



Via Overnight Mail

May 14, 2018

Mr. Steven J. Kean
Chief Executive Officer
Kinder Morgan
1001 Louisiana St, Suite 1000
Houston, TX 77002

Mr. Ian D. Anderson
President
Kinder Morgan Canada Terminals Limited Partnership
300 5th Avenue SW, Suite 2700
Calgary, AB T2P 5J2

Re: *Application of the U.S. Endangered Species Act to the Trans Mountain
Expansion Project*

Dear Mr. Kean and Mr. Anderson:

On behalf of the Natural Resources Defense Council (“NRDC”) and our members and activists in the United States, Canada, and around the globe, we are writing to express our strong concern about the proposed Kinder Morgan Trans Mountain Expansion Project (“Project”) and to notify your company of its liabilities under the U.S. Endangered Species Act of 1973 (“ESA”), 16 U.S.C. §1531 *et seq.* The Project would, if completed, substantially reduce the likelihood of survival and recovery of the critically endangered Southern Resident Killer Whale. For this reason, the company has significant responsibilities under ESA sections 9 and 10, pertaining to its construction and operation of the associated Westridge Marine Terminal.

The NRDC is an international nonprofit environmental organization, headquartered in the United States, with more than 3 million members and online activists. Since 1970, our lawyers, scientists, and other specialists have worked to protect the world's natural resources, public health, and the environment. Our organization has a commitment to the Southern Residents that dates back decades. To dramatically increase tanker traffic in the Salish Sea, impeding the whales' ability to forage and risking an oil spill in the whales' core habitat, would jeopardize this unique population and violate the Endangered Species Act.

I. Background on the Endangered Southern Resident Killer Whale

The Southern Resident Killer Whale (*Orcinus orca*) population of the Pacific Northwest is one of the most critically imperiled populations of marine mammals on the planet. With the death of

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the population's oldest matriarch (J2) and seven other individuals in the past two years, the population now stands at a 30-year low of 76 individual animals.¹ In both the United States and Canada, the whales have been formally protected because of their high risk of extinction for well over a decade. The United States listed the whales as endangered under the Endangered Species Act in 2005,² and Canada formally designated the whales as endangered under the Species At Risk Act in 2003.³

The National Oceanic and Atmospheric Administration (NOAA) is the agency in the United States tasked with safeguarding endangered marine species, including the Southern Resident Killer Whale. NOAA publishes a biennial Report to Congress in which it summarizes its efforts to recover all species under its jurisdiction. In the agency's last report, it identified the Southern Resident Killer Whale as one of eight marine species whose extinction is almost certain if immediate actions are not taken.⁴ Additionally, the Southern Residents, together with the St. Lawrence beluga and North Atlantic right whale, constitute one of three endangered populations for which conservation action is mandated under Canada's Oceans Protection Plan, adopted in 2016.⁵ There is widespread recognition on both sides of the border that this is a population on the cusp of extinction that requires protection by the government to the fullest extent of the law.

Since reaching a peak of 98 whales in 1995—the highest recorded since the first population census in 1974, but still far below the estimated historic abundance—the Southern Resident population has been in a general state of decline. In its 2016 Status Review, NOAA projected an average decline of 0.65 percent per year if demographic rates (such as lower fecundity) remain as they have been during the 2011–2016 period,⁶ resulting in an estimated extinction risk of 49 percent within the next 100 years.⁷ The whales have not had a successful birth in two years, and one of the population's three pods has not produced any surviving calves since 2011; in recent years, the calves that have been born have been disproportionately male.⁸ The small size of the population puts them at increased risk of reduced resilience to disease or pollution, reduced population fitness, inbreeding, and extinction from a catastrophic event.⁹ A recent genetic

¹ Center for Whale Research, 2017 SRKW Census—July1 (2017).

² Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69903 (Nov. 18, 2005).

³ See Fisheries and Oceans Canada, *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada*, Species at Risk Act Recovery Strategy Series (2011), http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_epaulard_killer_whale_v02_1011_eng.pdf.

⁴ National Marine Fisheries Service, *Recovering Threatened and Endangered Species Report to Congress (FY 2015-2016)* (Nov. 30, 2017), <https://www.fisheries.noaa.gov/resource/document/recovering-threatened-and-endangered-species-report-congress-fy-2015-2016>.

⁵ Transport Canada, *Canada's Oceans Protection Plan* (Nov. 7, 2016), <https://www.tc.gc.ca/eng/canada-oceans-protection-plan.html>.

