

December 21, 2009

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JAN 13 2010  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Mr. Steve Kolbeck  
Public Utilities Commissioner  
Pierre, South Dakota 57501

Mr. Steve Kolbeck:

I want to thank you for this opportunity to send the following correspondence.

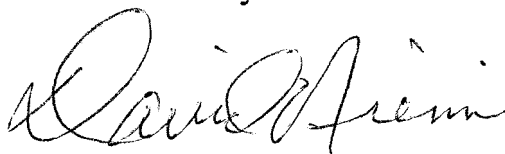
I received your address from my sister following the hearing November 3, 2009 in Pierre. This address will not be forwarded.

Several ranchers and farmers directly affected by the TransCanada pipeline have formed Protect South Dakota Resources LLC to negotiate an easement of right of way. The Keystone XL pipeline is a forced transaction on the ranchers and farmers in it's path. The members of Protect South Dakota Resources are not opposed to the pipeline. We need conditions to help negotiate a fair deal.

I hope you take the time to read this. If you have any questions or comments contact me at the following address or phone numbers. Cell phone service is very limited in this part of the state.

David Niemi  
12200 South Cave Hills Road  
Buffalo, South Dakota 57720  
[niemiranch@sdplains.com](mailto:niemiranch@sdplains.com)  
home- 605-375-3355

Thank You for your time and consideration.



November 25, 2009

**VIA U.S. MAIL**

Mr. Steve Kolbeck  
South Dakota Public Utilities Commission

[REDACTED]  
Pierre, SD 57501

Re: Landowner Concerns about the TransCanada Keystone XL Pipeline Project

Dear Commissioner Kolbeck,

I am writing on behalf of interested landowners in South Dakota whose lands will be negatively impacted by the TransCanada Keystone XL Pipeline project, which has applied for an Energy Conversion and Transmission Facilities Act permit from the South Dakota Public Utilities Commission. The letter is intended to express the concerns of the hundreds of landowners whose properties lay within the proposed Keystone XL Pipeline route.

In order to better manage the overwhelming cost and other issues confronting individual landowners, a number of us have contributed a great deal of time and expense putting together a large association of affected landowners. These landowners have banded together and formed the group Protect South Dakota Resources (PSDR) in order to hopefully garner more weight against the huge international pipeline corporation. In addition, PSDR is working in cooperation with similar associations in Montana (Eastern Mountain Landowners Group) and Nebraska (Landowners for Fairness). These groups are asking similar governmental agencies in these other states to consider the same issues that this letter proposes to the Commission. It is our belief that an association of landowners would be able to address the issues more substantively than we can as individuals. However, even this is not easy. For example, TransCanada has the name and contact information for every landowner whose property is to be crossed by the Keystone XL Pipeline; yet, TransCanada will not provide that information to our landowner associations. Therefore, our members have been forced to expend a great deal of time and money trying to locate and contact affected landowners, resources that could have been spent gaining knowledge of and addressing the substantive issues with the pipeline. Not only has TransCanada refused to provide the list that would make our initial job much easier, the TransCanada landmen have gone out of their way to actively discourage landowners from joining such landowners associations. Thus, we have had our hands tied behind our back even before we were allowed to take a step into the ring.

Before I get into the landowner concerns, I would like to explain why there appears to be less public concern over the Keystone XL Pipeline than there actually is. It was mentioned at the SDPUC hearings last week by both the Commission and the SDPUC staff attorney that there have been fewer public comments in opposition to this pipeline project than expected. On the contrary! Landowners, including my family, are

very concerned about the negative environmental and economic impacts that the Keystone XL Pipeline threatens on our properties. However, as you may well know, it is getting more difficult for landowners—many of whom are ranchers and farmers—to raise enough time and money to participate in the permitting of this pipeline. First of all, there is a mountain of very dense, technical and legal information that accompanies the Keystone XL Pipeline application. It has proven rather difficult for PSDR to review all of this information before the hearings began, in order to make knowledgeable and pertinent comments. In addition to the overwhelming volume of material involved in the SDPUC application, landowners must also simultaneously deal with the easements and options to purchase that TransCanada's land agents are pushing for landowners to sign. Many land owners have hired attorneys to review the easement documents. So far and without exception, these lawyers have stated that it is one of the most one-sided documents they have seen. Despite all this, PSDR members have been diligently reviewing the Keystone XL Pipeline application and have, in some circumstances, submitted public comments to the Commission. In fact, I myself have sent comments to the Commission voicing my concerns. It must be made clear to the Commission that the concerns expressed in these public comments represent the fears and concerns of *hundreds* of landowners, not just that of a few.

Secondly, it has become clear that to meaningfully engage in such immense project, it takes a vast amount of resources. As you are aware, this is an extremely complicated matter, and most of the issues before the Commission are present on or affect the property of each landowner along the pipeline route. TransCanada is spending millions and millions of dollars on issues related to the acquisition of this right of way and the folks who advocate for the company are armed with a great deal of information and almost unlimited financial resources. On the other hand, an individual land owner who wishes to stand toe to toe with TransCanada to protect his land and family will have to spend at least \$100,000, which is completely beyond the ability of most landowners and more than any landowner will receive for their property. As landowners struggling to make a living for our families, we unfortunately do not have readily available funds to support in-depth participation in the SDPUC permitting process for the Keystone XL Pipeline.

