

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

0-0

IN THE MATTER OF THE APPLICATION	:	HP 09-001
BY TRANSCANADA KEYSTONE		
PIPELINE, LP FOR A PERMIT UNDER	:	
THE SOUTH DAKOTA ENERGY		
CONVERSION AND TRANSMISSION	:	APPLICANT'S
FACILITIES ACT TO CONSTRUCT THE		MOTION FOR LIMITED
KEYSTONE XL PROJECT	:	RECONSIDERATION OF
		CERTAIN PERMIT CONDITIONS
	:	

0-0

On March 12, 2010, the Public Utilities Commission entered a Final Decision and Order, including 50 permit conditions. Because a few of the conditions are either unclear, impractical to implement, or likely to create conflict, Applicant TransCanada Keystone Pipeline, LP (“Keystone”), respectfully requests that the Commission clarify or reconsider the following conditions.

**¶ 16. Construction methods.**

In paragraph 16(j), the condition requires that Keystone notify landowners of “any” spill of hazardous materials on their lands. Keystone had requested that the notice requirement be limited to “significant” spills. Instead, Keystone proposes that the notice

requirement be tied to a definable standard of five gallons based on federal law.<sup>1</sup> To avoid the logistical and practical problems associated with notifying landowners of “any” spill, Keystone requests that its reporting obligation be limited to spills of five gallons or more.

**¶ 20. Sediment control practices.**

This condition requires in subparagraph (a) that Keystone use floating sediment curtains in the construction right of way in lieu of straw bales when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. Keystone does not understand how it could implement this condition. Sediment curtains are used only in flowing streams and would not be installed in the construction right of way. (TC-7, ¶ 25.) Staff's expert, Ross Hargrove, testified that a sediment curtain is “basically a curtain with floats on top which can be installed in areas of open water.” (Tr. at 350.) Although Hargrove testified that he thought sediment curtains should be used in “several small reservoir or stocks ponds which may be crossed by the project,” his examples are not flowing waterbodies. Moreover, Keystone will cross waterbodies within 24-48 hours, making in-stream devices unnecessary. (TC-1, Ex. B, ¶ 7.4.2.) Straw bales or silt fences, by contrast, would be installed on land, and so could be used in the right of way, but they are not an alternative to, or used in conjunction with, floating sediment curtains. There is

---

<sup>1</sup> The federal pipeline safety regulations at 49 CFR Section 195.50 require that an accident report be filed for each

no evidence in the record that floating sediment curtains could or should be used in the construction right of way.

Keystone does not object to the use of sediment barriers in appropriate circumstances, which is addressed in its CMR Plan (TC-1, Ex. B, ¶¶ 6.4, 7.7), but this condition is not consistent with Keystone's experience or with Staff's expert testimony and Keystone does not believe it is what was intended nor understand how to implement it. Keystone proposes that the condition in subparagraph (a) instead read as follows:

Keystone shall use floating sediment curtains to maintain sediments downstream of the construction right of way in flowing streams, if appropriate. On the construction ROW, silt fences may be used to augment straw bales in areas of high erosion potential. Keystone shall use sediment curtains in non-flowing streams where appropriate.

**¶ 22. Construction across or near wetlands, waterbodies, or riparian areas.**

In paragraph 22(a), the condition limits the width of the construction right of way to 75 feet in non-cultivated wetlands. Because the United States Army Corps of Engineers has regulatory oversight of all waters of the United States through the Nationwide Permit Program pursuant to 33 C.F.R. part 330 and § 404 of the Clean Water Act, Keystone requests that the condition include the following limitation: "unless a different width is approved or required by the United States Army Corps of Engineers."

In paragraph 22(c), the condition requires that spoil from water body crossings of

---

failure in a pipeline system subject to this part in which there is a release of the hazardous liquid or carbon dioxide of

streams greater than 30 feet in width shall be stored in the construction right of way at least ten feet from the water's edge. Paragraph 22(d) also addresses storage in streams greater than 30 feet in width, and requires something different. Because the methods addressed in (c) and (d) are different, Keystone presumes that subparagraph (c) should apply for streams "up to" 30 feet in width, not streams "greater than" 30 feet.

In paragraph 22(e), the condition requires maintaining 15-foot buffers for stream crossings. Keystone had requested that the condition be limited to flowing stream crossings. Of the 200 stream crossings in South Dakota, less than 50 are flowing streams. A list of perennial and intermittent waterbodies was provided in response to Staff's Third Data Request 3-37. (TC-3, No. 3-37.) There is no evidence in the record indicating that any purpose would be served by maintaining a 15-foot buffer, which requires a break in pipeline construction, followed by a subsequent pipeline tie-in weld at a later date for crossing a dry stream bed. As drafted, the condition would impose impracticalities, significant construction burden, extended duration of open trench scenarios, and ultimately lengthened inconvenience to the landowner, but would serve no purpose in 75% of the cases in which it would apply.

