

**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	)	DOCKET NUMBER HP09-001
DAKOTA ENERGY CONVERSION AND	)	
TRANSMISSION FACILITIES ACT TO	)	
CONSTRUCT THE KEYSTONE XL PROJECT	)	

**POST-HEARING REPLY BRIEF OF DAKOTA RURAL ACTION**

**I. Comments on Staff’s Recommended Conditions and Requested Modified and Alternative Permit Conditions**

Commission Staff provided the Commission with a set of recommended conditions.

Dakota Rural Action (“DRA”) supports some of these conditions, but finds that others are not sufficient to protect landowners and others impacted by the pipeline. In general, DRA requests that the Commission – at a minimum – provide protections comparable to those provided in its first Keystone Final Order (“Keystone 1 Final Order”). To the extent that the Commission needs evidence to impose such conditions, it may turn to its record in the Keystone 1 proceeding, to the extent that the Keystone 1 and Keystone XL pipelines are similar in design and create comparable risks that may be mitigated through comparable measures. Should the Commission not adopt comparable protections, DRA requests that the Commission explain its reasons for providing lesser protections and rights.

**A. Compliance with Federal Pipeline Safety Rules and Appropriate Coordination with State and Local Emergency Response and Spill Prevention Resources**

Commission Staff requests the following condition:

Staff recommends the Applicant notify the Commission if either the Oil Spill Response Plan or the Emergency Response Plan is

activated. The Commission may, at that time, request a copy of said plan and make any additional requests for information regarding execution of the plan as necessary.

DRA fails to see how this condition increases protections for citizens or the environment. First, mere notification by Applicant to the Commission that Applicant has “activated” its emergency plans and mere receipt of information about such plans does not increase citizen security. Such notification and information acquisition would not result in any improvement of such plans or confirmation that such plans comply with federal law, because the Commission has no process for review of emergency plans at the time of activation, no staff capable of evaluating such plans, nor is there any opportunity for citizen involvement in review of such plans. Absent Commission process to provide for appropriate review of such plans for compliance with federal law, the filing of such plans with the Commission would be mere gesture.

As discussed in DRA’s Initial Post-Hearing Brief, Applicant has provided evidence that it is aware of federal emergency planning standards and has promised to comply with federal requirements, but Applicant has not provided the Commission with any actual emergency or spill prevention plans, other than conceptual template plans. As such, the Commission has not received sufficient evidence that Applicant “will comply” with federal pipeline safety requirements.

Although DRA believes that Applicant’s failure to provide adequate evidence of its compliance with federal means that the Application must be rejected, at a minimum, the Commission must include the following condition within any permit it might issue:

Keystone shall provide copies of all plans required by federal pipeline safety laws to the Commission no later than six months prior to the start of operation of the pipeline. The Commission shall review such plans to confirm Applicant’s compliance with federal law. The Commission shall provide copies of such plans to interested parties, in accordance with the Commission’s

confidentiality requirements, and provide an opportunity for public comment on Applicant's compliance with federal law and to ensure adequate integration between federal requirements and state and local emergency response and spill prevention resources. The Commission may further condition this permit after such review as necessary to ensure appropriate integration of state and local resources into federally-mandated pipeline safety plans.

**B. Construction Monitoring and Public Liaison**

Commission Staff requests the following condition:

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

These conditions are inadequate. Public comment provided by landowners with direct experience with Applicant's construction of its first Keystone ("Keystone 1") pipeline indicates that the public liaison conditions included in the Keystone 1 permit were not adequate to apprise the Commission of citizen complaints, nor to ensure prompt response by Applicant to such complaints. Applicant's liaison officer did not timely communicate all complaints to the attention of the Commission and did not adequately describe the contents or nature of these complaints to the Commission, such that the Commissioners heard about some complaints only at the Keystone XL public comment hearing.