⁶ National Marine Fisheries Service, *Southern Resident Killer Whales (Orcinus orca) 5-Year Review: Summary and Evaluation* (Dec. 2016), <https://repository.library.noaa.gov/view/noaa/17031>.

⁷ L.A. Vélez-Espino *et al.*, *Comparative Demography and Viability of Northeastern Pacific Resident Killer Whale Populations at Risk*, Canadian Technical Report of Fisheries and Aquatic Sciences 3084 (2014).

⁸ *Southern Resident Killer Whales (Orcinus orca) 5-Year Review*, *supra* note 6.

⁹ *Id.*

analysis found that only two adult males fathered 52 percent of the calves born since 1990.¹⁰ While the 2016 NOAA Status Review recognized the significant threat of disturbance from vessels and sound faced by the whales, as well as the threat from an oil spill, it did not anticipate or account for a major additional industrial development, like the Project, with increased vessel traffic inside the Salish Sea.¹¹

The Southern Residents use the Salish Sea year-round, and in most years the whales are continuously present from May to November. The whales are drawn to the region because these fish-eating predators feed almost exclusively on salmonids, and the Strait of Juan de Fuca, Haro Strait, and Georgia Strait are relatively narrow channels that concentrate salmon returning from the Pacific Ocean to spawn in U.S. and Canadian rivers. Haro Strait and the San Juan Islands lie near the mouth of the Fraser River, which has the largest salmon runs in the Georgia Basin/Puget Sound region. NOAA's Northwest Fisheries Science Center has used fecal DNA analysis to confirm that, from May through September, Chinook salmon comprise 79.5 percent of the Southern Resident diet,¹² and a separate study that analyzed the whales' fecal samples found that 80 to 90 percent of the Chinook the whales ate during the summer months originated in the Fraser River.¹³ Given the manifest importance of this area, both the United States and Canada have designated the waters of the Salish Sea as "critical habitat" for the Southern Residents under their respective endangered species laws.¹⁴

Over the past several decades salmon abundance in the region has dropped dramatically, and the whales regularly appear visibly thin with an emaciated, peanut-shaped head and ribs showing.¹⁵ Declines in the availability of Chinook salmon have been correlated with increased mortality of the whales, decreased fecundity, changes in social cohesion, and declines in adult size of the Southern Residents.¹⁶ A 2017 study by the University of Washington Center for Conservation

¹⁰ M.J. Ford *et al.*, *Inbreeding in an Endangered Killer Whale Population*, *Animal Conservation* 10.1111/acv.12413 (2018).

¹¹ *Southern Resident Killer Whales (Orcinus orca) 5-Year Review*, *supra* note 6.

¹² M.J. Ford *et al.*, *Estimation of Killer Whale (Orcinus orca) Population's Diet Using Sequencing Analysis of DNA from Feces*, 11(1) *PLoS ONE* e0144956 (2016).

¹³ M.B. Hanson *et al.*, *Species and Stock Identification of Prey Consumed by Endangered Southern Resident Killer Whales in Their Summer Range*, 11 *Endangered Species Research* 69-82 (2010).

¹⁴ Designation of Critical Habitat for Southern Resident Killer Whale, 71 Fed. Reg. 69054 (Nov. 29, 2006); Fisheries and Oceans Canada, *Identification of Habitats of Special Importance to Resident Killer Whales (Orcinus orca) off the West Coast of Canada*, DFO Canadian Science Advisory Secretariat (2017).

¹⁵ H. Fearnbach *et al.*, *Using Aerial Photogrammetry to Detect Changes in Body Condition of Endangered Southern Resident Killer Whales*, 35 *Endangered Species Research* 175-80 (2018).

¹⁶ K.M. Parsons *et al.*, *The Social Dynamics of Southern Resident Killer Whales and Conservation Implications for This Endangered Population*, 77 *Animal Behaviour* 963-971 (2009); E.J. Ward *et al.*, *Quantifying the Effects of Prey Abundance on Killer Whale Reproduction*, 46 *Journal of Applied Ecology* 632-640 (2009); J.K.B. Ford *et al.*, *Linking Killer Whale Survival and Prey Abundance: Food Limitation in the Oceans' Apex Predator*, 6 *Biology Letters* 139-142 (2010); Holly Fearnbach *et al.*, *Size and Long-Term Growth Trends of Endangered Fish-Eating Killer Whales*, 13 *Endangered Species Research* 173-180 (2011); E.A. Foster *et al.*, *Social Network Correlates of Food Availability in an Endangered Population of Killer Whales, Orcinus orca*. 83 *Animal Behavior* 731-36 (2012).

