

TransCanada Keystone Pipeline Project – Public Comments - Responses

This document addresses the public comments the Montana Department of Environmental Quality (DEQ) received for the tentative determination to issue a 401 Water Quality Certification to TransCanada Keystone Pipeline, LP for the Keystone Pipeline Project (project), MT4011079. Written public comments were received during the public comment period, September 25, 2020 to November 30, 2020, and oral comments were received during the public hearing held on November 16, 2020. Substantive comments have been characterized into unique themes. Within each theme a synopsis characterizes the public input received and DEQ has prepared a response to the input. **Table 1** shows the comment themes and synopses and responses to each theme are provided below.

Table 1: Themes of Public Comments on Montana DEQ’s 401 Water Quality Certification

| Theme Code | Comment Theme |
|--------------|--|
| KXL Theme 1 | Leaks / Spills / Spill Clean-Up |
| KXL Theme 2 | Climate Change |
| KXL Theme 3 | Wetlands |
| KXL Theme 4 | Water Quality / Clean Water Act |
| KXL Theme 5 | Specific Conditions to Include in 401 / Edits to Existing Conditions |
| KXL Theme 6 | Hydrostatic Testing and Water Disposal |
| KXL Theme 7 | No Environmental Impact Statement / Need new EIS / Flawed EIS |
| KXL Theme 8 | Request for Extension / Timeline for Considering Comments |
| KXL Theme 9 | General – Project Will Damage Environment |
| KXL Theme 10 | Montana’s Constitutional Right to a Clean and Healthful Environment |
| KXL Theme 11 | Fort Peck Dam |
| KXL Theme 12 | Ogallala Aquifer |
| KXL Theme 13 | Tribal Water Quality Standards |
| KXL Theme 14 | Cultural Resources |
| KXL Theme 15 | Human Health / Social Issues / Missing & Murdered Indigenous Women |
| KXL Theme 16 | COVID-19 Concerns |
| KXL Theme 17 | Petroleum Economics: Demand / Price / Jobs |
| KXL Theme 18 | Endangered Species |

KXL Theme 1 – Leaks / Spills / Spill Clean Up

Synopsis:

Commenters expressed concern the project will transport diluted bitumen and the high potential for spills to contaminate water resources. Commenters noted diluted bitumen spills are difficult to clean up within surface waterways and in groundwater. Commenters noted that diluted bitumen is more difficult to remediate than ‘normal’ crude. One commenter noted that small leaks of fewer than 700,000 gallons per day may be undetectable. One commenter suggested that Montana could have legal liability to downstream states in case of spill. Commenters expressed concerns that pipeline construction standards, leak detection technology, and pipeline safety are inadequate to protect water resources. Commenters expressed concern oil spills will contaminate water and soil resources making them unavailable for agricultural practices such as farming and irrigation and water for livestock. Several commenters expressed concern that oil spills can lead to adverse effects on fish life, plants, and other aquatic species. Commenters point out other pipelines currently in operation have had significant leaks within the past decade.

Response:

These issues are outside of the scope of the 401 Water Quality Certification (WQC) of the Section 404 permit. However, this does not preclude the permittee from having to obtain other licenses, permits, or certifications for these issues.

Although not within the scope of the 401 WQC, the United States Army Corps of Engineers (USACE) addresses these concerns as follows:

Though not necessarily pertinent to the USACE federal action being reviewed, potential impacts to land and water resources due to a leak or spill along the proposed project route were evaluated as part of the National Environmental Policy Act (NEPA) review of the Project and are discussed in detail in Section 5 “Crude Oil Releases” of the 2019 Keystone XL Supplemental FSEIS. Section 5.5, “Impacts of Releases” provides an overview of each resource area and an assessment of the potential direct and indirect effects to the resources in the event of a spill.

The depth of the horizontal directional drill (HDD) under the Missouri River was also addressed through extensive analysis of the worst-case scenario for discharge of Fort Peck dam as part of the Section 408 review conducted by the USACE. In the untenable full dam release (a once in 40,000-year event), the scour produced did not uncover or expose the pipeline.

