

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY)	POST HEARING
TRANSCANADA KEYSTONE PIPELINE, LP)	COMMISSION STAFF BRIEF
FOR A PERMIT UNDER THE SOUTH)	HP09-001
DAKOTA ENERGY CONVERSION AND)	
TRANSMISSION FACILITIES ACT TO)	
CONSTRUCT THE KEYSTONE XL PROJECT)	

November 2nd through the 5th, 2009, the South Dakota Public Utilities Commission (Commission) conducted a contested case evidentiary hearing regarding the application of TransCanada Keystone Pipeline, LP (Applicant) for a permit to build a facility, the Keystone XL Pipeline (Pipeline), under the energy conversion and transmission facilities act of South Dakota. Throughout the discovery and pre-filed testimony process, Commission Staff (Staff) and the Applicant identified differing opinions regarding how to most effectively comply with relevant SD Statutes and to best mitigate potential effects of the Pipeline. Staff appreciates this opportunity to provide the Commission with its final thoughts and to restate Staff's recommendations regarding conditional approval of the permit at issue.

Issue

The issue to be decided in this matter is whether pursuant to SDCL 49-41B and ARSD 20:10:22, the permit requested by the Applicant should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Staff believes the permit requested by the Applicant should be granted with Staff recommended conditions. Staff believes the

Applicant met its burden of proof¹. Staff argues, however, its' recommended conditions will, along with the Applicant's mitigation and reclamation plans help mitigate negative effects. If properly constructed and operated, the proposed Pipeline will not pose harm or threat to our state above an acceptable legal level. No evidence to the contrary was introduced into the record at the evidentiary hearing. Facilities such as the proposed Pipeline may be built in the state of South Dakota if all applicable laws are followed. By following all pipeline safety regulations along with all other laws and rules, the Pipeline does not create unacceptable risk.

Staff's role is to ensure the public interest is protected. Public interest includes concern for those that live in the proposed pipeline footprint, generally the citizens of South Dakota, industry, and the environment. Staff's investigation shows the Applicant met its burden of proof as required in SDCL 49-41B-22 and ARSD 20:10:22 and with incorporation of Staff's recommendations, all interest groups are adequately protected.

The Applicant's burden of proof involves four specific elements. They are, in order: (i) The proposed facility will comply with all applicable laws and rules; (ii) the facility will not pose a threat of serious injury to the environment nor to the social and economic conditions of the inhabitants or expected inhabitants in the siting area; (iii) the facility will not substantially impair the health, safety or welfare of the inhabitants; and (iv) the facility will not unduly interfere with the orderly development of the region with

¹ The general standard of proof for administrative hearings is by preponderance, or the greater weight of the evidence. It is error to require a showing by clear and convincing evidence. *Dillingham v. North Carolina Dept. of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999). Each element must be established by reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable administrative law judge could conclude that the existence of facts supporting the claim are more probable than their nonexistence. *U.S. Steel Min. Co., Inc. v. Director, Office of Worker's Compensation Programs*, *U.S. Dept. of Labor*, 187 F. 3d 384 (4th Cir. 1999).

due consideration having been given the views of governing bodies of affected local units of government.

Introduction and procedural history

On March 12, 2009, TransCanada Keystone LP filed its application. Public meetings were held near the Pipeline route in late April, 2009. Fifteen parties intervened, including Dakota Rural Action. None of the intervening parties ultimately offered any testimony or evidence. Dakota Rural Action was, however, the most active intervening party. On June 9, 2009, the Commission issued an Order to set a Procedural Schedule for both discovery and the final evidentiary hearing. Discovery deadlines were modified several times prior to the hearing based on Dakota Rural Action's needs. The evidentiary hearing began on November 2, 2009. A public input meeting was held, in addition to the evidentiary hearing, on November 3, 2009. All those present, wishing to speak, were heard at the public input meeting. Pursuant to SDCL 49-41B-25 the Commission must rule on this matter by March 12, 2010. The Commission may deny, approve or approve the application with conditions.

Staff members were assigned to analyze this docket and determine whether the application meets statutory requirements. Additionally, Staff must determine if permit conditions could better protect interested parties. The conditions must be within the law, fair and equitable. Staff utilized the discovery process to first determine application completeness and second to "investigate" areas of concern where permit conditions may be appropriate. Staff contracted with three independent consultants or firms to assist in the "investigation." Ultimately four sets of discovery were served upon the Applicant totaling 147 questions with multiple subparts. The first 16 questions addressed

application completeness. All other questions requested specific detailed engineering and environmental information. See Exhibit TC-14 through TC-17. As with all regulatory processes, submission of proper materials is an important element in compliance. The Applicant adequately responded to all discovery questions and demonstrated a prudent analysis of all relevant issues.

Statutory siting provisions and administrative rule requirements should be read and interpreted within the confines of Commission decision making jurisdiction. For example, ARSD 20:10:22:12 requires submission of alternative routes whereas SDCL 49-41B-36 does not allow the commission to dictate facility route. Staff believes the two requirements must be and can be read together. Within the confines of the Commission's statutory authority, Staff found the application along with all discovery materials to comply with application requirements.

Staff's next step, after it determined administrative content requirements were met, was to "investigate" various factual and scientific aspects of the application. While Commission employees have diverse professional backgrounds, it is customary to hire experts for an in depth study of particular topics. Staff contracted with environmental experts with particular expertise in the area of pipeline construction. Staff contracted with engineering experts also with particular expertise in the field of pipeline construction. Finally, Staff contracted with an outside source to examine potential effects the pipeline may have on various sections of the economy.

An important part of the "investigative" step is identification of the issues in need of additional research. Staff identifies issues in a variety of ways. First, based on his or her professional background, staff members may have personal knowledge. Second,

Staff relies on public comments. The residents understand their land and local environment best. Staff takes Commission public input meetings and all written submissions to the Commission seriously. Similar, however, to Staff's reading of applicable laws and rules, the usefulness of public comment is restricted to the Commission's jurisdiction. In an effort to best use resources, and because outside consultants do not necessarily have legal expertise regarding the details of statutory jurisdiction, Staff directs the consultants' scope of work.

