Office of Inspector General

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United States Department of State
and the Broadcasting Board of Governors
Office of Inspector General

Office of Audits

Special Review of the Keystone XL Pipeline Permit Process

Report Number AUD/SI-12-28, February 2012

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PREFACE

This report was prepared by the Office of Inspector General (OIG) pursuant to the Inspector General Act of 1978, as amended, and Section 209 of the Foreign Service Act of 1980, as amended. It is one of a series of audit, inspection, investigative, and special reports prepared by OIG periodically as part of its responsibility to promote effective management, accountability and positive change in the Department of State and the Broadcasting Board of Governors.

This report is the result of an assessment of the strengths and weaknesses of the office, post, or function under review. It is based on interviews with employees and officials of relevant agencies and institutions, direct observation, and a review of applicable documents.

The recommendations therein have been developed on the basis of the best knowledge available to the OIG and, as appropriate, have been discussed in draft with those responsible for implementation. It is my hope that these recommendations will result in more effective, efficient, and/or economical operations.

I express my appreciation to all of those who contributed to the preparation of this report.

Harold W. Geisel
Deputy Inspector General

Acronyms

EIS	environmental impact statement
FOIA	Freedom of Information Act
IPS	Office of Information Programs and Services
NEPA	National Environmental Policy Act
OIG	Office of Inspector General

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Executive Summary

On September 19, 2008, TransCanada submitted a Presidential permit application to the Department of State (Department) for the Keystone XL oil pipeline. Keystone XL is a proposed 1,700-mile pipeline connecting Alberta, Canada, to the U.S. Gulf Coast. The Department is responsible for reviewing such applications for cross-border oil pipelines by virtue of the Presidential delegation of authority contained in Executive Order 13337 and deciding whether issuance of a requested permit "would serve the national interest." As part of this review process for Keystone XL, the Department prepared an environmental impact statement (EIS) to inform the overall "national interest determination." The Department uses third-party contractors to assist in the preparation of the EIS. In 2006, the Department consulted with the Council on Environmental Quality and agreed that the Federal Energy Regulatory Commission's process for using third-party contractors to prepare environmental documents was the best model for the Department to follow.

The EIS process includes evaluation of the proposed Federal action and reasonable alternatives to the proposed action; solicitation of input from organizations and individuals who could potentially be affected; and the presentation of direct, indirect, and cumulative environmental impacts for public review and comment. On August 26, 2011, the Department issued a final EIS and subsequently entered into the broader national interest determination period for Keystone XL. The national interest determination involves consideration of many factors, such as energy security; environmental, cultural, and economic impacts; and foreign policy.

The Department of State, Office of Inspector General (OIG), conducted this special review at the request of several members of Congress in an October 26, 2011, letter (see Appendix B). The members asked that OIG "launch an investigation into the State Department's handling of the Environmental Impact Statement (EIS) and National Interest Determination (NID) for TransCanada Corporation's proposed Keystone XL pipeline." OIG's objective was to determine to what extent the Department complied with Federal laws and regulations relating to the Keystone XL oil pipeline Presidential permit process. In conducting this review OIG asked seven researchable questions. Those questions, and OIGs conclusions, are as follows:

(1) To what extent and in what manner did TransCanada improperly influence the Department in the selection of a contractor for the EIS?

OIG found no evidence that TransCanada (the applicant) had improperly influenced the Department's selection of Cardno Entrix as the Keystone XL EIS third-party contractor. The Department followed the Federal Energy Regulatory Commission's third-party contracting process, from reviewing, editing, and approving the draft request for proposal to independently reviewing proposals and selecting a contractor. This process allows the applicant to influence the selection of the EIS contractor by (1) deciding which contractors will receive the request for proposal, (2) reviewing all proposals received in response to the request for proposal, and (3) forwarding to the Department the three ranked proposals to review. However, TransCanada's influence was minimal, given the Department's (1) control of the language in the request for

proposal, (2) general familiarity with the environmental contractor community, and (3) independent review of proposals and selection of the contractor. A prime factor in the Department's selection of Cardno Entrix was the Department's previous experiences using the company as a third-party contractor for other EISs.

(2) To what extent did the Department's final EIS fully incorporate the views and concerns of Federal agencies with expertise, such as the Environmental Protection Agency, in relation to alternatives and mitigation, pipeline safety, and environmental risks?

The Department's final EIS for Keystone XL generally addressed and incorporated the views and concerns of Federal agencies with expertise in relation to alternatives and mitigation, pipeline safety, and environmental risks from this project. However, some concerns, such as the manner in which alternative routes were considered in the Department's EIS, were not completely incorporated. OIG also determined that the Department's limited technical resources, expertise, and experience impacted the implementation of the NEPA process.

(3) To what extent is there a contractual or financial relationship between Cardno Entrix and TransCanada beyond Keystone XL, and does Cardno Entrix have a contract or agreement with TransCanada wherein Cardno Entrix would provide services, such as spill response, for Keystone XL? Furthermore, did the Department employees who selected Cardno Entrix have personal financial conflicts of interest?

Cardno Entrix has been the third-party EIS contractor for two Federal Energy Regulatory Commission pipeline reviews and two Department pipeline reviews for which TransCanada or an affiliate was the permit applicant. In addition, Cardno Entrix has also received a minimal amount of contract work on two corporate projects that Cardno Entrix has been associated with for many years but that were bought by TransCanada in 2007 and 2008. OIG determined that these relationships did not present a conflict of interest because they are not directly related to the Keystone XL project and are either federally controlled relationships or minimal financial relationships that would not "impair the contractor's objectivity in performing the contract work" or "result in an unfair competitive advantage to a contractor." In addition, no agreements between Cardno Entrix and TransCanada for future services for Keystone XL were found. However, the Department did not require the applicant to review and certify Cardno Entrix's organizational conflict of interest statement, as required by the Federal Energy Regulatory Commission's Handbook, nor did the Department perform any independent inquiry to verify Cardno Entrix's organizational conflict of interest statements. Finally, a preliminary inquiry determined that there were no personal financial conflicts of interest of those Department employees who were personally and substantially involved.

(4) To what extent did the Department violate its role as an unbiased oversight agency by advising TransCanada to withdraw their permit request to operate the pipeline at higher pressures with the reassurance that TransCanada could apply for the permit at a later date through a less scrutinized and less transparent process?

OIG determined that the Department did not violate its role as an unbiased oversight agency. TransCanada made the decision to withdraw its special permit application, and OIG found no evidence that the Department had assured TransCanada that it could obtain the permit at a later date through a less scrutinized and less transparent process. OIG also found that the Pipeline and Hazardous Materials Safety Administration, not the Department, has the statutory authority to issue special permits as they relate to pipeline safety and that the Department became actively involved in discussing the special permit conditions only after TransCanada withdrew its special permit application because the Department wanted to enhance the safety of the pipeline. After TransCanada withdrew the application, the Department worked with the Pipeline and Hazardous Materials Safety Administration and TransCanada to adopt 57 special conditions designed to increase Keystone XL's safety.

(5) To what extent did communication between Department officials, TransCanada, the Canadian Government, or proponents of Keystone XL deviate from the Department's obligations under Federal law to provide an objective analysis of the project and its potential risks?

OIG found no evidence that communications between Department officials, TransCanada, the Canadian Government, proponents, and opponents of Keystone XL deviated from the Department's obligations under Federal law. Specifically, no records existed showing that Department officials had made inappropriate commitments on behalf of the Department to TransCanada or to the Canadian Government.

(6) To what extent did the Department and all parties fully comply with the letter and spirit of all Federal disclosure laws and regulations in regard to Keystone XL?

OIG determined that the Department fully complied with the general disclosure requirements applicable to the Presidential permit and EIS processes. The Department's notices in the *Federal Register* show that the Department provided, among other things, the required notice of its decisions to initiate an EIS and a national interest determination for Keystone XL. The Department also announced public meetings and invited comments from the public, and it consulted with Federal agencies, as well as with State, tribal, and local governments.

(7) To what extent were Freedom of Information Act (FOIA) requests for materials related to Keystone XL timely fulfilled by the Department?

The Department's processing and fulfillment of Keystone XL-related FOIA requests have been as timely as, or faster than, its processing and fulfillment of other FOIA requests of similar complexity. Although the Department has not made a final determination on any of the Keystone XL-related requests within the baseline statutory requirement of 20 days, the Department has generally acknowledged requests within 20 days, assigning case numbers and the track in which the request was to be processed and informing requestors that it is processing the requests. OIG found that the Department has been consistent with its established processes in processing Keystone XL requests, given the complexity and volume of the records involved.

OIG made the following recommendations in this report: (1) the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, should redesign the Department's process for selecting third-party contractors by maximizing the Department's control of each step and minimizing the applicants' role in the process; (2) the Department should fill at least one full-time Civil Service position within the Bureau of Oceans and International Environmental and Scientific Affairs with staff who have experience and expertise in handling National Environmental Policy Act (NEPA) issues and the EIS process; and (3) the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, should redesign the Department's process for selecting and using third-party contractors in order to improve the Department's organizational conflicts of interest screening process.

In January 2012, OIG provided a draft of this report to the Department. The Bureau of Oceans and International Environmental and Scientific Affairs and the Office of the Legal Adviser agreed with the three recommendations (see Appendix E).

Background

In an October 26, 2011, letter to the Department, members of Congress requested that the OIG "launch an investigation into the State Department's handling of the Environmental Impact Statement (EIS) and National Interest Determination (NID) for TransCanada Corporation's proposed Keystone XL pipeline." The letter is included in its entirety in Appendix B.

The Presidential Permits Process and Applicable Laws and Regulations

Executive permission is required "for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country."[1] Permission is granted through a Presidential permit. By order of the President, the Department has been designated to process permit applications for these facilities.

The Department is responsible for reviewing such applications for cross-border oil pipelines under the Presidential delegation of authority contained in Executive Order 13337 and deciding whether issuance of a requested permit "would serve the national interest." Upon receiving an application, the Secretary of State must request the views of the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, and the Administrator of the Environmental Protection Agency. The Secretary may also consult with State, tribal, and local government officials and foreign governments. Moreover, the Secretary may publish a notice in the *Federal Register* regarding the Department's receipt of an application to receive public comments. After considering comments, the Secretary will determine whether to approve or deny a permit based on whether issuance of the permit would serve the national interest. In preparing the national interest determination, the Secretary considers a broad array of

[1] Executive Order 13337.

factors, including the proposed project's impact on economics, energy security, foreign policy, the environment, and culture. The Secretary must notify the Federal officials listed in this paragraph of the proposed determination (that is, approval or denial). The Secretary then issues or denies the permit in accordance with the national interest determination unless, within 15 days of notifying the required Federal officials, an official notifies the Secretary that he or she disagrees with the determination and requests that the Secretary refer the application to the President. In the event of such a request, the Secretary consults with the requesting official and, if necessary, refers the application to the President for a final decision.

As part of this review process for Keystone XL, the Department prepared an EIS to inform the overall national interest determination. NEPA [2] and the Council on Environmental Quality's regulations for implementing NEPA[3] prescribe the process for completing an EIS. The Executive Order 13337 process, NEPA, and the Council on Environmental Quality regulations are discussed throughout this report.[4]

Keystone XL Pipeline Project

On September 19, 2008, TransCanada submitted an application for a Presidential permit to the Department for the Keystone XL oil pipeline. Keystone XL is a proposed 1,700-mile pipeline connecting the tar sands region[5] of Alberta, Canada, to the U.S. Gulf Coast. Keystone XL would cross the United States-Canada border in Morgan, Montana, and continue through the states of South Dakota and Nebraska. In Nebraska, Keystone XL will connect with TransCanada's existing Keystone I pipeline, which crosses through Kansas and Oklahoma. Keystone XL would then continue from Cushing, Oklahoma, to Houston and Port Arthur, Texas. The proposed Keystone XL route is shown in Figure 1.

[2] The National Environmental Policy Act of 1969, as amended (Pub. L. No. 91-190, 42 U.S.C. §§ 4321-4347, Jan.1, 1970, as amended by Pub. L. No. 94-52, July 3, 1975, Pub. L. No. 94-83, Aug. 9, 1975, and Pub. L. No. 97-258 § 4(b), Sept. 13, 1982).
[3] 40 CFR §§ 1500-1508.
[4] The Council on Environmental Quality, which was created by NEPA, is a White House office that coordinates Federal environmental efforts and works closely with Federal agencies in the development of environmental policies and initiatives. The Council also oversees Federal agency implementation of the NEPA process and acts as a referee when agencies disagree over the adequacy of environmental assessments.
[5] Tar sands are oil sands that are a combination of clay, sand, water, and bitumen (a material similar to soft asphalt).

Figure 1. Proposed Keystone XL Route

Source: Department of State, Executive Summary, Final Environmental Impact Statement for the Proposed Keystone XL Project, Aug. 26, 2011.