Spill response and remediation measures are described in the 2019 Keystone XL Supplemental Final Supplemental Environmental Impact Statement (FSEIS), Section 5.4.4, “Response and Remediation of Spills”. Keystone has developed processes, procedures, and systems to prevent, detect and mitigate potential oil spills that could occur during operation of the Project. Keystone’s Emergency Response Plan (ERP)

details overarching strategies and specific tactics to manage various emergencies, including a potential release of crude oil into the environment. Within the ERP, detailed Geographic Response Plans will be developed to identify specific resources and tactics that would be used if a release occurred within a specific area. These plans are required prior to operations and are reviewed by Pipeline and Hazardous Materials Safety Administration (PHMSA) and the state regulators.

Section 5.5, “Impacts of Releases” of the 2019 Keystone XL Supplemental FSEIS describes Keystone’s liability and responsibility as the pipeline operator under potentially applicable federal and state soil, surface water and groundwater clean-up regulations. In the event that a release of crude oil contaminates groundwater, Keystone has agreed that it would be responsible for cleanup and restoration and, where appropriate, for providing an alternative water supply for groundwater that was used as a source of potable water or for irrigation or industrial purposes.

DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 2 - Climate Change

Synopsis:

Commenters focused on the effects to global climate arising from tar sands extraction, refining, and burning.

Response:

These issues are outside the scope of the 401 Water Quality Certification of the Section 404 permit. Although not within the scope of the 401 WQC, the climate impacts related to the project were assessed in the United States State Department (DOS) final supplemental environmental impact statement (FSEIS).

The USACE provided the following response on behalf of the Section 404 permit:

The DOS, in the 2019 Keystone XL Supplemental FSEIS, evaluated the impacts that the construction and operation of the Project would have on greenhouse gases and global climate change. Direct and indirect impacts are discussed in Section 4.10, “Greenhouse Gases and Climate Change” and cumulative impacts are discussed in Section 7.4.9, “Greenhouse Gases” of the 2019 Keystone XL Supplemental FSEIS. The DOS concluded that greenhouse gas emissions from the Project would result in effects on global, national, and regional climate. However, the DOS stated that the approval or denial of the proposed Project would not by itself significantly alter the trajectory of global climate change, but would add incrementally to greenhouse gas concentrations and the resulting climate change impacts. For the USACE federal action of issuing the Section 404/10 permit, greenhouse gas will only be considered for construction activities of the Project. The DOS concluded that the emissions from construction related equipment will result in minor increases in greenhouse gases.

DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 3 - Wetlands

Synopsis:

Commenters noted the application is missing wetland determinations and the application has undercounted the number of wetlands crossed. They also noted traditional trenching techniques through wetlands during pipeline installation will cause permanent impacts.

Response:

The 401 WQC is limited to jurisdictional wetland crossings regulated under the federal Clean Water Act. Wetland crossings of non-jurisdictional wetlands do not require a 401 WQC. Non-jurisdictional wetlands are Montana State Waters and disturbances within these wetlands require Montana 318 Authorizations. The wetland environments crossed by the project and the potential impacts from the associated disturbance are discussed within the State of Montana's Environmental Policy Act (MEPA) review under Section I-3.2 Wetlands. DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 4 - Water Quality / Clean Water Act

Synopsis:

Commenters requested ability to conduct baseline water quality sampling. Commenters identified beneficial uses they believe will be impacted: Agriculture, Aquatic Life, Drinking Water, Primary Contact Recreation, and Tribal cultural use. Commenters expressed concern that the cumulative impacts of turbidity from multiple open-cut crossings within close proximity and at the watershed scale will be significant. Commenters raised the issue of frac-outs from Horizontal Directional Drilling operations. Commenters express concern for the quality of waters of downstream receiving water states and tribes. Commenter stated that TC Energy doesn't seem to have applied for compensatory mitigation and that it seemed that they should. Commenters raised concerns that cumulative impacts of only 1/10 acre from 201 crossings appears to be too small and permanent impacts are likely greater. They noted the application has undercounted the number of waterbodies and wetlands crossed. They're concerned the application has major deficiencies and must include a site-specific crossing-by-crossing analysis of waterbodies crossed by the project. Commenters noted the project will cross impaired waterbodies.

Response:

The water quality impacts associated with the project are temporary and are not anticipated to alter or impair the beneficial uses of waterways. Water quality sampling of State Waters is ongoing throughout Montana and is summarized every two years in DEQ's Montana Water Quality Report. Additional baseline sampling is not required because project impacts to water quality will be temporary.

