BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

INITIAL POST-HEARING BRIEF OF DAKOTA RURAL ACTION

I. BURDEN OF PROOF AND STANDARD OF REVIEW

Applicant's burden of proof is contained in S.D.C.L. § 49-4lB-22 (2010):

> The applicant has the burden of proof to establish that:
> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The Commission's decision here is subject to review pursuant to S.D.C.L. § 1-26-36 (2010),

which in relevant part states:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Agency factual determinations are overruled only when they are clearly erroneous; however, conclusions of law are fully reviewable. *Lends His Horse v. Myrl & Roy's Paving*, 2000 SD 146, P9, 619 N.W.2d 516, 519, 2000 S.D. LEXIS 166 (Nov. 21, 2000).

II. STANDARD FOR DETERMINATION OF COMPLIANCE WITH OTHER LAWS

As noted, the Commission must determine whether Applicant "will comply" with all applicable laws. The meaning of the term "will comply" and the type of evidence that must be reviewed in a determination of compliance with other laws is a matter of law, not of fact, that is fully reviewable by a court. Although it appears that no South Dakota court has analyzed the type of information that must be reviewed for such determination, other jurisdictions have done so.

In particular, the courts in Pennsylvania have examined the type of evidence that local governments must consider when determining if applicants for zoning changes have complied with other laws. *See, e.g., Edgmont Township v. Springton Lake Montessori School, Inc.*, 154 Pa. Commw. 76, 79; 622 A.2d 418, 419-420 (Pa. Commw. Ct. 1988). When reviewing applications for special permits, applicants are required to show compliance with law through the submission of detailed plans that demonstrate compliance with such law. *Elizabethtown v. Mount Joy Township Zoning Hearing Board*, 934 A.2d 759, 767 (Pa. Commw. Ct. 2007). Submission of a mere "concept plan" is not sufficient to show compliance with law. *Id.* Further, the Pennsylvania courts have found that failure to obtain sufficient evidence of compliance cannot be cured by a condition that an applicant must comply with law, because the proper function of a condition imposed on an applicant is to reduce adverse impacts and not to enable an applicant to meet its burden of proof to show compliance with law. *Edgmont*, 154 Pa. Commw. at 80; 622 A.2d at 420.

Similarly, an Oregon Court has held that a local zoning body must know the specifics of a required mitigation plan before a determination that the plan will comply with the law requiring it. *Annunziata Gould v. Deschutes County*, 216 Ore. App. 150; 171 P.3d 1017 (2007).

Although little precedence appears to exist on the evidentiary standards for a determination of compliance with applicable law, where a failure of such compliance creates substantial risks to public safety and welfare, the applicable standards are detailed and comprehensive, the reviewing agency's public safety obligations are largely subsumed by other law, and no other opportunity for a public review of agency compliance exists, a determination of compliance with law should be based on a detailed review of an applicant's actual efforts to comply with the law and not merely on an applicant's knowledge of the law and intent to comply. Otherwise, a reviewing agency would fail to confirm that it had met its duty to the citizens it is required to protect.

Here, the Commission's duty to protect the public and environment from the potentially catastrophic injury that could result from this proposed Keystone XL Pipeline ("Pipeline") is largely subsumed by federal law. Thus, confirmation of Applicant's compliance with federal law is of the utmost importance to the people of the State. Further, public safety and environmental protection depend on compliance with the many detailed standards contained in 49 C.F.R. Parts 190 and 195, such that confirmation of compliance should not be had via a general finding of knowledge and intent to comply with the law. Instead, the only way to ensure compliance with federal law is via detailed review of Applicant's actual compliance.

Moreover, if the Commission does not provide an opportunity for public review of Applicant's compliance with federal law, then the public will have no opportunity to review and comment on Applicant's compliance with federal safety laws, in either a federal or state agency

process. PHMSA does not provide any opportunity for public review of ERPs or IMPs. Also, S.D.C.L. Chapter 34A-18 does not provide for public participation in review of a pipeline oil spill response plan, nor is DRA aware of any plans by the South Dakota Department of Environment and Natural Resources to provide for public review of the Keystone I pipeline oil spill response plan, indicating that it does not intend to allow for public participation in review of oil spill response plans. Thus, unless the Commission provides opportunity for public review of Applicant's compliance with federal law, citizens will have no opportunity to review spill prevention efforts or the emergency response plans intended to protect them.

