STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL DISTRICT

CIV. 16-33

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE LP FOR AN ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

BRIEF OF APPELLANTS JOYE BRAUN, JOHN H. HARTER, TERRY AND CHERI FRISCH, CHASTITY S. JEWETT, PAUL F. SEAMANS, CINDY MYERS, RN, ELIZABETH LONE EAGLE, DALLAS GOLDTOOTH, BRUCE BOETTCHER, GARY F. DORR, ARTHUR R. TANDERUP and WREXIE LAINSON BARDAGLIO

I. JURISDICTIONAL STATEMENT

This is an appeal from a final agency action of the Public Utilities Commission, *In re Petition of TransCanada Keystone Pipeline, LP for an Order Accepting Certification of Permit, Final Decision and Order Finding Certification Valid and Accepting Certification*, HP 14-001 (January 21, 2016) (hereinafter referred to as the "*Final Decision and Order*" located at Administrative Record ("AR") – 681). Notices of appeal of the PUC *Final Decision and Order* in HP 14-001 were timely filed with this court on February 19, 2016.

II. STATEMENT OF LEGAL ISSUES

The legal issues are as follows:

1. Whether the agency abused its discretion by accepting certification that the permittee complies with all permit conditions, although the federal Presidential Permit was denied by the U.S. Department of State.

The agency denied the appellants' motion to dismiss for failure to comply with permit condition 2 and obtain a Presidential Permit, and then entered a *Final Decision*

and Order approving the certification. *Order Denying Motion to Dismiss*, AR – 677; *Final Decision and Order*, AR – 681. Condition 2 requires TransCanada's to obtain a Presidential Permit from the U.S. Department of State; however, the State Department denied the Presidential Permit. *See* 80 Fed. Reg. 76611 (December 9, 2015). Nevertheless, the agency approved TransCanada's certification that Keystone XL continues to comply with all permit conditions. *Final Decision and Order*, AR – 681 at 031693, 031695.

2. Whether the agency abused its discretion by accepting certification that the permittee complies with all permit conditions, in the absence of any evidence relating to most conditions.

In the proceeding below, TransCanada argued that scores of permit conditions required no evidence of compliance at all, because they involve construction or are otherwise prospective in nature, and the Commission agreed. *Id.* at 031686. TransCanada also argued that the burden of proof lay with intervenors to disprove compliance, and the Commission incorporated this error into its *Final Decision and Order*. *Id*.

The *Final Decision and Order* accepted TransCanada's certification, and included findings of fact relating to "Keystone's Ability to Meet the Permit Conditions." *Id.* at 031686-031693. Finding of Fact 31 identifies over 60 permit requirements for which no evidence of compliance was produced, and purports to shifts the burden of proof on parties objecting to the permit. *Id.* at 031686. Overall, the record lacks substantial evidence of compliance or ability to comply with all permit conditions. *See e.g. M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, ¶15, 793 N.W.2d 816, 821-822.

3. Whether the agency improperly excluded intervenor witness testimony, as a discovery sanction prior to the evidentiary hearing.

TransCanada filed a pre-hearing motion to sanction 17 intervenors and preclude their testimony, as a discovery sanction, and the Commission granted the motion. AR – 206, 238.

III. STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

This is an appeal from the *Final Decision and Order* of the Public Utilities Commission, accepting certification that the Keystone XL pipeline project continues to comply with all permit conditions. AR – 681. TransCanada applied for and obtained a permit from the Commission in PUC docket HP 09-001, to construct the Keystone XL pipeline. *See* Public Utilities Commission, *In re Petition of TransCanada Keystone Pipeline, LP for a Permit to Construct the Keystone XL Pipeline,* HP 09-001, *Amended Final Decision and Order* (June 29, 2010). As construction of the project has not commenced within four years of issuance of the permit, South Dakota law requires the permittee to certify to the Commission that the proposed project continues to comply with the conditions attached to the permit. SDCL §49-41B-27.

Permit condition 2 mandates that TransCanada obtain a Presidential Permit from the U.S. Department of State. S.D. PUC Docket HP 09-001, *Amended Final Decision* at 25. A Presidential Permit is required under federal law, because the proposed pipeline crosses an international boundary. Executive Order 13337, 69 Fed. Reg. 25229 (August 30, 2004). On November 6, 2015, the U.S. Department of State denied TransCanada's second application for a Presidential Permit for the Keystone XL Pipeline. *See* www.Keystonepipeline-xl.state.gov/documents/organization/249450.pdf; *see also* 80 Fed. Reg. 76611.

Accordingly, in the proceeding below, the appellants filed a *Motion to Dismiss* the certification request, for failure to obtain the Presidential Permit and comply with permit condition 2. AR – 654. The Commission denied the appellants' *Motion to Dismiss*, and entered the *Final Decision and Order* approving certification. AR – 677, 681. In light of the denial of the Presidential Permit by the State Department, these orders are arbitrary, capricious and an abuse of discretion requiring reversal. SDCL §1-26-36(6); *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3 at ¶15, 793 N.W.2d at 821-822 (upholding reversal of agency by circuit court for abuse of discretion). The Commission misapplied the burden of proof and evidentiary requirements of the certification statute, and consequently the overall lack of substantial evidence likewise requires reversal. *Helms v.*

Lynn, 542 N.W.2d 764, 766 (S.D. 1996) ("the issue we must determine is whether the record contains substantial evidence to support the agency's determination"). Alternatively, the court should remand to the agency to take testimony and evidence of numerous appellants, who were improperly excluded as a discovery sanction. *Haberer v. Radio Shack*, 1996 SD 130, ¶20, 555 N.W.2d 606, 610 (severe discovery sanctions reserved for "willfulness, bad faith, or… fault.");

The certification of the the permit in light of TransCanada's failure to obtain federal approval is the fatal flaw requiring reversal. The PUC *Final Decision and Order* is contrary to law, arbitrary and capricious and an abuse of discretion within the meaning of the Administrative Procedures Act. SDCL §1-26-36(6); *Johnson v. Lennox School Dist. #41-4*, 2002 SD 89, ¶30, 649 N.W.2d 617, 625 (an agency decision which "fails to consider an important aspect" is arbitrary and capricious); *Schlumbohm v. City of Sioux Falls*, 630 N.W.2d 93, 96 (S.D. 2001) ("An abuse of discretion is… (agency action) not justified by, and against, reason and evidence").