Beneficial uses are protected by minimizing any contact with State Waters. The 401 WQC Special Condition 4 prohibits the open-cut, wet method of constructing stream crossings if water is present at the time of construction. Additionally, 'Section 2.10 Erosion and Sediment Control' in the Major Facility Siting Act's Certificate (MFSA) Attachment 1B Environmental Specifications outlines additional measures that will be taken to reduce and prevent turbidity during active construction operations within and adjacent to waterways. The horizontal directional drilling method will be implemented at the remaining crossings, which does not cause elevated turbidity in State Waters. Elevated turbidity levels associated with the project are discrete and isolated to each single and complete crossing and will have no cumulative impacts. Turbidity impacts at the watershed scale are not anticipated. The State of Montana's Environmental Policy Act review associated with the MFSA Certificate addresses the

“potential for the inadvertent release of drilling lubricant into the aquatic environment if there is a break-through during the drilling operation that could release these drilling fluids to the river. Drilling fluids used would be non-toxic, but would contain bentonite. Bentonite is naturally occurring fine clay that can physically inhibit respiration of fishes and aquatic invertebrates potentially resulting in suffocation. Exposure would likely be short term and limited in extent. Longer-term effects to fish populations can result from bentonite spills if larval fish are covered and suffocate due to fouled gills and/or lack of oxygen” (I-3.5.2.1 Special Status Fish).

Permanent impacts associated with the project are less than 1/10 acre as defined under the Section 404 permit. Mitigation is not required for impacts less than 1/10 acre. The application only includes wetlands falling under the jurisdiction of the Section 404 permit. A site by site analysis of all crossings was completed as part of the MFSA Certificate. The analysis is provided in the Keystone XL Pipeline Montana Stream Crossing Inspections Report.

In response to these comments, DEQ changed the tentative 401 WQC by adding further conditions to increase water quality protections. The protections include requiring the applicant to obtain a hydrostatic testing permit, requiring the project to not degrade the temperature of surface waterbodies, requiring the applicant to consult with the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation Office of Environmental Protection during project construction, and to maintain the beneficial uses of Waters of the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation.

KXL Theme 5 - Specific Conditions to Include in 401 Certification / Edits to Existing Conditions

Synopsis:

Commenters requested several specific changes to conditions provided in DEQ's tentative determination. One commenter noted the 401 Water Quality Certification (WQC) and Special Conditions are too narrow and the certification should include conditions on both the construction and operation of the project. The commenter provides case law examples on previous 401 WQCs in the U.S. The commenter noted the application was submitted prior to September 11, 2020, the date the Environmental Protection Agency's (EPA) new 401 WQC rules went into effect, so the application for 401 WQC falls under the prior EPA rules.

Response:

Each state has a different legal framework and division of regulatory authorities for environmental laws and pipeline regulation, making examples from other states difficult and inaccurate to use to define the scope of Montana's 401 WQC authority. In Montana, many of the commenters' concerns on the operation of the pipeline are regulated under the Major Facility Siting Act and other federal permits (see response to KXL Theme 1). DEQ's 401 WQC and Special Conditions were developed after a thorough review of the application, supporting Final Supplemental Environmental Impact Statement documents, the Major Facility Siting Act Certification, the State of Montana's Environmental Policy Act review, and input from stakeholders. The Special Conditions will protect the water quality of waterbodies crossed by the project. Receiving a 401 Water Quality Certification does not preclude the permittee from having to obtain other licenses, permits or certifications for operation and other pipeline concerns.

The application was received in early June 2020 and was processed under EPA's 401 WQC rules that were in effect at that time. DEQ did not make any changes to the 401 Water Quality Certification in response to this comment.

KXL Theme 6 - Hydrostatic Testing and Water Disposal

Synopsis:

Commenters noted the 401 Water Quality Certification (WQC) does not address hydrostatic testing or allow discharge of testing water. Commenters questioned how DEQ was evaluating and permitting hydrostatic testing water, noting that a National Pollution Discharge Elimination System permit is required by the Clean Water Act. Commenters advocated for an individual discharge permit for discharge of hydrostatic testing water rather than a general permit. Commenter stated TCE hasn't applied for a Montana Pollutant Discharge Elimination Systems (MPDES) permit.