Biology, NOAA's Northwest Fisheries Science Center, and the Center for Whale Research found that up to 69 percent of pregnancies failed from 2008 to 2014 (and 33 percent failed late in gestation) and linked this low reproductive success to stress brought on by low abundance of Chinook salmon.¹⁷ Several recent calf and adult-female Southern Resident Killer Whale mortalities have been attributed, at least in part, to poor body condition and starvation.¹⁸ For example, reproductive-age female J28 (or "Polaris") was noted to be losing body condition in January 2016 after birthing a calf, and she died in the Strait of Juan de Fuca in October of 2016.¹⁹ Shortly thereafter, her 10-month-old calf, J54, died as well.²⁰

Recent years have seen a concerning high mortality in reproductive-age females. Researchers measuring the whales' body condition with aerial drones have observed disproportionate declines in the body condition of reproductive-age females, who have higher energetic demands, compared with other age groups. Declines in body condition were documented in six reproductive females before their deaths between 2008 and 2016.²¹

Lack of adequate prey is directly exacerbated by vessel traffic and rising anthropogenic underwater noise. In its Recovery Plan for the Southern Residents, NOAA recognized vessel effects and underwater sound as one of the three primary threats to the species.²² Canada's Recovery Strategy for Southern Residents also identifies physical and acoustic disturbance from vessels as one of the main threats compromising the survival and recovery of the Southern Residents.²³

Killer whales rely on sound for orientation and navigation, for communication vital to group cohesion, and for hunting of salmon.²⁴ The underwater noise produced by vessels and the vessels' physical presence disrupt these vital behaviors, affecting the whales' basic life processes, foraging rates, and energetics. Behavioral reactions to noise and vessel presence can depend on a number of contextual factors, including the activity state of the whales; in the case of the Southern Residents, it is clear that the whales are highly vulnerable to vessel disturbance while feeding. Notably, researchers have reported that, on exposure to vessel noise, the whales

¹⁷ S.K. Wasser *et al.*, *Population Growth is Limited by Nutritional Impacts on Pregnancy Success in Endangered Southern Resident Killer Whales (Orcinus orca)*. 12(6) PLoS ONE e0179824 (2017).

¹⁸ C.O. Matkin *et al.*, *Review of Recent Research on Southern Resident Killer Whales (SRKW) to Detect Evidence of Poor Body Condition in the Population*, Independent Science Panel Report to the SeaDoc Society (2017).

¹⁹ K. Balcomb, *J28 Obituary*, Oct. 2016, <https://www.whaleresearch.com/j28>.

²⁰ *Id.*

²¹ Matkin *et al.*, *supra* note 18.

²² National Marine Fisheries Service, *Recovery Plan for Southern Resident Killer Whales (Orcinus orca)* (2008), http://www.nmfs.noaa.gov/pr/pdfs/recovery/whale_killer.pdf.

²³ *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada*, *supra* note 3; Fisheries and Oceans Canada, *Action Plan for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada*, Species at Risk Act Action Plan Series, (2017).

²⁴ J.K.B. Ford *et al.*, *Killer Whales: The Natural History and Genealogy of Orcinus orca in British Columbia and Washington*, 2nd ed. (2000).

increase their swimming speeds, engage in evasive swimming patterns, increase their time spent traveling, alter their dive lengths, and significantly reduce their foraging time.²⁵

These apex predators hunt together using echolocation, and their ability to effectively find and catch prey items already at low abundance is further reduced when foraging is occurring with acoustic and physical disturbance from vessel traffic. This reduction in foraging efficiency translates to lower intake of food energy, which in turn compromises fitness and survival, lowers birthrates, and increases mortality.

