

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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| IN THE MATTER OF THE PETITION OF |) | STAFF'S POST-HEARING |
| TRANSCANADA KEYSTONE PIPELINE, LP |) | REPLY BRIEF |
| FOR ORDER ACCEPTING CERTIFICATION |) | |
| OF PERMIT ISSUED IN DOCKET HP09-001 |) | HP14-001 |
| TO CONSTRUCT THE KEYSTONE XL |) | |
| PIPELINE |) | |

COMES NOW Commission Staff ("Staff") and hereby files this brief in reply to post-hearing briefs submitted by other parties. For the purpose of this reply, all references shall remain the same as initially provided in Staff's Post-Hearing Brief filed on September 28, 2015.

After carefully reading and considering the briefs submitted by all parties, there are two issues Staff addresses at this time. First, the burden of proof, and second, the applicability of the public trust doctrine.

I. Burden of Proof

Not surprisingly, views expressed in the post-hearing briefs differed as to which party, applicant or intervenor, bears the burden of proof. There are naturally three elements to the discussion of burden of proof: 1) who bears the burden, 2) what is the burden, and 3) what must be proven.

Staff agrees with several of the parties that Keystone bears the burden of proof under ARSD 20:10:01:15.01. Keystone is the petitioner in this matter. Therefore, Keystone "has the burden of going forward with presentation of evidence..." ARSD 20:10:01:15.01.

However, Staff disagrees with some of the other parties as to what standard is applicable. It has been argued by other parties that the standard is substantial evidence. To the contrary, the Court has held that "[t]he general burden of proof for administrative hearings is preponderance of the evidence." *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605. "Preponderance of the

evidence is defined as the greater weight of evidence.” *Pieper v. Pieper*, 2013 SD 98, ¶22, 841

NW2d 787 (citation omitted). Black’s Law Dictionary defines preponderance of the evidence as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (10th ed. 2014). Even the case which intervenors cite for their argument that the standard is substantial evidence actually holds that the standard at the administrative level is preponderance of the evidence. *Helms v. Lynn's, Inc.*, 1996 SD 8, ¶22, 542 NW2d 764, 768. The substantial evidence burden is applied to an agency’s decision on appeal. *Id.* at ¶10. Meaning, an appellate court will determine whether there was substantial evidence to show that the petitioner met its burden of preponderance of the evidence.

The final question is what must Keystone prove by a preponderance of the evidence? Simply stated, Keystone must prove that it has satisfied the requirement(s) of the statute at issue, SDCL 49-41B-27, by a preponderance of the evidence. As Staff explained in its post-hearing brief, a plain reading of this statute requires Keystone to certify that the Keystone XL Pipeline continues to meet the conditions upon which the permit was issued. Staff notes that Keystone witness, Corey Goulet, President of Keystone Projects, testified that he certified that “Keystone is or will be able to satisfy all of the conditions imposed by the Commission as part of its Amended Final Decision and Order dated June 29, 2010.” (See Exhibit 2001, page 4). Thus, the weight of the evidence establishes that Keystone has properly certified that it can continue to

meet the conditions, as required by SDCL 49-41B-27. No evidence was presented to weigh against the assertion that Keystone certified as required by statute.

If Keystone cannot or does not meet the conditions, as it has certified it would, the proper forum in which to address that issue is a violation filing under SDCL 49-41B-34, if and when the Project is constructed or operated. This may not be the preferable or pragmatic approach, but it is the only approach the Legislature has provided in which to address violations of a siting permit. The Legislature has not provided this Commission with the power to grant injunctive relief by effectively revoking a permit which was legally granted without appeal by a previous Commission.

Public policy may indeed suggest that the Commission should have broader, more expansive authority, and that merely requiring certification from a company that it can continue to meet the conditions listed in the permit is not enough. However, "it is the responsibility of the Legislature, rather than the PUC, to change the statute." *In re West River Electric Association, Inc.*, 2004 SD 11, ¶25, 675 NW2d 222, 230.

