



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Nebraska Field Office
203 West Second Street
Grand Island, Nebraska 68801

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FWS-NE: 2008-281

Ms. Elizabeth Orlando
OES/ENV, Room 2657
U.S. Department of State
Washington, D.C. 20520

RE: Letter of Concurrence under Section 7 of the Endangered Species Act for the Proposed Keystone and Cushing Pipeline Project by TransCanada

Dear Ms. Orlando:

This letter responds to your February 21, 2008, request to the U.S. Fish and Wildlife Service (Service) for concurrence with the findings of the U.S. Department of the State's (DOS) February 2008 final biological assessment (FBA) (ENSR Corporation 2008) for the Keystone and Cushing Pipeline Project (Keystone) under section 7 of the Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). The Service has been in consultation with DOS since January 2006. The summary of meetings, telephone conversations, and exchange of correspondence in the FBA, accurately depicts the consultation history of the Keystone project between DOS and the Service. This letter is only applicable to complying with ESA and does not represent concurrence or compliance with other federal fish and wildlife statutes such as Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712; 40 Stat. 755, as amended) and Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 688-688d, as amended) that are administered by the Service. The Service recommends that the project proponent (TransCanada) coordinate with the Service to develop measures necessary to comply with MBTA and BGEPA.

I. PROJECT DESCRIPTION

The Keystone project is a 1,830-mile-long interstate crude oil transmission system beginning in Hardisty, Alberta, Canada. The FBA specifically analyzes the effects of the 1,082 miles of a 30-inch diameter pipeline from the Canada/US border near North Dakota to Wood River, Missouri, and Patoka, Illinois, and the Cushing Extension including 296 miles of a 36-inch diameter pipeline from Steele City, Nebraska to Cushing, Oklahoma on federally listed species and federally designated critical habitat. The proposed project will include construction of pump stations, valves, meters, access roads, transmission and distribution lines and other electrical ancillary facilities, and contractor yards and pipe storage facilities. In the United States, the Keystone project would traverse through North Dakota, South Dakota, Nebraska, Kansas, Missouri and Illinois. The proposed Cushing pipeline would start in Oklahoma and move north

through Kansas where it would connect to the Keystone project in southern Nebraska. In total, both the Keystone and Cushing pipelines would be constructed in seven States. The proposed Keystone project would carry approximately 435,000 barrels per day (bpd) of crude oil when in full operation with an expandable capacity of 591,000 bpd. The pipeline would be buried a minimum of four feet below the surface. In order to cross over the Canada/US border with the pipeline, TransCanada must acquire a Presidential Permit from DOS.

II. U.S. DEPARTMENT OF STATE DETERMINATIONS

The FBA analyzes project impacts that are currently known and are summarized in the following sections. However, the location and design of interrelated and interdependent ancillary electrical infrastructure facilities of the project are not known at this time due to the planning and regulatory process that the Keystone project must undergo to acquire a Presidential Permit. Section 7 consultation for these project features is also discussed below.

A. Known Project Impacts That Would Cause No Effects to Listed Species

The FBA discusses the impacts of the Keystone project on federally listed species and designated critical habitat. Based on DOS's effects analysis, DOS has determined that the Keystone project would not affect the following federally listed species.

- gray bat (*Myotis grisescens*);
- gray wolf (*Canis lupus*);
- bald eagle (*Haliaeetus leucocephalus*); and
- winged mapleleaf (*Quadrula fragosa*)

The bald eagle was initially considered in DOS's assessment of the Keystone project, however, on June 28, 2007, the Service removed it from the *List of Endangered and Threatened Wildlife and Plants* under ESA (72 FR 37345). Similarly, gray wolves that are likely to occur in the Keystone project area would be wolves that are part of the Great Lakes Population, which includes portions of North and South Dakota where the proposed project area occurs. On March 12, 2007, the Service removed the gray wolves of the Great Lakes Population from the *List of Endangered and Threatened* (72 FR 6051). Thus, DOS did not do any further analysis for either the bald eagle or gray wolf for the FBA. DOS did not complete a detailed analysis of effects for the gray bat and the winged mapleleaf because neither of these two species is known to occur in the project area. Thus, due to the removal of the bald eagle and the gray wolf from *List of Endangered and Threatened Wildlife* and because the gray bat and winged mapleleaf are not known to occur in the Keystone project area, DOS determined that there would be no effect to bald eagle, gray wolf, gray bat, and winged mapleleaf.

B. Known Project Impacts That May Affect But Are Not Likely To Adversely Affect Listed Species

The DOS also determined that the Keystone project may affect but is not likely to adversely affect the following species.

