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INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

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

INDIGENOUS ENVIRONMENTAL)
NETWORK and NORTH COAST RIVERS)
ALLIANCE,)

Plaintiffs,)

vs.)

PRESIDENT DONALD J. TRUMP,)
UNITED STATES DEPARTMENT OF)
STATE; MICHAEL R. POMPEO, in his)
official capacity as U.S. Secretary of State;)
UNITED STATES ARMY CORPS OF)
ENGINEERS; LT. GENERAL TODD T.)
SEMONITE, Commanding General and)
Chief of Engineers; UNITED STATES)
FISH AND WILDLIFE SERVICE, a federal)
agency; MARGARET EVERSON, in her)

Civ. No. CV 19-28-GF-BMM
PLAINTIFFS' RESPONSE
TO STATUS REPORT BY TC
ENERGY
Judge: Hon. Brian M. Morris
Case Filed: April 5, 2019

official capacity as Acting Director of the)
U.S. Fish and Wildlife Service; UNITED)
STATES BUREAU OF LAND)
MANAGEMENT, and DAVID)
BERNHARDT, in his official capacity as)
U.S. Secretary of the Interior,)
)
Defendants,)
)
TRANSCANADA KEYSTONE PIPELINE,))
LP, a Delaware limited partnership, and TC)
ENERGY CORPORATION, a Canadian)
Public Company,)
)
Defendant-Intervenors.)
_____)

On September 20, 2019, TC Energy (formerly TransCanada) filed an unsolicited “Status Report” telling – rather than requesting permission from – this Court that TC Energy will commence preconstruction activities on its proposed Keystone XL Pipeline (“Keystone”) just four days hence, on October 1. Status Report by TC Energy (“TCE”) (Dkt. 62). TC Energy fails to disclose, however, that this Court has already ruled that these now-imminent activities would cause irreparable harm, both directly to environmental and cultural resources, and indirectly because they “raised the risk of the ‘bureaucratic momentum’ recognized . . . in *Colorado Wild*, [*Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213 (D.Colo. 2017)].” (*Indigenous Environmental Network v. United States Department of State*, 369 F.Supp.3d 1045, 1050-1051 (D. Mont. 2018) (Case No.

4:17-00029-BMM (“*IEN v. State*”), December 7, 2018, Supplemental Order Regarding Permanent Injunction (ECF. 231), p. 10.) As this Court forcefully held, TC Energy’s “proposed preconstruction activities could skew the Department [of State]’s future analysis and decision-making regarding the project.” (*Id.* at 1051.) TC Energy’s Status Report – although provided in the form of unsworn statements from counsel rather than competent evidence – reveals an aggressive agenda to proceed with Keystone before this Court rules on Plaintiffs’ pending Motion for Preliminary Injunction. This Court should reject TC Energy’s gambit and grant Plaintiffs’ Motion.

On December 7, 2018, TransCanada informed this Court that it would “perform no additional preconstruction mowing unless or until construction of Keystone XL is authorized.” (December 7, 2017 TransCanada Reply in Support of Motion to Amend (“December TC Reply”), *IEN v. State* (ECF 230), p. 3.) Now, despite Plaintiffs’ Motion and TC Energy’s failure to date to secure approvals from the Bureau of Land Management (“BLM”) and the Corps of Engineers, TC Energy has abruptly changed course. It now states that it plans to commence preconstruction activities, including “mowing” “along portions of the right-of-way in Montana and South Dakota to limit migratory bird nesting during construction,” days before this Court’s hearing on Plaintiffs’ Motion. (TCE, pp. 3-4.) It fails to identify the “portions” to be cleared. Given its claim that it already has garnered local approvals for the entire right-of-way, and federal approval is only required for a few crossings of BLM land and perhaps some rivers, these

“portions” comprise hundreds of miles of Keystone’s proposed route. It also intends to clear vegetation “at seven locations in Montana and South Dakota where pump stations are intended to be sited, also to minimize and avoid impacts to migratory birds.” (TCE, p. 4.) Aside from an unsupported claim that the “grass is expected to grow again once construction is completed,” TC Energy is silent as to the impacts of these preconstruction activities. (TCE, p. 4.)

