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**Re: Appeal of Section 401 Water Quality Certification Issued for DEQ
Application Number MT4011079, the Keystone XL Pipeline Project**

NOTICE OF APPEAL & REQUEST FOR HEARING

Northern Plains Resource Council and Sierra Club (collectively, “Conservation Groups”), pursuant to Montana Code Annotated § 2-4-101 *et seq.*, and Administrative Rule of Montana 17.30.109, hereby file this notice of appeal and request for a hearing concerning the Montana Department of Environmental Quality’s (hereinafter “DEQ”) December 31, 2020 issuance of a final Section 401 Water Quality Certification (hereinafter the “Certification”) to TransCanada Keystone Pipeline LP (hereinafter “TransCanada”), for the Keystone XL Pipeline Project (hereinafter the “Project”) in Phillips, Valley, McCone, Dawson, Prairie and Fallon Counties. The undersigned request that the Board of Environmental Review or its appointed hearing examiner hold a hearing on this appeal, pursuant to ARM 17.30.109(1)(b).

The Project as proposed, even with the conditions that DEQ includes in the Certification, does not assure compliance with water quality standards and violates law. In submitted comments (“Petitioners’ Comments”), the Conservation Groups have articulated in detail the reasons why, contrary to the Certification, DEQ has not met its burden to assure compliance with

all relevant provisions of the Clean Water Act and Montana's state water quality standards. Further, by its own admission DEQ has not reviewed or responded to public comment concerning the Project and thereby violated agency public participation duties, abused its discretion, and rendered its decisionmaking arbitrary and capricious. Therefore, the Board of Environmental Review should declare DEQ's Certification unlawful, and reverse and remand for further consideration.

DEQ's issuance of a 401 Certification for the Keystone XL Project is flawed. The grounds of DEQ's errors include, but are not limited to, the following:

1. The federal Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, was passed in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 401(a) of the CWA provides, in relevant part, that any applicant for a federal license or permit to conduct any activity that may result in discharge into navigable waters must provide the licensing or permitting agency with a water quality certification ("Certification") from the State in which the discharge originates. 33 U.S.C. § 1341(a).
2. If DEQ chooses to issue a Certification, it must ensure that all discharges from the activity will comply with the Act, including all applicable state water quality standards and requirements. *Id.* See also ARM 17.30.101(1)-(2). Specifically, any Certification "*shall set forth any effluent limitations or other limitations, and monitoring requirements necessary to assure*" that the applicant's discharges and other activities will comply with all applicable state water quality standards and requirements set forth in the Certification. 33 U.S.C. § 1341(d) (emphasis added).

3. The clear statutory directive of Section 401 requires the issuing authority to reconcile how a Certification is capable of assuring a project will protect water quality standards. *See* 33 USC § 1341(d). This requirement represents an affirmative duty to demonstrate, based on record evidence, that a Certification “will comply” with—and therefore “assure” no violations of—water quality standards.
4. Congruent with the direction of § 1341, the CWA “requires each state, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 704 (1994). State water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses[,]” 33 U.S.C. § 1313(c)(2)(A), and must “include ‘a statewide antidegradation policy’ to ensure that ‘[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.’” PUD No. 1, 511 U.S., at 705 (quoting 40 C.F.R. § 131.12).
5. Thus, ensuring compliance with water quality standards lies at the heart of the Certification required under Section 401 of the CWA. EPA regulations in place at the time of the Project’s submission to DEQ require that certifications include a “statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3). Therefore, to certify that there is a reasonable assurance that a federally permitted activity will be conducted in a manner that will not violate applicable water quality standards, a state must provide a record-based finding that includes analysis of (1) designated uses, (2) numeric and narrative water quality criteria, and (3) the state’s antidegradation policy. EPA has made clear that States “must

apply antidegradation requirements to ... any activity requiring a CWA §401 certification.”
63 Fed. Reg. 36,742, 36,780 (July 7, 1998).