**¶ 41. Protection and mitigation efforts.**

This condition requires that Keystone identify habitat for prairie chicken and sage

and sharp-tailed grouse within the buffer distances set forth for each species in its Application. Because some information has changed since the Application was filed, Keystone requests that the governing reference not be the Application, but the Federal Environmental Impact Statement prepared by the United States Department of State and the Biological Assessment prepared by the United States Fish and Wildlife Service, both of which Keystone must comply with when they are issued. Keystone proposes that the condition read as follows:

Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service and SDGFP. Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS. In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

**¶ 43. Cultural resources.**

This condition requires Keystone to cease work and develop a plan to address the discovery of protectable resources as directed by the State Historic Preservation Office. Pursuant to § 106 of the National Historic Preservation Act, however, the Department of State, not the SHPO, has the authority to determine what constitutes a protectable resource and to approve a plan to deal with it. As Paige Hoskinson Olson testified, "it's the Department of State's responsibility to determine what effects the project will have to

those historic properties if they're found and then to minimize or mitigate the effects to those properties.” (Tr. at 452.) Keystone proposes that the condition read as follows:

In accordance with Application, Section 6.4, Keystone shall follow the “Unanticipated Discoveries Plan,” as reviewed by the State Historical Preservation Office (SHPO) and approved by the Department of State and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3. If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS and the State Historical Preservation Office. If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage, avoid or protect the archaeological resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain commission and landowner approval for the new route before proceeding with any further construction. Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.

**¶ 44. Paleontological resources.**

The only guidelines addressing how paleontological resources should be handled if discovered during construction are published by the Bureau of Land Management. *See* BLM H-8270-1 (attached as Exhibit A), IM 2008-009 (attached as Exhibits B and C), and IM 2009-011 (attached as Exhibit D). These guidelines apply only to state and federal lands. Keystone therefore requests that this condition apply only to activity on all state and federal lands crossed by the pipeline as well as private lands where the landowner agrees.

With respect to subparagraph (a) of the condition, Keystone proposes that the condition be tied to BLM's Paleontological Resource Management Guidelines cited above, including the Potential Fossil Yield Classification system, which provide a more definite and ascertainable standard than does the undefined reference to fossils "of scientific or economic significance." The lack of a clear standard would invite conflict, unnecessary expense, and delay. Keystone proposes that subparagraph (a) be revised to read as follows:

Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the SD School of Mines and Geology to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system. Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.

Again following BLM guidelines, Keystone proposes that subparagraph (b) be revised as follows to be more specific about its obligations in conducting field surveys:

Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrian field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically significant surface fossils and evidence of subsurface fossils. Scientifically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare

vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found.

In subparagraph (c), Keystone proposes that the monitoring requirement be tied to the BLM standards, and limited to a trained paleontologist, whose training, education, and experience far exceeds the training that Keystone could provide to an environmental monitor. It is impractical to train environmental monitors to perform as a paleontological monitor. Keystone proposes that subparagraph (c) be revised to read as follows:

Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.

In subparagraph (d), the condition allows a landowner to determine whether a fossil is of scientific or economic significance, and then to stop construction until the parties develop an acceptable plan to address the fossil. Again, the condition invites conflict, expense, and delay because it is not tied to a definable standard. Keystone proposes that the condition be revised as follows:



If during construction Keystone or its agents discover what may be of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowners. Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of scientific significance as defined in subparagraph (b) above. If a scientifically significant paleontological resource is discovered on state land, Keystone will notify the Museum of Geology at the SD School of Mines and Technology (SDSM), and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSM determines that a scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner, BLM, or SDSM, as applicable, to accommodate the landowner's, BLM's or the SDSM's salvage or avoidance of the paleontological resource at the expense of the landowner, BLM, or the SDSM, to protect the resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.

Keystone in no way seeks to avoid the obligations the Commission seeks to impose to protect paleontological resources. Rather, Keystone seeks workable conditions tied to definable standards that will not promote conflict, expense, and delay.

**¶ 45. Damage Liability.**

Keystone requests that the concluding phrase of this condition addressing loss of value to a paleontological resource damaged by construction be omitted consistent with

its proposed revisions to paragraph 44.

### Conclusion

By its motion, Keystone seeks only to clarify conditions that seem impractical, that it does not understand how to implement, or that do not offer sufficient guidance to prevent conflict during construction. For the reasons indicated, Keystone respectfully requests that the Commission clarify or modify the conditions attached to its Final Order.

Dated this 9<sup>th</sup> day of April, 2010.

MAY, ADAM, GERDES & THOMPSON LLP

By 

Brett Koenecke  
503 South Pierre Street  
PO Box 160  
Pierre, SD 57501  
Phone (605) 224-8803

- and -

WOODS, FULLER, SHULTZ & SMITH P.C.

William Taylor  
James E. Moore  
PO Box 5027  
300 S. Phillips Avenue, Suite 300  
Sioux Falls, SD 57117-5027  
Phone (605) 336-3890  
Fax (605) 339-3357  
Email james.moore@woodsfuller.com  
bill.taylor@woodsfuller.com

Attorneys for TransCanada