The Department announced its receipt of the Keystone XL permit application in the *Federal Register* on November 4, 2008,[6] and formally initiated the EIS process by publishing its notice of intent to prepare an EIS on February 10, 2009.[7] After 2 1/2 years of conducting the EIS process, including receipt of public and interagency comments on two published drafts of an EIS, on August 26, 2011, the Department issued a final EIS and subsequently entered the national interest determination period. The Department held a series of public hearings from September 26 through October 7, 2011, to receive public comments for the broader national interest determination.

On November 10, 2011, the Department announced that it could not make a national interest determination regarding the permit application and would prepare a supplemental EIS because of concerns regarding the proposed route through the Sand Hills area of Nebraska. The Department called for an assessment of alternative pipeline routes that avoided the uniquely sensitive terrain of the Sand Hills in Nebraska and estimated that it could complete the necessary review to make a decision by the first quarter of 2013. The State of Nebraska and TransCanada agreed with the estimated timeline.

On December 23, 2011, Congress passed the Temporary Payroll Tax Cut Continuation Act of 2011 (Act), which included a provision requiring that "not later than 60 days after the enactment of this Act, the President, acting through the Secretary of State, shall grant a permit under Executive Order 13337 . . . for the Keystone XL pipeline" unless "the President determines that the Keystone XL pipeline would not serve the national interest." On January 18, 2012, the Department recommended to the President that the Presidential permit for Keystone XL be denied. The President concurred with the Department's recommendation, which was predicated on the fact that the Act did not provide the Department with sufficient time to obtain the information necessary to assess whether the project in its current state is in the national interest. The President directed the Secretary of State to deny the permit and submit to Congress the report required by the Act. Keystone XL's permit application history is chronicled in Table 1.

Table 1. Keystone XL Timeline

Date	Action
September 19, 2008	TransCanada applies for Keystone XL Presidential permit
April 16, 2010	Department issues draft EIS
April 22, 2011	Department issues supplemental draft EIS
August 26, 2011	Department issues final EIS
January 18, 2012	President Obama denies Keystone XL permit at Department's recommendation.

[6] 73 Federal Register 65713.
[7] 74 Federal Register 6687.

Department Bureaus and Offices Responsible for Keystone XL

The Secretary of State, appointed by the President with the advice and consent of the Senate, is the President's chief foreign affairs adviser. According to the *Foreign Affairs Manual*,[8] "The Secretary has responsibilities, by virtue of law or Executive order, with respect to matters such as international educational and cultural affairs, information activities, foreign assistance, food for peace, arms control and disarmament, supervision of programs authorized by the Peace Corps Act, social science research, immigration, and refugee assistance." The Secretary is also responsible for the overall direction, coordination, and supervision of interdepartmental activities of the U.S. Government abroad.

The Deputy Secretary of State is the Department's second-ranking official and its senior career diplomat. The Assistant Secretaries of the geographic bureaus and offices advise the Deputy Secretary and guide the operation of the U.S. diplomatic missions within their respective regional jurisdictions.

The Assistant Secretary for Economic and Business Affairs formulates and implements international economic policies aimed at protecting and advancing U.S. economic, political, and security interests by effective management of U.S. bilateral and multilateral economic relations through negotiated agreements and other initiatives in the fields of trade, energy, finance, development, transportation, communications, food, and resources policy. The Bureau of Economic and Business Affairs led the Keystone XL national interest determination process.

The Bureau of Oceans and International Environmental and Scientific Affairs is responsible for matters relating to oceans, environmental, polar, scientific, fisheries, wildlife, conservation, and natural resources and health affairs. This bureau was responsible for overseeing the NEPA process and the EIS for the Keystone XL pipeline permit. The bureau was also responsible for coordinating the inter-agency process with the Federal agencies involved in the EIS process.

The Office of the Legal Adviser advises and represents the bureaus and missions of the Department; the Secretary and senior leadership; and, through the Secretary, the Executive Branch on all legal and legal policy issues arising in connection with U.S. foreign policy and the work of the Department. The legal advisers worked closely with the Bureau of Oceans and International Environmental and Scientific Affairs and the Bureau for Economic Energy and Business Affairs throughout the EIS and the national interest determination processes.

The Bureau of Western Hemisphere Affairs implements U.S. foreign policy and promotes U.S. interests in the Western Hemisphere, as well as advises the Under Secretary for Political Affairs. The bureau was not involved in the EIS process, but it played a more prominent role when the Department transitioned into the national interest determination process. The bureau attended the weekly national interest determination task force meetings and had the lead in the foreign policy section. The American Embassy and Consulate General Calgary in

[8] *Foreign Affairs Manual*, 1 FAM 021.1, "Responsibilities."

Canada also did not have any decision role in the Keystone XL pipeline's Presidential permit request, but they stayed abreast of the progress and provided information to decision makers.

Objective

OIG undertook this special review to address the October 2011 Congressional request. The objective was to determine to what extent the Department complied with Federal laws and regulations relating to the Keystone XL permit process.

OIG asked seven researchable questions to address the special review's objective:

1. To what extent and in what manner did TransCanada improperly influence the Department in the selection of a contractor for the EIS?

2. To what extent did the Department's final EIS fully incorporate the views and concerns of Federal agencies with expertise, such as the Environmental Protection Agency, in relation to alternatives and mitigation, pipeline safety, and environmental risks?

3. To what extent is there a contractual or financial relationship between Cardno Entrix and TransCanada beyond Keystone XL, and does Cardno Entrix have a contract or agreement with TransCanada wherein Cardno Entrix would provide services, such as spill response, for Keystone XL? Furthermore, did the Department employees who selected Cardno Entrix have personal financial conflicts of interest?

4. To what extent did the Department violate its role as an unbiased oversight agency by advising TransCanada to withdraw their permit request to operate the pipeline at higher pressures with the reassurance that TransCanada could apply for the permit at a later date through a less scrutinized and less transparent process?

5. To what extent did communication between Department officials, TransCanada, the Canadian Government, or proponents of Keystone XL deviate from the Department's obligations under Federal law to provide an objective analysis of the project and its potential risks?

6. To what extent did the Department and all parties fully comply with the letter and spirit of all Federal disclosure laws and regulations in regard to Keystone XL?

7. To what extent were FOIA requests for materials related to Keystone XL timely fulfilled by the Department?

OIG's responses to each question are presented in the findings sections.

Review Results

Finding A. Selection of a Contractor for the Environmental Impact Statement

OIG found no evidence that TransCanada improperly influenced the Department's selection of Cardno Entrix as the Keystone XL EIS third-party contractor. The Department followed the Federal Energy Regulatory Commission's third-party contracting process, from reviewing, editing, and approving the draft request for proposal to independently reviewing proposals and selecting a contractor. This process does allow the applicant to influence the selection of the contractor in that the applicant (1) decides which contractors will receive the request for proposal; (2) reviews all the proposals received in response to the request for proposal; and (3) forwards, to the Department, three ranked proposals to review. However, TransCanada's influence was minimal, given the Department's (1) control of the language in the request for proposal, (2) general familiarity with the environmental contractor community, and (3) independent review of proposals and selection of the contractor. In the case of Keystone XL, the Department selected Cardno Entrix without any improper influence from TransCanada and in accordance with established third-party contracting procedures. A prime factor in the Department's selection of Cardno Entrix was the Department's previous experience in using the company as a third-party contractor on other EISs.

Third-Party Contracting Process

On April 19, 2006, TransCanada submitted an application to the Department for a Presidential permit for Keystone I. Following initial discussions with the applicant, the Department decided to prepare an EIS for Keystone I. Department regulations indicate that an environmental assessment rather than an EIS is typically appropriate for the initial review of a pipeline permit application, and, prior to the Keystone I application, the Department had prepared only environmental assessments for such applications. As a result, the Department did not have established procedures or guidance for issuing an EIS contract. Therefore, Department officials researched EIS contracting procedures used throughout the Federal Government. The Department and the Council on Environmental Quality agreed that the Federal Energy Regulatory Commission's process for using third-party contractors to prepare environmental documents was the best option for the Department to select an EIS contractor.

Since the Keystone I project in 2006, the Department has used the basic selection process from the Federal Energy Regulatory Commission's Handbook to select contractors that will help the Department review the environmental aspects of proposed projects. According to the Handbook, the permit applicant prepares a draft request for proposal, and this draft is reviewed and approved by Federal Energy Regulatory Commission staff. The applicant issues the request for proposal to contractors it has selected and screens all proposals received for technical adequacy and organizational conflicts of interest. According to the Handbook, a proposal should be concise and well organized. In the proposal, among other requirements, a bidder should

- explain its understanding of the project and include a summary of its qualifications for the project.
- present both an overall technical approach for the preparation of the EIS and the approach proposed for individual technical areas and tasks.
- list key personnel with an organization chart that includes positions, responsibilities, and reporting relationships.
- note where the work will be conducted and where each key person and subcontractor presently reside.
- provide the proposed mechanisms for communication, reporting, technical direction and control, cost control, schedule control, quality control, quality assurance, and control of subcontractors.
- describe prior experience in completing similar NEPA compliance projects, particularly pipeline construction projects or other linear facility projects.
- emphasize prior work experience with the Federal Energy Regulatory Commission, state agencies, and the geographical areas of study.
- submit a proposed schedule for completing the major work tasks specified in the request for proposal.
- list references for three successfully completed or in-progress projects of a similar nature.
- identify possible conflicts of interest that may require investigation by Federal Energy Regulatory Commission staff.
- include résumés and a cost estimate.

The Federal Energy Regulatory Commission directs the applicant to select the three best-qualified bidders and to rank them in their preferred order based on qualifications and cost. The applicant provides the Federal Energy Regulatory Commission with the ranked proposals, a written rationale for their rankings, and organizational conflict of interest statements. Federal Energy Regulatory Commission staff conduct an independent review of the three proposals and make the final selection based on technical, managerial, and personnel merits. For example, bidders are evaluated on their (1) familiarity with environmental regulations and procedures for satisfying NEPA-related requirements; (2) experience in managing major NEPA reviews and preparing NEPA documentation for pipelines or other linear facilities; (3) ability to assign and commit key personnel to a project and their experience, education, and location; and (4) demonstrated ability to meet schedule requirements.

According to the Federal Energy Regulatory Commission's third-party contracting process, the Federal Energy Regulatory Commission then selects the contractor, and the applicant is responsible for awarding the contract and paying the contractor for its work. However, Federal Energy Regulatory Commission staff direct the contractor's preparation of the EIS, and the applicant has no control over the activities of the contractor.

In 2006, the Department used the Federal Energy Regulatory Commission's process to select the Keystone I EIS contractor. In that case, TransCanada provided the Department with proposals from Tetra Tech, Cardno Entrix, and ERM, and it ranked Tetra Tech as its first choice. However, Department officials, after evaluating the proposals, stated that they were "impressed"

with Cardno Entrix: "The group concluded that the team and the company as a whole offer the most breadth and depth of experience directly relevant to [the Keystone I EIS]." The Department also sought the opinion of officials from the Federal Energy Regulatory Commission, the Department of the Interior's Bureau of Land Management, the Department of Energy, and the U.S. Army Corps of Engineers, and those officials agreed that Cardno Entrix was the best choice. The Department independently selected Cardno Entrix as the Keystone I EIS contractor.[9]

The Department's EIS Contractor Selection Process for Keystone XL

The Keystone XL EIS contractor selection process began when TransCanada provided the Department with a draft request for proposal. Department officials revised the draft, and TransCanada issued the final request for proposal on November 14, 2008, to nine companies it selected. Four companies submitted proposals in response to the request, and TransCanada officials evaluated the proposals and interviewed the bidders. Based on its review and interviews, TransCanada forwarded three of the four proposals to the Department, together with a list of all of the contractors to which it had sent the request for proposal. TransCanada noted in its analysis of the proposals that only three bidders were "deemed technically qualified to perform the required services and were ranked in . . . order." The bidders and their rankings were (1) Cardno Entrix, (2) Tetra Tech, and (3) TRC Environmental Corporation.

Department's Decision To Choose Cardno Entrix

Department officials analyzed various factors, including the experience of the companies and key team members and on how well the proposals matched the requirements in the request for proposal. The Department's analysis of the proposals noted that "two out of three bidders failed to conform their bids to the terms of the RFP [request for proposal]" and that "Entrix's team offered the most in-depth experience that is directly applicable to this project." The analysis further stated, "Entrix has a prior track record of experience with linear projects, has put together a team with relevant experience, . . . and provides the support and resources that [the Department of] State needs to complete its NEPA responsibilities in a timely fashion." OIG found that these merits match the selection criteria listed in the Federal Energy Regulatory Commission Handbook. In addition to Department officials, the Bureau of Land Management and the Montana Department of Environmental Quality reviewed the proposals. The group of Department and other agency officials agreed that Cardno Entrix was the best company to conduct the Keystone XL EIS.

OIG interviewed Department officials regarding their selection of Cardno Entrix as the Keystone XL EIS contractor, and the reasons cited for their choice included the good working experience they had had with the company on the Keystone I EIS and the Alberta Clipper EIS.[10]

[9] The Department granted TransCanada a permit for Keystone I on March 11, 2008.