“Mowing” appears to be TC Energy’s euphemism for clearing. This word is highly misleading. It falsely suggests a flat, uniform expanse of unremarkable grasslands that can be “mowed” like a lawn. To the contrary, the hundreds of miles TC Energy proposes to clear are home to a wide variety of native plants, including trees, shrubs, tall prairie grasses and wetland vegetation, and a rich array of wildlife. (DOS6798-6799.) And, Keystone’s proposed route is also varied topographically, with rivers, streams, ponds, gullies, hills, swamps and cliffs. (DOS6192-6198.) All of this varied habitat would be harmed, because the purpose of this clearing is to *remove* available habitat for nesting birds. (TCE, p. 4.) The obvious but unstated impact is that *less* habitat for birds and other wildlife will exist after the clearing. TC Energy intends to commence clearing along the right-of-way and at the pump stations “on or about October 6, 2019.” (TCE, p. 4.)

The Federal Defendants have already admitted these impacts are extensive. According to the Department of State’s Final Supplemental Environmental Impact State issued in 2014 (“SEIS”), Keystone’s construction right-of-way will “cross an estimated 356 miles of native grassland,” much of which has never been tilled, and

which may take decades to recover.¹ And, this “mowing” appears to be identical to that which the U.S. Fish and Wildlife Service (“FWS”) determined could *not* be used as an avoidance technique for the American Burying Beetle in South Dakota because it would cause habitat loss for grassland birds.²

According to that same SEIS, TC Energy plans to clear 11,666 acres of the right-of-way, causing “[p]ermanent loss of wetlands,” “permanent modification of surface and subsurface flow patterns,” “permanent modification of wetland vegetation,” and “[l]oss or alteration of wetland soil integrity,” among other harms. (ECF 221-1 ¶ 18; DOS5952, 6782-6784, 6809-6811; FWS 2062.) Preconstruction activities will also require clearing of 1,916 to 2,316 acres, including 1,037.6 acres for pipe storage yards, 479 acres for contractor yards, and between 400 and 800 acres for construction “man-camps.” (DOS5979-5980.)

For this clearing to achieve its intended purpose, TC Energy will need to *prevent* recovery of this degraded habitat at least until construction is completed, if not throughout the 50-year (or longer) Project life. (DOS7484.) It states that “[p]ump station construction will not commence until 2020,” but does not provide any specific schedule. (TCE, p. 4.) Nor does it reveal when it plans to commence pipeline construction. (*Id.*) In short, TC Energy intends to disturb and remove

¹ *IEN v. State* Administrative Record prepared by State, at DOSKXLDMT0006809 (hereinafter “DOS” with leading zeros omitted).

² *IEN v. State* Administrative Record prepared by FWS, at FWS000000002062 (hereinafter “FWS” with leading zeros omitted).

thousands of acres of habitat specifically to prevent their suitability for nesting birds, without any binding construction schedule – let alone end date for the ensuing habitat loss.

The importance of bird habitat cannot be overstated. A report published on September 19, 2019, in the respected scientific journal *Science*, revealed a 29% net loss in bird populations in North America since 1970.³ Native migratory birds experienced a 28.3% population loss. (*Id.*, at Table 1.) *Birds that rely upon grassland habitats for breeding saw a 53% population loss* over that period, the biggest decline by habitat type. (*Id.*, at Table 1.) The report cites habitat loss as a major contributor to these serious declines in bird populations, especially for native grassland birds.