The *Final Decision and Order* harms the property values and livestock operations of many South Dakota ranching families, by enabling the permittee to preserve pipeline easements across their land. *See* SDCL §21-35-1.1 It violates section 27 of the Energy Conversion and Transmission Facilities Act, because it certifies compliance with permit conditions even though the TransCanada fails to meet condition 2, and offered no evidence to demonstrate compliance with many other conditions. SDCL §49-41B-27. It is invalid, and it is pre-empted by federal law, because the State Department determined Keystone XL is not in the national interest, and denied the federal permit twice. *See e.g. Champion International Corps. v. United States Environmental Protection Agency*, 850 F.2d 182, 185 (4th Cir. 1988) (state water discharge permit invalid if objected to by EPA). Accordingly, the *Final Decision and Order* accepting certification of the permit for the Keystone XL pipeline must be reversed on appeal.

B. STATEMENT OF FACTS

The South Dakota Energy Conversion and Transmission Facilities Act authorizes the Public Utilities Commission to issue permits for oil and gas pipelines in the state. SDCL §§49-41B-1, 4. The PUC issued a permit to TransCanada for the Keystone XL

pipeline on June 29, 2010. S.D. Public Utilities Commission, *In re Petition of TransCanada Keystone Pipeline, LP for a Permit to Construct the Keystone XL Pipeline*, HP 09-001, *Amended Final Decision and Order*. The permit contained 50 conditions, many of which contain sub-conditions. *Id.* at 25-38. Condition 2 requires TransCanada to obtain a Presidential Permit from the U.S. Department of State, *id*. at 25, per Executive Order 13337, because Keystone XL crosses an international boundary. 69 Fed. Reg. 25229.

On September 19, 2008, TransCanada filed its first application for a Presidential Permit. *See* U.S. Department of State, *Record of Decision*, http://Keystonepipeline-xl.state.gov/documents/ organization/249450.pdf. As the permit constituted a "major federal action significantly affecting the quality of the human environment," the State Department prepared an environmental impact statement. 42 U.S.C. §4332. The environmental reports generated widespread concern with respect to the findings on Keystone's environmental and economic impacts. *See Order Granting Judicial Notice of Department of State Final Supplemental Environmental Impact Statement for the Keystone XL Pipeline* AR – 507, located at http://keystonepipeline-xl.state.gv/documents/organization/221213.pdf; *see also* AR – 589 at 29144-29191, Hearing Exhibit 8014 – Congressional Research Service, *Oil Sands and the Keystone XL Pipeline: Background and Selected Environmental Issues* (non-partisan Congressional research office criticized underestimate of air pollution resulting from Keystone XL); Hearing Exhibits 8024-8025 (statutorily-required peer review of environmental impact statement by U.S. Environmental Protection Agency, citing inadequate disclosure of environmental impacts and impacts on South Dakota Tribes); John Stansbury, Ph.D., P.E., *Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills from the Proposed Keystone XL Pipeline*.

Nevertheless, TransCanada's initial application for a Presidential Permit was denied by the State Department, in January, 2014. U.S. Department of State, *Record of Decision*, http://Keystonepipeline-xl.state.gov/documents/organization/249450.pdf. TransCanada re-applied to the State Department for a federal permit, on May 4, 2012. *Id*. The State Department released the *Final Supplemental Environmental Impact Statement*, in January, 2014. AR – 507.

June 29, 2014 was the four-year anniversary of the issuance by the South Dakota PUC of the permit for the Keystone XL Pipeline, in HP 01-009. On September 15, 2014, TransCanada filed with the Commission the *Petition for Order Accepting Certification*, pursuant to SDCL §49-41B-27. AR – 3. The proceeding below ensued.

The agency entered numerous pre-hearing orders that constrained the full and meaningful participation by intervenors. *See Grant County Concerned Citizens v. Grant County Bd. of Adjustment*, 2015 SD 54, ¶31, 866 N.W.2d 149, 160. The *Order Granting Motion to Define Issues and Setting Procedural Schedule* set out a compressed schedule and limited the matters subject to discovery. AR – 146. The order precluded testimony on the impact of tar sands extraction on climate – an issue of significant public import, and for which there has been considerable since TransCanada's 2010 permit was issued. *Id*. The *Order Granting in Part Keystone's Motion for Discovery Sanctions*, AR. – 298, imposed draconian sanctions against 21 intervenors, all but one unrepresented by counsel, and without a demonstration by TransCanada of requisite efforts to resolve the dispute, or willful misconduct. SDCL §§15-6-34, 15-6-37. The Commission also entered an *Order Granting Motion to Preclude Testimony Regarding the Mni Wiconi Project*, AR – 402; and an *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructory Rights*, *id*. – 403. These orders precluded testimony relating to compliance with important federal laws and rights of South Dakota Tribes, to which TransCanada must comply under permit condition 1. S.D. PUC, HP 09-001, *Amended Final Decision and Order* at 25.

Witnesses who did not meet the deadline for the pre-filing of written testimony – which was four months prior to the evidentiary hearing, were prohibited from presenting oral testimony at the hearing. *Id.* at 317. The commission also excluded numerous witnesses from Tribes and organizational intervenors, granting a plethora of motions in limine by TransCanada. *Id*. at 510-514, 516-517, 519, 522. Generally admissible and very helpful testimony pro-offered by appellant Cindy Myers, RN, was struck from the record in a post-hearing order of the Commission. AR – 661.

The opportunity to present a case against certification by appellants and other intervenors was restricted by the agency through its pre-hearing and evidentiary orders, in a manner inconsistent with its obligations under the APA and its own regulations. SDCL

§1-26-18 (right to present evidence); ARSD §20:10:01.15 (right to hearing in accordance with APA).

Nevertheless, the Commission held an evidentiary hearing from July 27-31 and August 3-5, 2015. AR – 555-596. Subsequent to the hearing but prior to a final agency order, the State Department denied, for the second time, TransCanada's application for Presidential Permit. 80 Fed. Reg. 76611. The acquisition of a federal permit being an important condition requiring certification, and it having been denied, the appellants filed a *Motion to Dismiss* the certification petition. AR – 654. The agency denied the motion to dismiss, AR– 677, and entered the *Final Decision and Order* accepting certification of the permit. AR– 681.

IV. ARGUMENT

ISSUE 1. Whether the agency abused its discretion by accepting certification that the permittee complies with all permit conditions, although the federal Presidential Permit was denied by the U.S. Department of State.

The *Final Order and Decision* is reversible error because TransCanada failed to demonstrate compliance with permit condition 2. As is discussed below, (1) this is a question of law reviewed by the circuit court de novo; (2) the Presidential Permit is mandatory under permit condition 2, and the State Department denied TransCanada's permit application; (3) in light of the denial of the Presidential Permit, the Final Decision and Order certifying compliance with the condition is arbitrary and capricious and an abuse of discretion; and (4) the record contains undisputed evidence that TransCanada fails to comply with condition 2 and lacks substantial evidence of compliance.