[10] Enbridge, a Canadian energy company, applied for a Presidential permit for an international crude oil pipeline in May 2007. The pipeline would be constructed from Hardisty, Alberta, Canada, to Superior, Wisconsin, crossing the United States-Canada border near Neche, North Dakota. The Department selected Cardno Entrix to conduct the EIS for this pipeline project, which was named "Alberta Clipper," and the Department issued a permit to Enbridge for the pipeline on August 3, 2009.

The good working experience was also noted in the Department's analysis of the Keystone XL EIS proposals, "Entrix . . . has shown by its work on the Keystone and Alberta Clipper pipeline projects that it is competent, flexible, and conscientious in meeting deadlines. . . .." Department officials did not consider TransCanada's ranking of the contractors as a factor in making their decision.

When asked about the applicant's influence on the process because it selects and ranks three proposals for the Department to review, Department officials noted, "[The applicants] can do that all they want, but the Department conducts its own review and makes its own decision," and "We don't care who TransCanada picks." To compare how the Federal Energy Regulatory Commission chooses a contractor, OIG interviewed Federal Energy Regulatory Commission officials regarding their third-party contracting process. Regarding the applicant's selecting who receives the request for proposal, the officials stated that they have no control over whom the applicant chooses to send the request for proposal. The officials review the draft request for proposal to ensure that the scope of work is sufficient, the schedule is reasonable, and the description of the project is accurate, but the applicant is free to send the request for proposal to any company that it chooses. The officials also stated that because the applicant is "paying the bill," the applicant is allowed to review the proposals and forward its top three choices, and sometimes more, to the Federal Energy Regulatory Commission but that Federal Energy Regulatory Commission officials independently evaluate the proposals and make the final selection. When asked if the Federal Energy Regulatory Commission had ever been accused of being improperly influenced by an applicant, officials stated that they did not recall that specific criticism but that there had been questions about the applicant's paying for the EIS contractor.[11] However, the officials stated that given that this is permissible under the process, the issue of the applicant's paying for the EIS contractor has never become an allegation of improper influence.

In speaking with Department officials, OIG learned that the Department is considering changes to further limit the applicant's role in the proposal review process. According to one official, the Department is not considering changes to the process because there was influence but because it understands how the appearance of the process has raised questions. The official added, "The appearance of this . . . needs to be cleaner." One possible change, according to the official, would be for the Department to review all EIS proposals without input from the applicant.

Conclusion

TransCanada did not improperly influence the Department's selection of Cardno Entrix as the Keystone XL EIS contractor. However, the third-party contracting process used by the Department to select an EIS contractor inherently gives the applicant some influence in the process because the applicant decides which contractors receive the requests for proposal, is allowed to review the proposals, and then identifies its preferred contractor. Any potential appearance of improper influence can lead the American public to question the Department's

[11] Federal Energy Regulatory Commission officials noted that applicants are willing to pay for the contractor because it saves time and that it would take Commission staff longer to conduct the EISs. Furthermore, the current process allows the Commission to receive assistance—the contractor does a lot of the "grunt work"—without cost to the taxpayer.

independence and objectivity. Therefore, the Department should modify its third-party contracting process to reduce the appearance of improper influence.

> **Recommendation 1:** OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State process for selecting third-party contractors by maximizing the Department's control of each step and minimizing the applicant's role in the process.
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> **Management Response:** The Department agreed with the recommendation, stating that it will "redesign the process for using third-party contractors in the preparation of environmental documents." The Department further stated that it "intends to seek input" from other Federal Government agencies that have "wide-ranging NEPA implementation experience."
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> **OIG Reply:** OIG considers this recommendation resolved, pending further action. The recommendation can be closed when OIG reviews and accepts documentation showing that the third-party contractor selection process has been redesigned to maximize the Department's role and minimize the applicants' role in the process.

Finding B. Views of Other Federal Agencies on the Environmental Impact Statement

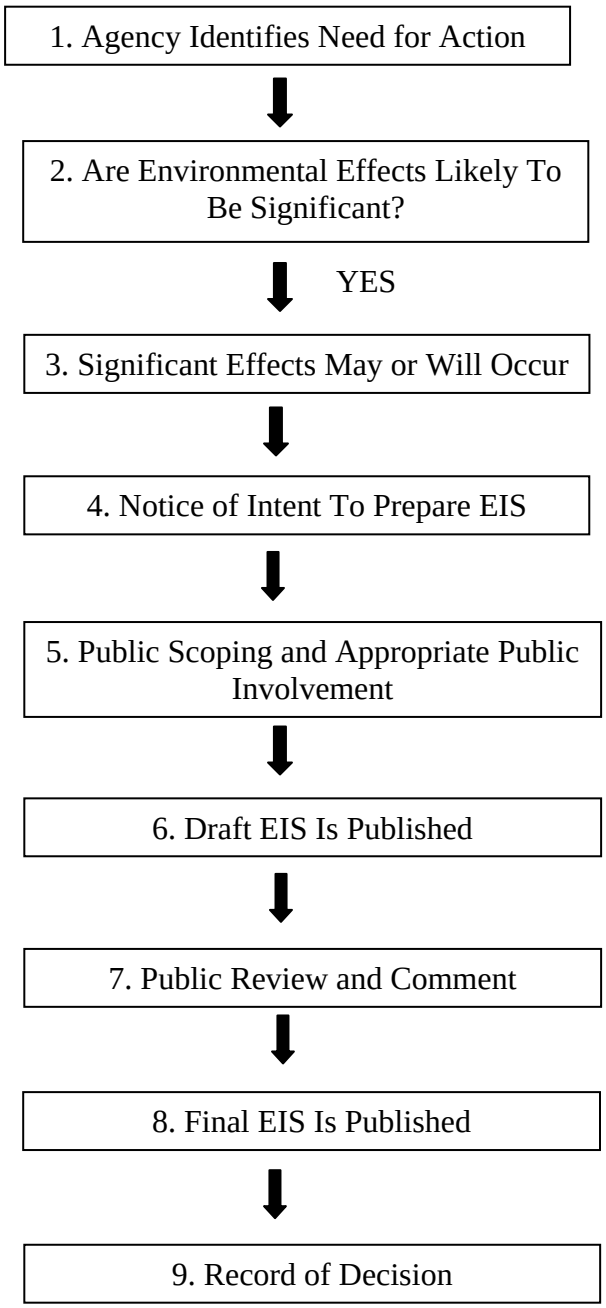
The Department's final EIS for Keystone XL generally addressed and incorporated the views and concerns of Federal agencies with expertise in relation to alternatives and mitigation, pipeline safety, and environmental risks from this project. However, some concerns, such as the manner in which alternative routes were considered in the Department's EIS, were not completely incorporated. OIG also determined that the Department's limited technical resources, expertise, and experience impacted the implementation of the NEPA process.

The National Environmental Policy Act Process

NEPA requires Federal agencies to assess and consider the environmental effects of their proposed actions prior to making decisions. NEPA applies to Federal agency actions such as Federal construction projects; plans to manage and develop federally owned lands; and Federal agency approvals of non-Federal activities such as agency grants, licenses, and permits. Frequently, private individuals or companies become involved in the NEPA process when they need a permit issued by a Federal agency. When a company applies for a permit, such as for crossing Federal lands, the Federal agency being asked to issue the permit must evaluate the environmental effects of the permit decision. Federal agencies may require the company or the developer to pay for the preparation of an environmental analysis, but the Federal agency remains responsible for the scope and accuracy of the analysis. NEPA does not require the Federal agency to select the environmentally preferable alternative or to prohibit adverse environmental effects. However, NEPA does require the Federal agency to be informed of the environmental consequences of its decisions.

Once an agency has developed a proposed action, the agency will determine whether to pursue the path of a "categorical exclusion" or prepare an environmental assessment or an EIS. The EIS process is a more detailed environmental review process than a categorical exclusion or environmental assessment process under NEPA and is specifically required for any "major federal action significantly affecting the quality of the human environment." The EIS process includes evaluation of the proposed agency action and reasonable alternatives of the proposed action; solicitation of input from organizations and individuals who could potentially be affected; and presentation and analysis of direct, indirect, and cumulative environmental impacts for public review and comment. The basic EIS process is depicted in Figure 2.

Figure 2. The NEPA Process for an EIS



*Per Council on Environmental Quality regulations contained in 40 CFR § 1502.9(c), significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision.

NEPA established the Council on Environmental Quality within the Executive Office of the President and assigned the Council on Environmental Quality the tasks of ensuring that Federal agencies meet their obligations under NEPA and overseeing Federal agency implementation of the NEPA process. As part of this responsibility, the Council on

Environmental Quality developed regulations for Federal agencies to implement NEPA. The Department also has regulations that supplement the Council on Environmental Quality's regulations.

Council on Environmental Quality Regulations for Implementing NEPA

According to Council on Environmental Quality regulations, when requested by the lead agency (in the case of Keystone XL, the Department), any other Federal agency that has jurisdiction by law is required to be a cooperating agency in the NEPA process. In addition, any other Federal agency that has special expertise with respect to any environmental issue that should be addressed in the EIS may be a cooperating agency if requested by the lead agency.

For Keystone XL, several Federal agencies agreed to be cooperating agencies. Additional information on the authority and consultation or permit requirements for some of the cooperating agencies as part of the EIS process is provided in Appendix C.

Also, according to Council on Environmental Quality regulations, after preparing a draft EIS and before preparing a final EIS, the lead agency is required to obtain the comments of any other Federal agency that has jurisdiction by law or expertise with respect to any environmental impact involved or that is authorized to develop and enforce environmental standards. The lead agency is required to allow not less than 45 days for comments on the draft EIS. If a cooperating agency is satisfied that its views are adequately reflected in the draft EIS, it can reply that it has no comment.

When preparing the final EIS, the lead agency is required to assess and consider comments received and to state its response in the final EIS by one or more of the following ways: (1) modifying alternatives, including the proposed action; (2) developing and evaluating alternatives not previously given serious consideration by the agency; (3) supplementing, improving, or modifying its analyses; (4) making factual corrections; and/or (5) explaining why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's position and, if appropriate, indicating those circumstances that would trigger agency reappraisal or further response. This section of the Council on Environmental Quality's regulations further states that all substantive comments received on the draft EIS, or summaries where the response has been exceptionally voluminous, should be attached to the final EIS whether or not the comment is thought to merit individual discussion by the agency in the text of the EIS.

Council on Environmental Quality regulations also include standards related to a lead agency's capability to comply with requirements in NEPA. The regulations require an agency to be capable, in terms of personnel and other resources, of complying with the requirements enumerated in NEPA. The agency's compliance may include the use of other's resources, but the lead agency itself is required to have sufficient capability to evaluate what others do for it. Further, the regulations require the lead agency to (1) designate a person to be responsible for overall review of agency NEPA compliance; (2) identify methods and procedures to ensure that environmental resources are given appropriate consideration; (3) prepare adequate EISs; and

(4) study, develop, and describe alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.

Department Regulations for Implementing NEPA

The Department has also developed regulations that supplement the Council on Environmental Quality's regulations for implementing NEPA. The Department's regulations indicate that the Department will conduct a NEPA review that will include preparation of an environmental assessment and/or an EIS prior to issuing a pipeline permit. For an EIS, Department regulations state that upon publication of the draft EIS, the Department is required to seek the views of appropriate agencies and individuals in accordance with Council on Environmental Quality regulations. The regulations further require that any views submitted during the comment period be considered in preparing the final EIS.

Department Incorporation of Comments From Other Federal Agencies

Because the Department is responsible for issuing Presidential permits for cross-border oil pipelines, the Department served as the lead Federal agency for conducting the EIS for the proposed Keystone XL pipeline. On April 16, 2010, the Department issued a draft EIS for public review. The public comment period for the draft EIS closed on July 2, 2010. After the draft EIS was issued, the Department issued a supplemental EIS for public review on April 22, 2011. The public comment period for the supplemental EIS ended on June 6, 2011. The Department issued the final EIS on August 26, 2011.

OIG determined that the Department, as the lead agency, took several actions that generally addressed and incorporated the views and concerns raised by other Federal agencies in the final EIS in accordance with NEPA and Council on Environmental Quality regulations. For example, pursuant to Council on Environmental Quality and Department regulations, the Department provided Federal agencies opportunities to comment on both the draft EIS and the supplemental EIS and included Federal agencies' comments in an appendix as part of the final EIS.

Comments on the draft EIS were provided by the Environmental Protection Agency, the Department of Energy, the Department of the Interior, the U.S. Army Corps of Engineers, the Department of Commerce, the Department of Homeland Security, and the Department of the Army. The Department of State responded in writing to those comments that were included in the appendix to the final EIS. More specifically, the Department either (1) revised or modified its analysis in the EIS, (2) cited a section of the EIS that already addressed or incorporated the Federal agency's comments, (3) provided additional information in its individual response or consolidated response related to the Federal agency's comments or concerns, or (4) provided rationale as to why the Department believed the Federal agency's comments did not warrant further response or revision to the EIS.