The SEIS admits that Keystone’s proposed route “falls entirely within the Prairie Avifaunal Biome.” (DOS6368.) The grassland habitats in this biome are used by “breeding landbirds” that are short-distance migrants. (*Id.*) The Project area is also used by migratory birds, for “nesting, migration, and overwintering, with large numbers of species nesting in the northern portion” of the Project area. (*Id.*) In Montana, the route will cross the North Valley Grasslands important bird

³ Rosenberg, K.V., Dockett, A.M., *et al.*, 2019 Decline of the North American avifauna. *Science*, p. eaaaw1313 (available at <https://science.sciencemag.org/content/early/2019/09/18/science.aaw1313>, and <https://birds.cornell.edu/home/wp-content/uploads/2019/09/DECLINE-OF-NORTH-AMERICAN-AVIFAUNA-SCIENCE-2019.pdf>, last visited September 25, 2019)

area (“IBA”), which is “one of the largest blocks of intact grasslands in Montana,” and “supports 73 species of birds,” including “15 species of grassland birds.” (DOS6368-6369.) The SEIS indicates that the Project crosses 42.9 miles of the North Valley Grasslands IBA. (DOS6411.) TC Energy’s plan to disturb and remove habitat in anticipation of construction – even as TC Energy still lacks a right-of-way grant from the BLM let alone approval from this Court – will directly exacerbate these species’ continuing decline.

“On or about October 6, 2019,” TC Energy plans to “cut selected trees along portions of the right-of-way in South Dakota,” ostensibly “to avoid affecting the Northern Long-Eared Bat during construction.” (TCE, p. 4.) TC Energy does not disclose the number, species, age, location or acreage of the trees it intends to remove. Nor does it explain how *removal* of trees currently used by this bat for roosting will protect – rather than harm – them. Removal is, by definition, a *permanent* loss of *existing* habitat. TC Energy ignores this loss.

The SEIS indicates that this bat species “does not migrate, but may travel up to 30 miles from winter hibernation to summer roosts.” (DOS6404.) Summer habitat includes “decaying trees, loose bark, tree snags, and stumps.” *Id.* In its March 16, 2017 letter regarding the Reinitiation of Section 7(a)(2) Consultation, FWS found that the Project would avoid adverse impacts to this listed species *only if* TC Energy implemented conservation measures “designed to protect maternity roost trees and hibernacula for the species” (FWS2748-2749.)

The conservation measures referenced in FWS' March 16, 2017 letter *prohibit* tree felling in South Dakota unless specific processes are followed. As relevant here, no trees may be felled within a 0.25 mile buffer around known hibernacula. (4(d) Rule for the Northern Long-Eared Bat, 81 Fed.Reg 1900, 1909-1910; 17 C.F.R. §17.40(o)(1)(ii) (C)(I).) “‘Known hibernacula’ are defined as locations where northern long-eared bats have been detected during hibernation or at the entrance during fall swarming or spring emergency.” (81 Fed.Reg. at 1909-1910.)

TC Energy does not address whether its planned tree-felling is consistent with these applicable limitations. Instead it provides only a statement that landowners have granted permission for this work. (TCE, p. 4.) Like its planned mowing's impacts on birds, this “tree felling” plan will *reduce* available habitat, not just for birds, squirrels, and other wildlife that obviously inhabit trees, but especially for the Northern Long-Eared Bat whose existing roosting habitat TC Energy plans to remove. This will cause significant and irreparable environmental harm including impacts on dwindling wildlife populations. (*National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp.2d 1143, 1159 (W.D. Wash. 2002) (activity that degrades critical habitat when species are not present still harms those species, because it “mak[es] the species’ return less likely”).)

TC Energy states that “on or about October 1, 2019,” it plans to “eradicate two types of weeds along the right-of-way in Montana and South Dakota.” (TCE,

p. 3.) It does not clarify which “weeds” it will be targeting during this spraying campaign, nor which herbicide or herbicides it intends to apply. (*Id.*) Nor does it identify the other plants – let alone wildlife – that would be impacted in the areas to be sprayed . Nor does it provide any estimate of the number of acres – either terrestrial or aquatic – that will be impacted by this action. (*Id.*) The use of herbicides has many unintended consequences, including plant and animal toxicity, degradation of wildlife habitat, water pollution from runoff into nearby creeks, ponds, lakes and wetlands, and the creation of herbicide-resistance. (ECF 120 (Report of Dr. Yan Linhart filed Dec. 29, 2017) at pp. 14-16.) TC Energy provides no information to assure that its “weed” eradication plans will avoid any of these foreseeable impacts.