Furthermore, it pains me to say, but many of the affected landowners in South Dakota feel that there is no way to win against such a large, well-staffed and well-funded company. For every dollar we spend to protect our lands and our families and to become knowledgeable on the facts and processes in South Dakota, we realize that TransCanada will spend thousands of dollars to steamroll across our land. For example, a landowner who will have one-half mile of pipeline on their property may be offered a payment by TransCanada of around \$6,000 for their property (actual amounts offered by TransCanada vary). Now, if the landowner seeks legal or expert advice regarding the multiple issues raised by having an easement on their property, the landowner will easily spend \$6,000. These landowners who wish to obtain even the most basic working knowledge of the additional issues concerning the Keystone XL Pipeline will easily spend upwards of \$15,000-\$20,000, not including the additional cost of trying to convince TransCanada to accept any of their concerns or suggestions. In short, the

landowners are put into a forced transaction over the pipeline where the proceeds of such a transaction may not even be half the transaction cost. Yet we refuse to lie down and surrender the health of our lands and families. But this does limit the battles we are able to fight against the Keystone XL Pipeline. Therefore, I would like to take this time to let the Commission know that when landowners voice concerns over the Keystone XL Pipeline before the Commission, they speak for the voices of *hundreds* of landowners in South Dakota.

Finally, PSDR was in the formation stage when the Keystone XL Pipeline application was being presented to the Commission and was not yet in the position to participate in the hearings. Moreover, our landowner associations must focus much of their time and resources to prepare for upcoming meetings with TransCanada to discuss possible easement agreements. Nevertheless, the permitting process before the SDPUC is extremely important. The landowner associations are realistic about these talks with TransCanada; TransCanada does not have to comport with a single concern or suggestion of the landowners, and it is unlikely that they are willing to do so. In addition, our lawyers have advised us that the courts do not have jurisdiction over these issues should TransCanada refuse to work with us. As discussed below, the Commission is the only entity in South Dakota that has the authority to address the issues which are raised by the landowners in the remainder of this letter.

Therefore, landowners in South Dakota are very interested and concerned with the Keystone XL Pipeline, but, for the reasons mentioned above, have sometimes lacked the ability voice those concerns to the Commission. To put it briefly, do not let the so-called deficiency in the number of personal comments against the Keystone XL Pipeline lull you into a false belief that the public supports this pipeline. It is simply not the case!

I would now like to reiterate some of the landowners' most pressing concerns stemming from the TransCanada Keystone XL Pipeline. The three most important concerns outlined in this letter are: (1) Landowner Liability; (2) Decommissioning, Reclamation and Indemnity Bonds; and (3) Reclamation Requirements.<sup>1</sup> These are issue that the landowners have raised with TransCanada, but TransCanada seems

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<sup>1</sup> A fourth issue that is important to many landowners—and should be take precedent in the minds of all residents of South Dakota—is the significant paleontological resources that are likely to be destroyed by the construction of the Keystone XL Pipeline if there are no adequate protections in place. For example, the pipeline route proposed in TransCanada's permit application will cross some of the most productive exposures of the Hell Creek Formation (Harding County), which has already yielded the discovery of three *Tyrannosaurus rex* specimens and a new genus of horned dinosaur, with more sites expected to be found. It is therefore extremely important to the cultural resources of the entire state of South Dakota, to condition the final Keystone XL Permit to include a team of independent paleontologists who have prior working knowledge of the area, including the Hell Creek Formation, to be on-site at all times to properly identify and secure any paleontological specimens uncovered during survey, construction and reclamation, at TransCanada's expense.

Currently, only fossils on federal lands are protected; paleontological specimens located on private or state lands are unfortunately unprotected. These fossils located within the State of South Dakota are nonrenewable and extremely valuable and it would be unfortunate for all involved if they were wrongfully taken or inadvertently destroyed by TransCanada. Thus, because of the lack of legal protections, the Commission must use its express authority to condition and modify the Keystone XL Permit to ensure adequate protections for invaluable resources.

unwilling to address the easement documents. However, it is our understanding that the Commission has the authority to thoroughly implement remedies to our concerns during the Energy Conservation and Transmission Facilities Act permit process. The Commission may deny or modify any application on issues of construction, operation, or maintenance of any application under the Act. SDCL § 49-41B-24. The following issues directly concern matters related to the construction, operation, and long-term maintenance of the Keystone XL Pipeline, and therefore are under the authority of the SDPUC. Furthermore, our legal counsel advised us that the courts cannot grant any relief on these issues. If the Commission grants TransCanada's application for the Keystone XL Pipeline, it must heed the long-term effects of the pipeline on landowners, including potential future liability five, ten, or fifty years down the line, and include conditions or modifications to the permit to ensure that these valid landowner concerns are seriously incorporated. I ask now that the Commission regards these comments, concerns and suggestions with great severity and an eye for the protection of future generations of South Dakotans.