At the hearing, intervener Dakota Rural Action, through its line of questions, confirmed consultant research and scope of work is in fact controlled by Staff, not the public. Time and resources are limited thus rendering it impossible for a consultant to contact all affected people on the route to conduct an independent case study for that individual property owner. Rather, Staff directs consultant scope of work based on Staff's knowledge of both public concern and Commission jurisdiction. With that being said, Staff attempted to collect information from intervening landowners in the legally appropriate way – through discovery. Again, it is not a prudent use of resources to telephone all landowners individually. Rather, Staff intended to use discovery responses obtained from interveners to best understand individual landowner concern. From a legal standpoint, none of the interveners replied in a meaningful way. As a result, Staff relied on its experience from the first TransCanada pipeline application handled by the Commission (HP07-001) and on public comments offered in both public meetings and written. The third method Staff uses to identify application issues is through use of the consultants themselves. The consultants study the application for a variety of things. In some cases, the consultant tests the applicant's conclusion; in others the consultant

assures compliance with an outside procedure or best practice. The experts' conclusions are represented in testimony and reports all filed with the Commission.

The hearing itself began on November 2, 2009, with applicant testimony. As previously stated, interveners did not offer testimony or evidence. Rather, members of the public, many of whom were interveners, appeared at the public input hearing and offered public comment. Dakota Rural Action was the only intervener to appear at the hearing. It did not offer testimony or evidence. Although Dakota Rural Action did not participate in Staff's research efforts, and chose not to utilize Staff's experts before the hearing itself, it did attempt to discredit Staff witnesses through cross examination. After failing to communicate, Dakota Rural Action appeared to blame Staff for lack of knowledge regarding it, its members and their individual concerns. Because Dakota Rural Action did not participate in discovery we don't know much about the organization. We must, however, assume it represents South Dakota landowners affected by the Pipeline. It is unfortunate the intervener opted not to utilize resources and the "process" available to best educate and explore its members' concerns. Without individual landowner testimony or discovery replies Staff relied on the field experts to broadly research the types of challenges the Applicant will encounter if the permit is granted.

Based on the hearing, three general areas or topics deserve added clarification.

- 1) Crude oil pipelines are legal in South Dakota and unless evidence shows the Applicant failed to meet its burden of proof, the Commission must grant the permit with conditions as it sees fit to best mitigate damages or risks.

- 2) South Dakota has specific jurisdiction per the South Dakota code and federal regulations. The Commission is restricted to such jurisdiction when ruling on this application.
- 3) Evidence and testimony presented at the hearing show the Applicant met its statutory burden of proof. Based on relevant evidence, however, several recommendations remain valid permit conditions.

Argument

I. Crude oil pipelines are legal in South Dakota and unless evidence shows the applicant failed to meet its burden of proof, the Commission must grant the permit with conditions as it sees fit to best mitigate damages or risks

Pipelines are regulated by both the federal and state government. The applicable statutes and rules address the siting of pipelines. Transmission facilities “may not be constructed or operated in this state without first obtaining a permit from the Public Utilities Commission.” SDCL 49-41B-1. The Pipeline is a transmission facility. SDCL 49-41B-2.1. SDCL 49-41B, the “Energy Conversion and Transmission Facility Act” goes on to describe the permitting process including the Applicant’s burden of proof.

If the Applicant meets its burden of proof, South Dakota code does not give the Commission any discretion regarding whether to grant a permit. Although no evidence was presented to show the applicant failed to meet its burden of proof, the Commission heard several affected landowners express a position the permit should be denied. Those opposed to the pipeline argue the permit should not be granted based on the associated risks. Some affected individuals fear environmental damage; others fear property damages. Others still oppose the permit due to a preference for alternative energy

sources or due to other ideological, political or policy purposes. While Staff respects each individual's concern, Staff's job is to advocate the law and regulations as they currently exist. Staff must, within the confines of the laws and regulations, determine if permit conditions can facilitate increased protection for affected individuals. It is simply nonsensical, however, to argue hydrocarbon pipelines are not site-able due to risks or opposing ideological missions. If the legislature intended for hydrocarbon pipelines not to exist in South Dakota, the law would be written as such. Rather, the law is written to allow the siting of such facilities.

Risk exists with a project of this nature. The siting chapter, when read as a whole, shows lawmakers acknowledged the risks and as a result developed the "burden of proof." Acceptable levels of risk have been identified. "Nothing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat." *In the Matter of Otter Tail Power Company on Behalf of Big Stone II*, 744 N.W.2d 594, 2008. If the risks of a hydrocarbon pipeline are unacceptable to this state, the siting chapter would not include hydrocarbon pipelines in the siting chapter. Experts tested the Applicant's identification of risks specific to this project. The same experts studied the Applicant's proposed mitigation plan and suggested additional measures in several specific areas. The recommendations, keep in mind, are in addition to the extensive plans already proposed by the Applicant. The siting chapter does not allow the commission to search outside the four elements in the burden of proof to decide whether to grant or deny the application at issue.

II. South Dakota has specific jurisdiction per the South Dakota code and federal regulations. The PUC is restricted to such jurisdiction when ruling on this application.

Pipeline regulation is a complicated “sharing” of federal and state regulation. The laws are not intended to compete with each other, rather they have different functions. As previously described, the Commission regulates facility siting. The other major entity regulating pipelines is the Department of Transportation’s (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA acting through the Office of Pipeline Safety (OPS), administers the Department's national regulatory program to assure the safe transportation of many products including petroleum. OPS oversees safety in design, construction, testing, operation, maintenance, and emergency response of pipeline facilities. Neither evidence nor testimony demonstrates the Applicant is either in violation of federal regulations or its plans will cause for it to be out of compliance with federal regulations. Nonetheless some interveners appear to wish: (i) the Commission had regulatory authority over safety as it pertains to design and that (ii) additional safety regulations existed.