1. The Circuit Court Reviews Questions of Law De Novo

The issue of whether the Commission erred in certifying that TransCanada demonstrated compliance with all permit conditions, even though condition 2 requires it to obtain a Presidential Permit and the State Department denied the permit, is a question of law to be reviewed de novo. *Manuel v. Toner Plus, Inc.*, 2012 S.D. 47, ¶8, 815

N.W.2d 668, 670 (questions of law reviewed de novo). "The interpretation of a permit is analogous to the interpretation of a contract or statute. 'Contract and statutory interpretation are questions of law we review de novo.' " *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Corporation*, 2013 S.D. 10, ¶29, 826 N.W.2d 649, 657. "[W]hen evaluating questions of law, the conclusions of… an administrative agency are fully reviewable." *Iverson v. Wall Bd. of Educ.*, 522 N.W.2d 188, 191 (S.D. 1994) *citing Wessington Springs Educ. Ass'n v. Wessington Springs School District*, 467 N.W.2d 101, 103 (S.D. 1987).

2. The Presidential Permit is Mandatory Under Condition 2 and the State Department Denied TransCanada's Application

Permit condition 2 requires TransCanada to obtain a Presidential Permit from the U.S. Department of State. S.D. PUC Docket HP 09-001, *Amended Final Decision* at 25. This condition reads in relevant part:

> **Keystone shall obtain and thereafter shall comply with** all applicable federal, state and local permits, including but not limited to: **Presidential Permit from the United States Department of State**, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) **and Executive Order 13337** of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels from a foreign country.

Id. (emphasis added).

The *Final Decision and Order* states on page 17:

> On November 6, 2015, the Presidential Permit was denied.

AR – 681 at 031684.

The Final Decision and Order provides on page 28:

> It is therefore ORDERED that Keystone's certification under SDCL §49-41B-27 is accepted by the Commission and found to be valid and Keystone is authorized to proceed with the construction and operation of the Keystone XL Pipeline subject to the conditions…

Id. at 031695.

A Presidential Permit is required under federal law, because the proposed pipeline crosses an international boundary. Executive Order 13337, 69 Fed. Reg. 25229 (August 30, 2004). On November 6, 2015, the U.S. Department of State denied TransCanada's application for a Presidential Permit for the Keystone XL Pipeline. *See* www.Keystonepipeline-xl.state.gov/documents/organization/249450.pdf; *see also* 80 Fed. Reg. 76611. This is undisputed.

Nevertheless, the Commission denied the motion to dismiss, and certified the permit. AR – 654, 677. The agency's *Order Denying Motion* and the *Final Decision and Order* violate the dictates of the statute, SDCL §49-41B-27, and are arbitrary and capricious and an abuse of discretion within the meaning of the Administrative Procedures Act. SDCL §1-26-36(6). "A decision is arbitrary and capricious when it is 'not governed by any fixed rules or standard." *Johnson v. Lennox School Dist. No. 41-4*, 2002 S.D. 89 at ¶8, 649 N.W.2d at 621. "An abuse of discretion is 'discretion exercised to an end or purpose not justified by, and against, reason and evidence.' " *Schlumbohm v. City of Sioux Falls*, 630 N.W.2d at 96.

That accurately describes the agency's final order. It is undisputed and uncontroverted that the State Department denied the permit – that as the Keystone XL pipeline project stands today, it does not comply with permit condition 2. AR – 674, at 031609 (counsel for TransCanada: "[t]he Presidential Permit was denied").

The permit condition states that TransCanada "*shall… obtain*" a Presidential Permit. S.D. PUC Docket HP 09-001, *Amended Final Decision* at 25. The language is mandatory. Permit terms must be interpreted according to the same rules as statutes. *Hyperion Energy Corporation*, *id*., ¶29, 826 N.W.2d at 657. "Words and phrases in a statute must be given their plain meaning and effect." *US West Communications, Inc. v Public Utilities Com'n of State of S.D.*, 505 N.W.2d 115, 123 (S.D. 1993) *citing Appeal of AT&T Information Systems*, 405 N.W.2d 24 (S.D. 1987). The mandatory nature of the plain words of condition 2 required the agency, in light of the denial of the federal permit, to deny certification.

However, "reasonableness did not prevail." *Matter of State of South Dakota Water Management Bd. Approving Water Permit No. 179-2*, 351 N.W.2d 119, 126 (S.D. 1984), Henderson, J., dissenting op. The agency ignored the plain words of the permit it

had issued, and violated SDCL §49-41B-27. It abused its discretion and committed reversible error.

3. In Light of the Denial of the Presidential Permit, the Order Certifying Compliance is Arbitrary and Capricious and an Abuse of Discretion

The PUC *Final Decision and Order* resembles administrative action that was overturned in *Kellogg v. Hoeven School District No. 53-2*, 479 N.W.2d 147 (S.D. 1991). In *Kellogg*, the Court affirmed the reversal of an administrative decision denying a minor school boundary change, because the "Board's reasons for denying Kellogg's petition dwell almost exclusively on the *hypothetical* financial impact a boundary change could have." *Id*. at 151 (emphasis original). That is precisely the situation here - the agency ignored its own permit condition and the legal effect of the denial of the requisite federal permit, and instead relied on the hypothetical possibility that the federal denial will not stand. *See Gabric v. City of Ranchos Palos Verdes*, 73 Cal.App.3d 183 (1977) (reversing denial of building permit because "the city ignored its own ordinances… (and cannot) justify its denial of a permit simply because of the probable future, but yet undetermined, zoning action of the city").

In the present case, with respect to the requirement in condition 2 that TransCanada obtain a Presidential Permit, the agency relies exclusively on speculation. AR – 674 at 031610, 031613 ("In 13 months we'll have a new President. We do not yet know who that new president will be… It is not impossible for the project to obtain a Presidential Permit."). Possible future contingencies – such as how an election may turn out, or the possibility that the State Department will change its mind on the Presidential Permit at some point in the future – do not constitute sufficient support for an agency action under the APA. *Kellogg v. Hoeven School District No. 53-2*, 479 N.W.2d at 151.