OIG determined that the Department, in addition to responding to agencies' written comments, also frequently consulted with other Federal agencies during the NEPA process to help address and incorporate the agencies' views and concerns in the EIS. Officials from other Federal agencies stated that the Department was open to meeting with the agencies and was

responsive in trying to address concerns that agencies raised. For example, Environmental Protection Agency officials expressed concerns to Department officials of the need for additional analysis in the EIS regarding the increased greenhouse gas emissions that may result from the increased extraction of tar sands oil in Canada for Keystone XL. In response, the Department hired a third-party contractor to conduct additional analysis, and a full life-cycle analysis of greenhouse gas emissions was included in the final EIS.

Environmental Protection Agency officials also had concerns related to aspects of the pipeline safety and the tar sands oil spills evaluation that was included in the draft EIS. These officials acknowledged that the Department had made significant efforts to address these concerns by working together with both the Pipeline and Hazardous Materials Safety Administration and the Environmental Protection Agency. In addition, the Department included a number of pipeline safety provisions in the EIS as mitigation measures, including 57 special conditions developed by the Pipeline and Hazardous Materials Safety Administration and the Department. To also address the Environmental Protection Agency's concerns, the Department engaged in getting a third-party contractor to conduct an independent engineering risk analysis of Keystone XL and to determine whether more mitigation measures were needed in the EIS for pipeline safety and prevention of potential oil spills.

Specific Issues Regarding Incorporation of Concerns From Other Federal Agencies

Although the Department took actions that generally addressed and incorporated the views and concerns raised by other Federal agencies in the final EIS, some comments from the Department of Energy's July 2010 letter on the draft EIS were omitted from the appendix in the final EIS. Therefore, the Department did not provide a written response to all of the comments contained in the July 2010 letter. In addition, some concerns provided by the Department of Energy and the Environmental Protection Agency were not completely incorporated. In particular, these agencies commented on the lack of alternative routes and the rationale the Department had used to exclude those routes from further evaluation in the EIS.

Alternative Routes

The Department's final EIS includes a discussion of 14 major alternative routes the Department considered and the rationale as to why it eliminated each of them from further consideration in the EIS. All 14 alternative routes were eliminated based on technical, economical, and environmental reasons. Five of the 14 routes were specific to concerns raised by the public regarding the Ogallala Aquifer in the Sand Hills region. Those five routes either minimized the pipeline length over that area or avoided the area entirely. The final EIS states that the Department eliminated the five alternative routes from further consideration because the Department determined them to be economically or technically impractical and infeasible.[12] In addition, the Department stated in the EIS that the alternative routes would be longer than the proposed route and therefore would disturb more land and cross more water bodies, which the

[12] The Council on Environmental Quality guidance defines reasonable alternatives as those alternatives that are practical or feasible from a technical and economic standpoint.

Department determined would not offer an overall environmental advantage over the proposed route.

In providing comments to the draft and supplemental EISs, the Department of Energy and the Environmental Protection Agency expressed concern with the Department's rationale for excluding alternatives from further evaluation and stated that the Department's draft and supplemental EISs did not sufficiently demonstrate that the alternatives were not reasonable for purposes of a NEPA analysis. However, these two Federal agencies also acknowledged that the Department was the lead agency for this review and that it was ultimately within the Department's discretion to decide not to include further analysis of alternative routes in the EIS.

On November 10, 2011, the Department announced its intent to provide additional alternative routes analyses in a supplemental EIS in response to the continuing concerns received on the proposed route through the Sand Hills area of Nebraska. However, even if the Department had not agreed to perform additional analyses of the alternative routes, if the Department of Energy, the Environmental Protection Agency, or another agency had disagreed with the Department on this matter and had believed that the proposed action was environmentally unsatisfactory, the agency could have referred the matter to the Council on Environmental Quality. Additionally, under the Executive Order 13337 process, if an agency involved in that process disagrees with the Department's proposed determination for a Presidential permit, the agency can request that the matter be referred to the President for consideration.[13]

Department Expertise in Executing NEPA

The Department's limited technical resources, expertise, and experience impacted the implementation of the NEPA process. The Department had an attorney involved in the process who had some prior experience and familiarity with NEPA. However, Department, other agency, and industry officials stated that the Department did not have a lot of technical resources or expertise for implementing the NEPA and EIS processes. The NEPA Coordinator position was filled by limited-term Foreign Service Officers who, at the time of their appointments, had little or no prior NEPA experience and had to seek training and learn quickly on the job as they tried to fulfill their responsibilities. As a result, the Department relied heavily on outside parties, such as its third-party contractor and other Federal agencies with expertise, to address issues related to alternatives and mitigation, pipeline safety, and environmental risks throughout the EIS process.

For example, had the Department had more expertise in NEPA and more knowledge of the information and analysis needed for an EIS, the Department may have been able to avoid the Environmental Protection Agency's poor rating of the draft EIS and the need for a supplemental EIS. Environmental Protection Agency officials rated the draft EIS as "Category 3-Inadequate Information," which they defined as not adequately assessing potentially significant environmental impacts of the proposed action, or the Environmental Protection Agency reviewer

[13] The Environmental Protection Agency has specific authority to do so under sec. 309 of the Clean Air Act (42 U.S.C. § 7609), and all agencies can do so under the Council on Environmental Quality's regulations at 40 CFR 1504. The agencies involved in the Executive Order 13337 process can do so under sec. 1(i) of the Executive order.

has identified new, reasonably available alternatives outside of those analyzed in the draft EIS that should be analyzed. Further, a Category 3 is assigned when the Environmental Protection Agency does not believe the draft EIS is adequate for the purposes of the NEPA review and should be formally revised. Environmental Protection Agency officials stated in their July 2010 letter that additional information and improved analyses were necessary to ensure that the information in the draft EIS was adequate to fully inform decision makers and the public about the potential environmental consequences of the project. Several other Federal agencies provided similar comments to the draft EIS, stating that the EIS lacked information and that it needed additional analysis. As a result of these comments, the Department issued a supplemental EIS in April 2011 and ended the public comment period in June 2011, which prolonged the EIS process by 11 months.

In addition, during the OIG review, U.S. Fish and Wildlife Service officials stated that initially, as part of the environmental review process, their interactions were primarily and almost exclusively with Cardno Entrix for the required Section 7[14] consultations under the Endangered Species Act. These consultations are typically an agency-to-agency process and require involvement from the lead agency that makes the final decisions on issues raised under Section 7. However, Department officials involved in the EIS did not initially have the knowledge or scientific background to fully participate in the consultations. Ultimately, the Department hired an individual with the biological background to handle the threatened and endangered species issues. Fish and Wildlife Service officials stated that after the individual was hired, the situation improved.

Initially, the Department's team for executing the EIS process consisted of one person in the Bureau of Oceans and International Environmental and Scientific Affairs and a legal adviser, with some assistance from an individual in the Bureau of Economic and Business Affairs. Recognizing the challenges involved in executing the NEPA process, the Department initiated actions to augment the team that was implementing the process. Specifically, the Department assigned a biologist, as well as another individual to lead the tribal consultations, for the process. In addition, to provide consistency to the team, the Department has developed and is in the process of filling a full-time Civil Service position within the Bureau of Oceans and International Environmental and Scientific Affairs specifically for handling the NEPA process and managing EIS third-party contracts.

Conclusion

The Department's final EIS for Keystone XL generally addressed and incorporated the views and concerns of Federal agencies. However, a few concerns were not completely incorporated, such as the manner in which alternative routes were considered in the Department's EIS. Federal agencies commented on the lack of inclusion and full evaluation of alternative routes to the route proposed in the EIS. However, the Department considered and still eliminated these other route alternatives from further evaluation in the EIS based on technical, economical, and environmental reasons. Some Federal agencies expressed concern

[14] Section 7 of the Endangered Species Act requires the lead agency for the NEPA process to informally and formally consult with the U.S. Fish and Wildlife Service to determine the likelihood of effects on listed species from the proposed project.

with the Department's reasoning for eliminating the route alternatives, but they acknowledged it was ultimately the Department's decision and was within the Department's discretion as the lead agency to not include a full evaluation of alternative routes in the EIS.

The Department's limited technical resources, expertise, and experience impacted the implementation of the NEPA process. The Department had to rely more on outside parties, such as its third-party contractor and other Federal agencies with expertise, to address issues related to alternatives and mitigation, pipeline safety, and environmental risks throughout the EIS process. As a result, OIG believes the EIS and related processes were less effective, thereby delaying the decision for approval or denial of the Keystone application.

Recommendation 2. OIG recommends that the Department of State fill at least one full-time Civil Service position within the Bureau of Oceans and International Environmental and Scientific Affairs with staff who have experience and expertise in handling National Environmental Policy Act issues and the environmental impact statement process.

Management Response: The Department agreed with the recommendation, stating that it is "in the process of filling" a Civil Service position and that "public posting" for the position closed on February 3, 3012.

OIG Reply: OIG considers this recommendation resolved, pending further action. The recommendation can be closed when OIG reviews and accepts documentation showing that a Civil Service position for "handling the NEPA process and managing NEPA third-party contracts" has been filled. The Department should, however, continuously reassess whether its staffing and other resources are sufficient to fulfill its responsibilities under NEPA.

Finding C. Relationship Between Cardno Entrix and TransCanada

Cardno Entrix has been the third-party EIS contractor for two Federal Energy Regulatory Commission pipeline reviews and two Department pipeline reviews for which TransCanada or an affiliate was the permit applicant. In addition, Cardno Entrix has also received a minimal amount of contract work on two corporate projects that Cardno Entrix has been associated with for many years but that were bought by TransCanada in 2007 and 2008. OIG determined that these relationships did not present a conflict of interest because they are not directly related to the Keystone XL project and are either federally controlled relationships or minimal financial relationships that would not "impair the contractor's objectivity in performing the contract work" or "result in an unfair competitive advantage to a contractor." In addition, no agreements between Cardno Entrix and TransCanada for future services for Keystone XL were found. However, the Department did not require the applicant (TransCanada) to review and certify Cardno Entrix's organizational conflict of interest statement, as required by the Federal Energy Regulatory Commission's Handbook, nor did the Department perform any independent inquiry to verify Cardno Entrix's organizational conflict of interest statements. Finally, a preliminary inquiry determined that there were no personal financial conflicts of interest of those Department employees who were personally and substantially involved.

Conflict of Interest Allegation

An October 7, 2011, article from *The New York Times* alleged that the Department assigned the Keystone XL EIS to Cardno Entrix, "a company with financial ties to the pipeline operator." The article stated, "Cardno Entrix . . . had previously worked on projects with TransCanada and describes the pipeline company as a 'major client' in its marketing materials." In their letter to OIG, members of Congress stated, "On its face alone, this creates an appearance of a conflict of interest and raises several questions," including the following:

- To what extent is there a contractual or financial relationship between Cardno Entrix and TransCanada beyond Keystone XL?
- Does Cardno Entrix have a contract or agreement with TransCanada wherein Cardno Entrix would provide services, such as spill response, for Keystone XL?

Conflict of Interest Regulations and Guidance

There are several regulations and guidance documents that address conflicts of interest in relation to EISs. For example, the Council on Environmental Quality's NEPA regulations and guidance state that EIS contractors must execute a disclosure statement specifying that they have no financial or other interest in the outcome of the proposed project. An example of a financial interest would be an EIS contractor for a construction project that, at the same time, has an agreement to perform the construction or is the owner of the construction site. Council on Environmental Quality guidance on NEPA[15] states, "[I]f there are no such . . . interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist."

The intent of the Council on Environmental Quality regulations and guidance is to prevent a conflict of interest among the involved parties. This guidance stipulates that the responsible Federal official furnish guidance and participate in the preparation of the contractor's disclosure statement documentation and that the lead Federal agency evaluate potential conflicts of interest prior to entering into any contract for the preparation of environmental documents. To facilitate compliance with NEPA regulations and guidance, the Department utilizes the conflict of interest procedures developed in the Federal Energy Regulatory Commission's Handbook as additional guidance. The Handbook uses the term "organizational conflict of interest" to refer to a relationship that would "impair the contractor's objectivity in performing the contract work" or "result in an unfair competitive advantage to a contractor." Organizational conflicts of interest typically exist where a contractor has past, present, or currently planned interests in the project to be covered by the third-party contract. For example, an organizational conflict of interest can exist if the contractor (1) has been involved with the applicant on the project before the project is proposed to the Federal agency or while it is pending with the Federal agency, (2) has an ongoing relationship with the applicant, (3) would be called on to review its own prior work, or

[15] Council on Environmental Quality's "Guidance Regarding NEPA Regulations," dated 1983.

(4) has a financial or other interest in the outcome of the Federal agency's decision. The Handbook also states that for each proposal submitted to the Federal agency, the applicant must provide an organizational conflict of interest certification stating that it has reviewed the proposal for organizational conflicts of interest and found it to be acceptable. It is the applicant's responsibility to review carefully all organizational conflict of interest materials to determine whether a bidder, including any subcontractors, is capable of impartially performing the environmental services required under the third-party contract.

