

1.5 AGENCY PARTICIPATION

1.5.1 Federal Lead Agency—U.S. Department of State

As noted in Section 1.3.2, Department of State Purpose and Need, the U.S. Department of State (the Department) is responsible for issuance of Presidential Permits for certain cross-border facilities. In addition, the Department is the lead agency for the environmental review consistent with the National Environmental Policy Act (NEPA), the National Historic Preservation Act of 1986 (NHPA) Section 106 consultation process, and the Endangered Species Act (ESA) Section 7 consultation process for the proposed Project. As the lead agency, the Department directed the preparation of the Final Supplemental Environmental Impact Statement (EIS) for the proposed Project consistent with NEPA, directed the Section 106 tribal consultation process consistent with the NHPA (16 United States Code [USC] § 470 et seq.), and initiated both informal and formal consultation with the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the ESA (ESA 16 USC § 1536) to determine the likelihood of effects on listed species.

The Department coordinated with the cooperating agencies to ensure compliance with laws and regulations within their authority as well as to ensure compliance with the following executive orders:

- Executive Order (EO) 11988—Floodplain Management;
- EO 11990—Protection of Wetlands;
- EO 12114—Environmental Effects Abroad of Major Federal Actions;
- EO 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations;
- EO 13007—Indian Sacred Sites;
- EO 13112—Invasive Species;
- EO 13175—Consultation and Coordination with Indian Tribal Governments;
- EO 13186—Responsibilities of Federal Agencies to Protect Migratory Birds;
- EO 13212—Actions to Expedite Energy-Related Projects; and
- EO 13337, as amended (69 Federal Regulation 25299)—Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States.

For proposed petroleum pipelines that cross international borders of the United States, the President, through EO 13337, directs the Secretary of State to decide whether a project serves the national interest before granting a Presidential Permit. To make this decision (i.e., the National Interest Determination), the Secretary of State, through the Department, considers many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant state and federal regulations. This Supplemental EIS was produced consistent with NEPA and will help inform that determination. Before making such a decision, the Department also asks for the views of eight federal agencies identified in EO 13337: the

Departments of Energy, Defense, Transportation, Homeland Security, Justice, Interior, and Commerce, as well as the U.S. Environmental Protection Agency (USEPA).

1.5.2 Cooperating Agencies

The following agencies have agreed to be cooperating agencies. A cooperating agency is any federal or state agency, other than a lead agency, that has jurisdiction by law or special expertise relevant to a proposed action and has agreed to formally become a cooperating agency. Information related to Tribal and State Historic Preservation Officer(s) (SHPO) Consultation is in Section 1.6, Tribal and SHPO Consultation, and in Section 3.11.4.3, Tribal Consultation.

1.5.2.1 U.S. Environmental Protection Agency

Under Section 402 of the Clean Water Act (CWA; 33 USC §1251 et seq.), USEPA has jurisdiction over the discharge of pollutants from a point source into waters of the United States. Administration of permit programs for point-source discharges that require a National Pollutant Discharge Elimination System permit has been delegated to the states that would be affected by the proposed Project. USEPA maintains oversight of the delegated authority. Regulated discharges include, but are not limited to, sanitary and domestic wastewater, gravel pit and construction dewatering, hydrostatic test water, and storm water (40 CFR 122). Section 401 of the CWA considers approval of water use and crossing permits, and is implemented through each state's Water Quality Certification Program.

Under Section 404 of the CWA (33 USC § 1251 et seq.), the USEPA reviews and comments on U.S. Army Corps of Engineers (USACE) Section 404 permit applications for compliance with the Section 404(b)(1) guidelines and other statutes and authorities within its jurisdiction (40 CFR 230).

Under Section 309 of the Clean Air Act (42 USC § 7401 et seq.), USEPA has the responsibility to review and comment in writing on the Final EIS for compliance with the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500 to 1508).

Under Sections 3001 through 3019 of the Resource Conservation and Recovery Act (42 USC § 3251 et seq.), USEPA establishes criteria governing the management of hazardous waste. In accordance with 40 CFR 261.4(b)(5), any hazardous waste generated in conjunction with construction or operation of the proposed Project would be subject to the hazardous waste regulations.

The proposed Project would extend through USEPA Regions 7 and 8.