### 1. Landowner Liability

TransCanada's permit application for the Keystone XL Pipeline is woefully inadequate on the protections it extends to landowners. The likelihood of contamination of land or water from the crude oil in the Keystone XL Pipeline is very real to start. Consider it like a train derailment—while it won't happen everywhere, it is very likely to happen at least on some properties. Moreover, TransCanada has applied for a special permit allowing them to operate at a higher maximum operating pressure (80% instead of 72%), which significantly increases the possibility of leaks and ruptures of the pipeline. It could be that TransCanada is correct, and this increase in maximum operating pressure may never result in a burst pipe or oil leak, but it is much more likely that serious problems will occur as a result over time. As well, the Keystone XL Pipeline is slated to be in operation for upwards of fifty years. The longer the pipeline remains in operation, the greater the risk of corrosion and leakage. I know that you heard from numerous "experts" on exactly these types of issues, and, by now, have probably formulated an opinion on the long-term safety of the Keystone XL Pipeline, despite the concerns of the landowners. But what you did not hear, was the very serious impacts that a leak could have on the landowner. Therefore, it is critical that there is a system in place that ensures the necessary resources to address these problems.

As was touched upon during the SDPUC hearing, landowners may be held liable for any contamination of land or water caused by the Keystone XL Pipeline. In fact, Ms. Kim McIntosh informed the Commission at the hearing, that the State has actually held landowners liable simply because there was an oil spill on the property, despite any lack of actual responsibility on the part of the landowner. Yet, what was not discussed at the hearing—by Ms. McIntosh or anybody else—was the devastating impact landowner liability has on the economy and the communities of South Dakota. Both federal and state law state that the owner or operator at time the contamination is discovered may be held liable as a potentially responsible party. Furthermore, the landowner can be held liable, or at least be sued, for the alleged acts of family, employees, contractors, or

anyone who is on the property, even trespassers. The thing that most people don't mention is that, in a fair amount of these hazardous substances contamination cases, the company who actually caused the contamination is either non-existent, cannot be found, or is insolvent. Thus, the owner of land over under which the pipeline runs is responsible for the cleanup of the site, and any and all fines or sanctions that accompany the contamination. The potential for contamination comes not only from the pipeline, but also from the construction, maintenance and repairs, and general operations associated with the pipeline. Thus, even if the person that actually caused the harm is found, the liability for the cleanup of the contamination falls squarely on the innocent landowner. What's more, this remediation can cost the landowner thousands, if not millions, of dollars. I doubt any landowner in the path of the Keystone XL Pipeline could afford that; I sure can't! As is all too clear from today's economic troubles, many organizations—even ones who have been operating for almost hundred years—are not immune from bankruptcy. In this case, any liability is limited to the Keystone Pipeline, LP whereas the landowner has absolutely no way to limit liability. And unlike TransCanada, which has formed subsidiary corporations—such as TransCanada Keystone Pipeline, LP—to limit any potential liability, it would be impractical for landowners to form such limited liability companies. While landowners could form limited liability entities, the sole asset in the limited liability entity would be the land; if something went wrong, the landowners would lose their land anyway. Finally, even if the landowner is not technically liable for any contamination—as TransCanada might argue—it doesn't mean that landowners can't be sued. In fact, in liability cases, plaintiffs will sue anyone and everyone possible, including the landowners. The only reason that landowners would even be brought into the litigation is because the pipeline was placed on their land. It is therefore imperative that TransCanada be required to indemnify the landowners for any potential contamination that is caused by the Keystone XL Pipeline.

TransCanada's permit application has no protections for landowners. At no time does it purport to "hold harmless" or "indemnify" a landowner from the legal ramifications from an oil spill. TransCanada may claim that landowners could hold the company responsible for any problems from the pipeline. Legally speaking this may be true; however, that does not mean that the landowners have the resources to go to court or that TransCanada Keystone Pipeline, LP will have the assets to indemnify them. On the contrary, the Commission does have the authority to condition the permit upon the requirement that TransCanada Keystone Pipeline, as well as relevant parent companies, agrees to indemnify each individual landowner. As mentioned above, such an indemnification condition by the Commission on TransCanada's permit would be directly related to the operation and maintenance of the Keystone XL Pipeline.

The following language is similar to what companies have agreed to in typical easement agreements and ranch and wind leases:

TransCanada Keystone Pipeline, LP ("TransCanada") at its expense shall comply with all applicable federal, state, and local laws, regulations, and ordinances applicable to Hazardous Materials. Hazardous Materials shall