In these circumstances, the Commission must require Applicant to provide direct evidence of its actual compliance with federal law for the Pipeline and not rest its case on its knowledge and stated intention to comply with the law. Otherwise, the Commission will not fulfill the intent of S.D.C.L. § 49-4lB-22(1)(2) and (3) to protect citizens and the environment from the dangers of crude oil pipelines.

III. APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF

Applicant's burden of proof under S.D.C.L. § 49-4lB-22(1)(2) and (3) are inseparably intertwined because pipeline safety is regulated by federal law. 49 U.S.C. § 60101 *et seq*. (2010) ("Pipeline Safety Act"); 49 C.F.R. Parts 190 and 195 (2010) ("Pipeline Safety Regulations"). Before granting a permit, the Commission is required by law to find that the proposed pipeline "will comply with all applicable laws and rules," S.D.C.L. § 49-4lB-22(1), including the Pipeline Safety Act and Regulations. Further, the Commission is required to find that "[t]he facility will not pose a threat of serious injury to the environment," and that "[t]he facility will not substantially impair the health, safety or welfare of the inhabitants." S.D.C.L. § 49-4lB-22(2) and (3).

Yet, federal law regulates pipeline safety and is intended to prevent injury to people and property and the environment. 49 U.S.C. § 60102(a)(1) and (b)(1)(B)(ii) (2010). Further, federal law preempts state crude oil pipeline safety law, unless a state has applied for and received certification to implement a state pipeline safety program for crude oil pipelines. 49 USCS § 60104(c) (2010); *e.g.*, *Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354 (8th Cir. 1993). South Dakota has not applied for or received certification to implement a state safety program for crude oil pipelines, therefore South Dakota is without authority to impose crude oil pipeline safety standards and the Commission is without authority to condition any permit it might grant with pipeline safety standards of the Commission's making.

This puts the Commission in the position of evaluating major elements of its state-law burden of proof based on whether or not Applicant has complied with the Pipeline Safety Law and Regulations. In particular, Applicant is required to submit, 49 C.F.R. § 194.101, and PHMSA is required to approve, 49 C.F.R. § 194.119, an Emergency Response Plan ("ERP") for the Pipeline. The purpose of the ERP is to "reduce the environmental impact of oil discharged from onshore oil pipelines." 49 C.F.R. § 194.1. Among other things, an ERP, for the entire pipeline and for each response zone, must contain:

- A description of each spill response zone;
- The person, position, or facility responsible for starting immediate notification of a spill;
- The maximum time required to detect spills and shut down flow in bad weather;
- Spill containment strategies;
- Description of spill response equipment and procedures to maintain it;
- The location of spill response equipment;
- The time to deploy response equipment;
- A description of the amount of trained personal and deployment of personnel for spill containment operations;
- The contents of the training program to be provided to first responders; and
- Drill procedures.

As such, the ERP will be the primary governmental mechanism to protect public health and safety and the environment in the event of a spill. Defects in the ERP could have catastrophic impacts on the lives and welfare of landowners and their property and on the environment, including drinking water sources for millions of people and large areas of habitat used for hunting, fishing, boating, bird watching, and other forms of recreation prized by Americans. In order to find under S.D.C.L. § 49-4lB-22 that damage from a spill of crude oil from the Pipeline will be mitigated and thereby not pose serious threat of harm to the environment or to the safety of inhabitants, the Commission must find that Applicant is in compliance with federal ERP requirements because no other protection can exist.

Also, Applicant is required to submit and PHMSA is required to review and approve a Risk Analysis and Integrity Management Program ("IMP") for the Pipeline. 49 U.S.C. §§ 60109(c)(9), 60118(a)(4) (2010). The purpose of the IMP is to ensure the safe operation of the Pipeline, particularly with regard to avoidance of spills in certain "high consequence areas." *See* 49 U.S.C. § 60109 (2010). Federal pipeline safety law and regulation contain a large number of detailed requirements for this program intended to identify and protect specific environmentally sensitive high consequence areas through pipeline-specific analysis and application of health and safety standards to protect these particular areas. 49 U.S.C. § 60109(c) (2010); 49 C.F.R. 195.452 (2010).