1.5.2.2 U.S. Department of Interior, Bureau of Land Management

The Bureau of Land Management (BLM) has authority to issue right-of-way (ROW) grants under the Mineral Leasing Act (MLA) of 1920, as amended (30 USC 181 et seq.). BLM would consider the issuance of a new ROW grant and issuance of associated temporary-use permits that apply to federal lands (excluding National Park System lands) crossed by the proposed Project. Conformance with land use plans and impacts on resources and programs would be considered in determining whether to issue a ROW grant. BLM staff participated in interagency meetings with the Department and other federal agencies, and reviewed and approved proposed routing across BLM-managed lands.

1.5.2.3 U.S. Department of the Interior, National Park Service

The National Park Service (NPS) provided technical review of the aspects of NPS-administered lands that would be affected by the proposed Project. TransCanada Keystone Pipeline, LP's (Keystone) proposed route crosses five National Historic Trails (NHTs), which are managed by the NPS, but are not units of the National Park System. NPS does not own any of the land or road ROWs for the NHTs in the Keystone study area. The proposed Project would also cross the Niobrara River and Verdigre Creek in the vicinity of (but not within) segments that have been designated as either a National Scenic River, Wild and Scenic River, or National Recreational River. These specially designated river reaches are units of the National Park System. NPS was a cooperating agency for the proposed Project and a consulting party under Section 106 of the NHPA. In addition and as required under the Wild and Scenic Rivers Act, USACE will contact the NPS to determine the need for Section 7(a) evaluations at all pipeline river crossings including those upstream, downstream, and on tributaries to the Niobrara River for both the Niobrara National Scenic River and the Missouri National Recreational River. Additional information related to NHTs and specially designated river reaches is in Section 3.9, Land Use, Recreation, and Visual Resources.

1.5.2.4 U.S. Department of the Interior, U.S. Fish and Wildlife Service

The USFWS is responsible for ensuring compliance with the ESA. Section 7 of the ESA, as amended, states that any project authorized, funded, or conducted by any federal agencies should not:

...jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined...to be critical... (16 USC § 1536[a][2] [1988]).

USFWS also reviews project plans and provides comments regarding protection of fish and wildlife resources under the provisions of the Fish and Wildlife Coordination Act (16 USC § 661 et seq.). In addition, USFWS is responsible for the implementation of the provisions of the Migratory Bird Treaty Act (16 USC § 703) and the Bald and Golden Eagle Protection Act (16 USC § 688). USFWS easements are protected under the National Wildlife Refuge Systems Administration Act (16 USC § 668dd[c]). There are several USFWS wetland easements in the Prairie Potholes Region in Montana and South Dakota that may be crossed by the proposed Project, including one USFWS easement containing protected wetlands in the vicinity of Mileposts 4 and 5 in Montana. In addition, there are several USFWS wetland easements within the Rainwater Basin Wetland Management District in Nebraska, some of which may be within the proposed Project area.

1.5.2.5 U.S. Department of Agriculture, Natural Resources Conservation Service

The Natural Resources Conservation Service (NRCS) administers the Wetlands Reserve Program (WRP; 16 USC § 3837 et seq.), under which it purchases conservation easements and provides cost share to landowners for the purposes of restoring and protecting wetlands. Under the WRP, the United States may purchase 30-year or permanent easements. Land eligibility for the WRP is based on NRCS's determination that the land is farmed or converted wetland, that enrollment maximizes wildlife benefits and wetland values, and that the likelihood of successful restoration merits inclusion into the program. Lands under WRP easement are subject to development and other use restrictions to ensure protection of wetland and wildlife conservation

values. NRCS also administers a number of other easement programs, including the Emergency Watershed Protection Program (Floodplain Easements), the Healthy Forest Reserve Program, the Farm and Ranch Land Protection Program, and the Grassland Reserve Program. (The Farm Service Agency administers Grassland Reserve Program rental agreements, as described below.) In addition, NRCS administers a number of financial assistance programs, including the Environmental Quality Incentives Program and the Conservation Stewardship Program, among others. Under these programs, NRCS provides cost-share assistance and other payments to farmers and ranchers who implement conservation practices that improve the condition and sustainability of the natural resources affected by their agricultural operation. NRCS is also responsible for implementation of the Farmland Protection Policy Act, including protection of prime, unique, and important agricultural lands. The proposed Project would not cross any NRCS conservation easements, but it would cross lands covered by a number of NRCS conservation financial assistance program agreements. Additional information related to NRCS conservation financial assistance program agreements is in Sections 3.9 and 4.9, Land Use, Recreation, and Visual Resources.