Department's Implementation of Organizational Conflict of Interest Regulations and Guidance

Although specific contractual and financial relationships exist between Cardno Entrix and TransCanada, OIG found that these relationships did not present a conflict of interest. OIG found that Cardno Entrix has been the third-party EIS contractor for two Federal Energy Regulatory Commission pipeline reviews and two Department pipeline reviews for which TransCanada or an affiliate was the permit applicant and paid the bills. In addition, OIG found that Cardno Entrix has done a minimal amount of contract work (about 0.3 percent of Cardno Entrix's total revenue from TransCanada over a 9-year period) on two corporate projects Cardno Entrix has been associated with for many years but that were bought by TransCanada in 2007 and 2008. OIG determined that these relationships do not present a conflict of interest because they are not directly related to the Keystone XL project and are either federally controlled relationships or minimal financial relationships that would not "impair the contractor's objectivity in performing the contract work" or "result in an unfair competitive advantage to the contractor." The Department and the Federal Energy Regulatory Commission, collectively, have directed the contracts under which 99.7 percent of all payments from TransCanada to Cardno Entrix (by value) have been made during the last 7 years. The contractual relationships that exist between Cardno Entrix and TransCanada do not violate Federal Energy Regulatory Commission Handbook organizational conflict of interest guidelines. Although not written into Federal Energy Regulatory Commission guidelines, Federal Energy Regulatory Commission officials interviewed by OIG indicated that they do not consider Federal agency-controlled third-party contracts to present potential organizational conflicts of interest and that they use a ceiling of 1 percent of a contractor's annual revenue as a de facto cut-off for a minimal financial relationship that would not present a potential organizational conflict of interest. In addition, OIG found that no agreements exist between Cardno Entrix and TransCanada for future services for Keystone XL.

Execution of Organizational Conflict of Interest Statements

Cardno Entrix and its subcontractors executed organizational conflict of interest Representation and Questionnaire documentation as required in the Federal Energy Regulatory Commission's Handbook, and Department officials reviewed the documentation. A Department official stated that the organizational conflict of interest materials are taken at face value. However, the Department did not request, and TransCanada did not provide, the organizational conflict of interest certification required by the Federal Energy Regulatory Commission Handbook, nor did the Department conduct any independent inquiry into the information contained in the organizational conflict of interest statement. OIG asked Federal Energy

Regulatory Commission officials about their organizational conflict of interest review process, and these officials stated that they review contractors' organizational conflict of interest organizational materials and sometimes they ask for further information or conduct Internet research on the project's owner and affiliates. In an effort to better determine conflicts of interest, rather than relying solely on contractor statements, the Department plans to consult with the Federal Energy Regulatory Commission on future projects. The Department is also discussing whether to contract with a company that investigates financial relationships.

OIG reviewed Cardno Entrix's organizational conflict of interest documents and found that they conform to applicable regulations and guidance and do not indicate an organizational conflict of interest. Additionally, TransCanada officials stated to OIG that there is no organizational conflict of interest with Cardno Entrix, and Cardno Entrix officials stated that they have only contractual relationships with TransCanada, all of which have been disclosed to the Department. Cardno Entrix's financial relationship with TransCanada is discussed in the sections that follow.

Financial Relationship

OIG reviewed the financial relationship between Cardno Entrix and TransCanada to determine whether an organizational conflict of interest exists. This review found no corporate affiliations between TransCanada and Cardno Entrix. Additionally, OIG analyzed Cardno Entrix's net revenues for TransCanada projects from 2002 to 2011[16] and found that 99.7 percent of this revenue was from two Federal Energy Regulatory Commission and two Department pipeline review contracts, where a Federal agency is the client and directs the work. The remaining 0.3 percent of revenue was from two corporate projects that Cardno Entrix has been associated with for many years but that were bought by TransCanada in 2007 and 2008. Federal Energy Regulatory Commission officials stated to OIG that they consider 1 percent or more of revenue from the applicant to be the threshold for an organizational conflict of interest. Therefore, OIG concluded that these two corporate projects do not constitute an organizational conflict of interest.

OIG also noted that Cardno Entrix was billing for "programmatic agreement" work related to Keystone I when it submitted its proposal for the Keystone XL EIS. This could be construed as an "ongoing relationship" between Cardno Entrix and TransCanada. However, this work is performed by a third-party contractor under direction of the Department as part of the continuing work on Keystone I; therefore, the "ongoing relationship" is with the Department and not TransCanada. Furthermore, according to Federal Energy Regulatory Commission officials, it is not uncommon for a contractor to bid on a new project while monitoring a previous project owned by the applicant, and the Federal Energy Regulatory Commission does not consider this to present a potential organizational conflict of interest. The Department does not consider this to be a conflict of interest because the Federal Government is the client and directs the work of the third-party contractor. In this case, while TransCanada pays Cardno Entrix for its continuing work on Keystone I, Cardno Entrix takes direction from and reports solely to the Department.

[16] For this review, the analysis of Cardno Entrix's revenues from TransCanada was performed on data disclosed to the Department by Cardno Entrix.

Agreement for Future Services

OIG reviewed documentation for the Keystone XL EIS contract and found that it does not contain any incentives or provisions for future work for Cardno Entrix. Moreover, it specifically prohibits Cardno Entrix from performing "any services for or enter[ing] into any contract with others that may conflict with its contractual, professional, equitable or other obligations to the Company [TransCanada], its subsidiaries, affiliates and joint ventures without first obtaining the written approval of the Company [TransCanada] and DOS [Department]." Additionally, a TransCanada official stated that TransCanada has not entered into any future service agreements with Cardno Entrix for its Keystone pipelines.

Furthermore, when asked about the Keystone XL oil spill response plan, a TransCanada official stated that oil spill response plans are normally completed once a project is finished. Therefore, the Keystone XL oil spill response plan is not finished. However, TransCanada is using Keystone I as its template. Oil spill response for Keystone I is contracted to the National Response Corporation. OIG reviewed National Response Corporation subcontractors and found no affiliation with Cardno Entrix or its subsidiaries. A Cardno Entrix official stated that although Cardno Entrix provides oil spill response services for a wide range of companies, it does not perform such services for TransCanada.

Conclusion

Based upon the information reviewed, OIG did not identify an organizational conflict of interest between Cardno Entrix and TransCanada. However, the Department did not verify Cardno Entrix's organizational conflict of interest statements, accepting them at face value. The Department did not request, and TransCanada did not provide, the organizational conflict of interest certification required by the Federal Energy Regulatory Commission Handbook, nor did the Department conduct any independent inquiry regarding the information contained in the organizational conflict of interest statement. Ultimately, it should be the Department's responsibility to review and certify the contractor's organizational conflict of interest materials. By not conducting further inquiry on contractors' organizational conflict of interest statements, the Department could miss existing organizational conflicts of interest. An undetected organizational conflict of interest could affect the objectivity of a contractor's work or at least call its objectivity into question.

> **Recommendation 3.** OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State process for selecting and using third-party contractors in order to improve the Department's organizational conflict of interest screening process.
>
> **Management Response:** The Department agreed with this recommendation, stating that as part of its effort to "redesign" the third-party contractor process, it will "develop measures that will provide for additional verification of potential organizational conflicts

of interest between prospective third-party contractors and the applicant for a Presidential permit."

OIG Reply: OIG considers this recommendation resolved, pending further action. The recommendation can be closed when OIG reviews and accepts documentation showing that the third-party contractor process has been redesigned to improve the Department's organizational conflict of interest screening process.

Finding D. The Pipeline and Hazardous Materials Safety Administration Permit

Based on its review of documentation and interviews of appropriate Department, interagency, and industry personnel, OIG determined that the Department did not violate its role as an unbiased oversight agency. TransCanada made the decision to withdraw its special permit application. OIG found no evidence during its review that the Department had assured TransCanada that it could obtain the permit at a later date through a less scrutinized and less transparent process. OIG also found that the Pipeline and Hazardous Materials Safety Administration, not the Department, has the statutory authority[17] to issue special permits as they relate to pipeline safety and that the Department became actively involved in discussing the special permit conditions only after TransCanada withdrew its special permit application because the Department wanted to enhance the safety of the pipeline. After TransCanada withdrew the application, the Department worked with the Pipeline and Hazardous Materials Safety Administration and TransCanada to adopt 57 special conditions[18] designed to increase Keystone XL's safety.

Special Permit Process

To obtain a special permit, Pipeline and Hazardous Materials Safety Administration regulations require applicants to provide a special permit application, including a citation of the specific regulation from which the applicant seeks relief from compliance. The applicant is also required to demonstrate that a special permit achieves a level of safety at least equal to that required by regulation or, if a required safety level does not exist, is consistent with the public interest. Once received, the Pipeline and Hazardous Materials Safety Administration's Associate Administrator reviews the application and has the discretion to grant or deny the application in whole or in part. The Associate Administrator also has the discretion to impose additional provisions on the applicant that were not specified in the application.

Pipeline and Hazardous Materials Safety Administration regulations state that the applicant may withdraw its application at any time before a decision is made to grant or deny the request. The regulations do not specify any limitation on reapplying for a special permit after an application is withdrawn.

[17] 49 U.S.C. § 60118.

[18] Special permit conditions were designed "to achieve an equivalent or better level of pipeline safety compared to if no special permit were approved" and addressed "both the specific concerns raised by operation and design safety factors of the Keystone XL" pipeline. (Source: Pipeline and Hazardous Materials Safety Administration Docket No. PHMSA-2008-0285.)

The Department's Role in the Pipeline and Hazardous Materials Safety Administration's Process

On October 10, 2008, soon after submitting its Presidential permit application to the Department, TransCanada filed an application for a special permit with the Department of Transportation, Pipeline and Hazardous Materials Safety Administration,[19] to operate the Keystone XL pipeline at a pressure higher than is normally allowed by the current regulation. The current regulation requires a standard design factor [20] of 0.72 (72 percent) for the pipe, and TransCanada requested a special permit to operate the pipeline at a design factor of 0.80 (80 percent). If approved, the special permit would authorize TransCanada to operate Keystone XL pipeline at the higher pressure.

TransCanada decided to withdraw its application because of unforeseen distractions that resulted from the special permit request. A TransCanada official stated that the special permit application had become a distraction from the Presidential permit application process. Therefore, on August 5, 2010, TransCanada withdrew its special permit application from the Pipeline and Hazardous Materials Safety Administration, hoping to change public opinion and focus on the Presidential permit application. The TransCanada official stated that although Department officials shared TransCanada's view that the special permit application had created a political distraction, Department officials did not direct TransCanada to withdraw its application and reapply later. Department officials also stated that they had made no commitments to TransCanada regarding the special permit, and OIG's review of Department records found no such commitments.

Pipeline and Hazardous Materials Safety Administration officials stated that only their organization has the authority to approve a special permit application and that the Department does not have any role in this part of the application review process. Should TransCanada reapply for a special permit, the Pipeline and Hazardous Materials Safety Administration will start the review process from the beginning, and that process will include a new environmental assessment.[21]

The Department became actively involved with the Pipeline and Hazardous Materials Safety Administration after TransCanada withdrew its special permit application. During the Pipeline and Hazardous Materials Safety Administration's review of the special permit request process, Department officials learned of the progress of the special permit application review process during meetings with TransCanada and Pipeline and Hazardous Materials Safety Administration officials concerning the Presidential permit application (the Pipeline and Hazardous Materials Safety Administration is a cooperating agency on the EIS). After TransCanada withdrew its application, the Department contacted the Pipeline and Hazardous

[19] The Pipeline and Hazardous Materials Safety Administration is responsible for ensuring the safety of U.S. energy pipelines, including crude oil pipelines.
[20] A standard design factor is a safety factor based on the ratio of ultimate load to maximum permissible load that can be safely placed on a structure.
[21] As a part of the review of the special permit, the Pipeline and Hazardous Materials Safety Administration conducts its own environmental assessment, which assesses whether granting a special permit would have a significant impact on the environment.

Materials Safety Administration and requested its technical assistance to enhance the overall safety of Keystone XL. The Pipeline and Hazardous Materials Safety Administration recommended the adoption of special conditions that it had developed. The Department and the Pipeline and Hazardous Materials Safety Administration worked together and ultimately established 57 project-specific special conditions. Pipeline and Hazardous Materials Safety Administration officials stated that they considered these special conditions to be robust and that they represent best practices within the pipeline industry. For the Department, the special conditions enhance the safety of the pipeline and address comments received during the EIS process about pipeline construction, operation, and maintenance. At the Department's request, TransCanada committed to operate Keystone XL under the 57 special conditions, even if it does not decide to reapply for permission to operate the pipeline at a higher pressure.

TransCanada withdrew its special permit application, knowing that it could reapply for a special permit later. When asked if a new special permit application would be guaranteed approval even if the 57 special conditions were adopted, Safety Administration officials stated, "Absolutely not." If TransCanada wants to operate Keystone XL at a higher pressure, it will have to reapply for a special permit. The officials further stated that permit approval would not be automatic for reasons such as possible changes in environmental regulations and in environmental conditions.

Conclusion

Department officials did not advise TransCanada to withdraw its special permit application, nor did they make assurances regarding reapplication. Even if the officials had made assurances, the Department does not play a role in the Pipeline and Hazardous Materials Safety Administration's application review process. Furthermore, the Department's involvement after TransCanada withdrew its special permit application ensured that if the Presidential permit were to be approved, Keystone XL would operate under robust special conditions that would increase the pipeline's safety.