The Commission cannot regulate the safety of interstate hazardous liquid pipelines. 49 UCS App. Section 2002(d). “Congress granted exclusive authority to regulate the safety of construction and operation of interstate hazardous liquid pipelines to the Secretary of the Department of Transportation. This Congressional grant of exclusive federal regulatory authority precludes state decision-making in this area altogether and leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards.” *Kinley Corporation v. Iowa Utilities Board, Utilities Division, Department of Commerce*, 999 F.2d 354, US Ct. App

8th (1993). Hazardous liquid pipelines run through many states, counties, and cities. The idea of uniform safety is thwarted if each body was entitled to demand compliance with its own individual standards. Additionally, the balance between energy needs, development, and safety would be unbalanced.

Dakota Rural Action is interested in a variety of pipeline safety issues. Through its line of cross-examination, Dakota Rural Action appeared specifically interested in pipeline depth of cover and pipeline decommissioning. Staff agrees these are just two of the many pipeline safety concerns of importance. Although the intervenor expressed frustration Staff failed to add these particular safety concerns to its case, Staff did so intentionally. As elements of pipeline safety they are not open for Commission regulation per previously cited authority. With that being said, the intervenor offered no evidence or testimony to show Applicant's construction plans are out of compliance with the applicable federal regulations. 49 CFR 195.248 regulates cover of buried pipelines. The particular section of code is found in Subpart D, Construction. Pipeline construction is expressly preempted by the federal code. See *Kinley v. Iowa Utilities Board*. Additionally, the Applicant filed a PHMSA request the special permit issued for the Keystone pipeline also apply to the Keystone XL pipeline. Testimony of William Walsh, Exhibit S-7, page 7. If that is the case, condition 20 of that special permit requires, "soil cover be maintained at a minimum depth of 48 inches in all areas except consolidated rock." PHMA also acknowledged, as Dakota Rural Action expressed, there may be areas where it is difficult to maintain such depth of cover. The special permit condition also states, "in areas where conditions prevent the maintenance of 42 inches of cover, Keystone must employ additional protective measures to alert the public and excavators

to the presence of the pipeline....If routine patrols indicate the possible loss of cover over the pipeline, Keystone must perform a depth of cover study and replace cover as necessary to meet the minimum depth of cover requirements specified herein.” Exhibit S-7, Attachment B. Staff appreciates Dakota Rural Action’s concern regarding depth of cover and is available to facilitate communication between landowners, the Applicant and PHMSA regarding specific areas of cover concern. We have not, however, been independently contacted by a landowner with such concerns up to this point.

Dakota Rural Action also spent significant time on pipeline decommissioning or abandonment of pipeline facilities. Although Dakota Rural Action did not offer testimony or evidence at the hearing, it offered argument when it had the opportunity to do so. Based on the oral arguments presented by Dakota Rural Action, it is clear it believes more regulation should exist. Regulatory law is a constantly evolving body. It will change with technology with public need and with the availability of resources. Pipeline regulation simply has not evolved regarding abandonment. Infrastructure is still relatively new and is well within its useful life. With that being said, 49 CFR 195.402 requires pipeline operators account for abandonment procedures in its operations and maintenance manual. Additionally, 40 CFR 195.59 requires pipeline operators file specific reports on any abandon pipelines. Both sections fall within areas of regulation expressly preempted by the federal government. *Kinley v. Iowa Utilities Board*. In the future Dakota Rural Action may wish to represent its members in the PHMSA pipeline safety process where permits are granted and rules and regulations are written. As it stands, we must honor the existing regulations.

In addition to the relationship the Commission has with various federal agencies, several state agencies also play a role in pipeline construction and operation. First, the SD Department of Environment and Natural Resources has significant responsibility. The department has jurisdiction over oil spill response plans, SDCL 34A-18. The department also regulates the Regulated Substance Response Fund, SDCL 34A-12. Aside from those two chapters of codified law specifically applicable to crude oil pipelines, the department is charged generally with the “protection of public health and the environment by providing environmental monitoring and natural resource assessment, technical and financial assistance for environmental projects, and environmental regulatory services...” DENR Mission Stmt. The SD Department of Environment and Natural Resources also participates in the Federal Environmental Impact Statement (EIS) drafting process. The department submitted South Dakota specific comments to the federal agency charged with drafting the EIS for this project.

The SD Historical Society the SD Departments of Revenue and SD Game Fish and Parks are among a list of other agencies with involvement in the project. To the extent the Commission can utilize the expertise of other agencies to understand application details, I argue such testimony is relevant and useful. It is neither useful nor relevant, however, to analyze the process outside agencies use to complete their duties. The proceeding in front of the Commission is restricted to the jurisdiction afforded the Public Utilities Commission through SDCL 49-41B.

III. Evidence and testimony show the Applicant met its statutory burden of proof. Based on relevant evidence, however, several recommendations remain valid permit conditions.

Staff believes the Applicant met the burden of proof. Staff also acknowledges it is impossible and not required to completely eliminate all risks associated with construction and operation of a crude oil pipeline. The Applicant proposed a complete, thorough construction and mitigation plan. The plan, generally complies with all industry and best practices to best mitigate resulting impacts. With that said, Staff made recommendations through expert testimony and evidence. Staff argues the recommendations will further mitigate damages. Recommendations are specified below and organized through elements of SDCL 49-41B-22.

A) Compliance with all laws and rules

It is impossible for the Commission to independently test the Applicant for compliance with all state and federal laws. From local traffic to federal taxes the Applicant must comply with a list of regulations. Regulations will vary from state to state in addition to the federal regulations. Throughout the application, the Applicant stated it will comply with all applicable rules and regulations. Staff found nothing in our review, nor did any party to the case provide evidence to show the Applicant was out of compliance or did not properly plan to comply with any law.

B) Acceptable risk of serious injury to the environment, health, safety or welfare of inhabitants.