mean hazardous or toxic materials, wastes, or substances, any pollutants, and/or contaminants, or any other similar substances or materials which are defined or identified as such in any federal, state, or local laws, rules, or regulations, whether now existing or hereinafter enacted, including crude oil. TransCanada shall not use the Property or the right-of-way area for treatment, storage, use, emission, release or threatened release, discharge, transportation, presence or disposal of Hazardous Materials. In the event of any emission, discharge, release or threatened release of any Hazardous Materials, TransCanada shall immediately commence any required environmental remediation (including, without limitation, monitoring with respect to any groundwater contamination, or any soil remediation, monitoring, or containment) of the Property (or any adjacent property or any groundwater which has become contaminated), in order to comply with any laws, rules, regulations, orders, directives, or mandates of any local, state, or federal governmental or quasi governmental authority having jurisdiction over the Property and/or any environmental risks or hazardous conditions associated therewith, relating to pollution, the protection or regulation of human health, natural resources, or the environment, or the emission, discharge, release or threatened release of pollutants, contaminants, chemicals, or industrial, toxic or hazardous substances or waste into the environment (including, without limitation, ambient air, surface water, ground water or land or soil). TransCanada shall be solely responsible for any expense for compliance with the requirements of any federal, state, or local laws, regulations, or ordinances caused, directly or indirectly, by the activities of TransCanada or TransCanada's agents, employees, contractors, successors, or assigns. TransCanada shall indemnify and hold Landowner harmless against any liability or loss from any and all claims, causes of action, penalties, costs, damages, or other liability, including attorney's fees, resulting from the failure of TransCanada or TransCanada's agents or contractors, to comply with any federal, state or local law, ordinance, or regulation relating to the generation, manufacture, production, use, storage, release or threatened release, discharge, disposal, transportation or presence of any substance, material or waste which is now or hereafter classified as hazardous or toxic, or which is regulated under current or future federal, state or local law, ordinance, or regulation, on or under the Property. TransCanada's obligations under this Section shall survive the expiration or termination of this Permit, as appropriate, and shall remain in perpetuity or the longest period allowed by law.

The Commission also has the ability to require TransCanada to secure a bond to ensure its ability to comply with any indemnification conditions imposed by the Commission. The risk of future harm is part of the cost of the Keystone XL Pipeline project. The cost of mitigating that risk should naturally be borne by TransCanada. Such a security bond is discussed in greater detail below.

The need for such indemnification of the landowners is apparent. Without these protections, individual landowners—many of whom are ranchers and farmers—would be responsible for the cleanup and reclamation of any spill from the Keystone XL Pipeline. These costs would likely be in the millions of dollars, bankrupting honest and innocent landowners across the state. So far, however, TransCanada has declined to consider the concept unless the landowners agree to different language—language that severely limits TransCanada’s liability to indemnify the landowners. It is for these reasons that I strongly suggest that you include a indemnification provision in the final Energy Conversion and Transmission Facilities Act permit for the Keystone XL Pipeline.

## 2. Decommissioning, Reclamation and Indemnity Bonds

Landowners, and their children, need extra protections upon the decommissioning of the Keystone XL Pipeline, an act that could happen well over 50 years from now. In addition to issues arising in the decommissioning and reclamation processes, landowners need general indemnity protections against any liability arising from the pipeline, including personal injury and property damages. It is for this reason that I suggest requiring certain decommissioning requirements, including requiring TransCanada to post a bond to ensure the successful decommissioning and reclamation of the pipeline. While it is the requiring of such a decommissioning, reclamation and indemnity bond that is most important for the landowners, and not necessarily the actual language of the bond requirement, typical decommissioning bond requirement language is usually stated as follows:

No later than five years after the granting of this Permit, TransCanada shall deposit with an escrow agent reasonably acceptable to TransCanada, a general liability bond from an individual or entity engaged in a construction business, a surety bond (from an issuer with a Best’s Rating of not less than A), a letter of credit (issued by a financial institution reasonably acceptable to TransCanada), a cash deposit, a guaranty from an entity with investment grade credit rating from Standard & Poor’s or Moody’s, or other form of security to cover the estimated removal and surface restoration costs associated with the Pipeline on the Property (the “Decommissioning Security”). The amount of said security shall be established by an independent third-party agreed to by TransCanada and the applicable Landowners in an amount equal to 1.5 times the estimated cost of remediation, removal, clean up, and site restoration of the Property, and shall be readjusted by such independent third-party every 5 years thereafter. The amount of said security shall not account for any salvage value of the Pipeline remaining on the Property. The proceeds of the security shall be paid to Landowner to the extent required to advance Landowner its costs of removal and restoration in the event that TransCanada does not complete removal or restoration in the manner required by the reclamation requirements as mandated by the Permit. The security shall remain in effect until completion of the restoration obligations, unless fully drawn upon by Landowner or unless Landowner provides the issuer of the bond or other security written



notice authorizing the expiration of the security. Landowner shall be considered a third-party beneficiary of any security established by TransCanada in accordance with this Section. This security shall not be amended, changed, or modified without the express written consent of Landowner and the Issuer. Landowner shall not be deemed to have waived any rights under this security, unless Landowner or an authorized representative of Landowner shall have signed a written waiver. No such waiver, unless expressly so stated therein, shall be effective as to any transaction that occurs subsequent to the date of the waiver, nor as to any continuance of a breach after the waiver. The Issuer of the security shall provide 180 days prior written notice to Landowner of any cancellation, termination, expiration, or material change in the security. No later than 120 days prior to the expiration date of the security, TransCanada shall cause the security to be renewed or replaced with another form security in an equal amount. Landowner shall have the right, but not the obligation, to cure or correct any default of TransCanada resulting in the cancellation, termination, expiration, or material change in the security.