Comments during the public comment period made clear that citizens were unaware of a right to submit a complaint and also had no knowledge of the procedure that complaints invoke. This citizen confusion appears to arise out of the fact that the Commission lacks a formal citizen complaint process related to crude oil pipeline permit compliance, such that citizen rights related to enforcement of crude oil pipeline permits are procedurally unclear and legally undefined. Although the Commission may determine whether to take permit enforcement action under SDCL §§ 49-41B-33 and 34, there are no statutory provisions related to citizen complaints under

the Energy Facility Permit Act, S.D.C.L. Chapter 49-41B, nor has the Commission issued regulations to establish such compliant process, nor are any of the Commission's other complaint processes legally applicable to crude oil pipelines. The Commission does have authority to hear citizen complaints related to:

- natural gas pipelines, A.R.S.D. 20:10:37:04;
- telecommunications and motor carriers, S.D.C.L. § 49-13-1, § 49-31-3, § 41-31-89, § 49-31-114, 49-31-115, ARSD 20:10:25:02, A.R.S.D. 20:10:34:05, A.R.S.D. 20:10:34:10.01;
- public utilities (natural gas and electric service), S.D.C.L. §§ 49-34A-3, 4, 13, 26, 27, 39, 59 and rules promulgated thereunder, A.R.S.D. 20:10:01:07.01, A.R.S.D. 20:10:17:13; and
- public grain warehouse licenses, S.D.C.L. § 49-43-11.

However, each of these complaint provisions apply only to specific subjects, not including crude oil pipeline permits, rather than creating a general right of citizens to file complaints related to alleged violations of any Commission permit, order, or rule. Moreover, S.D.C.L. § 49-7-11 exempts pipelines that are common carriers from all of the requirements of Title 49 except for the requirements of SDCL Chapters 49-7 and 49-41B, which literally means that none of the complaint procedures contained in Title 49 (listed above) are applicable to crude oil pipelines.

Also, no other provisions in South Dakota law establish a citizen complaint process applicable to crude oil pipelines. S.D.C.L. § 49-1-11 authorizes the Commission to promulgate regulations related to complaints generally, but this section does not otherwise authorize citizens to bring complaints and it appears that S.D.C.L. § 49-7-11 would prohibit the application of this section to promulgation of pipeline regulations. S.D.C.L. § 49-41B-29 relates to permit transfers and contains a general statement authorizing the Commission to adopt rules, but it is unclear whether this authority to adopt rules relates only to permit transfers or Chapter 49-41B,

generally, and in any case it does not authorize the Commission to hear citizen complaints. S.D.C.L. § 49-41B-33 authorizes the Commission to revoke or suspend the Energy Facility Permit Act permits upon a finding that the permittee has failed to comply with the terms or conditions of the permit, but does not expressly authorize or prohibit the filing of citizen complaints or specify any citizen complaint procedure. S.D.C.L. § 49-41B-34 of the Energy Facility Permit Act permits the Commission to file a criminal complaint, but does not otherwise appear to authorize citizen complaints. S.D.C.L. § 49-41B-35 authorizes the Commission to promulgate rules related to Energy Facility Permit Act application procedures but does not authorize or prohibit establishment of rules related to permit violations, citizen complaints, or permit enforcement. To enforce its permits, the Commission of necessity must have the authority to implement complaint and enforcement mechanisms.

Since the Commission has not established a citizen complaint process for crude oil pipelines, it should condition this permit to allow citizens to bring complaints and it should also describe such process; otherwise, the legal rights of citizens to seek enforcement of conditions established by the Commission will be entirely uncertain. Reliance by the Commission on an entirely extralegal and informal citizen complaint process of uncertain structure and design does not provide citizens with meaningful notification or surety of their rights under law. To address this deficiency, the Commission should condition Applicant's permit on the establishment of a formal right to submit a citizen's complaint to the Commission, including adoption of a process to review such complaint.

Finally, DRA is aware that Protect South Dakota Resources ("PSDR") by letter dated December 21, 2009, ("PSDR Letter"), which is herein incorporated by reference, has requested that the Commission require either the establishment of a joint Applicant and landowner

committee to monitor construction compliance, or in the alternative to require that Applicant maintain an independent third-party construction monitor. While DRA is generally in support of either of these approaches, it believes that such construction monitoring should be seen as separate from the public liaison's role, because not all potential problems related to construction of the pipeline will concern the actual process of construction, but rather could, for example, result in public health and safety issues related to worker camps and law enforcement. Further, establishment of a construction monitoring scheme also does not create a lawfully established citizen complaint process.

Accordingly, DRA recommends that the Commission adopt the following monitoring and citizen complaint conditions:

Keystone shall provide a fee to the Commission sufficient for the Commission to employ a public liaison officer who will:

- (i) facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities, residents, and local governments,
- (ii) attempt to informally and promptly resolve citizen complaints through negotiations; and
- (ii) identify problems that may develop for landowners, local communities and residents as a result of the Project before they create cause for complaint.