Response:

Comments regarding MPDES permit coverage for hydrostatic testing activities are outside the scope of the 401 Certification. TC Energy is, and will continue to be, required to obtain coverage under an authorized MPDES permit with defined outfalls for any discharge to State Waters. In accordance with the Montana Water Quality Act, a permit may only be issued if DEQ finds that it will not result in pollution of state waters. MPDES permits include limitations on all pollutants which will cause, or have reasonable potential to cause, an excursion of any state numeric or narrative water quality standard and do not allow for the degradation of state waters. Montana water quality standards can be found through regularly available sources, such as the Administrative Rules of Montana or by accessing the Montana Numeric Water Quality Standards in Circular DEQ-7 on the Department's website. Whether authorization to discharge is established through a general or individual permit, all outfalls are evaluated based on surface water quality standards; the State's nondegradation policy; present and anticipated beneficial uses of the receiving water; the quality and flow of the receiving water; the quantity and quality of the discharge; and the presence or absence of other sources of pollution in the same watershed. If a permittee is denied authorization under a general permit (covering discharges similar in degree or nature as described in the permit) for any reason, they may apply for authorization under an individual MPDES permit by submitting the required forms and fees.

In response to this comment, DEQ changed the tentative 401 WQC by adding Special Condition 11 requiring the applicant to obtain a hydrostatic testing permit. The MPDES permitting process for hydrostatic permits is subject to a separate public notice and comment procedure.

KXL Theme 7 - No Environmental Impact Statement / Need New EIS / Flawed EIS

Synopsis:

Commenters noted the National Environmental Policy Act (NEPA) studies are industry funded and flawed. One commenter noted that EIS does not include missing and murdered indigenous women (MMIW) evaluation. Commenters noted the applicant did not provide all additional information that has been provided to the U.S. Army Corps of Engineers. Commenters expressed concern that all reasonable alternatives should be within the application and considered as part of the review.

Response:

The application met Montana's regulatory requirements of ARM 17.30.103(3)(b)(vi) with the additional information submitted to DEQ on July 24 and 29, 2020. The additional information included environmental impact assessments provided to the permitting agency. Federal agencies are tasked with NEPA compliance.

The U.S. Army Corps of Engineers has provided the following NEPA compliance timeline:

As the lead federal agency for the Project, the U.S. Department of State (DOS) prepared an Environmental Impact Statement in 2011 (2011 Keystone XL EIS), a Final

Supplemental Environmental Impact Statement in 2014 (2014 Keystone XL SEIS), and as directed by the Montana Federal Court, a Supplemental Final Environmental Impact Statement in 2019 (2019 Keystone XL Supplemental FSEIS) to meet the requirements of the National Environmental Policy Act (NEPA) which requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The NEPA process brings environmental, cultural and socioeconomic considerations into any federal agency planning or undertaking and provides stakeholders with information needed to understand any potentially significant environmental impacts resulting from an action, including mitigation and conservation measures warranted to protect a resource or minimize impact to a resource. The three EIS documents incorporated the best available data at the time of publication to document existing resources and determining the potential adverse and beneficial effects on resources from the construction, operation and maintenance of the Project. In addition, the 2019 Keystone XL Supplemental FEIS addressed deficiencies that the federal court indicated needed to be addressed.

Montana DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 8 - Request for Extension / Timeline for Considering Comments

Synopsis:

Commenters stated that DEQ must not rush the review. Commenters called on DEQ to devote appropriate time of up to a full year to review of comments.

Response:

DEQ's 401 WQC review requirements and timelines can be found in ARM 17.30.101-108. As part of this 401 WQC, DEQ's 67-day public comment period closed on November 30, 2020. At that time, the US Army Corps of Engineers (Corps) granted DEQ until December 5, 2020, to complete the 401 WQC. To ensure that DEQ had a reasonable amount of time to consider and answer all public comments, DEQ sent two extension requests to the Corps. DEQ requested until at least February 28, 2021, as a reasonable amount of time to consider and answer the more than 650 public comments received by DEQ. DEQ notes that February 28, 2021, is less than three months after the public comment period closed and only six months from when the valid application was received on August 28, 2020. The Corps granted DEQ two extensions: to January 5, 2021, and January 11, 2020, respectively. DEQ granted an initial 401 WQC with conditions before the Corps deadline in order to ensure that the proposed activities do not impact applicable water quality standards, that the 401 WQC is consistent with Montana's Major Facility Siting Act approval, and that DEQ's 401 WQC was not automatically waived, which would have permanently removed Montana's Clean Water Act 401 authority over the project. By avoiding triggering the Corps waiver provision, DEQ's action preserved DEQ's ability to continue to evaluate comments and make responding modifications.