In the event the County or other governmental authority requires TransCanada to provide security for removal or decommissioning of the Project or portion thereof, TransCanada may provide a single Decommissioning Security that benefits both Landowner and the governmental authority in a manner consistent with the requirements of the governmental authority; provided, however, if such security is required by the governmental authority, but is in an amount less than the amount required as mentioned above, then TransCanada shall be required to post the Decommissioning Security only as to the amount of the shortfall; provided, further, that the security is required by said governmental authority only after consultation with, and approval by, Landowner, not to be unreasonably withheld.

Upon TransCanada's compliance with its reclamation and indemnification obligations as set forth in the Permit, Landowner shall be obligated to provide written notice to the issuer of the security authorizing the termination of the security. Any such written notice shall be provided by Landowner within 30 days of written request by TransCanada. Landowner shall not release the Decommissioning Security until such time as revegetation is completed. Revegetation shall be deemed to be complete when: (1) the vegetation species of the reclaimed land are self-renewing under natural conditions prevailing at the site; (2) the total vegetation cover of perennial species (excluding noxious weed species) and any species in the approved seed mix is at least equal to the total vegetation cover of perennial species (excluding noxious weed species) on the area before execution of the Agreement; (3) the species diversity and composition are suitable for the proposed post-Pipeline land uses; and (4) the requirements in (1), (2) and (3)

are achieved during one growing season, no earlier than the third full growing season on the reclaimed lands.

This language can also be tailored to require TransCanada to create a bond in order to secure the indemnification of the landowners, should they be sued for any reason.<sup>2</sup> Defense of a lawsuit could potentially cost the landowner hundreds of thousands of dollars, whether or not they are at fault. Merely being sued for something caused by the pipeline, or in relation to the pipeline, could bankrupt the landowner. Therefore, such an indemnity bond would include protections for lawsuits and judgments against landowners, including attorneys' fees, and should limit the liability of the landowner to no more than the price TransCanada paid for the easement on their property. As you can see, allowing a pipeline to be placed on their property puts the landowners at a severe disadvantage—while TransCanada stands to earn billions from placing the pipeline on the landowners' lands, these landowners have the very real potential to lose everything. An indemnity bond would ensure that the landowners are truly made whole by TransCanada, because clearly, the price of the easement is irrelevant when looking at the potential costs for landowners to protect themselves.

As with the reclamation requirements, the Commission is rightfully within its authority to condition the Energy Conversion and Transmission Facilities Act permit on a requirement that TransCanada post a decommissioning, reclamation and indemnity security bonds for the Keystone XL Pipeline. The market for oil is currently in flux and there is no guarantee that oil will provide this country with a stable and cost-efficient fuel for our nation. In addition, despite any claims from TransCanada Keystone Pipeline, LP, it cannot guarantee that it will be solvent—or even in business—in fifty years when the pipeline is set to expire. Therefore, requiring a decommissioning bond, such as is laid out above, would secure the environmental and economic protection of the future generations of South Dakota residents.

The bottom line is that the land resources of the state of South Dakota are at issue. Any cleanup or other cost of the Keystone XL Pipeline should be borne solely by TransCanada (who stands to profit billions of dollars), not by the State or the landowners (who unfortunately only share in the risk, not the profits). Likewise, the risk that things will not go as smoothly as TransCanada predicts is very real, and carries with it substantial costs. The cost of mitigating that risk properly lies with TransCanada, who is most likely to have sufficient resources to cover such costs. And while requiring a bond for each individual property is likely to be high TransCanada, the Commission may decide to require a bond for the entire state covering all properties that would be affected. This bond could then be accessed by individual landowners, as need be.

### 3. Reclamation Requirements

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<sup>2</sup> We would be more than happy to provide specific indemnity bond language to the Commission and/or meet with the Commission to discuss our suggestions further.

Finally, requiring adequate reclamation requirements in the final Keystone XL Pipeline permit is imperative for the long-term health of our people, economy and environment. Inadequate reclamation could lead to erosion of fertile soils, contamination of streams and drinking waters, and a decrease in property values. While TransCanada has included some reclamation procedures in its Construction Mitigation and Reclamation Plan, filed with its application, I would like to suggest these additional reclamation requirements that would fully ensure the lasting health of our lands:

1. Following the completion of construction, or upon removal of the Pipeline at the expiration, termination, or decommissioning of the Pipeline, TransCanada shall restore the area disturbed by construction as best as practicable to its original preconstruction topsoil, vegetation, elevation, and contour, in all respects to the reasonable satisfaction of Landowner.
2. TransCanada at its expense shall, unless otherwise requested by Landowner, abide by all guidelines and recommendations of the local or regional field office of the United States Natural Resources Conservation Service regarding the removal, storage, and replacement of top soil. TransCanada shall strip the topsoil from the ditch line in the right-of-way area and segregate all topsoil from the other excavated soil material, prior to construction and installation of any section of the pipeline placed in the right-of-way area. Following the construction and installation of each section of the pipeline, the top soil shall be replaced, to the extent feasible, as near as practicable to its original location and condition. Topsoil deficiency shall be mitigated with imported topsoil that is consistent with the quality of topsoil on the Property. In areas where the topsoil was stripped, soil decompaction shall be conducted prior to topsoil replacement.
3. All lands restored and reclaimed by TransCanada shall be re-seeded by TransCanada with comparable crops to be selected and approved by Landowner in Landowner's reasonable discretion, or with comparable grass seed (as the case may be) to be selected and approved by Landowner in Landowner's reasonable discretion.
4. Prior to any construction on the Property, TransCanada shall hire a range professional or soil scientist, reasonably acceptable to Landowner, to prepare a one-time assessment to document the baseline condition and topography, plant community, soil type(s), forage density, forage type, list and location of noxious weeds, riparian area delineation, fences, and trees (mature or otherwise). The range professional shall also take representative photographs of each such area prior to construction. TransCanada shall be responsible for the cost of the assessment, and a copy of the assessment shall be provided to Landowner at no charge.
5. After backfilling, grading, and contouring and the replacement of topsoil, and/or approved substitutes, revegetation shall be commenced in such a