The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' onsite managers and shall be available at all times to the Commission's Staff via mobile phone to respond to citizen complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been employed by the Commission, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. Until construction of the Project is completed, the public liaison officer shall report monthly to the

Commission on the status of the Project from his/her independent vantage point. The report shall:

- (i) list each complaint, formal or otherwise, communicated by a citizen to the public liaison officer;
- (ii) provide a detailed description of each such complaint or communication and any problems encountered; and
- (iii) provide a description of the outcome of all citizen complaints, whether resolved through informal or formal process.

For the period of three years following completion of construction, the public liaison officer shall report to the Commission quarterly regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

Keystone shall pay a fee sufficient for to establish a construction monitoring entity, which entity may be either a joint Keystone-landowner construction monitoring committee or an independent third-party construction monitor. The construction monitor shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' onsite managers, and shall have access to all Keystone construction sites, materials, and equipment needed to ensure compliance with the permit. The construction monitor shall provide monthly reports to the Commission that describe any construction deficiencies identified by the construction monitor, as well as all complaints received from citizens related to construction conditions contained in this permit. For the period of three years following completion of construction, the construction monitor shall report to the Commission quarterly regarding post-construction landowner and other complaints, reconstruction and land and crop restoration and any construction-related problems or issues occurring during the course of the year.

Keystone shall incorporate environmental inspectors into its Construction Mitigation and Reclamation Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable laws and rules.

Keystone shall comply with a citizen complaint process, wherein citizens may submit citizen complaints to the Commission related to compliance with the permit. The Commission shall review such complaints in accordance with procedures established by A.R.S.D. Chapter 20:10:01, as appropriate.

### **C. Soil Impact Mitigation**

Commission Staff and the PSDR Letter request a variety of soil impact mitigation measures. DRA supports the inclusion of such measures, but requests that the Commission clarify that landowners have the final decision on selection of such measures for their lands. DRA urges the Commission to recognize that landowners have superior knowledge of their lands, and also urges the Commission to trust that landowners are in the best position to decide on mitigation measures following full disclosure of mitigation options by Keystone and NRCS experts.

### **D. Construction Impact Mitigation**

In addition to the conditions proposed by Commission Staff, DRA requests that the Commission include the noxious weed and rock removal and disposal conditions identified by the PSDR Letter, as well as the following conditions included in the K1 Final Order:

Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. The environmental inspection in Condition \_\_ shall include forested lands

The width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less. The width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less.

### **E. Road Protection and Bonding**

DRA generally supports Staff's road protection and bonding condition, and also requests that the Commission include conditions from the K1 Final Order not recommended by Staff.

DRA is unsure why staff does not recommend that Applicant be required to keep roadways



passable during construction or provide reasonable alternative routes of travel. DRA is also uncertain why Staff has not included conditions related to preventative road protection measures, identification of private and new access roads, and the reclamation and restoration of land used for temporary access roads. To provide adequate protection, DRA requests the following additional road protection conditions:

Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways. All pre-existing roads and lanes used during construction must be restored to a condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

#### **F. Protection of Residential Property**

DRA is uncertain why Staff has not recommended conditions for protection of residential property comparable to those provided in the K1 Final Order. Although the proposed pipeline will impact fewer residences, it is possible for new residences to be constructed after approval of a permit but before the start of construction. Further, even if there is less overall need for protection of residences, it would be better for the Commission to include protections for residences and not have them be needed then it would be for the Commission to omit such

protections and then have them be needed. DRA requests that the following conditions be included in this permit:

To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.

Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.

Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.

Keystone shall repair any damage to residential property that results from construction activities.

Keystone shall restore all residential properties disturbed by construction to at least their preconstruction condition.

#### **G. Construction in Adverse Weather**

DRA is uncertain why Staff has not recommended conditions for construction in adverse weather comparable to those provided in the K1 Final Order. Specifically, in its K1 Final Order the Commission ordered that construction be suspended where construction activities cause irreparable damage, unless adequate protection measures are taken. Public comment during the hearing indicated that Applicant's contractors continued construction during adverse weather conditions without implementing adequate protection measures. To redress this problem, DRA requests that the Commission require Applicant to identify with specificity its protection measures and the conditions in which they may and may not be used. Also, DRA requests that

Commission include a condition that requires Applicant to stop all construction activities for at least 48 hours during adverse weather when a landowner notifies Applicant that its protection measures are inadequate, and that Applicant notify the construction monitor, the environmental monitor, and public liaison officer of such landowner notification, so that these individuals have an opportunity to evaluate the situation, attempt to resolve it informally and promptly, and report to the Commission before land is unnecessarily damaged. DRA urges the Commission to recognize that landowners are in the best position to determine appropriate treatment of their land and have no reason to unreasonably delay construction in progress.