DEQ has reviewed and evaluated all the comments received on this 401 WQC. In the event beneficial uses of State Waters are unavoidably impacted or lost, conditions of the 401 WQC are

adapted to allow for reopening under condition 15 and DEQ may also require TC Energy to provide compensatory mitigation for impacts or losses.

KXL Theme 9 - General - Project Will Damage Environment

Synopsis:

Commenters noted the requirements of tar sands production on Canadian water resources. Commenters are concerned of the cumulative impacts of the project on the uplands including service roads, electrical lines, pump stations and temporary facilities and staging areas used during pipeline construction. They are concerned the project will harm waterways, wetlands, groundwater, habitats, and species. Commenters expressed concern that construction activity would have on the area with increased noise pollution and truck activity causing increase dust in the air. Commenters recommended DEQ do a full environmental analysis and cumulative impact study to analyze the full scope of potential impacts related to the project. Commenters noted the applicant should provide updated information that has been generated since the State of Montana's Environmental Policy Act review.

Response:

The 401 Water Quality Certification does not preclude the permittee from having to obtain other licenses, permits or certifications that address these concerns. The project will meet all federal, state, and local environmental authorizations, certifications, and permitting requirements. Appendix F, "Permit Table" within the 401 WQC application includes the comprehensive list of federal, state, and local permits, licenses, approvals, and consultation requirements for the project. The project is required to obtain and comply with a stormwater construction permit. Runoff and subsequent sediment erosion from upland sites will be controlled through the implementation of Best Management Practices (BMPs) and routed to the outfalls identified within the stormwater construction permit. Increased turbidity in state waters is not anticipated from permanent or temporary upland sites.

The MFSA Certificate Section I. B. *Air Quality and Noise* addresses concerns as follows:

Air Quality: Air quality impacts from construction will include emissions from construction equipment, temporary fuel transfer systems, fuel storage tanks, and dust and smoke from open burning. Most of these emissions will occur only intermittently, will be limited to active construction areas, and will be controlled to the extent required by state and local agencies.

Montana DEQ conducted an environmental analysis required by the Montana Environmental Policy Act. This review is provided on DEQ's Keystone XL website under the April 2010 Draft Environmental Impact Statement, Volume 2, Appendix I.

KXL Theme 10 - Montana's Constitutional Right to a Clean and Healthful Environment

Synopsis:

Commenters noted DEQ must comply with Montana’s constitution, statues, and rules for 401 Water Quality Certification of the project.

Response:

DEQ has met its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution (MCA 75-5-102) for 401 Water Quality Certification of the project by meeting the requirements of the Montana Water Quality Act, MCA 75-5-101 *et seq.* and ARM 17.30.101 through ARM 17.30.109. DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 11 - Fort Peck Dam

Synopsis:

Commenters raised the issue of scour depth from high-flow dam releases exposing/undermining the pipeline due to its location relative to the dam.

Response:

The 2019 Keystone XL Supplemental FSEIS addresses these comments/concerns. The following is found in ‘Section 5.4.3.2 Water Release.’

As explained in Section 5.3.2, continuous scour caused by water currents or other hydrodynamic forces can threaten the integrity of pipelines buried beneath or along water bodies. As part of the USACE Section 408 review process (as codified at 33 USC 408), Keystone prepared a Missouri River Scour Analysis on the integrity of the Keystone XL pipeline to withstand scour action at the proposed Missouri River water crossing in Montana. At this crossing location (downstream of the Fort Peck spillway), the pipeline would be installed using HDD for 2,592 feet at a depth of approximately 53 feet below the lowest surveyed river elevation. In accordance with the Emergency Response Plan, pipeline inspections would be conducted following flash flood events to inspect for damage to or exposure of the pipeline caused by soil erosion. The hydraulic model and scour analysis estimated that the 500-year flood frequency event could result in a river-bottom scour depth of 11.9 feet, which would leave 22.1 feet of covering over the pipe. The analysis also considered a worst-case scenario, the equivalent of a 40,000-year event, whereby the Fort Peck spillway outflows exceed design capacity (resulting in a full spillway release) adding an additional 350,000 cubic feet per second of flow. Modeling indicated that this type of event could generate a river-bottom scour depth of 21.7 feet, leaving 12.3 feet of cover over the Keystone XL pipeline. Based on the hydraulic modeling analysis, the report concluded that the current design depth would be adequate to protect against potential scouring (TransCanada 2018a).