In *Johnson v. Lennox School Dist. No. 41-4*, the South Dakota Supreme Court affirmed the circuit court's reversal of an agency decision, which "fails to consider important aspects" that are required in making the decision. 2002 S.D. at ¶30, 649 N.W.2d at 625. The Court will not uphold agency orders which "re-wrote or ignored the factors applicable to consideration of such petitions." *Id*. at 621. That is what happened here – during the pendency of a petition to certify state permit compliance, a federal

regulator denied its permit, resulting in violation of a state permit condition – but the agency ignored the federal action. The *Final Decision and Order* "ignored the factors applicable." *Id.*

In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Corporation, 2013 SD 10, 826 N.W.2d 649, is also instructive. Hyperion's air emissions permit required the commencement of facility construction within 18 months, but included a provision enabling it to receive an extension upon a timely request. *Id*. at ¶6, 826 N.W.2d at 652. Hyperion did not begin construction within 18 months and invoked the extension provision. *Id*. The South Dakota Court ruled that the provision providing for an extension and Hyperion's timely request enabled the Board of Minerals and Environment to confirm the permit. *Id.*

Conversely, in the present case, the permit condition requires TransCanada to obtain a federal permit, but there is no savings provision if it fails to comply. There is no provision giving TransCanada a grace period or extension. *cf*. *Hyperion Energy Corporation*, *id*. As the Court instructed in *Hyperio*n, an agency cannot interpret a permit condition if it "leads to an absurd result." *Id*. at ¶35, 826 N.W.2d at 659-660. That is the case here.

4. The Record Contains Undisputed Evidence that TransCanada Fails to Comply with Condition 2 and Lacks Substantial Evidence of Compliance

"An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Krsnak v. Dep't. of Env't and Natural Resources*, 2012 S.D. 89, ¶8, 824 N.W.2d 429, 433. The unreasonableness of the Commission's decision is reflected in *Final Decision and Order* Finding of Fact 31, which reads in part: "Conditions 1-3… are prospective. No evidence was presented that Keystone cannot satisfy any of these conditions in the future." AR – 681 at 031686. Actually, it is undisputed that two permit applications were denied by the State Department. AR – 674 at 031609. Counsel for TransCanada admitted this at the hearing on appellants' *Motion to Dismiss*. *Id.* Nevertheless, the agency ignored the obvious, and improperly relied on pure speculation that the federal government might reverse its decision sometime in the future. *Kellogg v. Hoeven School District No. 53-2,* 479

N.W.2d at 151 ("On the other side of the ledger, there really are no sound arguments against this minor boundary change").

Upon judicial review, the agency will be upheld only if there is substantial evidence in support of its decision. *Helms v. Lynn*, 542 N.W.2d at 766. In the present case, there must be substantial evidence that TransCanada complies with all conditions, including condition 2. *cf. Matter of Solid Disposal, Etc.*, 295 N.W.2d 328, 331-332 (S.D. 1980) ("Board's findings that the proposed site met *all* regulations need… be supported by substantial evidence") (emphasis added).

The record lacks substantial evidence that TransCanada can comply with condition 2. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3 at ¶15, 793 N.W.2d at 821-822 (reversing administrative decision for lack of substantial evidence). In his argument against appellants' motion to dismiss, counsel for TransCanada expressed the company's hope to obtain a Presidential Permit someday. AR-674 at 031610. While that hope may very well exist, it is not evidence in support of compliance with permit condition 2. *Andruschenko v. Silchuk*, 2008 S.D. 8, ¶11, 744 N.W.2d 850, 855 (attorney affidavit improper foundation and not competent evidence). Ultimately, "[O]n review, this court must decide whether the law has been correctly applied, and whether the resultant conclusion is supported by competent and sufficient evidence." *Matter of Certain Territorial Elec. Boundaries, Etc.*, 281 N.W.2d 65, 69 (1979). The agency order totally fails this test. There is no evidence to support the fiction that TransCanada complies with permit condition 2. AR – 674 at 031610.

This is not a situation in which the agency received and balanced conflicting evidence, with respect to permit condition 2 requiring the Presidential Permit. *E.g Therkildsen v. Fisher Bev.*, 545 N.W.2d 834, 836 (S.D. 1996) ("[T]he question is not whether there is substantial evidence contrary to the finding, but whether there is substantial evidence to support the agency finding[, and t]he court shall give great weight to findings made and inferences drawn by an agency on questions of fact"). TransCanada conceded the denial of the federal permit and legal counsel stated the company wishes to obtain the permit someday. AR – 674 at 031610. There is no evidence of compliance or ability to comply with condition 2. *Id.*

Finding of Fact 31 suggests that obtaining a Presidential Permit is a "prospective condition" enabling TransCanada to certify compliance, without evidence. AR Alphabetical Index – 263 at 19. The implication is that TransCanada's expressed desire to obtain a Presidential Permit in the future is sufficient, for certification under SDCL §49-41B-27.

But the U.S. State Department denied the permit twice and has TransCanada not re-applied for one – that is the real world fact to which the PUC must give sufficient weight. *Johnson v. Lennox School Dist. No. 41-4,* 2002 S.D. 89 at ¶30, 649 N.W.2d at 625 ("the Board's decisions relies on factors not intended to be considered fails to important aspects of the problem, is counter to the evidence, (and) is… implausible. This renders the decision arbitrary and capricious, warranting reversal"); *cf. Matter of Solid Disposal, Etc.,* 295 N.W.2d at 331-332 (record included substantial evidence supporting all criteria for approval of permit). In the present case, the agency failed to properly confer evidentiary weight to the State Department's denial of the Presidential Permit, and instead found condition 2 to be prospective, not requiring compliance. *Johnson v. Lennox School Dist. #41-4,* 2002 SD at ¶30, 649 N.W.2d at 625. The agency ignored the impact of the State Department denial on the permittee's level of compliance with condition 2.

TransCanada intoned "It is not impossible for the project to obtain a Presidential Permit. It is not an impossibility." AR-674 at 031613. The contention that future compliance with condition 2 may not be impossible is not substantial evidence of compliance. The *Final Order and Decision* must be reversed for a total lack of evidence of compliance with condition 2.

ISSUE 2. Whether the agency abused its discretion by accepting certification that the permittee complies with all permit conditions, in the absence of any evidence relating to most conditions

The Commission's interpretation of the evidentiary requirements of SDCL §49-41B-27 and the allocation of the burden of proof are questions of law, to be reviewed de novo. *Daily v. City of Sioux Falls,* 2011 SD 48, ¶11, 802 N.W.2d 905, 910 (evidentiary burden implicates procedural due process and is reviewed de novo). If the record lacks

substantial evidence, the agency decision is arbitrary and capricious, and an abuse of discretion. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3 at ¶15, 793 N.W.2d at 822 ("The circuit court examined the record to determine 'whether there was substantial evidence supporting [the City Council's] decision and whether the decision was reasonable and not arbitrary").

