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## 1. Pipeline safety rules, regulations, and emergency response.

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## **2. Paleontological and Cultural Resources.**

Staff recommends that for cultural resources, Keystone follow the Unanticipated Discoveries Plan as approved by the Department of State and submit it to the Commission. (Staff Br. at 17.) Keystone agrees.

Staff makes four recommendations regarding paleontological resources: (I) a literature review; (ii) pre-construction field surveys; (iii) a mitigation plan including an on-site monitor; and (iv) discovered fossils should be returned to the owner. (Staff Br. at 17.) Keystone has worked with the Museum of Geology at the South Dakota School of Mines and Technology to conduct a literature review and Keystone has completed field surveys on state and federal lands, but not private lands. (TC-4 ¶ 16.) Staff's recommendation does not distinguish between public and private lands, even though federal law does not require surveying for paleontological resources on private lands. (Tr. at 47-48, 254-56.) The only paleontological surveys done to date on private lands were in Harding County where landowners hired their own paleontologist. (Tr. at 47-48.) If the Commission requires that Keystone survey for paleontological resources on private lands, the requirement should be limited to areas with known paleontological resources, and monitoring should be required only in areas where the surveys would require it if located on federal land according to Bureau of Land Management Standards. Because private landowners own all paleontological resources on their land, surveying and

monitoring on private lands should be at landowner expense, and landowners should have the ability to waive pre-construction field surveying and construction monitoring.

### **3. Wildlife.**

Staff recommends a number of conditions related to endangered wildlife. (Staff Br. at 18.) Aside from the recommendation that Keystone follow all mitigation efforts identified by the United States Fish & Wildlife Service, Keystone cannot commit to follow conditions that are within the jurisdiction of the USFWS. (TC-4, ¶ 26; TC-5, ¶ 22.) Nesting habitat for the Least Tern and Piping Plover (ii) and active bald eagle nests (iii) are addressed in the Biological Assessment that USFWS and the Department of State are finalizing. (*Id.*) Keystone would not object to a condition on leks as follows:

“Keystone shall identify all sage and sharp-tailed grouse leks within two miles of the construction right of way. During construction, Keystone shall endeavor to avoid impacts during the nesting season within one mile of active nests between March 1 and June 15.”

### **4. Soil-related environmental hazards and recommendations.**

Staff's recommendations are on pages 19-20 of its brief.

Keystone would modify Staff's first recommendation to read as follows: “Prior to construction, the Applicant should, with input from the NRCS, develop specific construction/reclamation units or soil handling procedures prior to construction in soils with low reclamation potential.” Staff's reference to “all soil challenges” is ambiguous

and imprecise. The development of con/rec units is applicable to specific land uses and environmental settings. (S-4, p. 9.) Dr. Arndt's testimony about soil-handling procedures focused on soils with low reclamation potential. (Tr. at 272, 275-76.)

Keystone would modify Staff's second recommendation to read as follows: "In the development of the construction/reclamation units and where NRCS recommends, the Applicant should conduct analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to PUC Staff and to the specific landowner affected by such soils upon request."

Keystone would modify Staff's third recommendation to read as follows: "Through development of the construction/reclamation units and consultation with NRCS, the Applicant should identify soils for which alternative handling methods are recommended. Alternative soil handling methods may include but are not limited to the 'triple-lift' method. The Applicant will inform landowners of the options applicable to their property before implementing the selected measure that will be used. Records regarding this process shall be available to PUC Staff upon request." Keystone's proposal is based on testimony that Keystone not be locked into one particular method. (Tr. at 594-96.)

Keystone agrees with Staff's fifth and sixth recommendations.

Staff's fourth recommendation duplicates the first, that it develop construction/reclamation units, and overstates the detail provided in the construction/reclamation units, which are meant to be used with Keystone's CMR Plan and other construction documents to identify where erosion control or other site-specific procedures would be implemented.

## **5. Sediment control**

Staff's first recommendation is that Keystone use floating sediment curtains to maintain sediments within the construction right of way as recommended by Ross Hargrove. (Staff Br. at 21; Tr. at 350, 353.) Keystone has used floating sediment curtains only in flowing streams. (TC-7, ¶ 25.) Because Keystone will cross waterbodies along the route with 24-48 hours, in-stream devices are not necessary. (TC-1, Ex. B, ¶ 7.4.2.)

Staff's second recommendation is that Keystone install sediment barriers in the vicinity of delineated wetlands and water bodies. (Staff Br. at 21.) Keystone agrees that the use of sediment barriers is appropriate depending on topography, as described in its CMR Plan. (TC-1, Ex. B, ¶¶ 6.4, 7.7.) Keystone would modify the recommendation to read: "The Applicant should install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in their CMRP regardless of the presence of water flow at the time of construction."

Staff's third recommendation is that Keystone consult with SDGFP to avoid construction near sensitive water bodies during fish spawning. (Staff Br. at 21.) Because there are no significant commercial or recreational fisheries impacted by the Project, consultation is unnecessary. (TC-5, ¶ 26; TC-16, DR 3-75.)

**6. Frac-out.**

Staff recommends that Keystone develop South Dakota-specific frac-out plans where horizontal directional drilling will occur. (Staff Br. at 21-22.) Keystone agrees to develop a South Dakota-specific frac-out plan limited to areas where horizontal directional drilling of water bodies will occur.

**7. Wetland crossing, water bodies and riparian areas.**

Staff makes eight recommendations. (Staff Br. at 23.) The first is that the right of way be limited to 75 feet in non-cultivated wetlands, as opposed to Keystone's proposed 85-foot right of way. Keystone maintains that it is not standard industry practice to reduce construction rights of way to 75 feet in wetlands. (TC-7, ¶ 20.) It is FERC's recommended practice, but, FERC does not have regulatory authority over a crude-oil pipeline. (S-8 at 1; Tr. at 353.)