Accordingly, DRA requests the following conditions:

Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures pre-approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall prepare an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

Keystone shall immediately stop all construction activities for at least 48 hours during adverse weather conditions upon request by a landowner where the landowner notifies Keystone that adverse protection measures are not adequate or not being appropriately implemented. Upon such notification, Keystone shall immediately transmit such notification to the public liaison officer, the construction monitor, and environmental monitor.

#### **H. Continuous Reclamation and Clean Up**

DRA requests conditions related to continuous reclamation and clean up contained in the K1

Final Order in this permit, specifically:

Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

Keystone's obligation for maintenance of the right-of-way shall continue throughout the life of the pipeline.

## **I. Noise**

DRA requests that the Commission include the noise mitigation conditions contained in the K1 Order because it believes that these conditions provide superior protection to those recommended by Staff here. Specifically, Staff recommendation here is vague with regard to the point of measurement of noise levels, referring only to a “noise sensitive area,” does not specify who will take noise measurements, and puts responsibility on landowners to complain if Applicant fails to comply with this condition. In contrast, the K1 Final Order specified that the measurement site be 100 from a residence or business in the direction of Applicant’s facility, and ordered that noise assessments be evaluated by an independent third-party consultant approved by the Commission. Therefore, DRA requests that the Commission provide at least the same level of protection as it provided in its K1 Final Order, specifically including the following conditions:

Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump station and other noise-producing facilities will not exceed a 55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission and impacted landowners. In the event the noise level exceeds the

limits set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

#### **J. Water Piping Replacement**

DRA requests that the Commission include the following water pipe protection measures contained in the K1 Order, so that KXL landowners have the same level of protection as K1 landowners:

At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project. Keystone shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Keystone shall publish a notice in at least one newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

#### **K. Paleontological Resource Protection**

Public comment and testimony before the Commission indicated that the paleontological resources impacted by the pipeline will likely be scientifically and financially significant, and could potentially be worth millions of dollars. DRA requests that Applicant be directed to conduct its pre-construction field survey before any construction anywhere in South Dakota, so that if any valuable resources are found, there is sufficient time for appropriate excavation. Should construction in sensitive formations be delayed until later in the South Dakota construction process, paleontological excavation schedules could conflict with Applicant's construction schedule. By prioritizing surveying and excavation in sensitive areas, the

Commission will maximize the time available for construction in sensitive areas. Also, DRA requests that Applicant be required to include landowners and their experts in its efforts to protect such resources, notify landowners when valuable paleontological resources are identified, and be required to preserve and protect such resources. Finally, DRA requests that the Commission clarify that Applicant does not own paleontological resources such that it must return such resources to their owner. In contrast, Staff's condition excludes landowners from the protection process and specifies only that resources "should" be returned to their owners.

Accordingly, DRA requests the following modifications of Staff's paleontological conditions:

(i) The Applicant should conduct a literature review to identify known fossil sites along the pipeline route prior to construction, and shall consult with recognized paleontological experts identified by landowners upon request by landowners.

(ii) A pre-construction field survey of sensitive formations along the pipeline route should be conducted prior to the start of any construction in South Dakota at times and in weather conditions appropriate for such survey. Keystone shall allow experts identified by landowners to participate in the design and implementation of such survey.

(iii) A specific paleontological mitigation plan should be prepared following the completion of field surveys. The mitigation plan shall include a trained on site monitor in sensitive areas and proper employee training to identify any paleontological resources. Keystone shall provide a draft of such plan to impacted landowners who may provide comments on such plan. If a landowners believes that a final plan does not adequately protect paleontological resources owned by the landowner, such landowner shall notify Keystone of inadequacies. Keystone shall notify the public liaison officer, the construction monitor, and the environmental monitor of such landowner notifications. A landowner may file a citizen complaint with the Commission to protect paleontological resources.

(iv) Keystone shall preserve and protect paleontological resources. At the landowner's discretion, a landowner may either remove discovered resources at the landowners expense or agree that Keystone may do so at Keystone's expense, after which Keystone shall promptly return such resources to their owner. If discovered on private land, paleontological resources must be returned to the landowner. If found on federal or state

lands, paleontological resources must be returned to the Museum of Geology at the SD School of Mines and Geology or other appropriate agency.