Section 27 of the Energy Conversion and Transmission Facilities Act requires the permittee to "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." SDCL §49-41B-27. The conclusion in Finding of Fact 31 that TransCanada need not proof compliance with condition 2 (and other conditions) because they are "prospective," enables any permittee to make promises of future compliance, without demonstrating an ability to comply. The Commission enervated the entire reason the legislature included section 27 in the statute – to hear evidence of continuing compliance with the permit conditions.

As stated by the South Dakota Court, "statutes must not be read in a manner that renders them useless or meaningless." *Johnson v. Lennox School Dist. #41-4*, 2002 SD at ¶28, 649 N.W.2d at 625 *citing Yankton Ethanol, Inc. v. Vironment, Inc*., 1994 SD 42, ¶15, 592 N.W.2d 596, 599 (presumption against a construction which renders a statute ineffective or meaningless). The determination in Finding of Fact 31 that most permit requirements are "prospective" and therefore the Commission needed no evidence in order to certify compliance, renders the entire certification under SDCL §49-41B-27 to be meaningless, in violation of South Dakota's rules for statutory interpretation and implementation . *Id.*

The PUC misapplied the burden of proof and failed to require TransCanada to produce evidence on dozens of permit conditions. *Daily v. City of Sioux Falls*, 2011 SD 48 at ¶28-30, 802 N.W.2d at 917 (misapplication of burden of proof in an administrative hearing violates procedural due process and requires reversal). As a result, the record lacks evidence of compliance for many of the permit conditions. Taken as a whole, the record lacks substantial evidence of compliance with all permit conditions. *See Application of Leo's Bus Service*, 342 N.W.2d 228, 230 (S.D. 1984) ("A ruling or decision of an administrative agency is upheld unless its decision is clearly erroneous in light of the entire record"). The lack of substantial evidence of compliance with the

permit conditions dictates that the circuit court reverse the agency certification. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3 at ¶15, 793 N.W.2d at 821-822 (reversing administrative decision for lack of substantial evidence).

Finding of Fact 31 in the Final Order states:

> As identified in Petition Appendix C, Conditions 1-3, 5, 6a-6f, 17, 18, 19a, 20-34a, 35-40, 41b, and 42-48 are prospective. No evidence was presented that Keystone cannot satisfy any of these conditions in the future.

AR– 681 at 031686.

The "conclusion" of fact in Finding of Fact 78 states:

> The Commission finds that the Company certified that the Project continues to meet the conditions upon which the 2010 permit was issued.

Id. at 031693.

The following table demonstrates the testimony given by TransCanada and the PUC staff in support of compliance with the permit conditions.

Permit Conditions for Which Testimony on Compliance is Found in Record – PUC Docket HP 14-001

Condition	Requirement	TransCanada testimony	Staff testimony
1	Compliance w/ applicable laws	Goulet [PHMSA] Schmidt [ESA, NEPA,NHPA]; Tilliquist [NEPA; Goulet & Kothari [NEPA, PHMSA], AR-524	Schramm [PHMSA] Walsh [NEPA, SDWA]; Iles [NEPA, PRPA]; McIntosh [PSA, CWA], Kirschenman [ESA]; Hudson [PHMSA]; Hughes [PHMSA]; Olson [NHPA], AR-53
2	Obtain all required permits, incl. Pres Permit, 404, water use & discharge	Schmidt, AR-524	
3	Comply w/ FSEIS		Walsh, Iles, AR-

	recommendations		536
4	PUC permit not transferable		
5	TransCanada responsible for all acts of subs, affiliates		
6	Must advise PUC of all deviations fr. map	Schmidt, AR-524	
7	Public liaison officer to work w local gov't		
8	Quarterly progress reports		
9	Liaison to report to PUC		
10	W/ in 6 mos start of constr, contact local LERC		
11	Pre-construction conf. required w/ staff		
12	Inform PUC once construction start date known		
13	Comply w/CMR plan	Schmidt, AR-524	Flo, AR-536
14	Must have environmental inspectors		
15	In consult w NRCS, develop Con/Rec sections based on soils. Give landowners options for soil handling. Identify sodium & erosion areas	Schmidt, AR-524	
16	Give landowners info on trenching, restoration. Completely restore. Fix prop damage; erosion & noxious weed control measures		
17	Cover dump trucks carrying sand, soil		
18	Fuel storage facilities 200' private wells, 400' pws wells		
19	If trees must be removed comp landowner, let them harvest		
20	Sed. control – use floating sed. curtains in low flow/no flow areas Install sed. barriers in wetlands; consult w/ GF & P re fish spawning times		
21	Dev HDD frack out plan. Report all frack outs to PUC.		
22	Construction mitigation provisions to protect water		
23	Coor. road closures w/ local govt; prevent damage, do reg.		

	maintenance, repairs.		
24	If residence w/ in 50', coor. constr. w/ landowner, maintain access; safety fencing when requested, sep. topsoil from subsoil		
25	Stop constr. when weather would cause damage, adverse weather plan		
26	On-going reclamation & clean-up		
27	Restore roads original condition		
28	File list of priv. & new access roads		
29	Winterization plan		
30	Can modify requirements if landowner agrees		
31	Comply w/ PHMSA, conditions	Kothari, AR-524	Schramm; Hudson; Hughes, AR-536
32	Shippers must do anti-corrosion		
33	All vehicles extinguisher, radio		
34	Consult locals on determination HCAs		
35	High plains aquifer designated as HCA in ERP		
36	File ERP & operation & maintenance procedures		
37-38	Reclaim w/ herbaceous to spot leaks		
39	Keep noise to 55 db at nearest residence, retain noise expert		
40	Replace water line w in 500'		
41	Mitigation per FWS & GFP		Flo, AR-536
42	Maintain drain tile system and incorporate into ERP		
43	Comply w/ Unanticipated Discoveries plan & PA		Olson, AR-536
44	Paleo surveys, mitigation, notification requirements		Iles, AR-536
45	Reclaim trans. lines		
46	Compensation if well contamination		
47	Compensation if soil damage		
48	No liability farmers		
49	Indemnification		
50	PUC complaint process to enforce		

TransCanada failed to produce any evidence whatsoever on the overwhelming majority of permit conditions. The record includes evidence relating to only ten out of 50 conditions. Many of the 50 conditions contain sub-conditions, so TransCanada actually produced testimony or evidence for approximately ten out of 108 total requirements. The testimony for those 10 conditions largely consisted of platitudes and generalizations relating to compliance. AR-524.