Keystone agrees with Staff's second recommendation that extra work space be located at least 50 feet from wetlands and water boundaries except where site-specific or topographical conditions do not permit. (TC-7, ¶ 20.)

Keystone agrees with Staff's third recommendation.

Keystone agrees with Staff's fourth recommendation, except that there is no state agency that permits stream crossings.

Staff's fifth recommendation is that wetland and water body boundaries and buffers should be 15 feet and marked and maintained until ground-disturbing activities are completed. Keystone would modify the recommendation as follows: "Wetland and water body boundaries should be marked and maintained until ground-disturbing activities are completed. Keystone will maintain 15-foot buffers where practicable and for stream crossings, until the period of trenching and pipe laying."

Keystone agrees with Staff's remaining three recommendations.

**8. Restored land productivity and use by the landowner.**

Staff makes 12 recommendations. (Staff Br. at 27-28.)

The first recommendation includes language that Keystone's construction/reclamation unit maps shall be created with specific information "regarding restored land productivity." (Staff. Br. at 27.) This language is unclear. Keystone proposes that the first sentence of the recommendation read as follows: "Keystone shall prepare construction/reclamation unit maps in consultation with area NRCS staff. The construction/reclamation units shall contain the sort of information described in response to Staff Data Request 3-25." (TC-5, ¶ 9; TC-16, DR 3-25.)

Keystone's second recommendation concerns "specific crop monitoring protocols for agricultural lands." (Staff Br. at 28.) Keystone would modify the language to refer to "specific crop monitoring protocols for active crop lands."

Keystone agrees to staff's third, fourth, fifth, and sixth recommendations.

Staff's seventh recommendation is that Keystone complete cleanup in non-residential areas within 20 days of backfilling the trench, and within 10 days in residential areas unless practically infeasible. (Staff Br. at 28.) Keystone requests instead that it be allowed 20 days in non-residential areas to complete final grading, topsoil replacement, and installation of erosion control structures except when weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control do not permit the work to be done within that time. (TC-6, ¶ 12.) There are no residential areas along the pipeline route.

Staff's recommendations on compaction are several: that stringing trucks use the proposed trench line for travel where conditions allow; that subsoil be decompacted before and after replacement of the topsoil; and that decompaction be done a second time if the right of way is used for travel after topsoil replacement. (Staff Br. at 25-26.)

Keystone agrees that stringing trucks will travel on the proposed trench line where conditions allow. (TC-7, ¶ 10.) Keystone does not agree that the topsoil needs to or should be decompacted. Topsoil is typically loose when spread across the right of way



and does not need to be decompacted. In addition, conducting decompaction after the topsoil is replaced could result in mixing the topsoil and subsoils. (Tr. at 342.)

**9. Construction-related water contamination.**

Staff recommends that fuel storage and refueling be minimized within 200 feet from private wells and 400 feet from municipal wells. (Staff Br. at 28.) Keystone maintains that the industry standard for refueling and fuel storage is not within 100 feet from surface water and known private water wells. (TC-7, ¶ 7.) Keystone's spill protection containment plan is sufficient to protect private wells. (*Id.*)

**10. Noise.**

Staff recommends that pump station noise be limited to 55 DBA at the nearest noise sensitive area after construction, that Keystone must conduct subsequent noise assessment if the PUC receives noise complaints to show compliance with 55 DBA, and that Keystone must remedy any violation. (Staff Br. at 29.) Keystone agrees to abide by this standard. (TC-7, ¶ 26.)

**11. Road and railroad concerns.**

Staff makes five recommendations. (Staff Br. at 30.) The first is that Keystone coordinate with emergency responders regarding the timing and intended duration of temporary road closures. (*Id.*) This recommendation is unnecessary because Keystone cannot close a road without a permit, which requires evidence that Keystone consulted

with emergency responders. (TC-1, Ex. B, ¶ 2.17.) Keystone agrees with the other recommendations.

**12. Cattle movement.**

Staff recommends that Keystone coordinate with landowners to protect cattle and adequately compensate the landowner for any loss. (Staff Br. at 30.) Keystone agrees.

**13. Fence, drain tile, and other private property.**

Staff recommends generally that Keystone is responsible for full restoration or compensation of all damage to private property resulting from construction or operation of the pipeline, including livestock, fences, and drain tile. (Staff Br. at 31.) Keystone agrees. Staff makes four more recommendations specific to drain tile. (*Id.*) Keystone agrees, except for the recommendation that Keystone hire qualified drain tile contractors to repair drain tile. (*Id.*) Keystone is unaware of any union drain-tile contractors. (TC-7, ¶ 18.) Keystone does not expect to encounter any significant amount of drain tile on the Keystone XL right of way. (TC-7, ¶ 18.)

**14. Landowner communication.**

Staff recommends that Keystone provide a public liaison officer approved by the Commission, as with the Keystone pipeline project. (Staff Br. at 32.) Staff also recommends that Keystone file a confidential list of property owners crossed by the pipeline. (*Id.*) Keystone agrees with both of these recommendations.

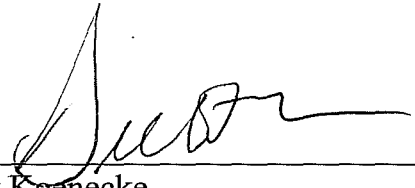
## Conclusion

Not all of Staff's recommendations are necessary to mitigate the effects of construction and operation of the Project. Keystone respectfully requests that Staff's recommendations be implemented as qualified in this brief.

Dated this 2<sup>nd</sup> day of February, 2010.

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