Through use of the standard previously cited from the *Otter Tail Power Company*, *Big Stone II* case the proper question is: whether the possible threat to the environment,

health or safety of the inhabitants exceeds standards of “acceptability.” With proper and adequate mitigation, the answer is, “no.” Just as in any industry, the pipeline industry has building, construction and operation standards to protect landowners, consumers, the environment and the industry. Because pipelines are legal, however, the standards are also written to allow for their development. As with all regulation the proper balance must be found. Based on the application, independent expert analysis and testimony this project will not exceed acceptable levels of risk if the Applicant follows all proposed plans. In addition to the Applicant’s proposed mitigation plan, however, Staff identified several areas where bolstered mitigation is warranted. It is the Applicant’s and the Commission’s responsibility, through the siting process to identify relevant risks and adequately mitigate the same. Staff therefore recommends the Commission incorporate the conditions below into the permit.

i) **Pipeline Safety Rules, Regulations and emergency response**

As previously written, pipeline safety is regulated by a complex set of rules and regulations established by the Office of Pipeline Safety. Rules are drafted and passed based on actual pipeline operations, and acceptable risks. If the rules are followed, risks are properly mitigated. The application and all other available materials were reviewed by experts in pipeline construction. Experts found the application in compliance with PHMSA rules and regulations. As a result, engineering risks have been properly mitigated.

The Applicant, as is required by the Office of Pipeline Safety must draft written plans for the following items: Operating and Maintenance Procedures, Emergency Procedures, Integrity Management Programs, Damage Prevention Programs, Continuing

Public Education Programs, Operator Qualification Programs, Oil Spill Response Plans, Anti-Drug Plans, Alcohol Misuse Plans and compliance with the National Pipeline Mapping System. Testimony of William Walsh, Exhibit S-7, page 3. With a few exceptions, it is industry practice to use active plans and programs from other pipelines. It is expected the Applicant will use Keystone plans for Keystone XL. *Id.* PHMSA audits plans and makes the company aware of deficiencies. The plans, therefore, have been or will go through the PHMSA auditing process in the first, east river Keystone pipeline. PHMSA requires correction of any deficiencies.

Additionally, PHMSA must approve the Oil Spill Response Plan and Emergency Response Plan. *Id.* page 4. The plans must be approved prior to pipeline operation. Staff recommends the Applicant notify the Commission if either the Oil Spill Response Plan or the Emergency Response Plan is activated. The Commission may, at that time, request a copy of said plan and make any additional requests for information regarding execution of the plan as necessary.

RECOMMENDATION SUMMARY:

Staff recommends the Applicant notify the Commission if either the Oil Spill Response Plan or the Emergency Response Plan is activated. The Commission may, at that time, request a copy of said plan and make any additional requests for information regarding execution of the plan as necessary.

ii) **Paleontological and Cultural Resource Risks and Recommendations**

The Pipeline will cross exposed geological formations (i.e. the Hell Creek Formation, the Ludlow member of the Fort Union Formation, and the Fox Hills

Formation) with moderate or high potential for containing fossil remains. Testimony of Patrick Robblee, Exhibit S-3, page 10, Exhibit TC-1 page 36. Short of pre-excavation along the pipeline route, it is impossible to predict with absolute certainty where paleontological resources will be found. Again, as with all risks associated with infrastructure construction, it is necessary to find the proper balance among all interests.

Natural Resource Group, a Staff expert, studied TransCanada's plans regarding both paleontological and cultural resources and found them to be typical and proper. In addition to the Applicant's paleontological plan, Staff recommends the following preventative steps be taken: (i) the Applicant should conduct a literature review to identify known fossil sites along the pipeline route prior to construction; (ii) a pre-construction field survey of sensitive formations along the pipeline route should be conducted; (iii) a specific paleontological mitigation plan should be prepared following the completion of field surveys. (The mitigation plan shall include a trained on site monitor in sensitive areas and proper employee training to identify any paleontological resources); and (iv) any discovered fossils should be returned to the proper owner upon discovery. Testimony of Patrick Roblee, S-3, page 10; Hearing Transcript page 252. If discovered on private land the find should be returned to the landowner and to the Museum of Geology at the SD School of Mines and Geology if found on federal or state lands. S-3 page 11.

Cultural Resources are subject to Section 106 of the Natural Historic Preservation Act. Hearing Transcript page 243. Section 106 requires the Applicant to develop an "Unanticipated Discoveries Plan" specific to cultural resources. *Id.* page 256. The Plan is then subject to approval by the Department of State and the South Dakota State

Historic Preservation Office. The Applicant is in compliance with all such filings and is awaiting final approval. The final approved document will become part of the Final Environmental Impact Statement. The South Dakota State Historical Office made recommendations. It is now up to the United States office regarding whether those recommendations are incorporated in the final plan. Testimony of Paige Hoskinson Olson, S-15.

RECOMMENDATION SUMMARY:

CULTURAL RESOURCES - The Applicant shall specifically follow the "Unanticipated Discoveries Plan," as approved by the Department of State and provide it to the Commission upon request.

PALEONTOLOGICAL RESOURCES

- (i) The Applicant should conduct a literature review to identify known fossil sites along the pipeline route prior to construction;
- (ii) A pre-construction field survey of sensitive formations along the pipeline route should be conducted;
- (iii) A specific paleontological mitigation plan should be prepared following the completion of field surveys. The mitigation plan shall include a trained on site monitor in sensitive areas and proper employee training to identify any paleontological resources; and
- (iv) Discovered fossils should be returned to the proper owner upon discovery. If discovered on private land the find should be returned to the landowner and to the Museum of Geology at the SD School of Mines and Geology if found on federal or state lands.

iii) Wildlife

Staff recommends the Applicant locate and monitor active leks prior to construction and further avoid or restrict construction in those areas from March 1 through June 15. The company should also identify the Least Tern and Piping Plover and avoid disturbing their nesting habitat with a .25 mile minimum buffer zone surrounding such areas. Testimony of Tom Kirshenmann, S-15. As a guideline the nesting timeframe would run, generally, from April 20 through August 31. Staff recommends bald eagle

nest monitoring prior to and during construction. Active nests should be identified and a one mile buffer should be established surrounding those areas. *Id.* Finally, mitigation efforts regarding the Burying Beetle should be referred to the US Fish and Wildlife Service. *Id.* page 3.