There may be some conditions relating to post-construction developments for which the Commission may reasonably accept TransCanada's blanket generalities with respect to compliance (e.g. conditions 46-47 regarding compensation for well contamination and soil damage). However, many of the conditions deemed by the Commission as "prospective" involve consultation with local officials and landowners. For example, condition 10 requires TransCanada to contact local emergency responders prior to commencing construction. Although the construction will not begin imminently because it would violate federal law, TransCanada produced no evidence of any progress on this important condition, four years after the permit was issued. Similarly, there is no emergency plan for Keystone XL for South Dakota per condition 36 – an especially important omission in light of the recent oil spill.

Nearly five years elapsed from issuance of the permit to the evidentiary hearing for certification – yet TransCanada offered no evidence of updated hazardous materials contractors for clean-up in an updated emergency response plan. TransCanada produced no evidence regarding consultations with state or local officials on the identification of "high consequence areas," per condition 34. The PUC ignored many important conditions which warrant testimony and evidence on compliance.

Substantial evidence is defined as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL §1-26-1(9). A petitioner required to certify compliance with 50 conditions who produces evidence of compliance for only ten conditions did not provide evidence "sufficiently adequate" for certification of compliance with the 50 conditions. *cf. Matter of Solid Disposal, Etc.*, 295 N.W.2d at 331-332 (record included substantial evidence supporting all criteria for approval of permit). The lack of substantial evidence

demonstrating the ability to comply with the overwhelming majority of permit conditions requires reversal of the *Final Decision and Order*.

Moreover, Finding of Fact 31 shifts the burden of proof, in violation of the PUC regulations. *See* ARSD §20:10:01:15.1 ("In any contested case proceeding… petitioner has the burden of proof as to factual allegations that form the basis of the complaint, counterclaim, application or petition."); Opening Statement of Commission Counsel John Smith, "It is the Petitioner, TransCanada, that has the burden of proof." AR – 555 at 023968.

Nevertheless, Finding 31 (and many other findings) contains the statement: "No evidence was presented that Keystone cannot satisfy any of these conditions in the future." AR – 681 at 031686. The PUC did not require the permittee to produce any testimony or evidence on most conditions, and improperly transferred the evidentiary burden onto the intervenors. *Id.* Then it certified compliance with all permit conditions. *Id.*

This is impermissible under the procedural due process requirements of South Dakota law. In *Daily v. City of Sioux Falls*, the South Dakota Court affirmed the reversal of a city administrative proceeding, for misapplying the burden of proof. 2011 SD 48 at ¶21, 802 N.W.2d at 913-914. The Court stated, "the trial court did not hold the city to its burden of proof… we find that due process was not served." *Id.*

Similarly, in the present case, the findings of fact demonstrate that the agency misapplied the burden of proof. AR– 681 at 031686-031687. The *Final Decision and Order* must be reversed for failing to be supported by substantial evidence, *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3 at ¶15, 793 N.W.2d at 821-822, as well as violating the appellants' due process by shifting the burden of proof to the intervenors. *Daily v. City of Sioux Falls*, 2011 SD 48 at ¶21, 802 N.W.2d at 913-914.

Issue 3. Whether the agency improperly excluded intervenor witness testimony, as a discovery sanction prior to the evidentiary hearing.

The agency issued numerous pre-hearing rulings that violated the intervenors' right to fully participate in the hearing. The most egregious was the *Order Granting in*

Part TransCanada's Motion for Discovery Sanctions, which excluded 20 intervenors from providing testimony and evidence at the hearing, as a discovery sanction. AR– 298. This order misapplied South Dakota discovery law and violated the rights of numerous appellants to fully and fairly participate in the hearing under the Administrative Procedures Act, SDCL §1-26-18, and South Dakota's requirements for procedural due process. The appellants' procedural due process claim is reviewed de novo. *Daily v. City of Sioux Falls*, 2011 SD 48 at ¶11, 802 N.W.2d at 910.

1. The Discovery Sanctions Violate Rule 37 and the APA

The PUC regulations incorporate the South Dakota Rules of Civil Procedure for use in contested cases. ARSD 20:10:01:01.02. Rule 37 provides for the enforcement of discovery rights. SDCL §15-6-37(a)(2). The Commission entered a scheduling order providing for limited discovery. AR – 146. Subsequently, TransCanada filed an *Amended Motion to Preclude Certain Intervenors* against 20 intervenors (including numerous appellants). *Id*. at 206. The motion alleged that the non-moving parties did not respond to TransCanada's discovery requests, and requested the draconian sanction of total preclusion from introducing evidence or testimony. *Id.*; SDCL §15-6-37(b)(2)(B). The Commission entered the *Order Granting in Part Keystone's Motion for Discovery Sanctions*. AR – 298.

A discovery ruling is reviewed for an abuse of discretion. *Haberer v. Radio Shack*, 1996 SD 130 at ¶16, 555 N.W.2d at 610; *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999). The Commission failed to follow the proper procedure for discovery sanctions, and its order was unwarranted by the conduct alleged. The *Order Granting in Part Keystone's Motion for Discovery Sanctions* violated the procedures for discovery sanctions delineated in SDCL §§15-6-37(a) & (b), and was arbitrary and capricious and an abuse of discretion.

The procedure for enforcing discovery rights under Rule 37 is clear, but TransCanada did not follow it. SDCL §15-6-37. Under Rule 37, if a party fails to respond to a proper discovery request, "the discovering party may move for an order compelling an answer." *Id*. at (a)(2). "The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing

to make the discovery in an effort to secure the information or material without court action." *Id.* A party whose proper discovery requests are not honored and who follows these procedures is entitled to an order compelling discovery under the statute. *Id.*

Subsection (b) of the statute provides for sanctions against a party that violates an order compelling discovery. *Id.* at (b). The sanctions include (A) establishing as true the moving party's fact issue being investigated in discovery; (B) prohibiting the party from introducing evidence on the fact issue; or (C) judgment against the non-moving party. *Id.* at (b)(2).

The statutory process was not followed by TransCanada. "In order to impose sanctions under Rule 37, there must be an order compelling discovery, a willful violation of that order, and prejudice to the other party." *Mems v. City of St. Paul, Dept. of Fire & Safety Servs.*, 327 F.3d 771 (8th Cir. 2003). TransCanada did not file a motion to compel discovery as required in SDCL §15-6-37(a)(2). It skipped the first step in the statutorily-required process, and sought sanctions prior to obtaining a court order compelling discovery. *cf. O'Neil v. Corrick,* 239 N.W.2d 230 (1976) (per curiam) (affirming discovery sanction when order to compel included penalty for violating order – second step unnecessary). In the absence of an order compelling discovery, and the willful violation of that order, the sanction of preclusion is procedurally improper, and an abuse of discretion.