manner so as to most efficiently accommodate the retention of moisture and control erosion on all affected lands to be re-vegetated.

6. Seeding of affected lands shall be conducted during the first normal period for favorable planting conditions after final preparation. Any rills or gullies that would preclude successful establishment of vegetation shall be removed or stabilized. Seeding rates shall depend on seed types, climatic and soil conditions and the techniques to be used in seeding. Introduced, naturalized or non-indigenous native plant species, may be included in the approved seed mixture if they support the approved land uses.
7. TransCanada must protect young vegetative growth planted by TransCanada from being destroyed by livestock or wildlife by approved techniques for a period of at least two years, or until the vegetation is capable of renewing itself with properly managed grazing and without supplemental irrigation or fertilization. TransCanada shall obtain the approval or consent of Landowner regarding the approved techniques; however, said approval or consent shall not be unreasonably withheld. TransCanada shall consult Landowner to evaluate fencing the right-of way from livestock, or alternatively, provide compensation to rest a pasture until vegetation can become established. Landowner's concerns such as livestock access to water or movement within a pasture shall be incorporated as necessary. TransCanada agrees to provide temporary water to livestock where temporary fencing has cut off the normal supply of water.
8. In all respects to the reasonable satisfaction of Landowner, if uneven settling occurs, sinking of topsoil, cracks in the surface, or surface water drainage problems develop as a result of Pipeline construction, TransCanada at its expense shall provide corrective action, additional land leveling services, or initiate negotiations for reasonable compensation to Landowner in lieu of restoration within forty-five days of receiving Landowner's written notice, weather permitting.
9. TransCanada shall use dust abatement techniques on unpaved and unvegetated surfaces to minimize airborne dust. TransCanada shall have a water truck on the Property at all times during construction to reduce dust generated by construction. TransCanada shall take reasonable steps to control erosion on the Property and on lands immediately adjacent thereto as a direct result of TransCanada's operations and activities on the Property.
10. Reclamation shall be deemed to be complete when: (1) the vegetation species of the reclaimed land are self-renewing under natural conditions prevailing at the site; (2) the total vegetation cover of perennial species (excluding noxious weed species) and any species in the approved seed mix is at least equal to the total vegetation cover of perennial species (excluding noxious weed species) on the area before the Pipeline; (3) the species diversity and composition are

suitable for the proposed post-Pipeline land uses; and (4) the requirements in (1), (2) and (3) are achieved during one growing season, no earlier than the third full growing season on the reclaimed lands.

11. Upon the request of Landowner, all water wells developed on the Property by TransCanada shall be conveyed or transferred to Landowner permanently upon the earlier of the (i) abandonment or plugging of said water well, or (ii) the abandonment, expiration, or decommissioning of the Pipeline.
12. To help achieve the goal of prevention of the introduction and spread of invasive, non-native plants and noxious weeds and to eliminate or control them, as practical, within the right-of-way area, the following management measures shall be implemented by TransCanada at its expense during work activities and during the term of the pipeline operation:
  - a. TransCanada shall use the best practices and measures commonly in use in County within the State of South Dakota where the Property is located, to control the introduction, growth, and spread of invasive weeds on the pipeline area and construction right-of-way.
  - b. All work equipment (including, but not limited to, conventional earthmoving equipment such as excavators, bulldozers, graders, dump trucks, and cement trucks) shall arrive for work in a clean condition to minimize the risk of weed introduction and spread. Any equipment which arrives in a dirty condition shall not be allowed to work until it has been cleaned off at a suitable location. Equipment passing through areas identified as having a weed problem shall be cleaned thoroughly, with all soil and debris removed prior to continuing work on the right-of-way area.
  - c. Weed growth shall be monitored and controlled by TransCanada on a routine basis while the digging and reclamation is completed and then continued at least annually.
  - d. TransCanada shall control the growth of noxious or nuisance weeds on topsoil storage piles by hand cultivating, mowing, or if necessary using selective, non-persistent herbicides. Control shall be initiated before weedy species mature (*i.e.* produce seed).
  - e. Weed growth shall be frequently monitored by TransCanada during restoration activities and weed control measures applied on a site-specific basis. Weed species of concern that are identified at the pipeline right-of-way area and construction right-of-way shall be treated by TransCanada. Manual removal of plants or chemical treatment shall occur. If weeds are manually removed when in flower, the weed material shall be disposed of in an approved landfill facility.