RECOMMENDATION SUMMARY:

- (i) Applicant should locate and monitor active leks prior to construction and avoid or restrict construction from March 1 through June 15 if found;
- (ii) Identify Least Tern and Piping Plover nesting habitat prior to construction and develop at least a 0.25 mile construction buffer zone if present
- (iii) Identify active bald eagle nests prior to construction and develop at least a one mile construction buffer zone if present
- (iv) Properly follow all mitigation efforts as identified by the US Fish and Wildlife Service.

iv) Soil related environmental hazards and recommendations

Soil properties are unique in the western portions of South Dakota potentially affected by the Pipeline. The best mitigation plan should consider the Pipeline's potential impacts on agricultural and range productivity, erosion potential and reclamation potential. Proper planning also requires the Applicant access challenges it will likely face during construction. Testimony of James Ahrnd, S-4 Page 4. Current practice is to evaluate soil characteristics, properties and limitations along the pipeline right of way. *Id.* The Applicant mapped and considered all such soil properties in Exhibit TC-16. Hearing Transcript page 273. The level of detail provided in Exhibit TC-16 makes detailed site-specific soil limitations possible when used in connection with the soil maps provided as Exhibit A to the application (TC-1). Testimony of James Ahrnd, S-3, page 8 -9. In an effort to effectively consider all soil-related conditions, the Applicant proposes to develop site-specific construction/reclamation procedures. The procedures are applicable to specific land use/environmental settings and will be developed prior to

construction. The Applicant's approach indicates an understanding of the need for specific construction and reclamation procedures. Detail is necessary to deal with substantial variety of landforms and soil conditions experienced along the route. *Id.* page 9.

Once located and mapped, unique soil properties may require alternative soil handling procedures during trenching and backfill operations to prevent a loss in productivity. A mix of poor quality sub soils with overlaying soils layers could potentially reduce soil productivity. *Id.* page 12. Alternative soil handling methods can, however, be costly and require additional workspace. *Id.* Staff recommends specific identification of sensitive areas through consultation with experts at NRCS and resulting alternative soil handling procedures made available as an option to landowners in those areas. As previously stated, alternative soil handling methods may require a larger disturbance foot print. Staff recommends after proper consultation with NRCS and thorough explanation, the ultimate decision regarding soil handling method be left up to the individual landowner.

The Applicant appropriately identified "tools" that can be specifically applied to appropriate construction reclamation units to address stabilization, erosion and other reclamation challenges. *Id.* page 13. Those tools should, however be specifically applied to said units upon complete development of the construction reclamation map units.

RECOMMENDATION SUMMARY:

- (i) The Applicant should, with input from the NRCS, develop site specific construction/reclamation units prior to construction that account for all soil challenges that may be encountered along the route.
- (ii) Through development of the construction/reclamation units and consultation with NRCS, the Applicant should conduct analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is

- low. Records regarding this process shall be available to PUC Staff and to the specific land owner affected by such soils upon request.
- (iii) Through development of the construction/reclamation units and consultation with NRCS, the Applicant should identify soils for which alternative handling methods are recommended. Alternative soil handling methods shall include but are not limited to the "triple-lift" method. The Applicant should, however, after adequately educating the landowner regarding benefits and challenges, allow landowners the final decision regarding soil handling on private property. Records regarding this process shall be available to PUC Staff upon request.
 - (iv) Construction/reclamation map units shall, through consultation with NRCS, specifically identify and plan for areas susceptible to erosion, those areas where sand dunes are present, those areas with high concentrations of sodium bentonite and any other area with low reclamation potential.
 - (v) The Construction/reclamation mapping units shall be available upon request to the PUC or landowners specifically affected. Construction/reclamation map units may be evaluated by the PUC upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures were followed.
 - (vi) Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the PUC and the affected property owner specifically affected upon request.

(v) **Sediment Control**

Water crossings can also have an impact not only on the water body but also on property downstream. Sediment barriers are important in mitigation. The water level of most affected water bodies will vary depending on the time of year and the rain or snowfall. It is, therefore, difficult to predict with certainty how each water crossing should be handled. As the Applicant testified, first it tried to avoid as many water crossings as possible, next it will work to complete a crossing as quickly as possible. The quicker construction is complete, the less impact to the environment. It is impossible, however, to eliminate all impacts through expedient construction. It is also impossible to predict all unexpected circumstances that may prevent the Applicant from completing a water body crossing as quickly as it plans. Mitigation is, therefore, appropriate.

RECOMMENDATION SUMMARY:

- (i) The Applicant should use floating sediment curtains to maintain sediments within the construction right of way in lieu of straw bales when the depth of non-flowing water exceeds the height of straw bales or silt fence installation.
- (ii) The Applicant should install sediment barriers in the vicinity of delineated wetlands and water bodies regardless of the presence of flowing or standing water at the time of pipeline installation.
- (iii) The Applicant should consult with South Dakota Game, Fish and Parks to avoid construction near sensitive water bodies during fish spawning timeframes, (sensitive water bodies are those that have commercial or recreational importance)

