

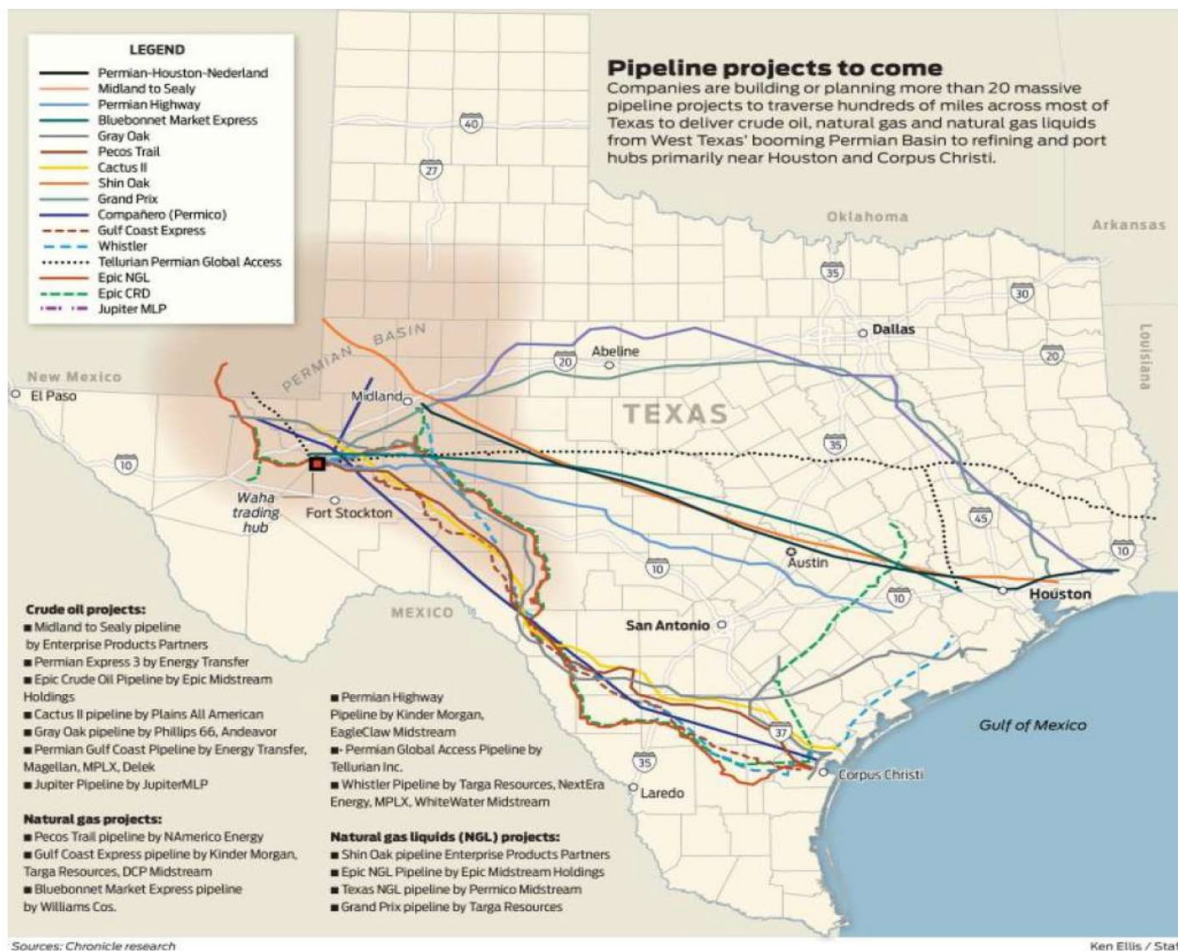
The amici are nonpartisan, nonprofit organizations that protect environmental values and landowner rights when threatened by pipelines, transmission lines, and other ecologically destructive development in Texas and elsewhere. Due to the proliferation of oil and gas production in the Permian Basin of western Texas, the amici are intimately familiar with many existing and proposed pipeline and related projects—all of which rely upon the U.S. Army Corps of Engineers' ("Corps") Nationwide Permit 12 ("NWP 12") to cross sensitive streams and wetlands in Texas—that pose grave risk to species protected under the Endangered Species Act ("ESA"). These highly imperiled species include the Whooping Crane, the Ocelot, the Golden-cheeked warbler, the Aplomado falcon, the Houston toad, 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. Based on extensive scientific research compiled by independent, third-party biologists, pipelines and related projects in Texas authorized under NWP 12 have caused, and will continue to cause, significant harm to these and other ESA-listed species, including through habitat destruction and fragmentation, construction-related disruptions, chronic leakage and acute spills of petroleum-based materials, pipeline ruptures, and groundwater contamination.