- f. TransCanada shall record all weed treatment and monitoring. TransCanada shall also provide records of weed control measures and weed treatment to Landowner for any treatment on the Property.
  - g. TransCanada shall notify Landowner 48 hours in advance of the location of any noxious weed abatement that TransCanada plans to undertake, so as to coordinate such abatement with Landowner.
- 13. The following conditions with respect to rock removal shall be accomplished by TransCanada at its expense on Landowner's agricultural land:
  - a. The Pipeline trench, or bore pits, or other excavations shall not be backfilled with soil containing rocks of greater concentration or size than existed prior to the Pipeline's construction.
  - b. If trenching, blasting, or boring operations are required through rocky terrain, suitable precautions shall be taken to minimize the potential for oversize rocks to become interspersed with the soil material that is placed back in the trench or the right-of-way area, construction right-of-way, or the Property.
  - c. Soil removed from the Pipeline trench, bore pits, or other excavations containing unacceptable rock concentrations or sizes shall be hauled off Landowner's premises or disposed of on Landowner's premises at a location that is mutually acceptable to Landowner and TransCanada and at TransCanada's expense. TransCanada may elect to remove excess rock from the soil and use the soil as backfill material.
  - d. After completion of the compaction alleviation activities required below, TransCanada shall remove rocks which are greater than 3 inches in diameter from the surface of disturbed soil on the entire right-of-way area if the adjacent areas do not contain rocks larger than 3 inches in diameter. Where rock removal is required, the amount of rock on the surface of the right-of-way area after construction shall be similar to that on adjacent areas. For purposes of this section only, "surface" shall include a depth of soil no greater than 24 inches. Rocks shall be hauled off Landowner's premises or disposed of on Landowner's premises at a location that is mutually acceptable to Landowner and TransCanada, and at TransCanada's expense.
- 14. Prior to trenching operations and in order to minimize soil compaction, TransCanada shall drive trucks used for transporting Pipeline segments and transporting other materials, and for all other purposes, along an alignment which corresponds closely to the Pipeline centerline.

- a. Upon consultation with and approval of Landowner, compaction may be alleviated on all lands traversed by construction equipment. Cropland that has been compacted shall be plowed using appropriate deep-tillage and draft equipment. Alleviation of compaction of the topsoil shall be performed during suitable weather conditions, and must not be performed when weather conditions have caused the soil to become so wet that activity to alleviate compaction would damage the future production capacity of the land.
- b. In the case of a claim for damages related to soil compaction, upon written request, TransCanada at its expense shall retain a Professional Soil Scientist, who is also licensed by the State of [state], or an appropriately qualified licensed professional engineer, to perform a soil survey for soil compaction using appropriate field equipment such as a soil penetrometer to investigate such claim. In addition, where there are row crops, samples shall be taken in the middle of the row, but not in rows where the drive wheels of farm equipment normally travel. Copies of the results of the above-described survey shall be provided to Landowner and/or Tenant making such claim at TransCanada's expense within 45 days of completion of the soil survey.
- c. TransCanada shall restore rutted land, vegetation, and topsoil as near as practical to its preconstruction condition.
- d. TransCanada shall promptly compensate Landowner for all damages caused by TransCanada during Pipeline construction and operation during the term of this Agreement, including the cost of soil and vegetation restoration in the right-of-way area and anywhere on Landowner's Property.

Again, the Commission has the authority to modify the Energy Conversion and Transmission Facilities Act permit to include these reclamation requirements under its authority to modify such a permit based on construction, operation, and maintenance aspects. Here, reclamation is directly related to construction and operation, albeit post-construction and post-operation. Additionally, any maintenance performed by TransCanada on the pipeline could also result in the need for reclamation of the lands. Therefore, I implore the Commission to incorporate these additional reclamation requirements in the final permit for the TransCanada Keystone XL Pipeline to ensure the future health of our precious natural lands.

In addition to these specific reclamation requirements, we would also like to request that the Commission condition the final Keystone XL Permit on the inclusion of a committee of TransCanada representatives and landowners which will be responsible for monitoring construction and reclamation of the pipeline, as well as act as a liaison to TransCanada to voice the concerns of the landowners. Providing for such a committee would ensure that the reclamation and construction requirements are being met;

otherwise, the landowners may have no recourse to address any issues or problems during these processes. An example of language in the permit requiring a joint committee would be:

TransCanada agrees to create a committee to provide a mechanism to address Landowners' concerns that arise during and following construction of the Pipeline, including concerns related to wet soil shutdown decisions, concerns raised during and following construction, and concerns on the post-construction monitoring and reclamation programs (the "Joint Committee"). The Joint Committee shall be formed during the year of construction in advance and prior to the commencement of construction. Landowners shall be responsible for recruiting the landowner members and advising TransCanada of their names and contact information. The Joint Committee shall continue for a period of two years from the date of commencement of construction and so long thereafter as the Joint Committee determines is necessary. Members of the Joint Committee shall be affected landowners, and appropriate representatives of TransCanada. The Joint Committee shall be composed of no less than three landowners, and three representatives from TransCanada. The person or entity in charge of monitoring construction and reclamation of the Pipeline shall report to the Joint Committee regularly and advise the Joint Committee as necessary. Meetings of the Joint Committee shall be held at such times and locations as reasonably necessary and shall require the presence of at least two landowner members and two TransCanada members. Results of all meetings shall be recorded and communicated in writing within a reasonable time period to all members of the Joint Committee. Members of the Joint Committee shall be provided reasonable access (subject to safety requirements) to all TransCanada's construction and reclamation activities. TransCanada shall pay to each landowner member of the Joint Committee a total payment of \$10,000.00 per year for their participation on the Joint Committee, as well as reasonable out-of-pocket travel and other expenses incurred to attend the meetings.