Montana DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 12 - Ogallala Aquifer

Synopsis:

Commenter discussed the impact of leaks on the Ogallala aquifer.

Response:

The Ogallala aquifer is not present within the State of Montana and is outside the jurisdiction and scope of DEQ's 401 WQC. DEQ made no changes to the 401 WQC in response to this comment.

KXL Theme 12 - Tribal Rights / Tribal Consultation

Synopsis:

Numerous commenters expressed concern the project is a violation of tribal sovereignty, treaties, and will disproportionately affect Native Americans in the event of a spill. Commenters stated that tribal consultation is not consent. Commenters noted that tribal protests over the pipeline are expected and may lead to violence. Commenters expressed concern the Tribes' water quality standards will be violated by the project.

Response:

The USACE is the lead federal agency requesting government-to-government consultation with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Yankton Sioux Tribe, Standing Rock Sioux Tribe, Fort Belknap Tribe, and Rosebud Sioux Tribe. Additionally, the US Department of State developed a programmatic agreement to address cultural and historical resources that may be encountered by the pipeline route. This programmatic agreement is discussed in more detail below in KXL Theme 14.

In response to these public comments, DEQ added conditions to the tentative 401 WQC requiring consultation, planning and approval from the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation's Office of Environmental Protection within the Special Conditions. Special Condition 13 ensures the project will maintain the beneficial uses of the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation.

KXL Theme 13 - Tribal Water Quality Standards

Synopsis:

Commenters identified the beneficial uses and the Assiniboine and Sioux Tribes Water Quality Standards they believe will be impacted: Public Water Supply, Class 1 Cool Water Aquatic Life, Primary Contact Recreation, Industrial, Navigation, Agricultural, and Cultural Uses. Commenters requested that the Tribes be consulted on water quality issues related to construction and for

reasonable access to the construction site. Commenters requested DEQ share documents relating to the project with the Tribes.

Response:

In response to these public comments, DEQ added conditions to the tentative 401 WQC requiring consultation, planning and approval from the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation's Office of Environmental Protection within the Special Conditions. Special Condition 13 ensures the project will maintain the beneficial uses of the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation. Special Condition 14 facilitates coordination and sharing of documents related to project. The Montana Pollution Discharge Elimination System permitting process also provides an opportunity for public notice and comments.

KXL Theme 14 - Cultural Resources

Synopsis:

Commenters expressed concerns about reviews by the Burial Preservation Board of MT and the potential for the project to impact Tribal burial grounds and sacred lands.

Response:

In recognition of these concerns, the US Department of State (DOS) developed a Programmatic Agreement in coordination with consulting parties including the Montana State Historic Preservation Officer. This agreement specifies the procedures for pre-construction surveys and for further survey and tribal notification in the event of unanticipated discoveries. The Cultural Resources and consultations are addressed in the Major Facility Siting Act (MFSA) Certificate Section B. Cultural Resources. The MFSA Certificate states the following about the programmatic agreement:

DOS, in coordination with consulting parties, has minimized the potential for adverse effects to historic properties along the Area of Potential Effect (APE) of the Project by the development of avoidance and mitigation measures. Since 2008, DOS has consulted with Indian tribes, State Historic Preservation Officers (SHPO), federal agencies, state agencies, and local agencies under Section 106 of the National Historic Preservation Act. As part of this effort, DOS initially contacted over 95 Indian tribes to find out their level of interest in becoming consulting parties. DOS also conducted Section 106 government-to-government consultation with the consulting parties for the Project. DOS also invited the consulting tribes to prepare Traditional Cultural Property studies as part of the lead agency responsibilities for the identification, evaluation, and mitigation of historic properties.

A Programmatic Agreement has been executed by DOS in consultation with the parties and DEQ. The Programmatic Agreement establishes a procedure for the further identification, evaluation, mitigation, and treatment of historic properties. The Advisory Council on Historic Preservation participated in the development of this agreement with

DOS and the other consulting parties. As part of this agreement, a Tribal Monitoring Plan, a Historic Trails and Archaeological Monitoring Plan, and an Open Trench Monitoring Plan were also developed. If previously unidentified archaeological sites are encountered during construction of the Project, Keystone, DOS, and the consulting parties will follow the procedures described in the Unanticipated Discovery Plans.