TC Energy also indicates that it will transport pipe to pipe storage locations, “resume grounds keeping activities” at pipe storage yards, install underground utilities and power, and conduct other undisclosed activities to prepare its man-camps for use. (TCE, p. 3.) Although these activities will impact large areas, TC Energy fails to disclose the size and scale of these operations. In December 7, 2018, it stated that it would be preparing approximately 225 acres for its man-camp compounds, and approximately 161 acres for pipe storage yards. (TC Reply (*IEN v. State*, Dkt. 230), p. 3.) As it conceded in 2018, this land would be graded in order to accommodate these uses, thus removing additional available habitat. (*Id.*)

All of these activities will be conducted on the untenable assumption that this Court will not enjoin them. As this Court previously observed, these preconstruction activities “go beyond simply ‘integrating the NEPA process with other planning.’” (*IEN v. State*, 369 F.Supp.3d at 1050 (*IEN v. State*, Dkt. 231, p. 10) (quoting *National Audubon Society v. Dept. of Navy*, 422 F.3d 174, 206 (4th Cir. 2005); 40 C.F.R. § 1501.2).) Instead, these activities “could skew the [agencies’] future analysis and decision-making regarding the project.” (*Id.* at 1051 (citing *Colorado Wild*, 523 F.Supp.2d at 1221).)

Most objectionable of all, TC Energy ignores – and tacitly asks this Court to overlook – the broader impacts of its huge fossil-fuel development project. An article published in the Proceedings of the National Academy of Sciences assigns a 50% probability that global warming will increase between 2.4° and 2.6° Celsius in the near term (2050) and between 4.1° and 5° Celsius by 2100.⁴ If these levels are reached, the Earth’s climate will be destabilized because self-reinforcing feedback loops would then push the Earth’s climate beyond a temperature regime from which it can recover.⁵ The planet would suffer a disastrous series of

⁴ See Xu, Y., Ramanathan, V., Well below 2 °C: Mitigation strategies for avoiding dangerous to catastrophic climate changes, PNAS v. 114 n. 39 (Sept. 26, 2017) pp. 10315-10323 (available at: <https://www.pnas.org/content/pnas/114/39/10315.full.pdf>, last visited Sept. 25, 2019).

⁵ See Steffen, W., et al., Trajectories of the Earth System in the Anthropocene, PNAS, v. 115 n. 33 (Aug. 14, 2018), pp. 8252-8259 (available at: <https://www.pnas.org/content/pnas/115/33/8252.full.pdf>, last visited Sept. 25,

inexorable increases in temperatures on what they term a “hothouse Earth” pathway, *even if human emissions are then reduced* in belated response. (*Id.*) And in October 2018, the IPCC issued a special report warning of the impacts of global warming of just 1.5° Celsius.⁶ The IPCC report’s stark conclusion is that we must reduce carbon dioxide emissions by at least 45% in the next 12 years compared with 2010 levels, and achieve net zero carbon dioxide production by 2050, in order to stave off potentially calamitous “hothouse” scenarios.

TC Energy’s push to immediately begin construction of this massive fossil-fuel-project – whose greenhouse gas emissions will worsen the global warming crisis – must be rejected. TC Energy’s preconstruction activities will cause concrete harms to existing habitat and create impermissible bureaucratic momentum for an as-of-yet unreviewed and unapproved NEPA project.

Dated: September 26, 2019 PATTEN, PETERMAN, BEKKEDAHL &
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s/ James A. Patten
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2019).

⁶ Special Report: Global Warming of 1.5° C. 2018, IPCC (available at: <https://www.ipcc.ch/sr15/>, last visited on Sept. 25, 2019).

CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' RESPONSE TO STATUS REPORT BY TC ENERGY** contains 2,267 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

s/ Stephan C. Volker _____

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On September 26, 2019 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

PLAINTIFFS' RESPONSE TO STATUS REPORT BY TC ENERGY

I declare under penalty of perjury that the foregoing is true and correct.

s/ Stephan C. Volker
STEPHAN C. VOLKER (Pro Hac Vice)