- Indiana bat (*Myotis sodalis*);

- Interior least tern (*Sterna antillarum*);
- piping plover (*Charadrius melodus*);
- whooping crane (*Grus americana*);
- pallid sturgeon (*Scaphirhynchus albus*);
- Topeka shiner (*Notropis topeka*);
- Arkansas River shiner (*Notropis girardi*);
- Neosho madtom (*Notropis pacidus*);
- Higgins eye pearl mussel (*Lampsilis higginsii*);
- scaleshell mussel (*Leptodea leptodon*);
- running buffalo clover (*Trifolium stoloniferum*);
- decurrent false aster (*Boltonia decurrens*); and
- western prairie fringed orchid (*Platanthera praeclara*).

The FBA analyzed the effects of the proposed Keystone project on these species. In addition, the FBA describes conservation measures that will be employed to either avoid or offset adverse impacts. Based on the effects analysis and conservation measures identified in the FBA to avoid or offset adverse impacts, DOS has determined that the Keystone project may affect but is not likely to adversely affect the Indiana bat, Interior least tern, piping plover, whooping crane, pallid sturgeon, Topeka shiner, Arkansas River shiner, Neosho madtom, Higgins eye pearl mussel, scaleshell mussel, running buffalo clover, decurrent false aster, and western prairie fringed orchid.

C. Platte River Basin Water Depletions in Nebraska

In addition to the analysis of effects to the federally listed species listed above, the FBA identifies conservation measures that will be implemented to avoid water depletions to the Platte River system in Nebraska that may affect the Interior least tern, piping plover, pallid sturgeon, and western prairie fringed orchid. The FBA identifies that in order to avoid adverse impacts to listed species from water depletions to the Platte River system, TransCanada has designed the hydrostatic testing of the pipeline so that all water removed from the Platte River system will be used and returned to the Platte River system within a 30-day time frame. Based on this testing timeframe, DOS has determined that hydrostatically testing the Keystone project with water from the Platte River system may affect but is not likely to adversely affect the Interior least tern, piping plover, pallid sturgeon, and western prairie fringed orchid.

D. Unknown Project Impacts That May Affect Listed Species

At this time, DOS is unable to assess the impacts to federally listed species and designated critical habitat from electrical transmission and distribution lines and related facilities needed to provide power to the Keystone pump station. Design, location, and construction of the electrical infrastructure needed to operate the Keystone project will be completed by local utility companies. However, these local utility companies may not be required to conduct Section 7 consultation with the Service unless federal authorization, permitting, or funding applies to these actions. For Section 7 purposes, the Service views the design, location, and construction of the electrical infrastructure for the Keystone project, no matter who is responsible for constructing the power source, as interrelated and interdependent actions of construction and operation of the Keystone project. Further, it is recognized that the Rural Utilities Service (RUS), an agency within the U.S. Department of Agriculture, may finance a portion of

transmission line construction by local utility companies and that Western Area Power Administration (Western), an agency of the U.S. Department of Energy, may oversee the construction of the electrical substations. Thus, DOS, RUS, and Western, realizing their obligations to comply with section 7 of ESA have jointly signed a letter received by the Service on February 27, 2008, committing to completing section 7 consultation with the Service prior to any resources or authorizations being committed for the electrical infrastructure of the Keystone project. In addition, TransCanada has also signed this *Letter of Intent* and along with DOS, RUS, Western, and the Service, will develop a Memorandum of Agreement (MOA) that outlines the responsibilities and obligations of each of the signatories for completing section 7 consultation. This *Letter of Intent* serves as a conservation measure by the federal agencies to assure the Service that the electrical infrastructure of the Keystone project will be constructed until section 7 consultation with the Service has been completed for these facilities. Thus, DOS determines that implementing the conditions of the *Letter of Intent* and subsequent MOA may affect but is not likely to adversely affect federally listed species or designated critical habitat.

E. Candidate Species

The Dakota skipper (*Hesperia dacotae*) and eastern massasauga rattlesnake (*Sistrurus catenatus catenatus*) are candidate species that occur in the area where the proposed Keystone project is planned to be constructed. The FBA did not address measures to protect these candidates, however, DOS did address these species in the *Final Environmental Impact Statement for the Keystone Oil Pipeline Project* (USDOS 2008).