In lieu of requiring a Joint Committee in the Keystone XL Pipeline permit, the Commission could instead require TransCanada to maintain a construction monitor—preferably a uninterested third-party—to monitor the construction and reclamation of the pipeline to make sure all of the requirements in the permit and the Construction Mitigation and Reclamation Plan are fully complied with by TransCanada. Without either of these provisions, the landowners are left with no security that such protections and requirements for construction and reclamation will be met.

A meaningful and adequate response from the Commission on these three issues is so important because with the permit comes the ability to condemn the landowners' properties. The landowners are forced to sell their property and then live with the consequences of the pipeline for a very long time including reclamation and decommissioning and the other issues raised in this letter. Of course, TransCanada has spent a great deal of time asserting to all that this is a great deal for landowners and that



there will be no adverse consequences. (Of course, TransCanada flatly refuses to absolve landowners of future liability.) Not surprisingly, most landowners would like to have their own legal and expert opinions as opposed to the self-serving assertions of the project proponent. The landowners who obtain third-party opinions hear a significantly different opinion than that promoted by TransCanada. However, the cost of obtaining those opinions is much greater than what most landowners will receive for the property they are forced to sell. Unfortunately, there is no way for a landowner to recover these costs because under the law of eminent domain, TransCanada is only required to pay for the value of the property taken. It is not required to pay for any of the expenses that the landowner will incur as a result of participating in this forced transaction. Perhaps even more disturbing is the fact that landowners make the effort and expend the resources to understand the long-term risk of the pipeline and then propose thoughtful solutions, only to have their suggestions flatly denied by TransCanada. TransCanada is fully aware that it does not have to compromise on big issues related to the easement across our properties. If we do not reach agreement and the matter ends up in condemnation proceedings, the court only has the authority to consider the fair market value of the easement. The court does not have the authority to consider the long-term issues raised in this letter or fashion any relief for the landowner.<sup>3</sup>

In short, dealing with the safety and liability risks associated with the Keystone XL Pipeline is very difficult for landowners because the issues are complicated and expensive to manage. The landowners are forced into this process and, at best, most will only receive a few thousand dollars as payment for their property but will receive nothing for the time and expense of attempting to address long-term issues. In the end, many of the landowners who attempt participation in the process will have spent far more money than they would ever hope to receive for their property. This is clearly a no-win deal for the landowners of South Dakota. It is the hope of PSDR that the Commission will require TransCanada to sufficiently address with the landowners, or the landowners association, the issues raised in this letter.

In conclusion, I would like to remind the Commission that landowners in South Dakota have severe reservations about the potential risks of the TransCanada Keystone XL Pipeline. They fear for the safety of their environment, economy, and families. However, these landowners have chosen to band together, rather than have their voices lost in the crowd. We do not oppose the pipeline, but rather it is our goal to remove as much of the associated risk as possible. This letter set forth three of the most

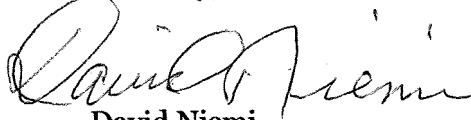
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<sup>3</sup> In Canada, however, TransCanada is required to deal directly with these associations—with arbitration by the government if needed—to come to acceptable terms for payment for the land and on issues such as those set forth in this letter. What's more important is that under Canadian law, TransCanada is required to pay all costs and fees, including attorneys' fees, associated with the creation of these easements. Thus, the Canadian landowner associations, unlike American associations like PSDR, have most, if not all, of their expenses of negotiating with TransCanada covered by TransCanada. Here, however, such costs will ultimately be subtracted from the final payment price for the land, thereby making it even harder for landowners to get a fair shake. (If the Commission so wishes, a copy of such an agreement between a Canadian landowner association and a pipeline company may be provided for review by the Commission.)

pressing concerns of the landowners in South Dakota—the indemnification of landowners, requiring security bonds, and including adequate reclamation requirements. The Commission has the legal authority to condition the Energy Conversion and Transmission Facilities Act permit with these requirements. For the protection of all of the landowners, as well as the safety of future generations of South Dakotans, I respectfully request that you require our concerns to be incorporated into the final Keystone XL Pipeline permit.

I thank you for granting me this opportunity to express to the Commission some of the most important concerns affected landowners have regarding the TransCanada Keystone XL Pipeline. This letter serves as the voice of the hundreds of concerned landowners in South Dakota who have entrusted their voice to PSDR. Please do not hesitate to let me know if the landowners or our association can provide additional information, or if you would like to more thoroughly discuss any of the landowner concerns or requests set forth in this letter. I look forward to working with the Commission to ensure the adequate protection of all landowners.

Sincerely,



David Niemi