In response to these public comments, DEQ added conditions to the tentative 401 WQC requiring consultation, planning and approval from the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation's Office of Environmental Protection within the Special Conditions.

KXL Theme 15 - Human Health / Social Issues / Missing & Murdered Indigenous Women

Synopsis:

Commenters noted DEQ must study project impacts to Montana communities and many expressed concern the project is a threat to these communities. Commenters noted oil spills can have negative social and psychological implications on the surrounding communities that are reliant on water resources for subsistence or material income. They also noted spills can have negative health effects on the workers involved in spill cleanups. Commenters noted paucity of tribal law enforcement resources. Commenters expressed concern of elevated crime associated with man camps, temporary workers, and the ongoing missing and murdered indigenous women (MMIW) epidemic.

Response:

DEQ's 401 Water Quality Certification provides additional conditions to the Federal 404 permit to ensure that the placement of dredged material into state waters does not cause violations of Montana's state water quality standards. No discharges from the pipeline are permitted without a Montana Pollution Discharge Elimination System permit. The permittee is responsible and liable for cleanup and restoration of any accidental release from the pipeline.

The social issues raised are outside of DEQ's authority and beyond the scope of the 401 WQC. Even though these concerns are outside the scope of the 401 WQC, these concerns were identified and evaluated in the Major Facility Siting Act Certificate and the U.S. State Department's Final Supplemental Environmental Impact Statement. DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 16 - COVID-19 Concerns

Synopsis:

Commenters expressed concern out-of-state workers coming into Montana for project construction would transmit COVID-19 to the surrounding communities and within the Fort Peck Assiniboine and Sioux Tribes reservation.

Response:

Local, state, tribal, and federal public health authorities provide guidance and regulations to ensure the safety of residents, workers, and others. These concerns are outside DEQ's authority and outside the scope of DEQ's 401 Water Quality Certification action. DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 17 – Petroleum Economics: Demand / Price / Jobs

Synopsis:

Commenters noted current market conditions are not favorable for extraction or transport. The concerns included pointing to the price of crude oil going negative during the middle of 2020. Commenters note the profits from the project will benefit foreign businesses/entities. Commenters are concerned the project is a financial loss and return on investment to produce diluted bitumen is negative. One commenter noted the project will benefit rural electrical cooperatives and lower property taxes in the counties it passes through. Another commenter noted the project will create jobs, helps with energy dependency, and will foster good business relationships with our Canadian neighbors. One commenter stated that transporting oil via rail car would provide more jobs than pipeline. Another commenter noted the project will provide a limited number of low wage workers for a limited time.

Response:

These topics are unrelated to Montana's state water quality standards and are outside the scope of DEQ's 401 WQC. Even though these concerns are outside the scope of the 401 WQC, these concerns were evaluated in the U.S. State Department's Final Supplemental Environmental Impact Statement. DEQ did not make any changes to the 401 WQC in response to this comment.

KXL Theme 18 - Endangered Species

Synopsis:

Commenters noted the NWP 12 injunction over ESA consultation.

Response:

Federal agencies are tasked with Endangered Species Act compliance. The USACE addresses comments as follows:

To address the potential effects of the proposed Project on federally listed species under the Endangered Species Act (ESA) of 1973, as amended, within the jurisdiction of the USACE Omaha District, Keystone and federal agencies considered the potential Project effects on ten different species afforded protection pursuant to the ESA. The November 26, 2019, amended Biological Assessment prepared by the Bureau of Land Management (BLM) and Department of State in coordination with other federal agencies, including the USACE, determined the Project effects on these species. The ESA consultation requirements for the Project were completed between the Bureau of Land Management (in coordination with the USACE) and the U.S. Fish and Wildlife Service (USFWS), including all areas within waters of the U.S and the USACE's area of control and responsibility with the issuance of the December 23, 2019, Keystone XL consultation letter and Biological Opinion (BO) by USFWS. The BO and a copy of the consultation letter can be found in the Project Individual Permit Application as Appendix K. Additionally, Keystone has requested an Incidental Take Permit from the USFWS for the American Burying Beetle on private lands outside of the USACE's scope of analysis.

DEQ did not make any changes to the 401 WQC in response to this comment.