(vi) Frac-Out

One of the risks associated with directional drilling is the escape of drilling mud into the environment as a result of a spill, tunnel collapse or the rupture of mud to the surface, commonly known as “frac-out”. A frac-out is caused when excessive drilling pressure results in drilling mud propagating toward the surface. The risk of a frac-out can be reduced through proper geotechnical assessment practices and drill planning and execution. The extent of a frac-out can be limited by careful monitoring and having appropriate equipment and response plans ready in the event that one occurs. Directional drilling can also result in a disturbance of riparian vegetation and sedimentation and erosion due to operation of equipment on the shoreline or fording to access the opposite bank. In an effort to mitigate this risk, the applicant drafted a frac-out plan. Exhibit S-6, Attachment 3. While the frac-out plan submitted by the Applicant is consistent with industry standards, Staff believes it is prudent for the Applicant to draft a plan specific to South Dakota directional drilling locations. Testimony of Ross Hargrove, Exhibit S-6. Staff’s recommendation is very similar to recommendations related to the construction reclamation mapping units. While the overall plan is adequate, Staff would like to see site by site planning for such unexpected occurrence. *Id.*

RECOMMENDATION SUMMARY:

Staff recommends South Dakota specific frac-out plans be produced specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, the Applicant shall file notice with the Commission. The Applicant shall also, after execution of the plan provide notice to the Commission regarding any lingering concerns or results of said occurrence.

(vii) Wetland Crossings, Water bodies and Riparian Areas

The application states width of construction right-of-way would be reduced to 85 feet or less in wetlands unless non-cohesive soil conditions require utilization of a greater width. Staff recommends the Commission require the Applicant use the reduced industry standard. The industry standard calls for a right-of-way width of 75 feet in non-cultivated wetlands. Exceptions are occasionally warranted. If site specific conditions require it, and landowner permission is granted, Staff recommends the Applicants proposed 85 feet right-of-way. Testimony of Ross Hargrove, S-6 attachment 2, page 5.

According to the application, extra work space for things such as staging and spoil storage will be located at least 10 feet from wetland and water body boundaries where conditions permit. Staff recommends the Commission require the applicant to utilize, where possible, industry standards. The industry standard is to locate extra work areas a minimum of 50 feet from wetland and water body boundaries except where adjacent upland consists of actively cultivated or rotated cropland, disturbed land or where site specific conditions do not permit the 50 foot setback. *Id.* Spoil, however, from actual water body crossing construction may be temporarily stored at least 10 feet from the waters edge. Temporary in-stream sidecasting of spoil for wide water body crossings should only be conducted with approval from the appropriate federal or state agency. *Id.* page 6.

Wetland and water body boundaries and buffers should be marked until ground disturbing activities are complete. The Applicant should maintain at least 15 feet of undisturbed vegetation between the wetland or water body and the construction right of way where conditions allow. Staff recommends the Applicant implement best management practices to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly to prevent exceeding federal and state water quality standards. *Id.* Page 3. Erosion control fabric is recommended on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits. *Id.* Page 4. Finally, the use of timber and slash to support equipment crossings of wetlands should be avoided.

RECOMOMENDATION SUMMARY:

- (i) Right-of-way width of 75 feet in non-cultivated wetlands except when site specific conditions require the Applicant's proposed 85 feet right-of-way and landowner permission is granted
- (ii) Extra work areas located at a minimum of 50 feet from wetland and water body boundaries except where adjacent upland areas consist of actively cultivated or rotated cropland, disturbed land or where site specific conditions do not permit the 50 foot setback
- (iii) Water body crossing spoil shall be stored at least 10 feet from the water's edge and only on a temporary basis.
- (iv) Temporary in-stream sidecasting of spoil for wide water body crossings should only be conducted with approval from the appropriate federal or state agency.
- (v) Wetland and water body boundaries and buffers (at least 15 feet where practical) should be marked and maintained until ground disturbing activities are complete.
- (vi) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly
- (vii) Erosion control fabric should be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.
- (viii) The use of timber and slash to support equipment crossings of wetlands should be avoided.

C) Risk of serious injury to the social and economic condition of inhabitants

(i) Restored land productivity and use by the landowner

Many landowners affected by this proposed project derive their livelihood from the land. Whether the landowner ranches or farms, proper restoration of the land is necessary. A Staff expert evaluated the application and restoration plans to determine whether they are adequate to restore the affected area to its original productivity within a reasonable timeframe. Testimony of Ross Hargrove, Exhibit S-6, page 2.

Overall the Applicant's Construction Mitigation and Reclamation Plan (CMRP) was consistent with industry and environmental standards. *Id.* Page 3. The plan commits to the use of specialized environmental inspectors during construction to monitor compliance with regulatory requirements. *Id.* Aside from environmental inspectors, however, Staff believes an independent crop monitor should be available upon request by a landowner. *Id.* Page 4. A successful crop monitoring program often includes: (i) on-versus off-right-of-way yield testing performed by qualified agricultural specialists using industry-standard methods (ii) and several years worth of data as adverse impacts frequently do not become apparent until the crop is stressed. *Id.* Page 5. Staff defers, however, to the independent monitor regarding a specific program.

Generally, the Applicant should defer to landowner preference when several prudent mitigation measures exist. The landowner should have the ability to balance the pros and cons of each measure. Mitigating noxious weeds is one such challenge. Staff recommends the Applicant consult with landowners or the appropriate land management

agency to obtain permission in writing before treating weeds with herbicides on private property. Testimony of Ross Hargrove, S-2 attachment 2.

In South Dakota weather changes fast and dramatically. Adverse weather change can exaggerate and cause construction damage. Sound mitigation practices should be used throughout the construction footprint if the Applicant faces adverse weather during construction. Staff found the Applicant's adverse weather plans up to industry standard with one recommendation. Staff recommends the plan apply to all agricultural land, not just cultivated lands. Hearing Transcript page 337. It is reasonable to anticipate winter weather as a construction challenge. Winter weather could, for example, delay successful compaction, topsoil replacement or seeding until spring. Staff recommends the Applicant utilize a winterization plan. The winterization plan should be provided to affected landowners and made available to the PUC upon request.