Finding E. Communications Between the Department and TransCanada, the Canadian Government, and Pipeline Proponents

OIG found no evidence that communications between Department officials, TransCanada, the Canadian Government, and proponents of the Keystone XL pipeline deviated from the Department's obligation under Federal law to provide an objective analysis of the project and its potential risks. Specifically, OIG found no record that Department officials had made inappropriate commitments on behalf of the Department to TransCanada or to the Canadian Government. OIG also found no support for the contention that the Department coached TransCanada on what to say during the legally mandated review process. Lastly, OIG found that the Department also kept TransCanada officials at arm's length from decision makers and other senior officials.

Communications Criteria

Executive Order 13337 establishes the required process and legal framework for determining whether a Presidential permit is in the national interest. In addition, the Department has incorporated the NEPA process into the Executive order process and conducts the entire process generally in accordance with the Administrative Procedures Act.[22] However, none of the authorities in this combined legal framework establish how the Department should communicate with the permit applicant (that is, TransCanada), the Canadian Government, or proponents or opponents of the pipeline.[23]

Department Communications

The October 26, 2011, letter from members of Congress asked whether communications between Department officials, TransCanada, the Canadian Government, or proponents of Keystone XL deviated from the Department's obligations under Federal law to provide an objective analysis of the project and its potential risks. The members also asked whether Department officials, past or current, improperly disclosed any materials or information to TransCanada, the Canadian Government, or proponents of Keystone XL. Also, OIG received a letter from several environmental nongovernmental organizations, dated October 28, 2011, alleging that Department officials improperly advised TransCanada on Keystone XL and made inappropriate commitments on behalf of the Department to TransCanada.

OIG found no evidence that Department officials had made any inappropriate commitments on behalf of the Department to TransCanada or to the Canadian Government. OIG found that throughout the EIS process, TransCanada provided detailed factual and technical input regarding its proposed project as needed for the Department's environmental analysis. TransCanada was also involved in negotiating conditions on and changes to the proposed project as the Department and other agencies deemed appropriate throughout the EIS process, including the NEPA-required consideration of mitigation measures and the regulatory reviews related to cultural and historic preservation and endangered species. These interactions were primarily at the staff level. OIG considered such involvement by the applicant to be routine, reasonable, and required as part of the EIS process and related regulatory consultations, such as those under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act.

In addition to those required staff-level interactions, OIG found that three meetings were held at the Deputy Assistant Secretary level or the Assistant Secretary level with TransCanada officials between July 2010 and October 2011. In its review of available meeting notes, OIG did not find any inappropriate commitments from Department officials. Specifically, the meeting notes did not indicate that Department officials made any comments on the merits of the

[22] The Administrative Procedures Act "requires an agency that is engaged in informal rulemaking" to "afford interested persons an opportunity to participate through the submission of written data, views, or arguments, with or without opportunity for oral presentation."

[23] As noted in the Background section, the Executive order allows for the Department to seek public comments on a Presidential permit application. Also, as noted in Finding B, the public involvement and public comment periods are required as part of the NEPA process.

application or commitment to eventual approval of the application. Further, in response to interagency and public comments received during the EIS process and in order to further its objective analysis of the project and its potential risks, the Department made two significant decisions that were adverse to TransCanada despite TransCanada's communications containing arguments against those Department decisions.

The first decision resulted from public comments to the draft EIS and the Environmental Protection Agency's rating the draft EIS as "Inadequate Information." TransCanada disagreed with the need to conduct a supplemental draft EIS, but nevertheless, the Department decided to proceed with a supplemental draft EIS. The second decision occurred in November 2011 concerning Keystone XL's environmental impact on the Sand Hills in Nebraska, when the Department announced that it would analyze additional alternative routes and that the process could be completed by the first quarter of 2013.

In correspondence with proponents of the pipeline, Department officials did not prejudge the process or make inappropriate commitments. Instead, while acknowledging the economic benefits, the officials indicated that a decision would be based on all relevant factors, including environmental and economic impacts.[24] In meetings with environmental groups opposed to the pipeline, Department officials likewise did not prejudge the process or make inappropriate commitments. Department officials encouraged input from all sources, indicated that they were considering all comments made as part of the public comment process, and further indicated a willingness to receive relevant studies that were publicly available.

OIG also did not find evidence that the Department had advised TransCanada on what to say during the legally mandated review process. For example, environmental nongovernmental groups alleged that a Department official, the former Special Envoy and Coordinator for International Energy Affairs, had assured Canadian officials that Keystone XL would be approved and that he had instructed TransCanada officials on how to improve messaging to the public about tar sands. However, OIG found that the individual did not participate in the Department's process for preparing the EIS or adjudicating the permit application. Furthermore, OIG's review of documents and interviews with the former Special Envoy and his staff did not indicate that the Department official had made any inappropriate commitment. The official was accessible to parties on both sides of the issue and did not take any action that impaired or attempted to impair an objective analysis of the application.

There were also allegations that an Embassy Ottawa official's communications with TransCanada officials showed bias within the Department. Based on OIG's review of the official's email records, OIG determined that the official's email messages to a TransCanada official were cordial and familiar in tone. However, the messages did not convey any inappropriate commitments on behalf of the Department. Furthermore, the official did not participate in the preparation of the EIS or in the broader national interest determination process, and OIG did not find evidence that the email exchanges had had any impact on the Department's analysis of the project.

[24] Environmental and economic impacts are components of the national interest determination, which also involves consideration of factors that include energy security, cultural impacts, foreign policy, and compliance with relevant Federal regulations.

The Department also kept TransCanada officials at arm's length from decision makers and other senior officials. OIG found no evidence that Department senior officials met with TransCanada officials despite repeated efforts from TransCanada to obtain a meeting. Department records show that from July 2010 through October 2011, Department senior officials met with TransCanada officials once in July 2010 and once in February 2011 and met several times with environmental nongovernmental organization officials on the proposed pipeline. Finally, with the then-anticipated close of the public comment period in October 2011, the Department's Office of the Legal Adviser provided guidance on avoiding improper ex parte contacts,[25] counseling against advising TransCanada on internal deliberations, or giving advance notice of a Department decision on the application.

In attempting to determine whether Department officials made themselves available to a wide range of groups holding different views on the proposed pipeline, OIG found that Department officials did make themselves available to many groups and individuals. A sample of some of the meetings held by Department officials to discuss Keystone XL is presented in Table 3.

Table 3. Department Meetings on Keystone XL

Date	Group/Individual
July 19, 2010	TransCanada officials
July 20, 2010	TransCanada officials
Sept. 9, 2010	TransCanada officials
Sept. 10, 2010	Environmental nongovernmental organization officials
Sept. 20, 2010	Canadian & U.S. Aboriginal Delegation and National Resources Defense Council
Oct. 15, 2010	TransCanada officials
Dec. 7, 2010	Indian tribal groups
Jan. 25, 2011	Canadian Government officials
Jan. 26, 2011	National Resources Defense Council and Pembina Institute
Feb. 10, 2011	TransCanada officials
March 3, 2011	Canadian Energy Pipeline Association
March 9, 2011	Nebraska Leaders & Sierra Club representatives
March 30, 2011	Environmental nongovernmental organization officials
April 11, 2011	TransCanada officials
April 13, 2011	Canadian Association of Petroleum Producers
April 15, 2011	Environmental nongovernmental organization officials
April 28, 2011	Alliance for Climate Protection
May 27, 2011	Canadian Chiefs, Environmental Defense Canada, Climate Action Network, and The Pembina Institute
May 27, 2011	Environmental nongovernmental organization officials
July 27, 2011	Cenovus Energy officials
Aug 16, 2011	Canadian Government officials

[25] Ex parte communication is unilateral contact with one party without notice to the other party.

Aug. 22, 2011	Environmental nongovernmental organization officials
Sept. 2, 2011	Indigenous Environmental Network
Oct. 6, 2011	Indigenous leaders and Canadian First Nation representatives
Oct. 6, 2011	Faith Group leaders
Oct. 6, 2011	High school students

Source: Bureau of Oceans and International Environmental and Scientific Affairs

Conclusion

Based on its review of the Department's communications, OIG determined that communications between Department officials, TransCanada, the Canadian Government, and proponents of the Keystone XL pipeline did not deviate from the Department's obligation under Federal law to provide an objective analysis of the project and its potential risks.

Finding F. Department Compliance With Federal Disclosure Requirements

OIG determined that the Department fully complied with the general disclosure requirements applicable to the Presidential permit and EIS processes. The Department's notices in the *Federal Register* show that the Department provided, among other things, the required notice of its decisions to initiate an EIS and a national interest determination for Keystone XL. The Department also announced public meetings and invited comments from the public and consulted with Federal agencies, as well as with State, tribal, and local governments.

Disclosure Requirements

Several Federal authorities are relevant to the Department's disclosure practices as part of the Keystone XL permit process. Primarily, Executive Order 13337 delineates which Federal agencies the Department must consult with once it receives a permit application. Further, the Executive order indicates that the Department should request views of other Federal Government departments and agencies as it deems appropriate and that the Department may also consult with State, tribal, and local government officials and provide notice of the permit application in the *Federal Register* to seek public comment. NEPA and Council on Environmental Quality regulations guide the EIS process and the associated "disclosure" of the EIS, including describing how public comment is to be sought and evaluated.

Department Compliance With Disclosure Requirements

The Department published multiple notices in the *Federal Register* regarding Keystone XL, which was in compliance with disclosure requirements. The Department's *Federal Register* notices related to Keystone XL are summarized in Table 4.

Table 4. Summary of the Department's *Federal Register* Notices for Keystone XL

Notice	Date	Federal Action
73 FR 65713	November 4, 2008	• announced receipt of a permit application from TransCanada • described the proposed pipeline route

		• noted TransCanada's ownership • reported that the Department is circulating the permit application to other Federal agencies and invited public comment
74 FR 5019	February 10, 2009	• announced the Department's intent to prepare an EIS for Keystone XL • listed 20 public scoping meetings, in accordance with Department regulations • solicited comments
75 FR 20653	April 20, 2010	• announced availability of the draft EIS and invited comments by May 31, 2010 • listed 19 additional public meetings • noted that copies of the draft EIS have been mailed to interested Federal, state, and local agencies; to public interest groups; to individuals and affected landowners who requested a copy or provided comments during the scoping period; and to libraries, newspapers, and other stakeholders
75 FR 22890	April 30, 2010	• extended the deadline for submission of public comments on the draft EIS to June 16, 2010
75 FR 33883	June 15, 2010	• extended the deadline for submission of public comments on the draft EIS to July 2, 2010 • provided notice of two additional public meetings
76 FR 22744	April 22, 2011	• issued notice of a supplemental draft EIS and requested comments via email, mail, fax, or the Department's Web site by June 6, 2011
76 FR 53525	August 26, 2011	• announced release of the final EIS • invited further comment on Keystone XL • announced nine additional public meetings to be held in September and October 2011 • stated the Department's determination of whether issuance of a permit "would serve the national interest" would take into account a wide range of factors, including environmental, economic, energy security, foreign policy, and pipeline safety concerns • indicated the Department expected to make a decision on whether to grant or deny the permit before the end of the year

In addition, the Department's final EIS disclosed and catalogued the Department's analysis and public discussions of the environmental issues associated with Keystone XL. The Department also included the following documents in the final EIS: (1) a listing of public comments submitted to the Department that included comments from Federal, tribal, State, and local agencies and the Department's responses to those comments; (2) a list of preparers for the EIS; and (3) the Department's EIS distribution list. Also, the Department's Web site for

Keystone XL provides direct, public access to copies of EIS documents and other information about the permit and EIS processes, and it includes a link to the applicant's Web site regarding the pipeline.

Conclusion

The Department's actions provided Government agencies and the public ample information and opportunity over the course of several years to study and comment on Keystone XL and to understand and participate in the Department's decision-making process. The Department's disclosures, many of which invited comment, ensured that the Department benefited from a wide range of views and expertise throughout the permit application process.

Finding G. Department Fulfillment of Freedom of Information Act Requests

The Department's processing and fulfillment of Keystone XL-related FOIA requests have been as timely as, or faster than, its processing and fulfillment of other FOIA requests of similar complexity. Although the Department has not made a final determination on any of the Keystone XL-related requests within the baseline statutory requirement of 20 days, the Department has generally acknowledged requests within 20 days, assigning case numbers and the track in which the request was to be processed and informing requestors that it is processing the requests. OIG found that the Department has been consistent with its established processes in processing Keystone XL requests, given the complexity and volume of the records involved.

FOIA Regulations and Guidance

FOIA allows for the public to request records from Federal Government agencies and establishes "a strong presumption in favor of disclosure."[26] FOIA defines agency records as all documentary materials that are either created or maintained by an agency and are under agency control at the time of an FOIA request. Records can include, but are not limited to, correspondence, reports, media files, emails, and email attachments.