In its *Amended Motion to Preclude*, TransCanada alleged that the non-moving parties failed to produce any response to TransCanada's discovery requests, and requested the sanction of preclusion. AR – 206. The Commission may have properly entertained a motion to compel discovery, SDCL §15-6-37(a)(2), but in the absence of an order to compel, sanctions were premature. *Mems v. City of St. Paul, Dept. of Fire & Safety Servs.*, 327 F.3d 771.

Moreover, TransCanada failed to properly consult with the non-moving parties and attempt to informally resolve the dispute. SDCL §15-6-37(a)(2). This is a procedural perquisite to relief for an alleged discovery violation. *Id.* The informal consultation requirement is designed to provide an opportunity to cure the alleged violation, and for judicial economy. Due to TransCanada's failure to follow the proper procedure, the

parties were provided no meaningful opportunity to cure the alleged violation of the discovery rule, as required. *Id.*

The PUC regulations incorporate the requirements of the South Dakota APA for hearings before the Commission. ARSD §20:10:01.15. The APA provides that "Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy." SDCL §1-29-18. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Matter of State of South Dakota Water Management Bd. Approving Water Permit No. 179-2*, 351 N.W.2d at 125, Henderson, J., dissenting op., *quoting Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970). Numerous appellants were denied the right to present their case, because the Commission misapplied the discovery rules and violated norms of fundamental fairness to pro se litigants.

Ultimately, the record is devoid of the misconduct required for such a severe discovery sanction. *Haberer v. Radio Shack*, 1996 SD 130 at ¶20, 555 N.W.2d at 610 (severe discovery sanctions reserved for "willfulness, bad faith, or… fault."). Significantly, the sanctioned parties were intervenors *pro se* before the PUC. The fact that they were unrepresented is a significant mitigating factor. "Generally, a pro se complaint, such as the one filed in this case, is held to less stringent standards than formal pleadings drafted by a lawyer." *Peck v. South Dakota Penitentiary Employees*, 332 N.W.2d 714, 716 (S.D. 1983). "[D]rastic sanctions under Rule 37 are not authorized when 'the failure to comply is the result of inability rather than willfulness or bad faith." *Haberer v. Radio Shack*, 1996 SD 130, ¶20, 555 N.W.2d at 610.

The courts routinely reject the enforcement of strict evidentiary and procedural rules in administrative hearings, where they may operate to the detriment of unrepresented parties. *Highfill v. Bowen*, 832 F.2d 112 (8th Cir. 1987) (disability claim); *St. Dept. of Labor and Employment v. Esser*, 30 P.3d 189 (Colo. 2001) (unemployment claim). "Where, as here, the claimant is unrepresented by counsel, the ALJ is under heightened duty to scrupulously and conscientiously probe into, inquire of, and explore all the relevant facts." *Eschevarria v. Sec'y of Health and Human Servs*., 685 F.2d 893, 895 (2nd Cir. 1982); *see also Blanco v. Blanco*, 311 P3d 1170, 1174 (Nev. 2013)

("Procedural due process considerations require that such case-concluding discovery sanctions be just, and relate to the claims at issue").

Instead, the PUC misapplied the rules and precluded the testimony of numerous *pro se* intervenors, even though there was no meaningful effort by TransCanada to resolve the matter through negotiation, SDCL §15-6-37(a)(2), no order to compel, *id*., and no demonstration of prejudice to TransCanada. *Mems v. City of St. Paul, Dept. of Fire & Safety Servs.*, 327 F.3d 771. There was no bad faith or willful misconduct. The *Order Granting in Part TransCanada's Motion to Preclude* was an abuse of discretion. *Haberer v. Radio Shack*, 1996 S.D. 130, 555 N.W.2d 606, 611. The circuit court should remand this matter and direct the PUC to take the testimony of appellants Joye Braun, Dallas Goldtooth, John Harter, Chastity Jewett and Terry and Cheri Frisch.

2. The Discovery Sanctions Violate the Procedural Due Process Rights of the Affected Parties.

The discovery sanctions also violated also the requirement of fundamental fairness in the proceeding below. "Due process requires adequate notice and an opportunity for meaningful participation." *Grant County Concerned Citizens v. Grant County Bd. of Adjustment*, 2015 SD 54 at ¶31, 866 N.W.2d at 160 *citing Osloond v. Farrier*, 2003 S.D. 28, ¶16, 659 N.W.2d 20, 24. The "opportunity for meaningful participation," *id*., was denied the appellants who were subjected to the *Order Granting in Part TransCanada's Motion for Discovery Sanctions.* AR – 206.

"To establish a due process violation, a plaintiff must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law." *Grant County Concerned Citizens*, 2015 SD 54, ¶25, 866 N.W.2d at 158; *Daily v. City of Sioux Falls*, 2011 SD 48, ¶14, 802 N.W.2d at 911. "Protected liberty interests may arise from two sources, the Due Process Clause itself and the laws of the states." *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

"A state may create such a liberty interest when it statutes or regulations place substantive limitations on the exercise of official discretion or are phrased in mandatory terms." *Jenner v. Nikolas*, 2015 WL 46003 (D.S.D. 2015) slip op. at 2 *citing Nolan v. Thompson*, 521 F.3d 983, 989 (8th Cir. 2008). In the present case, the PUC regulations

incorporate the South Dakota Rules of Civil Procedure. ARSD §20:10:01:01.02. A state may create such a liberty interest when it statutes or regulations place substantive limitations on the exercise of official discretion or are phrased in mandatory terms." *Jenner v. Nikolas*, 2015 WL 46003 (D.S.D. 2015) slip op. at 2 *citing Nolan v. Thompson*, 521 F.3d 983, 989 (8th Cir. 2008). "The procedures adopted by a board for it to follow… have the force and effect of law and must be followed by the board." *Sutera v. Sully Buttes Bd. of Educ.*, 351 N.W.2d 457, 459 (S.D. 1984) *citing Ward v. Viborg School Dist. No. 60-5*, 319 N.W.2d 502 (S.D. 1982).

The adoption by the Commission of the rules of civil procedure gives Rule 37 the force of law in PUC contested cases, and it confers upon appellants a protected liberty interest with respect to discovery sanctions which violate the rule. SDCL §15-6-37(a). Similarly, the adoption by the Commission of the APA in such cases confers upon the appellants a protected liberty interest in the "Opportunity… to present evidence" that is guaranteed in the APA. SDCL §1-29-18. The *Order Granting in Part TransCanada's Motion for Discovery Sanctions* violates Rule 37 and section 18 of the APA, and accordingly frustrates a protected liberty interest of appellants, in violation of their right to procedural due process under South Dakota law. *See Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981) ("The requirements of the law then are that where there are adversary parties they are accorded procedural rights that are consonant with due process").