In an effort to return the land to its useful state as soon as possible while creating as little disturbance to the landowner as possible, Staff recommends rock encountered during construction be replaced in the trench only up to the existing bedrock profile. All other rock should be considered debris and removed. The size, density and distribution of rock within the construction right-of-way should be similar to adjacent areas not disturbed by construction. S-2, Attachment 2. Additionally, cleanup should be completed in non-residential areas within 20 days of backfilling the trench and within 10 days in residential areas unless practically infeasible. *Id.* .

Soil compaction could also result from pipeline construction and affect land productivity. Stringing of the pipeline in particular has potential to cause compaction in agricultural areas. Staff recommends stringing trucks utilize the proposed trench line for

travel where conditions allow. *Id.* If subsoil compaction problems are identified following completion of pipeline construction, the Applicant states subsoil would be decompacted prior to replacing the topsoil. Staff recommends decompaction be repeated following replacement of the topsoil . S-2 page 2. Additional compaction issues can result if topsoil is replaced under wet conditions. Decompaction or ripping should be completed a second time if such conditions exist or additionally if the right of way continues to be used as a travel lane following replacement of topsoil. Hearing Transcript page 338.

Trench dewatering may be necessary during construction and water salinity must be considered where it could affect soil and crop productivity. The Applicant stated the Environmental Inspector would perform a field conductivity test of the water to determine a course of action for disposal if the water is found to be too saline. Staff recommends the Applicant develop environmentally appropriate procedures for disposal of such water if it cannot be disposed of on site or if “alternative disposal” areas are not readily available. S-2 Attachment 2, page 3. Just as the trench dewatering may be necessary, water runoff in and around the trench could negatively affect surrounding land productivity. Staff recommends trench breakers be installed in areas crossed by the pipeline where slope breakers are not practical at the same spacing provided in the CMRP for permanent slope breakers. Slope breakers are used to divert run-off water away from construction ROW and reduce velocity of water which does run off construction site whereas trench breakers are intended to slow flow of subsurface water along pipeline trench. Staff also recommends the Applicant install trench breakers at crossings of saline

seep or zones transmitting saline water to ensure that seepage water is not diverted along the trench to create a new saline seepage area. S-2, Attachment 2, Page 3-4

In an effort to speed reclamation and avoid erosion, Staff recommends mulch be installed where reasonably requested by landowners, but also on slopes except in cultivated cropland concurrent with or immediately after seeding wherever necessary to stabilize the soil surface and to reduce wind and water erosion. Mulch should be installed prior to seeding only if final grading and installation of permanent erosion control measures would not be completed in an area within 20 days after the trench is backfilled or when construction activities are interrupted for extended periods . If liquid binders are used to anchor mulch they should be used at the rates specified by the manufacturer. S-2, Attachment 2, Page 4.

Finally, revegetation and proper use of all mitigation measures should be monitored for at least 2 years following installation of the pipeline. Revegetation of non-cultivated areas should be considered successful if upon visual survey the density and cover of non-nuisance vegetation are similar in density and cover to adjacent areas. Temporary erosion control devices should be maintained or replaced as necessary until successful revegetation of the right of way or as required by federal or state permits. S-2, Attachment 2, Page 4.

RECOMMENDATION SUMMARY:

- (i) Construction/Reclamation maps shall be created with specific information regarding restored land productivity. The Construction/reclamation mapping units shall be available upon request to the PUC and landowners specifically affected. Construction/reclamation map units may be evaluated by the PUC upon complaint regarding whether proper damage mitigation or reclamation procedures were done. Areas of specific concern or of low reclamation potential shall be

recorded in a separate database. Action taken at said locations and the results thereof shall also be recorded and made available to the PUC and the property owner specifically affected upon request therefore.

- (ii) The Applicant shall draft specific crop monitoring protocols for agricultural lands. The protocols shall be available to the PUC upon request and evaluated for adequacy if a consumer complaint so warrants it.
- (iii) The Applicant shall work closely with landowners or land management agencies to determine a plan to control noxious weeds.
- (iv) The Applicant's adverse weather plan shall also apply to improved hay land and pasture lands.
- (v) The Applicant shall utilize a winterization plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to the PUC and landowners upon request.
- (vi) Rocks above the natural bedrock depth shall be considered construction debris and removed.
- (vii) Construction cleanup should be completed in non-residential areas within 20 days of backfilling the trench and within 10 days in residential areas unless practically infeasible due to weather or other issue out of the applicant's control.
- (viii) Efforts shall be made to adequately remedy compaction issues. Staff made several specific recommendations above.
- (ix) Salinity shall be considered when dewatering. Specific recommendations are made above.
- (x) Trench and slope breakers shall be installed where necessary. Specific recommendations are made above.
- (xi) Mulch shall be installed wherever necessary to stabilize the soil surface and to reduce wind and water erosion. Specific recommendations are made above.
- (xii) Revegetation shall be actively monitored for at least 2 years.

(ii) Construction related water contamination

Staff recommends fuel storage and or refueling activities be minimized in all areas within 200 feet from private wells and 400 feet from municipal wells. Hearing Transcript page 339.

(iii) Noise

Although most noise associated with the pipeline will be due to construction, pump stations can be a source of unwanted noise. The Applicant commits to the standard 55 dBA noise level at noise sensitive areas. TC-1. Staff recommends the Applicant

conduct post construction operational noise assessments to confirm the proposed pump station facilities meet the 55 dBA guideline at the nearest noise sensitive area. If the noise level exceeds 55 dBA the Applicant should use appropriate mitigation measures. Upon complaint to the PUC, the Applicant shall conduct subsequent noise assessment to show continued compliance with the 55 dBA noise level.

RECOMMENDATION SUMMARY:

- (i) Conduct post construction operational noise assessments to confirm pump station facilities meet 55 dBA at nearest noise sensitive area;
- (ii) If noise levels exceed 55 dBA at the noise sensitive area, the applicant must use appropriate mitigation measures to reduce the noise levels;
- (iii) If PUC receives noise complaints, the applicant must conduct subsequent noise assessment to show compliance with 55 dBA.
- (iv) If found out of compliance with the standard, the Applicant must remedy the violation.