When an agency receives a proper FOIA request (a request that "reasonably describes" the requested records and is made in accordance with published rules), the agency has 20 working days in which to make a determination to comply with the request, meaning that the agency has compiled and evaluated records that are responsive to the request and has determined whether to release records or to deny the request. However, exceptions in FOIA that have been applied by the courts allow agencies additional processing time as long as the request meets the requirements of the exception and the agency has diligently processed the request.[27] The 20-day period begins "on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations . . . to receive requests."

[26] Pub. L. 110-175, sec. 2, Dec. 31, 2007, 121 stat. 2524, sec. (3).

[27] See 5 U.S.C. § 552(a)(6)(C)(i). "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request."

An agency can toll (that is, pause) the 20-day period for only two reasons: (1) to make one reasonable request to the requester for information and (2) to clarify with the requester fee issues.[28] In either case, the agency's receipt of information or clarification from the requester ends the tolling period. In unusual circumstances, the 20-day period may be extended by written notice to the requester noting the unusual circumstances leading to the extension and the date on which the agency expects to make a decision to fulfill the request. If the required extension exceeds 10 days, the agency must provide the requester with an opportunity to (1) modify the scope of the request so that it can be processed within 10 days or (2) arrange with the agency an alternative timeframe for processing the request or a modified request. Unusual circumstances encompass (1) the need to search for and collect records from facilities that are separate from the office processing the request; (2) the need to search for, collect, and examine a voluminous amount of records that are demanded in a single request; or (3) the need for consultation with another agency or among two or more components within the agency. If legal action is taken for reasons of untimeliness, the courts may grant an agency additional time to process that request if the agency shows that its failure to meet the statutory time limits is the result of "exceptional circumstances" and that it has exercised "due diligence" in processing the request.

FOIA allows agencies to establish multitrack processing for requests based on the amount of work or time (or both) involved in processing requests. Agencies are also required to establish expedited processing procedures for when the requester demonstrates a compelling need for records and in other cases as determined by the agency. FOIA states that a "compelling need" means "that a failure to obtain requested records on an expedited basis . . . could . . . pose an imminent threat to the life or physical safety of an individual" or if there is an "urgency to inform the public concerning actual or alleged Federal Government activity."

The Department has also issued internal FOIA guidance.[29] This guidance notes that FOIA requests are generally processed on a first-in, first-out basis within the processing track to which the requests are assigned. The Department's FOIA processing office, the Office of Information Programs and Services (IPS), has divided the multitrack processing into three tracks: Simple/Fast, Routine/Complex, and Expedite. A request in the Simple/Fast track requires material that can be reviewed in a week or less and no searches outside of IPS (for example, the responsive records are located in the State Archiving System[30]) or coordination with other offices or agencies is required and requires the volume of responsive material to be reasonable. A request in the Routine/Complex track requires that more than one records source be searched or external coordination. This track is also used if the response contains voluminous amounts of or highly sensitive records. If a requester can demonstrate that a compelling need for the information exists, IPS, with approval from the Department's Office of the Legal Adviser, will process the request through the Expedite track.

[28] FOIA directs agencies to specify a fee schedule for processing requests and to establish guidelines for determining when fees should be waived or reduced.
[29] FOIA Guidance for State Department Employees.
[30] The Department's State Archiving System maintains the authoritative records of official correspondence and communications, including mission-critical, historical, and sensitive cables and foreign relations documentation. The system has the ability to store, search, retrieve, and manage official correspondence and communications.

The Department's guidance states that offices and posts should make every effort to meet the 20-day statutory time requirement to respond to requests. The guidance further states, "It is important that bureaus, offices, and posts conduct their searches in as timely a manner as possible." If a delay in responding is anticipated, IPS should be notified so that it can determine whether the requester should be contacted to renegotiate the scope of the request.

Department Processing of Keystone XL FOIA Requests

IPS coordinates, tracks, and reports on the Department's responses to all FOIA requests. IPS receives, acknowledges, and assigns control numbers to FOIA requests and tasks bureaus, offices, and overseas posts with conducting searches. IPS reviews the records found to determine whether release is appropriate and responds to appeals and litigation brought under FOIA.

At IPS, the FOIA process begins when a request is received by the Requester Liaison Division, which determines the request's validity, establishes a case number, assigns a processing track, and moves the request to the appropriate division within IPS for processing. Invalid or deficient requests are closed, and the requestor is informed of the deficiencies. A new case is opened when the deficiencies are addressed and a new request is submitted. The section within IPS that is assigned a case is responsible for processing the request and reviewing documents that are responsive to the request. Materials are released to the requestor in segments as they become available for release.

OIG reviewed 28 Keystone XL-related FOIA requests received by the Department between March 2009 and November 2011. (These 28 requests are summarized in Appendix D.) Requesters included media organizations, nonprofit organizations, a law office, a doctoral candidate, and a private business. The records requested included (1) all correspondence between the Department and parties such as TransCanada, the Canadian Government, Koch Industries, environmental nongovernmental organizations, and the State of Nebraska; (2) all comments submitted by Federal agencies, State agencies, and the public on the draft EIS; (3) all records regarding the Department's procedures for processing Presidential permit applications for pipeline facilities on the United States-Canada border; (4) all records concerning the Presidential permit applications of TransCanada for its "Keystone I," "Keystone XL," and "Alberta Clipper" pipeline projects;[31] (5) an electronic (PDF format) copy on CD-ROM of the Keystone XL final EIS; and (6) the Geographic Information Systems data that was used to make the maps in the final EIS. Except for the expedited request for correspondence between the Department and Koch Industries, all of the Keystone XL FOIA cases have been designated "complex" cases.

IPS generally acknowledged receipt of a Keystone XL FOIA request within 2 to 58 work days,[32] with 20 of these requests being acknowledged in 20 work days or less. OIG reviewed five non-Keystone related FOIA cases of similar complexity and found that the Department generally

[31] The Alberta Clipper project was managed by Enbridge and not TransCanada.
[32] Work days exclude weekends and Federal holidays.

acknowledged the requests within 12 to 54 work days, with two of these requests being acknowledged in less than 20 days.

As of January 30, 2012, the Department had closed eight of the 28 Keystone XL FOIA requests. Of these eight cases, three were closed because they were duplicate requests, one was closed because the Department did not possess the requested records, one was closed because additional information was sought from the requestor and then later opened as a new case, one request was invalid, and two requests were completed and closed. One of the completed requests took 399 work days to process, and the other request took 2 work days. An additional two cases have gone into litigation, which leaves 18 Keystone XL FOIA cases open.

As of January 30, 2012, the 18 open cases had been in process an average of 164 work days, with half of these open cases having been in process for less than 125 work days. These cases are within the Department's average complex case processing time for 2010,[33] which is 284 days. In 2010, the fastest processed complex case was 21 days, and the longest case had been pending 2,162 days. These 18 cases are in various stages of processing, including releasing the first segment to the requestor, awaiting release to the requestor pending review, and tasking the request to various bureaus and offices for records.

IPS has three branches under its Research Division, and each branch has 12 analysts. Analysts process from 250 to 300 cases a year. In 2010, the Department received 30,206 FOIA requests. In its search of electronic records of officials involved with Keystone XL, OIG generated 31,212 records pertaining to Keystone XL. Of the 28 total Keystone XL FOIA requests, OIG found that in the majority of the cases, the requestor was informed that unusual circumstances may arise that would require additional time to process the request.

Conclusion

The Department has not made a final determination on any of the Keystone XL-related FOIA requests within the baseline statutory requirement of 20 days. OIG determined that the Department processed the FOIA requests related to Keystone XL as timely as or faster than comparable non-Keystone XL requests.

[33] Data on the Department's average complex FOIA case processing time and total FOIA requests received for 2010 was provided by the U.S. Department of Justice–Freedom of Information Act Web site at <www.FOIA.gov.>

List of Recommendations

Recommendation 1. OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State process for selecting third-party contractors by maximizing the Department's control of each step and minimizing the applicants' role in the process.

Recommendation 2. OIG recommends that the Department of State fill at least one full-time Civil Service position within the Bureau of Oceans and International Environmental and Scientific Affairs with staff who have experience and expertise in handling National Environmental Policy Act issues and the environmental impact statement process.

Recommendation 3. OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State process for selecting and using third-party contractors in order to improve the Department's organizational conflict of interest screening process.

Appendix A

Scope and Methodology

The Office of Inspector General (OIG) conducted a special review of the Department of State's (Department) handling of the environmental impact statement (EIS) and national interest determination for TransCanada Corporation's proposed Keystone XL pipeline in response to a request from several members of Congress (see Appendix B). OIG conducted this review to determine to what extent the Department and all other parties involved complied with Federal laws and regulations relating to the Keystone XL pipeline permit process. OIG conducted fieldwork for this review from November 2011 to January 2012 in the Washington, DC, metropolitan area.

To obtain background and criteria for the review, OIG researched and reviewed documentation that related to the Presidential permit and EIS processes, such as the Keystone XL permit application, the Department's EIS for Keystone XL, and the Federal Energy Regulatory Commission's "Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects." OIG also reviewed relevant laws and regulations that apply to the national interest determination and EIS processes, such as Executive Order 13337, the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality and Department regulations for implementing NEPA, and Pipeline and Hazardous Materials Safety Administration regulations for issuing or modifying special permits for U.S. oil pipelines. Additionally, OIG reviewed Freedom of Information Act (FOIA) regulations.

To address several of the questions by Congress, OIG interviewed and reviewed documentation from Department officials in the Bureau of Oceans and International Environmental and Scientific Affairs; the Bureau of Economic, Energy and Business Affairs; and the Office of the Legal Adviser. OIG also reviewed relevant *Federal Register* notices by the Department and briefing memoranda, meeting notes, cables, and correspondence between the Department and other entities that related to the Keystone XL permit. In addition, OIG interviewed officials from Embassy Ottawa to gain an understanding of the communications that took place between the Department, TransCanada, and the Canadian Government regarding Keystone XL in the permit process.

OIG interviewed and analyzed financial and contractual documentation for Cardno Entrix and TransCanada officials to determine whether there were any contractual or financial relationships between these two entities beyond Keystone XL. In addition, OIG interviewed and obtained documentation from officials in other Federal agencies, including the Environmental Protection Agency, the Department of Energy, the Department of the Interior, and the Department of Transportation. OIG also analyzed the 281 Federal agency comments for the Department's draft EIS and the Department's responses to each comment that were included in an appendix to the final EIS. OIG used this information to identify the extent to which the Department incorporated the views and concerns of the other agencies in its final EIS. OIG used information from the Department of Transportation, specifically, to identify what role the Department played, if any, in the decision by TransCanada to withdraw its special permit request for Keystone XL.

To determine whether the Department fulfilled FOIA requests for materials related to Keystone XL in a timely manner, OIG reviewed records from the Bureau of Administration, Global Information Services, Office of Information Programs and Services. In reviewing these documents, OIG checked all 28 FOIA requests related to Keystone XL and determined whether the Department addressed them in accordance with FOIA regulations.

As part of this review, the OIG team reviewed Department electronic records, including the contents of email mailboxes and network files for Department officials involved with Keystone XL. The OIG team utilized software to conduct keyword searches and identify relevant records.

Appendix B

Congress of the United States
Washington, DC 20515

October 26, 2011

The Honorable Harold W. Geisel
Office of Inspector General
United States Department of State
2201 C Street, NW
Washington, D.C. 20520

Dear Deputy Inspector General Geisel:

We are writing to request that the Office of Inspector General at the U.S. Department of State launch an investigation into the State Department's handling of the Environmental Impact Statement (EIS) and National Interest Determination (NID) for TransCanada Corporation's proposed Keystone XL pipeline. Given the significant economic, environmental, and public health implications of the proposed pipeline, we believe that it is critical that the State Department conduct thorough, unbiased reviews of the project. Further, it is imperative that the State Department process be free of actual or apparent conflicts of interest, and that the process fully meets both the letter and spirit of all federal laws, including but not limited to the National Environmental Policy Act.

We are disturbed by reports, such as those in *The New York Times* on October 7, 2011, that the State Department allowed TransCanada, the pipeline developer, to screen applicants to conduct the EIS mandated by federal law. The reports also allege that TransCanada successfully recommended the State Department select Cardno Entrix to conduct the EIS, despite Cardno Entrix listing TransCanada as a "major client" and Cardno Entrix having a pre-existing financial relationship with TransCanada. On its face alone, this creates an appearance of a conflict of interest and raises several questions:

- Did TransCanada improperly influence the State Department's selection of a contractor for the EIS?
- Did the State Department and all parties fully comply with the letter and spirit of all federal disclosure laws and regulations in regards to the Keystone XL pipeline project?
- Is Cardno Entrix's contract for the EIS and Keystone XL pipeline analysis with the State Department or with TransCanada, and has this contract been publicly disclosed? Does Cardno Entrix have a contract or agreement with TransCanada wherein Cardno Entrix would provide services, such as spill response, for the Keystone XL pipeline if it is approved?
- What is the nature and extent of any other contractual or financial relationship between Cardno Entrix and TransCanada?