For example, the IMP must assess the risk factors for particular high consequence areas when determining a schedule for inspection of the pipe segment in that area. 49 C.F.R. § 195.452(e)(1) (2010). These factors include existing or projected activities by others in the area, local environmental factors that could affect the pipeline, and site-specific geotechnical factors. *Id*. Further, the IMP must identify "preventive and mitigative measures" to protect specific high

consequence areas. 49 C.F.R. § 195.452(f)(6) (2010). The regulations contain many more project and site-specific requirements intended to protect citizen safety and the environment.

As such, the IMP is the federal government's primary spill prevention mechanism intended to protect areas along the Pipeline where a spill could have severe environmental consequences. It represents an essential part of the federal government's environmental mitigation effort. A failure of Applicant to properly design and implement its IMP could result in a catastrophic oil spill. Since federal law preempts all state and local pipeline safety laws intended to prevent pipeline spills, the Commission's finding that the pipeline will not pose a substantial risk of spilling oil and thereby harming inhabitants, property, and the environment must rely upon Applicant's compliance with federal IMP standards.

Thus, the Commission can find that Applicant has met its burden of proof under S.D.C.L. § 49-4lB-22(2) and (3) only if it also finds, pursuant to S.D.C.L. § 49-4lB-22(1) that Applicant is in compliance with the Pipeline Safety Act and Regulations, including its ERP and IMP requirements. A failure by Applicant to comply with these federal requirements would be evidence that it had not met its burden of proof under S.D.C.L. § 49-4lB-22(2) and (3), and also that it was not in compliance with "all applicable laws and rules" such that it could not meet its burden of proof under S.D.C.L. § 49-4lB-22(1).

The only action that the Commission can take to protect South Dakotans from improper actions by Applicant related to pipeline safety is to ensure that Applicant "<u>will comply</u>" with federal Pipeline Safety Law and Regulations and other federal safety and environmental protection laws. S.D.C.L. § 49-4lB-22(1) (2010) (emphasis added).

DRA submits that Applicant has not provided sufficient evidence that it "will comply" with the Pipeline Safety Law and Regulations. Specifically, Applicant has provided evidence

that it is aware of federal requirements and it states an intent to comply with federal law, but it has not provided sufficient evidence of the sufficiency of its actual compliance with federal safety requirements for the Pipeline. Mere awareness of legal standards does not assure compliance with law. Likewise, statements of intent do not ensure actual compliance with law.

Given the vital importance of both the ERP and IMP to the health and safety of South Dakotans and their environment, the Commission must review evidence not only of Applicant's knowledge and intent to comply with these federal requirements, but also detailed evidence that demonstrates Applicant's compliance with these federal requirements. Specifically, the Commission must examine at least a draft of Applicant's ERP and IMP documentation, because only such drafts would provide sufficient proof that Applicant will in fact comply with federal law. Although Applicant has provided a "draft" ERP, such draft is merely a conceptual template that provides almost no project-specific information and cannot form the basis for confirming compliance with federal law. Further, that PHMSA has approved Applicant's Keystone 1 ERP does not mean that the ERP for the Pipeline will be in compliance with federal law. Also, given the complete lack of public oversight of PHMSA's actions, there is reasonable doubt that PHMSA has fully complied with its legal obligations in its approval of the Keystone I ERP. The Commission should not trust secret federal agency action.

Mere reliance on knowledge and intent without review of actual project-specific documentation showing compliance with federal law places undue trust in Applicant and PHMSA. Such trust is undue given the life and death implications of a failure by Applicant or PHMSA to comply with federal standards.

DRA submits that a finding that Applicant will comply with federal pipeline safety standards requires greater Commission scrutiny of Applicant's actual compliance with federal

standards. Impacted landowners and community members deserve more assurance than mere review of Applicant's self-serving assurances that it will comply with pipeline safety laws. They deserve Commission review of actual draft documents. The public also deserves an opportunity to comment on and confirm that Applicant and PHMSA have complied with federal law, which compliance should not be presumed. Absent such review, the Commission will trust to a federal government and industry "star chamber" negotiation of compliance with federal law.

DRA also notes it is practically impossible for any intervenor to ever disprove that an applicant for a large interstate pipeline siting permit would not meet its burden of proof if the Commission reviews only Applicant's knowledge and intent. Such limited review would mean that intervenors would need to prove either that Applicant is unaware of federal standards or that it intends to mislead the Commission about its intentions.