A recent expert population viability analysis (PVA)²⁶ found that if it were possible to eliminate acoustic disturbance while maintaining current levels of Chinook abundance, annual population growth would increase to 1.7 percent.²⁷ The greatest predicted rates of population growth were only possible, however, by combining an increase in Chinook with a reduction in acoustic disturbance. For example, if Chinook availability were increased by 15 percent and ambient noise decreased by 50 percent, the PVA model predicted a 2.3 percent increase in population growth, which is the United States' recovery target.²⁸ On the other hand, the authors found that if additional threats from proposed and approved shipping developments—including from the Project—are realized, together with the predicted decline of Chinook due to climate change, then the population could decline by as much as 1.7 percent annually, have a 70 percent probability of collapsing to fewer than 30 animals, and have a 25 percent chance of complete extirpation within 100 years.²⁹

The threat of additional vessel traffic inside the whales' critical habitat is not limited to increased underwater noise and decreased hunting efficiency, but also includes the risk of ship strikes. Although collisions with vessels are infrequent, they do occur and can result in serious injury or death. Two recent Southern Resident mortalities have been attributed to blunt force trauma consistent with such a collision.³⁰

II. Kinder Morgan's Responsibilities under the U.S. Endangered Species Act of 1973

The proposed Trans Mountain Expansion Project would nearly triple the capacity of Kinder Morgan to transport crude oil from the oil sands in Alberta to Vancouver, from 300,000 to

²⁵ R. Williams *et al.*, *Estimating Relative Energetic Costs of Human Disturbance to Killer Whales* *Orcinus orca*, 133 *Biological Conservation* 301-11 (2006); D. Lusseau *et al.*, *Vessel Traffic Disrupts the Foraging Behavior of Southern Resident Killer Whales* *Orcinus orca*, 6 *Endangered Species Research* 211 (2009).

²⁶ Population viability analyses (PVA) use models of population dynamics to evaluate the relative importance of multiple anthropogenic stressors, so that conservation can be directed toward efforts most likely to promote species recovery.

²⁷ R.C. Lacy *et al.*, *Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans*, 7 *Scientific Reports* art. no: 14119 (2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See, e.g.*, Memorandum from J. Bolton, NMFS Northwest Fisheries Science Center, to B. Norberg, NMFS Northwest Regional Office (Nov. 21, 2013) ("Persistent Organic pollutant and lipid analyses of blubber from a Southern Resident killer whale (*Orcinus orca*)").

890,000 barrels of oil per day. That increase in oil would result in a related increase in oil tanker and barge traffic in the region. The number of tankers loaded at the proposed expanded Westridge Marine Terminal complex is forecasted to increase to approximately 34 per month, or as many as 408 tankers per year.³¹ Each ship would pass directly through the Southern Residents' critical habitat: an area afforded substantive protection under the U.S. Endangered Species Act because it has been found essential to the survival and recovery of the species.³² Underwater noise produced by the tankers and additional associated vessel traffic would disrupt the whales' vital behavior, reducing foraging efficiency in the already compromised Southern Resident population.

The Project would not only increase ocean noise, but also increase the risk of an oil spill. A risk analysis prepared for Trans Mountain estimated that, even if all current and future proposed risk control measures were implemented, the increased risk of a "worst case oil spill in the study area" from Trans Mountain tanker traffic would be 30 percent higher than the risk of such an occurrence without the Project.³³ This risk is heightened by the fact that the Project's tankers would carry diluted tar sands bitumen, which presents exceptional challenges for spill response and cleanup in the water. Following a spill, the volatile petrochemicals in the diluted bitumen typically evaporate, leaving the heavy bitumen to sink to the ocean bottom.³⁴ Tar sands crude that has sunk below the surface cannot effectively be contained with conventional spill response measures, and this can lead to long-term contamination, as tar sands crude does not appreciably biodegrade over time and is extremely difficult, if not impossible, to completely dredge from the ocean bottom.³⁵

The U.S. National Marine Fisheries Service recently highlighted the potential risk to the Southern Resident population, due to its small size and social structure, from catastrophic events such as an oil spill.³⁶ The transit of hundreds of large oil tankers each year through the Salish Sea would heighten the risk of an existential spill.

Given these impacts, construction of the Project would violate section 9 of the Endangered Species Act for the reasons set forth below.

³¹ Trans Mountain, *Marine Plans*, <https://www.transmountain.com/marine-plans> (last accessed on May 9, 2018).

³² Designation of Critical Habitat for Southern Resident Killer Whale, 71 Fed. Reg. 69054 (Nov. 29, 2006).

³³ *Marine Plans*, *supra* note 31 at 7.