6. Montana has adopted water quality standards, including an antidegradation policy (called the nondegradation policy in Montana). *See* 75-5-303 MCA; 17.30.601 *et seq.* Degradation of high-quality waters is prohibited unless under limited circumstances, ARM 17.30.706, and then only pursuant to the procedures and findings required pursuant to 17.30.706. Because Montana’s nondegradation policy is part of its water quality standards, DEQ must consider whether a federally permitted activity complies with that policy before certifying such activity under Section 401. 40 C.F.R. § 121.2(a)(3), 63 Fed. Reg. at 36,780.
7. DEQ must also solicit and respond to significant public comment before decisionmaking to “permit an exchange of views, information, and criticism between interested persons and the agency.” Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 11, 54 L.Ed.2d 89 (1977); Article II, Section 8, Montana Constitution (“[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision”); *see also* 2-3-101, MCA (citizens are to be afforded reasonable opportunity to participate). An agency is obligated to identify and comment on the relevant and significant issues raised during a proceeding. Home Box Office, 567 F.2d at 35 n. 58; Community Nutrition Institute v. Bergland, 493 F. Supp. 488, 492-93 (D.C. 1980); ARM 17.30.101 (“the department shall ensure that any activity that requires a federal license or permit and that may result in a discharge to state waters shall fulfill the requirements of ARM Title 17, chapter 30 and thereby also fulfill the requirements of 33 U.S.C sections 1311-1313, 1316, and 1317”); *see* 33 U.S.C. § 1251(e) (public’s right to participate in the development of

pollution permit limits guaranteed by the CWA); *see also* ARM 17.30.1377 (DEQ must respond to public comments).

8. DEQ issued a final 401 Certification for the Project on December 31, 2020 suffering from a number of significant flaws that violate important provisions of the Clean Water Act and Montana law.
9. First, DEQ's Certification fails to assure the Project—as a whole—will not violate water quality standards. DEQ made an error of law when it constrained its scope of review only to planned construction-related stream crossing and wetland impacts of the Project. Doing so ignored key Project impacts directly relevant to assuring compliance with Montana's water quality standards, such as consideration of the overall Project's footprint and impacts on Montana waters in addition to stream crossings, including upland water quality impacts from associated facilities, reasonably foreseeable water quality impacts from pipeline operation and/or pipeline spills, and the cumulative impacts associated with numerous crossings in close proximity. The U.S. Supreme Court has expressly rejected DEQ's myopic scope of review for a 401 Certification and confirmed that the Clean Water Act requires a 401 Certification to consider all Project related activities and facilities, planned and potential discharges, during both construction and operation of a Project. PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 711-12 (1994); *see also* 33 U.S.C. § 1341(a). DEQ, in limiting its Certification review solely to construction-related stream crossings and wetland impacts, rather than considering impacts of the entire “activity,” committed clear legal error and therefore its Certification is unlawful, arbitrary and capricious.

10. Second, DEQ's Certification was issued despite the absence of material information concerning the Project's impacts on water resources, information required prior to decisionmaking under ARM 17.30.103(3) and which is critical to assessing water quality impacts. Missing material Project information required by DEQ's rules includes but is not limited to: the volume of discharge at each crossing of a wetland or waterbody within Montana, the biological, chemical, physical, and radiological characteristics of discharges, a description of the existing environment at each of the sites of discharge, or identification of all potentially affected Waters of the United States. *Id.* Similarly, the Project's application fails to provide meaningful detail qualifying the permanence or ongoing propensity of Project activities and facilities to degrade water quality beyond initial construction and crossing activities. The record does not reflect adequate consideration of these Project impacts, without which DEQ could not reasonably determine whether the Project, including all its connected and associated activities and facilities, will assure compliance with water quality standards. Therefore, DEQ's failure to require material data essential to its Certification represents a decision based upon unlawful procedure, and the failure to adequately consider such renders its Certification legal error, arbitrary and capricious.
11. Third, the record does not support DEQ's Certification and finding that the Project will be constructed in compliance with the Clean Water Act and assure compliance with water quality standards. DEQ's Certification was clearly erroneous, in violation of the law, and arbitrary and capricious because it: (a) failed to account for water quality impacts on numerous wetlands and upland areas that would be affected by construction and operation; (b) ignored permanent impacts to water quality from pipeline construction; (c) failed to consider the Project's cumulative effects and ability to, long-term, assure compliance with