1.5.2.6 U.S. Department of Agriculture, Farm Service Agency

The Farm Service Agency administers several land conservation programs, including the Conservation Reserve Program, the Conservation Reserve Enhancement Program, the Farmable Wetlands Program, and rental agreements under the Grasslands Reserve Program. These programs provide annual rental payments and cost-share assistance to establish long-term resource conservation measures on eligible farmland. The terms of rental agreements are from 10 to 30 years, during which most uses of the affected lands are prohibited. The Grasslands Reserve Program is managed jointly with NRCS and includes provisions for rental agreements as well as for easements administered by NRCS. The proposed Project would cross lands included in Farm Service Agency land conservation programs. Additional information related to Farm Service Agency land conservation programs is in Sections 3.9 and 4.9, Land Use, Recreation, and Visual Resources.

1.5.2.7 U.S. Department of Agriculture, Rural Utilities Service

The Rural Utilities Service (RUS) is an agency that administers the U.S. Department of Agriculture's Rural Development Utilities Programs. These programs include the provision of loans and loan guarantees to electric utilities and other entities in order to serve customers in rural areas through the construction or expansion of generation, transmission, and distribution facilities. Applications for financing have been submitted to RUS by several rural electric cooperatives to provide electricity to the proposed Project's pump stations, including Basin Electric Power Cooperative for the Big Bend to Witten 230-kV Transmission Line, as discussed in Section 2.1.12, Connected Actions. RUS is responsible for NEPA/NHPA compliance for facilities proposed by the cooperatives to provide these services.

1.5.2.8 U.S. Army Corps of Engineers

The USACE has jurisdictional authority pursuant to Section 404 of the CWA (33 USC 1344), which governs the discharge of dredged or fill material into waters of the United States, and Section 10 of the Rivers and Harbors Act (33 USC 403), which regulates any work or structures that potentially affect the navigable capacity of a waterbody. The USACE must comply with the requirements of NEPA before issuing permits under these statutes; therefore, it has elected to

participate as a cooperating agency in the preparation of this Final Supplemental EIS. The USACE would adopt this Final Supplemental EIS pursuant to 40 CFR 1506.3 if, after an independent review of the document, it concludes that its comments and suggestions have been satisfied. In addition and as required under the Wild and Scenic Rivers Act, USACE will contact the NPS to determine the need for Section 7(a) evaluations at all pipeline river crossings including those upstream, downstream, and on tributaries to the Niobrara River for both the Niobrara National Scenic River and the Missouri National Recreational River.

As an element of its review, the USACE must consider whether a proposed project avoids, minimizes, and compensates for impacts on existing aquatic resources, including wetlands, to achieve a goal of no net loss of values and functions. Although this Final Supplemental EIS addresses environmental impacts associated with the proposed Project as it relates to Section 404 of the CWA and Section 10 of the Rivers and Harbors Act, it does not serve as a public notice for any USACE permits. Such notice would be issued separately. The USACE's Record of Decision resulting from consideration of this Final Supplemental EIS and materials submitted by Keystone would formally document the agency's decision on the proposed Project, including the Section 404 (b)(1) analysis and the required environmental mitigation commitments. It is likely that most or all of the crossings in waters of the U.S. would be processed in accordance with the USACE general permit procedures, specifically Nationwide Permit (NWP) Number 12 for Utility Line Crossings. If all work in waters of the United States would meet the terms and conditions of this NWP, including applicable regional conditions, then the USACE would not prepare a separate Record of Decision because a NEPA-sufficient document would have already been completed for the NWPs. Verification of activities under NWPs would not require the USACE to advertise the activities on separate public notices. If any work in waters of the United States does not meet the terms and conditions of the NWP, then those activities would be evaluated in accordance with individual permit procedures, including publication of a public notice and completion of project-specific NEPA documentation and project-specific determination of compliance with the Section 404(b)(1) Guidelines.