III. U.S. FISH AND WILDLIFE SERVICE'S REVIEW AND CONCURRENCE OF THE KEYSTONE PIPELINE PROJECT FINAL BIOLOGICAL ASSESSMENT

A. Known Project Impacts That Would Cause No Effects to Listed Species

The DOS has determined that there would be no effect to bald eagle and gray wolf from the construction of the Keystone project because the bald eagle and gray wolf have been delisted and no longer require protection under ESA. Further, DOS has determined no effect to the gray bat and winged mapleleaf because these two species do not occur in the Keystone project area. Based on the information in the FBA, **the Service concurs with DOS's no effect determination for the bald eagle, gray wolf, gray bat, and winged mapleleaf.**

B. Known Project Impacts That May Affect But Are Not Likely To Adversely Affect Listed Species

For the 13 listed species identified in Section II. B. above, DOS has determined that the Keystone project may affect but is not likely to adversely affect these species. This determination is based on the project proponent implementing avoidance measures (e.g., horizontal directionally drilling under the Missouri and Mississippi Rivers as opposed to open trenching to avoid impacts to pallid sturgeon) as well as implementing conservation measures (e.g., seasonal restrictions, habitat replacement, daily monitoring, etc.) to avoid impacts to listed species. These avoidance and conservation measures are described in detail in the FBA for each of the 13 species. Based on the information in the FBA regarding avoidance and the implementation of conservation

measures, **the Service concurs with DOS's determination that the Keystone project may affect but is not likely to adversely affect the Indiana bat, Interior least tern, piping plover, whooping crane, pallid sturgeon, Topeka shiner, Arkansas River shiner, Neosho madtom, Higgins eye pearl mussel, scaleshell mussel, running buffalo clover, decurrent false aster, and western prairie fringed orchid.**

C. **Platte River Basin Water Depletions in Nebraska**

The Service has adopted a policy that water-related activities in the Platte River basin resulting in less than 0.1 acre-feet/year of depletions in flow to the nearest surface water tributary to the Platte River system have an insignificant effect on the Platte River target species, and thus do not require consultation with the Service for potential effects on those species. This threshold was established to minimize the time and effort expended by the Service, by project proponents, and by lead federal agencies in the review of projects that are not expected, either individually or collectively, to have any appreciable effect on the success or failure of Platte River species-recovery efforts. One-tenth of an acre-foot roughly equates to the annual consumptive use of one residential water user in the Platte River basin.

Based on TransCanada's commitment to return all Platte River system water within a 30-day period during the hydrostatic testing phase of the Keystone project as described in the FBA, **the Service concurs with DOS's determination that the Keystone project may affect but is not likely to adversely affect the Interior least tern, piping plover, pallid sturgeon, and western prairie fringed orchid for the Platte River system in Nebraska.**

D. **Unknown Project Impacts That May Affect Listed Species**

The Service has reviewed the joint *Letter of Intent* signed by DOS, RUS, Western and TransCanada. The Service recognizes that large-scale construction projects entail several planning and construction phases that do not always have the level of detailed plans or information all at one time. However, section 7 of ESA requires federal agencies to assess both direct and indirect affects of a project including the interrelated and interdependent affects prior to commitment of resources. **The Service does view the *Letter of Intent* and subsequent MOA as a conservation measure for the Keystone project and programmatically concurs with DOS's determination that the electrical infrastructure of the Keystone project may affect but is not likely to adversely affect federally listed species or designated critical habitat.** The Service recommends that the MOA be completed and signed as soon as possible.

E. **Candidate Species**

Candidate species are species under consideration by the Service for possible inclusion on the *List of Endangered and Threatened Wildlife and Plants*. Although these species receive no substantive or procedural protection under ESA, the Service encourages federal agencies and project proponents to consider candidate species in their project planning process. Actions taken to avoid effects to these species may reduce the need to consider listing under ESA at a later date. The Service encourages the Keystone


project proponent to avoid and minimize impacts to the Dakota skipper and eastern massasauga rattlesnake during construction of the project.

IV. REINITIATION OF CONSULTATION

This concludes section 7 consultation on the actions outlined in the FBA. As provided in 50 CFR § 402.16, reinitiation of consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: 1) take is to occur; 2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in the FBA and this letter; 3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in the FBA or this letter; or 4) a new species is listed or critical habitat designated that may be affected by the action. In instances where take is to occur, any operations causing such take must cease pending reinitiation.

The Service appreciates DOS's commitment to protecting federally listed species and their habitats within the Keystone project area. If you have any questions regarding this letter, please contact John Cochnar at John_Cochnar@fws.gov or telephone number (308) 382-6468, extension 20.

Sincerely,



Michael LeValley
Acting Nebraska Field Supervisor

REFERENCES

ENSR Corporation. 2008. Keystone Pipeline Project Biological Assessment – Final. Prepared for the Department of State, Document No.: 10623-004r1. Ft. Collins, Colorado.

United States Department of the Interior. 2007. Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife; Final Rule. U.S. Fish and Wildlife Service, Washington D.C. 72 FR 37345-37372.

_____. 2007. Endangered and Threatened Wildlife and Plants; Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife. U.S. Fish and Wildlife Service, Washington D.C. 72 FR 6051-6103

United States Department of State. 2008. Final Environmental Impact Statement for the Keystone Oil Pipeline Project: Applicant for Presidential Permit: TransCanada Keystone Pipeline LP. Washington, D.C.