water quality standards; (d) inadequate consideration of less-harmful alternatives in determining Project compliance with water quality standards; (e) failed to consider the risks and impacts of frac-outs on the Project's ability to assure compliance with water quality standards; and (f) failed to evaluate the risks and impacts of oil spills during pipeline operation as part of evaluating the Project's ability to assure compliance with water quality standards. Petitioner's submitted substantial evidence during the Certification comment period raising these water quality impacts and identifying less-degrading alternatives, issues DEQ failed to reasonably consider.

12. In sum, the record for DEQ's Certification falls short of providing a reasonable assurance that the Project will maintain and protect existing water quality, and nowhere does DEQ explain its omissions or failure to identify or consider significant water quality impacts of the Project. Nor does the record reasonably allow DEQ to conclude that there are no prudent and feasible alternatives available that would avoid or minimize adverse impacts to water quality, or that the Project would avoid creating a permanent obstacle to attaining and maintaining water quality standards. In such circumstances DEQ's decision to issue the Certification was clearly erroneous, in violation of law, and arbitrary and capricious.
13. Fourth, upon information and belief, DEQ utterly failed to perform nondegradation review with regard to the numerous streams and wetlands that would receive discharges from the Project's construction and operation. That failure renders DEQ's issuance of the Certification inconsistent with the requirements of Section 401, the CWA, and error as a matter of law. To the extent DEQ conducted any form of nondegradation review supporting a conclusion that the Project's impacts were nonsignificant, that review was clearly erroneous and an abuse of discretion. The record contains, at best, inadequate consideration

of the Project's water quality impacts and proscribes generic best management practices, neither of which satisfy the rigorous review mandated by ARM 17.30.701 *et seq.* or 75-5-303 MCA. DEQ's abbreviated discussions do not satisfy required regulatory criteria, prohibit unlawful degradation, or represent a reasonable basis supporting the Certification's finding that the Project will not violate water quality standards. Therefore, the Certification was clearly erroneous, unlawful, arbitrary and capricious.

14. Similarly, DEQ also abused its discretion when it failed to analyze the effect(s) of Project discharges to impaired waterways on the State's 303(d) List, or to ensure adequate plans exist to bring impaired waters into compliance with water quality standards before allowing increased pollution through issuing its Certification. *See Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007, 1014 (9th Cir. 2007); 40 C.F.R. § 122.4. Among other impacts, a primary Project effect is the discharge of increased turbidity and sedimentation, which may also carry other pollutants of concern, into waterways. Discharges of additional pollutants of concern for each respective impaired waterway will exacerbate existing impairments. Doing so will result in violations of water quality standards, in violation of Section 401 and the Clean Water Act.

15. Fifth, DEQ violated its statutory and constitutional duty to provide a meaningful public comment process that satisfies the public's right to a reasonable opportunity to participate. DEQ's final Certification admits that "[DEQ] cannot meaningfully consider and answer all the public comments it received." Public participation statutes and Montana's constitutional guarantees of public participation contemplate more than merely eliciting public comment. Art. II, Sec. 8, Montana Constitution; 2-3-101 MCA *et seq.*; *see also* ARM 17.30.1377; *see supra* Home Box Office, 567 F.2d at 35 n. 58. Upon information and belief, DEQ received

hundreds of comments opposed to and questioning varying aspects of its tentative decision to certify the Project, yet by its own admission DEQ failed to consider, much less respond to significant, public comments and Petitioners are unaware of any Response to Comments document supporting the Certification as of the filing of this appeal. Accordingly, DEQ's issuance of the Certification violated public participation mandates and was unlawful, arbitrary and capricious.

16. The Conservation Groups respectfully request that BER declare the Keystone XL Pipeline Project 401 Certification unlawful, void ab initio, and remand this matter to DEQ to reassess the application consistent with the requirements of the Clean Water Act and Montana law.

Respectfully submitted this 4th day of January, 2021.



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