Given the resources of large pipeline companies, it is likely that all pipeline companies are fully aware of federal requirements. Thus, practically speaking, it would likely be impossible for intervenors to prove that any applicant for an interstate pipeline lacks awareness of federal standards. With regard to intentions to comply with law, it would also be highly unlikely that any intervenor could ever have access to evidence that could show an applicant's lack of intent to comply with law, because such evidence would be held only by applicants. Adoption of a "knowledge and intent" evidentiary standard would have the practical effect of making all Commission findings of compliance with federal law *fait accompli*. Mere reliance on knowledge and intent would result in an evidentiary standard that offers no meaningful review of actual compliance with federal law and therefore no actual state protection of citizens or the environment from the dangers of noncompliance with federal law.

In contrast, review of a draft ERP and IMP documentation would provide direct evidence of Applicant's compliance with federal standards. Such review would permit the Commission and intervenors to compare Applicant's actions to objective federal standards.

Given Applicants failure to provide evidence of its actual compliance with federal law, it has failed as a matter of law to meet it burden to prove that it "will comply with all applicable laws and rules" intended to limit the "threat of serious injury to the environment" and ensure that the Pipeline will not "substantially impair the health, safety or welfare of the inhabitants." S.D.C.L. § 49-4lB-22 (2010). Further, such failure has unlawfully limited DRA's meaningful participation in the Commission's review of the Application and prejudices DRA's ability to protect its rights under law. As such, the Commission must deny the permit.

IV. APPLICANT'S SUBMISSION OF ITS APPLICATION WAS PREMATURE

Applicant has argued that it will not have draft federal documents available for Commission review prior to termination of the Commission's hearing on this matter. While this may be true, this timing issue indicates that the Applicant's submission of its application was premature. Specifically, neither federal nor state law require that the Applicant receive Commission approval prior to completion of federal pipeline safety requirements, such that the Commission could require that Applicant submit its application later in the federal review process. Instead, Applicant chose to submit its Application long before its proposed start of construction and before almost all of its efforts to comply with federal safety requirements.

Likewise, Applicant chose to initiate Commission review before most if not all other federal permit processes, such that the Commission cannot know before its determination whether Applicant has complied with federal law.

This timing forces the Commission to trust to Applicant's intentions and trust that federal agencies will properly implement federal law. In contrast, submission of an application to the Commission later in the federal review process would have allowed the Commission access to greater information about Applicant's compliance with federal law, thereby avoiding the reality of a Commission decision unfounded on review of any of Applicant's actual federal safety plans or efforts or any federal environmental review.

Consideration of the timing of submission of an application is also critical given the one-year limitation on the duration of the Commission's hearing. S.D.C.L. § 49-41B-24 (2010). If such requirement did not exist, then the Commission could adjust its schedule to the federal review schedule and thereby benefit from information gathered through federal process. Here, the premature start of the Commission's process means that its review is hampered by a lack of access to information about compliance with federal safety and environmental standards. The Commission can only trust that Applicant will comply with federal law, and not confirm that it in fact will comply with federal law. Such timing in the Keystone 1 decision may have resulted in the Commission conditioning that permit on compliance with federal safety laws, because the Commission could not in fact verify such compliance before issuance of its order. Such "will comply" condition should not be used as substitute for a Commission determination of actual compliance with federal law.

DRA could not know that submission of the Application was premature at the time it was submitted because DRA was not then aware and could not know Applicant's internal timing for compliance with federal requirements.

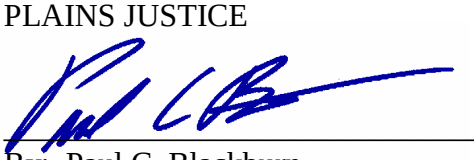
CONCLUSION

For the foregoing reasons, DRA requests that the Commission find that Applicant has not met its burden of proof under S.D.C.L. § 49-41B-22 and therefore deny the Application.

Respectfully submitted,

Dated January 20, 2010.

PLAINS JUSTICE



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CERTIFICATE OF SERVICE

I hereby certify that the above **INITIAL POST-HEARING BRIEF OF DAKOTA RURAL ACTION** and **MOTION TO ACCEPT LATE-FILED BRIEF** were served upon all of the parties listed on the attached Service List on the 20th day of January, either electronically or by mailing a true and correct copy thereof to them by first class mail, postage prepaid, at their last known address.

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