"Procedural due process is flexible, and requires only such protections as the particular situation demands." *Esling v. Krambeck*, 2003 S.D. 59, ¶16, 663 N.W.2d 671, 678. Nevertheless, numerous appellants were denied the right to present testimony and evidence, AR, Chronological Index – 298, and the Commission mistakenly required them to bear the burden of *disproving* compliance with the permit conditions. AR Alphabetical Index – 263 at 19. Under these circumstances, appellants were denied procedural due process. *Custer County Bd. of Ed. V. State Commission on Elementary and Secondary Ed.*, 86 S.D, 215, 220, 193 N.W.2d 586, 589 (1972) ("One of the essentials of a hearing is the right to be heard… and to present proofs and arguments"); *Daily v. City of Sioux Falls*, 2011 SD 48 at ¶21, 802 N.W.2d at 913-914

In *Matter of State of South Dakota Water Management Bd. Approving Water Permit No. 179-2*, 351 N.W.2d 119, the Court upheld hearing procedures conferred upon intervenors in an administrative proceeding for a water permit. The Court ruled that the process complied with the procedural due process of intervenors: "Bruch was given the opportunity to call his own witnesses, cross examine other witnesses and testify on his own behalf." *Id.* at 121-122.

The present case is distinguishable. The intervenors were afforded the right to cross examination, but were precluded from calling witnesses and testifying on their own behalf. The procedural due process afforded in *Water Permit No. 179-2* was not conferred upon the appellants subjected to the *Order Granting in Part TransCanada's Motion to Preclude.* Additionally, the misapplication of the burden of proof by the Commission, as reflected in the findings of fact in the *Final Decision and Order,* violates procedural due process. *Daily v. City of Sioux Falls*, 2011 SD 48 at ¶21, 802 N.W.2d at 913-914. The Final Decision and Order must be reversed and remanded accordingly.

V. CONCLUSION

The agency ignored the real world development of the federal permit denials by the State Department, and certified TransCanada's permit even though permit condition 2 requires that it obtain the federal permit. In doing so, the PUC ignored the words in the permit it had issued itself.

This is precisely the character of agency action which the court is authorized to reverse under the APA. SDCL §1-26-36. The agency decision is in "violation of… statutory provisions," *id.* at (1), with respect to pre-hearing discovery sanctions, SDCL §15-6-37(a); exempting, as "prospective," dozens of permit conditions from the need for evidence of ability to comply, SDCL §49-41B-27; and misapplying and confusing the burden of proof, ARSD §20:10:01:15.1. The *Final Decision and Order* is "made upon unlawful procedure," SDCL §1-26-36(3), in that it improperly sanctioned numerous *pro se* intervenors and precluded them from presenting testimony and evidence, SDCL §15-6-37(a)(2); and failed to properly allocate the burden of proof. ARSD §20:10:01:15.1. It is "[a]ffected by other error of law," SDCL §1-26-36(4), in that it violated the appellants' procedural due process rights. *E.g*. SDCL §1-26-18 (right to present evidence). It is

"clearly erroneous in light of the entire evidence in the record," SDCL §1-26-36(5), lacking in substantial evidence for all but a few of the 50 conditions. Ultimately, denial of the *Motion to Dismiss* and the *Final Decision and Order* are "arbitrary and capricious or characterized by an abuse of discretion," SDCL §1-26-36(5), because the agency failed to give proper consideration to the penultimate fact that the federal permit is required, and was denied.

The Commissioners may feel frustration with the federal permit process, but that does not justify violating statutory and constitutional obligations. AR – 145 at 001470-001471. The certification of a permit for a project that would violate federal law is not countenanced by the courts. *Crown Simpson Pulp Co., v. Costle*, 445 U.S. 193, 196 (1980) (federal veto of state water discharge permit is final agency action subject to judicial review).

The agency action has real-world consequences for South Dakotans and their neighbors. Easements have been acquired from scores of South Dakota ranching families and community members. AR – 674 at 031600. The existence of these easements impacts the property values of landowners. Valuable pasture lands have been taken out of production for easements that run for miles across the lands of appellants Paul Seamans and John Harter. *See* AR-10; AR-18.

"[A] condemning agency must have a *present* plan… before it is authorized to commence a condemnation action." *Krauter v. Lower Big Blue Natural Resources District*, 259 N.W.2d 472 (Neb. 1971) (emphasis added). The PUC certified a permit that violates federal law, and in doing so, unnecessarily caused real injury to many South Dakota families and communities who otherwise may seek to vacate easements. *See* SDCL §21-35-1.1 ("A utility constructing a transmission line in this state *that has a permit pursuant to chapter §49-41B*… is entitled to the power of eminent domain") (emphasis added).

The livestock operations of South Dakota ranching families often depends on the availability of credit, and the continuing existence of these easements potentially impedes access to credit. The full range of rural lifestyle, from South Dakota livestock operations, to the Boettchers organic farm operation, have legitimate concern with their livelihood and their way of life. AR – 40.

That is of special concern to Native communities, such as Howes, South Dakota, on the Cheyenne River immediately downstream from where the Keystone XL Pipeline crosses the river. AR-17. Appellants such as Elizabeth Lone Eagle and Joye Braun are residents of the Howes community, and the Cheyenne River Reservation. *Id*.

The appellants jointly submitting this brief were entitled to a fair hearing, in which the agency considered the permittees' evidence of compliance with the conditions, and gave appropriate consideration of real-world evidence. Instead, evidence and testimony was excluded wholesale and many *pro se* litigants were improperly sanctioned. In certifying the permit, the PUC totally ignored the most important real-world fact – the Keystone XL pipeline has been denied by the United States.

The appellants are entitled to an order reversing the *Final Decision and Order*, or alternatively to an order remanding to the PUC to take testimony and evidence by appellants unlawfully precluded at the hearing.

VI. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in this matter.

VII. APPENDIX

Attached as an appendix are the following:

- PUC *Final Decision and Order*, HP 14-001, AR-681.
- PUC *In re Petition of TransCanada Keystone Pipeline, LP for a Permit to Construct the Keystone XL Pipeline,* HP 09-001, *Amended Final Decision and Order* (June 29, 2010).
- *Jenner v. Nikolas*, 2015 WL 46003 (D.S.D. 2015).
- *Gabric v. City of Ranchos Palos Verdes*, 73 Cal.App.3d 183 (1977).

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