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We also ask that your inquiry examine the full scope of the State Department process related to the EIS and NID for the Keystone XL pipeline. The public has a right to answers to the following questions that have been raised about this process:

- Did the State Department's Final EIS fully incorporate the views and concerns of federal agencies with expertise, such as EPA, in relation to central questions of alternatives and mitigation, pipeline safety, and environmental risks from this project, including:
  - fully considering whether the oil from Keystone XL will stay in the United States or be exported,
  - evaluating a tar sands oil spill in the Kalamazoo river with a cleanup cost that has increased from $430 million in 2010 to $700 million today,
  - assessing the exacerbation of climate change due to increased greenhouse gas emissions from increased exploitation of tar sands oil?
- Were there any communications between State Department officials and TransCanada, the Canadian government, or proponents of the pipeline, which were in any way improper or which indicate any deviation from the State Department's obligations under federal law to provide objective analysis of the project and its potential risks?
- Did the State Department or any of its officials or employees, past or current, improperly disclose any materials or information to TransCanada, the Canadian government, or proponents of the pipeline?
- Have all requests for materials related to the Keystone XL pipeline under the Freedom of Information Act been timely fulfilled so that the public has access to all the necessary documents and materials related to this project?
- Did the State Department violate its role as an unbiased oversight agency by advising TransCanada to withdraw their permit request to operate the pipeline at higher pressures with the reassurance that TransCanada could apply for the permit at a later date through a less scrutinized and less transparent process?

We believe that given the importance of this project and the controversy regarding the State Department's process to-date, a thorough investigation covering the questions we have raised, and any other possible violations of federal law or improper conduct related to the State Department EIS and NID process for the Keystone XL pipeline, is warranted. We greatly appreciate your assistance with this important matter, and look forward to your response.

Sincerely,

BERNARD SANDERS
United States Senator

STEVE COHEN
Member of Congress

RON WYDEN
United States Senator

SHELDON WHITEHOUSE
United States Senator

PETER WELCH
Member of Congress

EARL BLUMENAUER
Member of Congress

CHELLIE PINGREE
Member of Congress

MAZIE K. HIRONO
Member of Congress

RAUL M. GRIJALVA
Member of Congress

HANK JOHNSON
Member of Congress

MICHAEL M. HONDA
Member of Congress

DENNIS J. KUCINICH
Member of Congress

TIM RYAN
Member of Congress

MIKE QUIGLEY
Member of Congress

Appendix C

Consultation and Permit Requirements With Some Cooperating Federal Agencies for the Proposed Keystone XL Project

Federal Agency	Permit or Consultation/Authority	Federal Agency Action
Department of State	Presidential Permit, Executive Order 13337 of April 30, 2004 (69 Federal Register 25299, et seq.)	Considers approval of cross-border facilities.
	National Environmental Policy Act	Is lead Federal agency for the environmental review of major projects considered for Presidential permits that require an EIS.
	Section 106 of the National Historic Preservation Act	Supervises and coordinates compliance with the National Historic Preservation Act and consults with interested Tribal agencies.
	Section 7 of the Endangered Species Act	Consults with Department of the Interior's U.S. Fish and Wildlife Service regarding federally listed or proposed species.
Bureau of Land Management	Right-of-way (ROW) grants and short-term ROWs under the Federal Land Policy and Management Act of 1976 as amended and Temporary Use Permit under Section 28 of the Mineral Leasing Act	Considers approval of ROW grant and temporary use permits for the portions of the proposed project that would encroach on public lands.
	Archeological Resources Protection Act Permit	Considers issuance of cultural resource use permit to survey, excavate, or remove cultural resources on Federal lands.
	Notice to Proceed	Considers, following issuance of a ROW grant and approval of the proposed project's Plan of Development, issuance of a Notice to Proceed with project development and mitigation activities for Federal lands.
U.S. Army Corps of Engineers	Section 404, Clean Water Act	Considers issuance of Section 404 permits for the placement of dredge or fill material in waters of the United States, including

		wetlands.
	Section 10 Permit (Rivers and Harbors Act of 1899)	Considers issuance of Section 10 permits for pipeline crossings of navigable waters.
U.S. Fish and Wildlife Service	Endangered Species Act, Section 7, Consultation, Biological Opinion	Considers lead agency findings of an impact of federally listed or federally proposed species; provides a Biological Opinion if the proposed project is likely to adversely affect federally listed or federally proposed species or their habitats.
U.S. Bureau of Reclamation	ROW Grant and Temporary Use Permit under Section 28 of the Mineral Leasing Act	Determines whether ROW grant issued is in compliance with this agency's standards.
Federal Highway Administration	Crossing Permit	Considers issuance of permits for the crossing of federally funded highways
U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration	49 CFR Part 195 – Transportation of Hazardous Liquids by Pipeline	Reviews design, construction, operations, maintenance, and emergency operations plan; inspects pipeline projects, including Integrity Management Programs; and identifies high-consequence areas prior to installation of pipeline.
	49 CFR Part 194 – Response Plans for Onshore Pipelines	Reviews response plans prior to initiation of operation and, within 2 years of startup, approves the plan.
U.S. Environmental Protection Agency	Section 401, Clean Water Act, Water Quality Certification	Considers approval of water use and crossing permits for non-jurisdictional waters.
	Section 402, Clean Water Act, National Pollutant Discharge Elimination System (NPDES)	Reviews and issues NPDES permit for the discharge of hydrostatic test water.
Advisory Council on Historic Preservation	Section 106 Consultation	Advises Federal agencies during the Section 106 consultation process and is signator to the Programmatic Agreement.

Appendix D

Department Fulfillment of Freedom of Information Act Requests

Date of Request Received by Department	Organization Requesting Information	Summary of Information Requested
March 20, 2009	Non-Profit Organization	All records concerning the Department of State (Department) Regulations for Implementation of the National Environmental Policy Act (NEPA). All records concerning the Department "Fact Sheet" entitled *Applying for Presidential Permits for Border Crossing Facilities (Canada) (Fact Sheet)*. All records regarding, discussing, or mentioning Department procedures for processing Presidential Permit applications for the construction, operation, and/or maintenance of pipeline facilities on the United States-Canada border. All records concerning the Presidential Permit applications of TransCanada for its "Keystone I," Keystone XL," and "Alberta Clipper" pipeline projects.
August 25, 2009	Law Office	The names and addresses of all landowners over whose property Keystone XL would cross (received via fax).
September 1, 2009	Law Office	Duplicate request (received via mail) for the names and addresses of all landowners over whose property Keystone XL would cross.
September 15, 2010	Non-Profit Organization	All inter-agency communication regarding NEPA, including all comments on the Keystone XL Draft Environmental Impact Statement (EIS) submitted by consulted Federal and State agencies, all comments submitted at the hearings on the Keystone XL draft EIS, and all correspondence within the Department and between other agencies regarding the EIS.
November 18, 2010	Non-Profit Organization	All records relating to communications between the Department and TransCanada from November 2009, to present.
December 6, 2010	Non-Profit Organization	All records regarding, discussing, or mentioning Department procedures for processing Presidential Permit applications for the construction, operation, and/or maintenance of pipeline facilities on the United States-Canada border, including, but not limited to, any standards, guidance documents, or statements of policy or procedure used in determining whether a proposed project serves the national interest and whether a Presidential permit should be granted.
December 13, 2010	Non-Profit Organization	Copies of documents and information regarding all Department communications involving the Department

		and lobbyist of TransCanada (received via fax).
December 22, 2010	Non-Profit Organization	Duplicate request (received via mail) for copies of documents and information regarding all Department communications involving the Department and lobbyist of TransCanada.
January 13, 2011	Media	All correspondence (including electronic) since June 1, 2010, between the Department and Canadian and American elected officials and bureaucrats and the corporate sector regarding Keystone XL.
February 7, 2011	Media	Copies of documents and information regarding all Department communications involving the Department and lobbyist of TransCanada from January 1, 2009, to present.
February 7, 2011	Media	Any and all records of communications, contacts, or correspondence between the Department and lobbyist of TransCanada, regarding the Keystone XL.
March 23, 2011	Environmental Non-Governmental Organization	All records in the possession or control of the Department reflecting communications between the Department and TransCanada, the Pipeline and Hazardous Safety Administration, the Alberta Energy Resources Conservation Board, and the Canadian National Energy Board regarding Keystone XL.
April 27, 2011	Media	All correspondence to and from representatives of Hyperion Resources of Dallas, Texas, concerning the possibility or feasibility of building a dedicated pipeline from oil sands fields in Canada to the site of a proposed petroleum refinery in Union County, South Dakota.
May 31, 2011	Media	Any and all correspondence between representatives of Koch Industries or its subsidiaries and the Department relating to the construction and permitting of any portion of the Keystone pipeline system.
June 1, 2011	Media	All records in the control of the Department concerning President Permits granted by the Department pursuant to Executive Order 11423 or any amending Executive Order, for the pipeline facilities on the United States-Canada border.
June 3, 2011	Media	Documents about contacts between Department officials and lobbyists for TransCanada, the government of Alberta, the Canadian-American Business Council and Nexen Corporation regarding Keystone XL.
August 1, 2011	Democratic Senatorial Campaign Committee	Documents involving direct correspondence between the Department and Keystone representatives and officials from the House of Representatives and contracts with law firms.
August 8, 2011	Media	Access to and copies of any correspondence between the

		State of Nebraska and the Department over the past five years related to the proposed Keystone XL.
September 23, 2011	Educational Noncommercial Scientific Institution	All of the Geographic Information Systems data that were used in the maps depicted in the Final EIS for the Keystone XL.
September 30, 2011	Educational Noncommercial Scientific Institution	Public testimonies given by Nebraskans pertaining to two Keystone pipeline projects in Nebraska: (1) Keystone I and (2) the proposed Keystone XL.
October 3, 2011	Media	All of the Department's records for all written correspondence between agency personnel and environmental non-governmental organizations regarding Keystone XL.
October 4, 2011	Media	Access to and copies of the same Keystone XL related Freedom of Information Act information that has been requested by and delivered to an environmental non-governmental organization by the Department.
October 11, 2011	Individual	An electronic copy on CD-ROM of the Keystone XL Final EIS.
October 11, 2011	Educational Noncommercial Scientific Institution	All public comments, for Nebraska only, pertaining to the Keystone I and Keystone XL.
October 13, 2011	Non-Profit Organization	All of the Department's documentation referring to Presidential permit applications, criteria, and other records related to Keystone, and all Department correspondence regarding Keystone (September 19, 2008, to present).
October 19, 2011	Individual	All records related to the granting of a permit to an individual for the study, trapping, or relocation of American burying beetles in Nebraska or South Dakota in the vicinity of Keystone XL.
October 28, 2011	Private Corporation	All internal emails discussing the permitting of Keystone XL.
November 3, 2011	Non-Profit Organization	Any contract(s) or agreement(s) between the Department and Cardno Entrix (or its predecessor companies) and/or between TransCanada and Cardno Entrix (or its predecessor companies) between 2008 and the present regarding work that Cardno Entrix has or will perform for Keystone XL under NEPA.

Appendix E

United States Department of State
Washington, D.C. 20520

UNCLASSIFIED February 3, 2012

MEMORANDUM

TO: OIG – Harold W. Geisel

FROM: OES – Daniel A. Clune, Acting
L – Harold Hongju Koh

SUBJECT: Special Review of the Keystone XL Pipeline Permit Process

We have reviewed the Draft Report on the Special Review of the Keystone XL Pipeline Permit Process (Report) prepared by the Office of Inspector General. We have been pleased to work with the OIG in providing documents and information in support of the preparation of the report. We also commend the OIG for the thorough, efficient, and professional manner in which it has conducted the Special Review.

Our responses to the three recommendations in the report are as follows:

Recommendation 1. OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State Process for using third-party contractors by maximizing the Department's control of each step and minimizing the applicants' role in the process.

> **Response.** We agree with this recommendation. Before retaining a third-party contractor for any future work, the Department will redesign the process for using third-party contractors in the preparation of environmental documents in accordance with this recommendation. The Department intends to seek input from other agencies in the federal government with wide-ranging NEPA implementation experience.

Recommendation 2. OIG recommends that the Department of State fill at least on full-time Civil Service position within the Bureau of Oceans and International Environmental and Scientific Affairs with staff who have experience and expertise

in handling National Environmental Policy Act issues and the environmental impact statement process.

Response. We agree with this recommendation. As noted in the Report, the Department has developed and is in the process of filling a full-time Civil Service position with the Bureau of Oceans and International Environmental and Scientific Affairs for handling the NEPA process and managing NEPA third-party contracts. The public posting for this position closed on February 3, 2012.

Recommendation 3. OIG recommends that the Bureau of Oceans and International Environmental and Scientific Affairs, in coordination with the Bureau of Administration and the Office of the Legal Adviser, redesign the Department of State process for using third-party contractors in order to improve the Department's organizational conflict of interest screening process.

Response. We agree with this recommendation. As part of the effort to redesign the process for using third-party contractors in the preparation of environmental documents, the Department will develop measures that will provide for additional verification of potential organizational conflicts of interest between prospective third-party contractors and the applicant for a Presidential permit.

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