1.5.2.9 U.S. Department of Energy

At the request of the Department of State, the Department of Energy (DOE) provided expert assistance in the analysis of the previously proposed Project. In the preparation of the EIS finalized in 2011, DOE consulted with the Department on factors such as domestic and international oil markets and greenhouse emissions. As part of this assistance, DOE commissioned EnSys Energy and Systems, Inc. (EnSys), to conduct two studies specific to the previously proposed Project (EnSys 2010 and 2011). In addition, the DOE consulted with the Department during the preparation of this Final Supplemental EIS on market analysis and greenhouse gas related factors.

DOE's role in the Department's Presidential Permit process is advisory. DOE's advisory role does not involve a DOE proposal, determination, or decision that is itself subject to the provisions of NEPA.

DOE's Western Area Power Administration (Western) sells and delivers federal electric power to municipalities, public utilities, federal and state agencies, and Indian tribes in 15 western and central states. Most of the proposed Project is located within DOE Western's Upper Great Plains Region, which includes substations and transmission lines in Minnesota, South Dakota, North Dakota, Montana, Nebraska, and Iowa. Western is responsible for responding to requests to

interconnect to Western's transmission system and ensuring the transmission system's reliability and stability.

Western has received requests to provide new electricity load at new delivery points associated with the proposed Project in Montana and South Dakota. To determine the potential effects of the proposed Project's additional facilities and services on transmission system reliability and stability, Western conducted joint system engineering studies and determined that accommodating these requests would require the following:

- Construction and operation of new transmission lines; at the proposed Project's maximum throughput (830,000 barrels per day), power demands for pump stations in South Dakota would require a 70-mile long 230-kilovolt (kV) single-circuit electric transmission line (from Big Bend to Witten) and approximately 1 mile of 230-kV double-circuit transmission line (from Big Bend to Lower Brule);
- Construction and operation of two new electric substations; and
- Expansion of six existing substations.

(See Sections 2.1.12.2, Big Bend to Witten 230-KV Transmission Line, and 2.1.12.3, Electrical Distribution Lines and Substations, for detailed description of these actions.) These actions are considered connected actions, as defined by 40 CFR 1508.23(a)(1), since they would be needed as a direct result of implementation of the proposed Project.

Western's Big Bend to Lower Brule project is part of the larger Big Bend to Witten 230 kV Transmission Line project. The Big Bend to Witten project serves to stabilize and increase the reliability of the entire Integrated System and, therefore, has independent utility. It is being evaluated under NEPA in the Big Bend to Witten Transmission Line Environmental Assessment (DOE/EA-1880) being prepared by RUS with Western as a Cooperating Agency.

DOE also consulted with the Department to ensure that cultural resources potentially affected by any Western transmission lines are taken into account.

1.5.2.10 U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety

The Pipeline Hazardous Material Safety Administration (PHMSA) is responsible for protecting the American public and the environment by ensuring the safe and secure movement of hazardous materials to industry and consumers by all transportation modes, including the nation's pipelines. Through PHMSA, the U.S. Department of Transportation develops and enforces regulations for the safe, reliable, and environmentally-sound operation of the nation's 2.3-million-mile pipeline transportation system as well as the nearly 1 million daily shipments of hazardous materials by land, sea, and air. Within PHMSA, the Office of Pipeline Safety has the safety responsibility for the nation's natural gas and hazardous liquid pipelines. For those pipelines, PHMSA identifies and evaluates risks; develops and enforces standards for design, construction, operations, and maintenance of pipelines; responds to incidents¹; educates operators and the public; conducts research on promising technologies; provides grants to states in support of their pipeline safety programs; and reviews oil spill response plans with a special

¹ The terms *incident* and *accident* can be used interchangeably or with specified definitions in various agency reports and databases. For the purposes of this report, the term *incident* has been selected for consistency.

focus on protecting unusually sensitive areas. The regulations for Transportation of Hazardous Liquids by Pipeline are presented in 49 CFR Part 195; the regulations for Response Plans for Onshore Oil Pipelines are presented in 49 CFR Part 194. PHMSA, as a cooperating agency, provided technical expertise to the Department in the assessment of the proposed Project and in identifying appropriate mitigation measures.