³⁴ See, e.g., Government of Canada, *Properties, Composition, and Marine Spill Behavior, Fate, and Transport of Two Diluted Bitumen Products from the Canadian Oil Sands* (2013), www.ec.gc.ca/scitech/6a2D63e5-4137-440B-8BB3-e38eCeD9B02F/1633_Dilbit%20technical%20report_e_v2%20FINaL-s.pdf.

³⁵ See, e.g., Letter from C. Giles, Assistant Administrator for Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, to J.W. Fernandez, Assistant Secretary for Economic, Energy, and Business Affairs, U.S. Department of State, and K.-A. Jones, Assistant Secretary, Oceans and International Environmental and Scientific Affairs, U.S. Department of State (Apr. 22, 2013), www.epa.gov/compliance/nepa/keystone-xl-project-epa-comment-letter-20130056.pdf.

³⁶ *Southern Resident Killer Whales (Orcinus orca) 5-Year Review: Summary and Evaluation*, *supra* note 6.

a. **The ESA prohibits the “take” of any endangered Southern Resident Killer Whale in U.S. territorial waters, unless such take is permissible and receives a permit under the Act.**

The Endangered Species Act was passed by the U.S. Congress, in 1973, “to halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The Act is designed to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers. *See* 16 U.S.C. §§ 1531(b), 1532(3). It achieves its goal by outlawing direct harm to listed species and by protecting “the ecosystems upon which endangered species and threatened species depend.” 16 U.S.C. § 1531(b). In particular, the act protects species and their critical habitat. Critical habitat is defined as “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection,” and the “specific areas outside the geographical area occupied by the species . . . [that] are essential for the conservation of the species.” *Id.* at 1532(5).

At the Act’s core is a prohibition on the “take” of endangered and threatened species. Section 9 prohibits the “take” of a protected species including, *inter alia*, within *the territorial sea* of the United States. 16 U.S.C. § 1538(a)(1)(B) (emphasis added). The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” and it includes harm caused by habitat modification. 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (explaining that harm includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering”); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995). It is well established that “take” includes acoustic harassment from underwater noise that disrupts of marine mammal behaviors, such as foraging, breeding, and resting. *See e.g. Native Vill. of Chickaloon v. Nat’l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031, 1057 (D. Alaska 2013) (upholding use of threshold to measure “take” from underwater noise); *Hawaii Cty. Green Party v. Evans*, No. C-03-0078 SC, 2003 WL 25289318, at *4 (N.D. Cal. Jan. 24, 2003).

The Act allows persons to “take” marine mammals incidental to an otherwise lawful activity, provided that they first obtain a permit from the federal wildlife agencies. 16 U.S.C. §1539 (a)(1). To obtain an incidental take permit, the applicant must demonstrate, among other requirements, that the harm to the species will be minimized and mitigated to the maximum extent practicable *and* that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 USCA §1539 (a)(2)(b)(iv). No such permit has been issued, nor, to our knowledge, has any application for such a permit been filed in the case of the Trans Mountain Expansion Project.

b. Oil tanker traffic related to the Project would “take” Southern Resident Killer Whales in U.S. territorial waters.

If constructed, the Project would result in a substantial, long-term increase in tanker and barge traffic through U.S. territorial waters that are federally recognized as critical for the recovery and survival of Southern Resident Killer Whales. As noted above, the Project would load as many as 408 tankers at the expanded Westridge Marine Terminal each year. Each ship would enter and exit through the Strait of Juan de Fuca and pass through Haro Strait, resulting in as many as 816 annual tanker transits, accompanied by support vessels, through the core feeding habitat of these whales.

The increased tanker traffic would increase noise in the Southern Resident’s critical habitat and result in the “take” of the endangered whales in U.S. territorial waters. Ships generate noise by a variety of mechanisms including propeller cavitation, propeller singing, and propulsion (*e.g.*, by shafts, gears, engines, and other machinery).³⁷ When considering whether elevated underwater noise from a vessel constitutes “take” of a marine mammal, the U.S. government and NOAA presently apply a standard of 120 decibels (broadband SPL) as the take threshold for continuous noise, such as that produced by a moving tanker. This standard, however, may underestimate take for resident killer whales based on the best available science, which finds changes in critical behavioral activities, such as communication and foraging, at levels below 120 decibels.³⁸ A hydrophone measuring the noise output of relatively slow-moving tankers in Haro Strait, within the Salish Sea, has recorded spectral source pressure levels in the range of 170-178 decibels.³⁹