**L. Property Damage Prevention and Compensation**

DRA generally supports Staff's conditions related to crop damage, construction and reclamation maps, and restoration and compensation for damage to private property of all types. However, DRA requests that the Commission provide at least the same level of protection offered by the K1 Final Order, including but not limited to the following conditions:

Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and irrigation or drainage systems. Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses.

In the event that a person's well is contaminated as a result of the pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages including but not limited to any consequences, medical or otherwise, related to water contamination.

Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

**M. Construction-Related Water Contamination**

DRA supports Staff's recommended condition. In addition, DRA requests that the Commission require that Applicant notify landowners of spills of hazardous materials on their lands.

**N. Cattle Movement**

DRA supports Staff's recommended condition.

**O. Indemnification for Release of Hazardous Materials**

DRA supports the PSDR Letter's requested indemnification provisions.

**P. Bonding Requirements**

DRA supports the PSDR Letter's bonding conditions.

**Q. Post Abandonment Reclamation**

DRA supports the PSDR Letter's post-abandonment reclamation conditions.

**R. Water Well Transfers**

DRA supports the PSDR Letter's water well transfer conditions.

**II. Inadequacy of Commission Staff Engagement with Intervenors and the Public**

Commission Staff generally argue that DRA and landowners did not appropriately engage Commission Staff or its expert witnesses. DRA notes that at no time prior to the evidentiary hearing did Staff indicate that intervenors, landowners, or impacted citizens have an opportunity to request the assistance of Staff witnesses. Given that this is a contested case proceeding, it is not reasonable to assume that intervenors, landowners, or impacted citizens would know this option was available.

Staff also argues that it sought to collect information from intervening landowners in "the legally appropriate way – through discovery" and then blamed intervenors for not responding.



DRA notes that Staff's discovery request was unconstitutional, vague, overbroad, and obviously hostile, and sought irrelevant and privileged information, such that while the discovery process is an appropriate means to gather information, Staff's specific filing was not legally appropriate. DRA did not object to providing relevant non-privileged information to Staff, but did object to the form of Staff's request. Staff could have restated their discovery request to comply with discovery rules or sought to compel a response from DRA on relevant matters, but it merely abandoned its request.

Staff states that it could not know much about DRA because DRA "did not participate in discovery." This is an untrue statement. DRA did participate in discovery; it just insisted that Commission Staff comply with the rules of discovery and evidence. As far as Staff's attempts to learn about DRA, Staff appears to have not reviewed DRA's website, which contains substantial information about DRA, nor did Staff attempt to communicate informally with DRA or its members.

Moreover, it appears that Staff made no effort to engage with landowners who did not chose to intervene. Given statements made by Commissioners at the initial public hearings that appeared to discourage formal intervention by impacted landowners in part by highlighting other options for public participation, Staff and their experts should have made an effort to engage non-intervening landowners in their hearing preparation; otherwise, landowner participation in Commission process will be, as happened here, extremely limited.

Finally, Staff indicated that they consulted with landowners as part of their expert witness preparation, yet DRA was not aware that Staff or its witnesses had attempted to engage any landowners. DRA cross-examination clarified that none of Staff's expert witnesses testified that they communicated directly with any landowners. Thus, it appears that Staff made no effort –

outside of their limited, hostile, and inappropriate discovery – to engage any impacted landowners.

Staff has an affirmative duty to protect the people of South Dakota generally, as well as the unfortunate individuals who must bear the burden of the projects the Commission approves. Public participation is not served by a lack of clarity of the Staff's role in working with impacted citizens and a failure to publically describe such role. DRA suggests that the Commission review the appropriate role of Staff in its proceedings, clarify the relationship between Staff, intervenors, and non-intervening but impacted citizens, and provide public education information that clearly describes Staff's roles and citizen rights to engage Staff.


### **CONCLUSION**

Should the Commission issue a permit for the Project, DRA requests that it include the above described conditions.

Respectfully submitted,

Dated February 2, 2010.

PLAINS JUSTICE



---

By: Paul C. Blackburn

Plains Justice

P.O. Box 251

Vermillion, SD 57069

Phone: 605-675-9268

Fax: 866-484-2373

Email: [pblackburn@plainsjustice.org](mailto:pblackburn@plainsjustice.org)

ATTORNEYS FOR DAKOTA RURAL ACTION