For several reasons, discussed in turn below, this Court should not grant the stay requested by Federal Defendants and Defendant-Intervenors. Even a temporary stay would result in significant, long-lasting harm to listed species and habitat during the period in which the Corps and the U.S. Fish and Wildlife Service (“Service”) are engaged in consultation concerning the impacts of NWP 12.

First, there are currently **more than a dozen** pipelines in Texas that are currently under construction or that will be built in the near future.



Each of those pipelines must cross many streams and wetlands subject to the Clean Water Act, meaning that the Corps must authorize their construction either through NWP 12 or a more rigorous project-specific individual permit. Despite the fact that *all* of these proposed pipelines would traverse sensitive habitat for ESA-listed species—and in combination would threaten grave damage to the survival and recovery prospects of these species—the Corps has *never* analyzed whether projects authorized by NWP 12 in the same geographic region, such as those in Texas, will have cumulatively significant effects on the region’s most vulnerable species. Because the programmatic ESA consultation required by the district court is more than three years overdue—during which time the Corps has unlawfully approved countless projects through the fatally flawed NWP 12—it would be contrary to the explicit purposes of the ESA to stay the district court’s partial vacatur in order to allow the Corps to greenlight additional projects via the legally defective NWP 12, especially when doing so will indisputably harm listed species before the agencies conclude consultation.

Second, the Court should not grant the requested stay because, as the district court found, project-specific ESA consultation neither cures the Corps’ failure to programmatically consult with the Service before re-issuing NWP 12 nor ensures that permittees will comply with the ESA in constructing pipelines and other projects pursuant to NWP 12 verifications. For example, Kinder Morgan has commenced construction on the Permian Highway Pipeline in Texas pursuant to NWP 12 verifications issued by the Corps in February 2020. Although the Corps and the Service engaged in project-specific ESA consultation for the Permian Highway Pipeline, Kinder Morgan and the Service violated the terms of the resulting biological opinion in numerous ways once Kinder Morgan began constructing the pipeline. *See City of Austin v. Kinder Morgan Texas Pipeline, LLC*, No. 1:20-cv-138, 2020 WL 1324071 at \*\*11-15 (W.D. Tex. Mar. 19, 2020). For example, the court reviewing the legality of that pipeline found that “Plaintiffs’ evidence that Kinder Morgan has violated the terms and conditions of the incidental take statement compelling, and concludes that these violations draw the continued validity of the biological opinion and incidental take statement into question.” *Id.* at 11. The Court further explained that “the Service . . . conceded that it lacked a mechanism for monitoring compliance on the ground”; and “[t]he Service also failed to provide a concrete definition of continuous activity or a metric by which good-faith implementation of the term might be measured.” *Id.*<sup>1</sup>

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<sup>1</sup> In addition to the *City of Austin* case that remains pending, the Sierra Club also filed a separate lawsuit challenging the Permian Highway Pipeline on Clean Water Act, ESA, and National Environmental Policy Act grounds. *See Sierra Club v. U.S. Army Corps of Eng’rs*, No. 1:20-cv-

These repeated violations of the project-specific biological opinion for the Permian Highway Pipeline demonstrate the critical need for a programmatic consultation for NWP 12—and vacatur of new pipeline construction in stream crossings and wetlands in the interim—to ensure that any such pipeline construction is deferred until *after* the agencies complete consultation, thereby avoiding harm to or jeopardizing endangered or threatened species in the meantime. In the absence of a completed programmatic consultation, the Corps and the Service lack a coherent framework for adopting rigorous programmatic terms and conditions that are necessary for conservation of ESA-listed species that then can be consistently applied and tailored as appropriate in the context of project-specific consultations. Granting a stay would subvert the express purposes of the ESA by allowing developers to construct harmful projects in streams and wetlands without the benefit of *any* programmatic consultation to guide project-specific terms and conditions. A broad, programmatic framework is critical to identifying risks to and implementing conservation measures for at-risk species in light of other threats, including the cumulative impacts posed by other projects authorized under NWP 12 within the same geographical region.