1.5.3 Assisting Agencies and Other State Agencies

The U.S. Department of Interior, Bureau of Reclamation (BOR), is a water management agency that manages many programs initiatives and activities designed to help the western states, Indian tribes, and others to meet new water needs and balance the multitude of competing uses of water. The mission of BOR is to assist in meeting the increasing water demands of the western states while protecting the environment and public investments in these structures. The agency emphasizes fulfilling its water delivery obligations, water conservation, water recycling, and re-use; developing partnerships with its customers, states, and Indian tribes; and in finding ways to bring together the variety of interests to address the competing needs for limited water resources.

The federal lands that would be included within the MLA application for the proposed Project include canals, water lines, and ditches managed by BOR along the proposed pipeline route. BOR must determine whether or not to issue “use authorization” for the proposed Project in accordance with requirements of 43 CFR 429.3 and whether or not the ROW grant issued under MLA by BLM is in compliance with BOR standards. Those standards for each facility are presented in Appendix D, Waterbody Crossing Tables and Required Crossing Criteria for Reclamation Facilities. The crossing criteria included in Appendix D were revised April 2013 after draft criteria were provided to the Oglala Sioux Tribe, affected irrigation districts, Keystone, and a professional consulting firm for comment. The final criteria incorporated comment suggestions where appropriate, and allow for site-specific adjustments that may be necessary during construction. There were additional communications between the Department and BOR regarding concerns raised by the Oglala Sioux Tribe about the proposed Project and the Mni Wiconi Rural Water Supply System in South Dakota, which includes the Oglala Sioux Rural Water Supply System. Details related to the Mni Wiconi Rural Water Supply System can be found in Section 3.3, Water Resources, and Appendix D, Waterbody Crossing Tables and Required Crossing Criteria for Reclamation Facilities. In addition, BOR consulted with the Department and BLM regarding the ROW grant and the use authorization.

The Montana Department of Environmental Quality (MDEQ) is the lead agency for compliance with the State of Montana Environmental Policy Act. On December 22, 2008, Keystone submitted an application to MDEQ and the Certificate of Compliance from MDEQ under the Montana Major Facility Siting Act was signed on March 30, 2012, thus certifying the design, location, construction, operation, maintenance, and decommissioning of the Montana portion of the proposed Project.

The South Dakota Public Utilities Commission (SDPUC) is the lead agency for compliance with the South Dakota Energy Conversion and Transmission Facilities Act. On March 12, 2009, Keystone submitted an application to SDPUC. The Permit to Construct from SDPUC under the South Dakota Energy Conversion and Transmission Facilities Act was granted, with conditions, on February 18, 2010. An amended order was issued on June 29, 2010, thus certifying the design, location, construction, operation, maintenance, and decommissioning of the South Dakota portion of the proposed Project.

The Nebraska Department of Environmental Quality (NDEQ) is the lead agency for review and evaluation of compliance with the Nebraska Major Oil Pipeline Siting Act. The Nebraska Governor, however, was responsible for granting approval of the proposed Project route based on the NDEQ's review and evaluation. On April 18, 2012, Keystone submitted proposed alternative routes to NDEQ. The Nebraska Governor approved the proposed Project route under the Nebraska Major Oil Pipeline Siting Act on January 22, 2013, thus certifying the design, location, construction, operation, maintenance, and decommissioning of the Nebraska portion of the proposed Project.

Further, many county governments in Nebraska assisted the Department in addressing their concerns regarding local planning processes and laws. The Lower Big Blue Natural Resources and Upper Elkhorn Natural Resources districts in Nebraska served as assisting agencies on the previously proposed Project.

In addition to these assisting agencies, many other state and local resource agencies from each of the states that would be crossed by the proposed Project have responsibilities for state and local permit issuance. The permits required by the various state and local jurisdictions crossed by the proposed Project are listed in Section 1.9, Permits, Approvals, and Regulatory Requirements.

1.5.4 References

EnSys Energy and Systems, Inc. 2010. Keystone XL Assessment. 1775 Massachusetts Avenue, Lexington MA.

_____. 2011. Keystone XL Assessment – No Expansion Review. Prepared for DOE and DOS. Final Report, August 12.