The likelihood of take from a Project tanker is increased for this species because of the narrow channels in the Salish Sea, particularly for the high frequencies that killer whales use for echolocation. In a 2016 study of vessel noise exposure experienced by the Southern Residents, the authors observed that, while in open ocean the high-frequency noise radiated by a ship will be absorbed within about 10 km, in urban estuaries marine mammals are exposed to noise from ships at ranges of 1–10 km routinely, and less than 100 m occasionally.⁴⁰ For example, Southern Residents frequently occur within 10–300 m of the shoreline at Lime Kiln Point, on San Juan Island, Washington, where they are about 2 km from the center of the nearest shipping lane, through which tankers bound for the Trans Mountain terminal would transit. Since the absorption rate of noise is only about 3 decibels/km at 20,000 Hertz, ship noise in such close quarters would easily retain the potential to mask echolocation clicks essential to the whales’ foraging, as well as other biologically important high-frequency signals.⁴¹

³⁷ S. Veirs et al., *Ship noise in an urban estuary extends to frequencies used for echolocation by endangered killer whales*, 4 PeerJ e1657 (2016).

³⁸ Williams et al., *supra* note 25; Lusseau et al., *supra* note 25.

³⁹ Veirs et al., *supra* note 38.

⁴⁰ *Id.*

⁴¹ *Id.*

Large vessels, like oil tankers, elevate noise levels at frequencies used by killer whales for communication and echolocation necessary for navigation, foraging, and social cohesion.⁴² As discussed above, increases in ambient noise are closely tied to reduced foraging success for this population, and social cohesion and coordination are vital to these whales' ability to forage cooperatively and socialize normally. The takes caused by the Project would result in regular disruption to vital behavioral patterns, including feeding, and reduce the whales' likelihood of survival in direct violation of Section 9 of the Endangered Species Act. 16 U.S.C. § 1538(a)(1)(B).

The Project also increases the risk of ship strike or an oil spill. These harms could also occur in U.S. territorial waters, and the elevated likelihood of their occurrence in the whales' critical habitat without a permit is a further violation of the Act.

In sum, the proposed increase in tanker and barge traffic would significantly degrade the Southern Resident killer whale's acoustic habitat and injure the animals by significantly impairing their ability to feed. This take would occur in U.S. territorial waters and, therefore, violate Section 9 of the Endangered Species Act unless a permit is issued.

c. Kinder Morgan is subject to the jurisdiction of the United States, and its expansion and operation of the Westridge Marine Terminal would cause species take to be committed in violation of ESA.

Although Kinder Morgan does not own or operate the oil tankers that would be used to transport the Project's diluted bitumen, by expanding and operating the Westridge Marine Terminal, the company is legally responsible for any related harm to Southern Resident Killer Whales. The Endangered Species Act's Section 9 prohibition applies not only to state and federal agencies, but to private parties as well, 16 U.S.C. § 1532, and the Act broadly forbids any person subject to its jurisdiction "to attempt to commit, solicit another to commit, *or cause to be committed*, any offense defined in this section." 16 USCA § 1538(g) (emphasis added).

As a direct and necessary result of the proposed Kinder Morgan Trans Mountain Expansion Project, marine traffic calling at the Westridge Marine Terminal and transiting through Southern Resident Killer Whale critical habitat in U.S. territorial waters would substantially increase. The proposed Project would build a new dock complex with three berths at the Westridge Marine Terminal, expressly to increase capacity from one tanker to three tankers, for the loading and transportation of diluted bitumen. As discussed above, this increase in tanker traffic, caused by Kinder Morgan, would amount to a "take" of Southern Resident Killer Whales, in violation of Section 9.

⁴² Approximately 20 large vessels travel through Haro Strait, within the core Southern Resident summer range, each day. This increases noise above average ambient levels by 20-30 dB at low frequencies (from 100-1000Hz) and 5-13dB at high frequencies (10,000-40,000 Hz). *Id.*

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III. Conclusion

The proposed Trans Mountain Expansion Project, and the related expansion of the Westridge Marine Terminal, risk significant habitat degradation and harm to Southern Resident Killer Whales, in violation of Section 9 of the Endangered Species Act. We urge the company to desist from expanding the Westridge Marine Terminal without having applied for, and received, an incidental take permit consistent with U.S. law.

Sincerely,

A handwritten signature in black ink, appearing to read "Giulia G. Stefani".

Giulia Good Stefani

Staff Attorney, Oceans

Natural Resources Defense Council