Third, any purported harm alleged to result from the district court’s partial vacatur of NWP 12 is greatly overblown. The Clean Water Act explicitly provides that developers can obtain authorization from the Corps to construct and operate projects through individual permits in contexts where, as here, nationwide permits are not available. *See* 33 C.F.R. 330.6(a)(2) (noting that if “an activity does not comply with the terms or conditions of an NWP,” the applicant may “seek authorization under a regional general permit or individual permit”). The Corps routinely grants individual permits for these kinds of projects under the Clean Water Act and, in doing so, engages in robust ESA consultation before issuing any such permits. Pipeline developers may avail themselves of this routine mechanism for Clean Water Act authorization while simultaneously ensuring that such permits do not suffer the same glaring flaws observed in the NWP 12 context. In this way, the district court’s partial vacatur ruling ensures that neither project proponents nor listed species are harmed until consultation has been completed.<sup>2</sup>

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460 (W.D. Tex.). The amici letter filed by the Essential Infrastructure Coalition on May 15, 2020 erroneously asserts that the *Sierra Club* case “relies entirely on the order below”; in reality, two of the three causes of action in that case are not in any way dependent on the district court’s ruling in this case.

<sup>2</sup> An added benefit of the Corps considering projects through individual permits while partial vacatur is in place—as opposed to through NWP 12—is that the Corps must conduct review of such permits under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347,

In sum, there is no legal or logical basis for granting the requested stay in light of the significant and irreparable harm that it would cause to ESA-listed species in the event that developers can continue to construct new pipelines and related infrastructure in our nation's streams and wetlands in the absence of any programmatic ESA consultation to guide project-specific ESA compliance efforts. Accordingly, the amici fully support the arguments contained in Plaintiffs' opposition and respectfully request that the Court deny the motions for a stay.<sup>3</sup>

Respectfully submitted,

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which requires consideration of effects to drinking water, health and safety, historical and archaeological resources, and ecological resources. Although the Corps and/or the Service should be conducting NEPA review for projects authorized through NWP 12, the agencies have been ignoring NEPA for many projects subject to NWP 12 including the Permian Highway Pipeline. *See City of Austin*, 2020 WL 1324071, at \*11 n.10 (noting that “the Court questions” the Corps’ and the Service’s use of the “small federal handle” process, which allows the agencies to sweep activities occurring on private uplands into the ESA Section 7 consultation process, especially where neither the Corps nor the Service conducted any NEPA review for the project).

<sup>3</sup> Although this Court’s rules do not explicitly require the positions of the parties for an amicus letter, undersigned counsel contacted counsel for all parties to this appeal. Their positions on the filing of this letter are as follows: Plaintiffs consent; Federal Defendants do not oppose; Defendant-Intervenors TC Energy, et al. take no position; Defendant-Intervenor State of Montana does not oppose; and Defendant-Intervenors American Gas Association, et al. did not provide a response before this letter was filed.

No. 20-35412

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,  
*Plaintiffs-Appellees*,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,  
*Defendants-Appellants*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

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**FRAP 26.1 DISCLOSURE STATEMENT**

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Counsel for Amici Curiae

In accordance with Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), Amici provide the following information:

1. **Big Bend Conservation Alliance** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

2. **Environmental Defense Fund** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

3. **Greater Edwards Aquifer Alliance** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

4. **Texas Real Estate Advocacy and Defense Coalition** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

5. **Trinity Edwards Springs Protection Association** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

6. **Wimberley Valley Watershed Association** is a nonprofit organization and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing disclosure statement and related letter of support using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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