(iv) Road and Railroad Concerns

Pipeline construction will create challenges for individual landowners but also for all those that use road and railways near construction areas. While the proposed construction method regarding road and railway closures is consistent with industry standards, Staff recommends the following condition: coordination with emergency responders regarding the timing and intended duration of any temporary road closures.

Pipeline construction will also affect the conditions of local roadways. The counties, cities and townships specifically affected by the pipeline are best situated to dictate haul routes and determine the extent of damages. The Applicant should acquire all necessary permits authorizing county roads and township road crossings. If not otherwise required in the local permit, Applicant shall restore roads to their preconstruction condition. The Applicant shall be responsible for the repair of all roads to

pre-construction condition if pipeline related construction caused damage to roads.

Pursuant to SDCL 49-41B-38, Staff recommends the Applicant post a bond to ensure damage beyond normal wear to public roads, highways, bridges or other related facilities is adequately compensated. Staff recommends the bond amount under SDCL 49-41B-38 for damage to highways, roads, bridges and other related facilities be set at \$15,600,000 for 2011 and a second bond in the same amount for 2012. Testimony of Tim Binder, Exhibit S-1 page 3.

RECOMMENDATION SUMMARY:

- (i) Coordinate with emergency responders regarding timing and intended duration of temporary road closures;
- (ii) Applicant shall acquire all necessary permits authorizing crossing of county and township roads;
- (iii) Applicant shall restore roads to their preconstruction condition;
- (iv) Applicant shall be responsible for the repair of all roads to pre-construction condition if pipeline related construction caused damage to roads;
- (v) Applicant shall post bonds for to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately compensated. A bond of \$15,600,000 for 2011 and another bond of \$15,600,000 for 2012 is recommended.

(v) **Cattle movement**

Staff recommends coordination with landowners regarding his or her desires to properly protect cattle and adequately compensate the landowner for any loss.

(vi) **Fence, drain tile and other private property**

Applicant is responsible for any damage to private property. Specific damage records shall be kept and available to the PUC and specifically affected landowner upon request. Specific to drain tile, however, Staff recommends the Applicant record the pre-construction location of drain tiles. If relocation is necessary the Applicant shall work directly with the landowner to determine proper location. Drain tile records shall be used

in the event of a pipeline release during operation of the facility. Specifically, the location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to locate and repair any damaged drain tiles. Ross Hargrove Testimony, S-2, Attachment 2.

RECOMMENDATION SUMMARY:

- (i) Applicant is responsible for full restoration or compensation of all damage, to result from construction or operation of the pipeline, to private property including but not limited to livestock, fences and drain tile.
- (ii) Applicant should record pre-construction location of drain tiles;
- (iii) If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location;
- (iv) The location of permanent drain tiles shall be noted on as-built maps;
- (v) Qualified drain tile contractors shall be employed to repair drain tiles.

(vii) Landowner Communication

Based on experience Staff gained in HP07-001, Staff understands landowner and Applicant communication is a key element in the successful completion of pipeline construction. Staff, in many recommendations above, asked information be made available upon request of landowners. A central, accessible, local contact is an essential element to obtain relevant information. Staff recommends, similar to the first pipeline project in eastern South Dakota, the Applicant provide a public liaison officer, approved by the Commission. The public liaison officer shall facilitate the exchange of information between the Applicant, including its contractors, and landowners, local communities and residents to promptly resolve complaints and problems that may develop as a result of the Project. Finally, Staff may need to communicate directly with landowners. Staff asks the Applicant provide Staff with a confidential list of property owners crossed by the pipeline.

RECOMMENDATION SUMMARY:

- (i) Applicant shall provide a public liaison officer, approved by the Commission, to facilitate exchange of information;
- (ii) Applicant shall file with the Commission a confidential list of property owners crossed by the pipeline.

(D) Interference with orderly development of the region

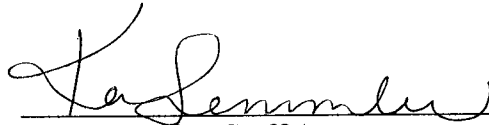
Expert witnesses did not identify any facts to show the development of the pipeline will interfere with the orderly development of the region.

Conclusion

Staff utilized outside expert assistance as well as other state agency employees to assist in review of the application. The application was not lacking in either administrative completeness nor in scientific or technical analysis. The Applicant did not attempt to argue negative effects will not exist, nor did the Applicant argue that they can entirely remove all effects through mitigation. Rather, the Applicant identified and worked diligently to compose a mitigation plan regarding challenges. With that said, Staff expert witnesses suggested measures to bolster the already proposed mitigation measures. Staff asks the Commission include its recommendations as requirements in addition to those proposed by the Applicant. Staff understands the Pipeline is unwelcome by some landowners. Petroleum pipelines are, however legally site-able in this state. South Dakota has specific jurisdiction and control over the process to the extent provided in the South Dakota code. The Commission must also, however, respect the jurisdiction of other state and federal agencies. Evidence and testimony presented at the hearing

show the Applicant met its burden of proof. With that said, various concerns can be further mitigated with the recommendations as suggested by Staff.

Signed and dated this 20th day of January, 2010

A handwritten signature in cursive script, appearing to read "Kara Semmler", written over a horizontal line.

Kara Semmler, Staff Attorney
South Dakota Public Utilities Commission
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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION)	HP 09-001
BY TRANSCANADA KEYSTONE PIPELINE,)	
LP FOR A PERMIT UNDER THE SOUTH)	
DAKOTA ENERGY CONVERSION AND)	CERTIFICATE OF SERVICE
TRANSMISSION FACILITIES ACT TO)	
CONSTRUCT THE KEYSTONE XL)	
PROJECT)	

I hereby certify that the Commission Post Hearing Commission Staff Brief was served upon all of the parties listed below on the 20th day of January, 2010, either electronically or by mailing a true and correct copy thereof to them by first class mail, postage prepaid, at their last known addresses, to-wit:

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