If, however, the Commission disagrees with Staff's assertion that certification is all that is required of the company under SDCL 49-41B-27, and instead finds that, as intervenors have asserted, that Keystone must demonstrate that it can meet the conditions upon which the permit was granted, the preponderance of the evidence standard continues to apply. In that case, the Commission would need to determine if, based upon the evidence, it is more likely than not that Keystone can continue to meet the conditions. See, *Pieper*, 841 NW2d at 787 (holding that the trial court must determine if it is more likely than not that a child was being abused). Therefore, Keystone must show that a majority of the evidence, however slight, indicates that Keystone can continue to meet the original conditions upon which the permit was initially granted. See, *Hanten*

v. Palace Builders, Inc., 1997 SD 3, ¶9, 558 NW2d 76, 78 (holding that a claimant's burden is not met when the probabilities are equal). The substantial evidence standard is a standard applied by the appellate court. An appellate court would look at the Commission's decision to determine whether there was substantial evidence to suggest that Keystone satisfied the preponderance of the evidence burden, not whether Keystone proved their case based upon substantial evidence.

II. Public Trust Doctrine

Much mention is made of the public trust doctrine. Since this is an issue which has not been previously addressed and is likely to come before the Commission again, Staff takes this opportunity to discuss the public trust doctrine and its applicability to the Keystone proceedings.

DRA argues in its post-hearing brief that the "public trust doctrine imposes upon the Commission a heightened fiduciary standard when it comes to protecting South Dakota's environment and resources... DRA suggests that the application of [this doctrine] means that the Commission should set a higher bar for companies such as TransCanada, whose activities risk damaging the State's land and water resources." (DRA at 9) DRA cites no authority for its assertion that a) a higher burden is imposed, or b) the claim that soil, grasses, and crops are public trust assets. Failure to cite authority is waiver of an argument. *Guthmiller v. South Dakota Department of Transportation*, 502 NW2d 586, 589 (SD 1993).

There is no citation to authority that the public trust doctrine requires the Commission to examine applications for permits or certification under a higher burden of proof than that required by SDCL 49-41B-22 or 49-41B-27. Although, as a Legislatively-created agency, the Commission is subject to the public trust doctrine and the fiduciary responsibilities it imposes, those responsibilities are as the Legislature provides. The Legislature has provided those in

SDCL 49-41B-22, which notably is not applicable to the pending docket, as the permit has already been issued. The legislature has spoken on this issue by creating a statute laying out the burden and the statute did not create a heightened burden for water resources. Therefore, a heightened burden cannot be inferred. When a statute is “clear, certain, and unambiguous, there is no reason for construction” and the statute must be applied “as clearly as expressed.”¹ *Save our Neighborhood—Sioux Falls v. City of Sioux Falls*, 2014 SD 35, ¶8, 849 NW2d 265, 268.

In addition, the Commission cannot enlarge the authority it has been granted by the Legislature. “Once the Legislature has created broad policy through its enactments, it may delegate in the execution of that policy certain quasi-legislative powers for functions to executive or administrative officers or agencies.” *Krsnak v. South Dakota Department of Environment and Natural Resources*, 2012 SD 89, ¶13, 824 NW2d 429, 435 (citations omitted). However, the Commission cannot exceed the authority granted to it by the Legislature. See generally, *Matter of Northwestern Public Service Co.*, 1997 SD 35, 560 NW2d 925.

Clearly the Legislature recognizes the public trust doctrine and has not taken its responsibility toward the state’s water resources lightly. Therefore, it cannot be presumed that its failure to task the Commission with enforcing a higher burden was an oversight. The Legislature has recognized the importance of the public trust doctrine in not only giving the Commission broad authority to protect water and the environment in general by enacting SDCL 49-41B-22, but has also enacted a comprehensive water pollution control program administered by the Department of Environment and Natural Resources, including stringent pollution control penalties. See, SDCL 34A-2-75.

¹ This same case law applies to interpretation of the requirements of SDCL 49-41B-27.

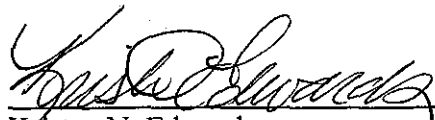
Contrary to the assertion of DRA, the public trust doctrine applies only to water resources. See, *Parks v. Cooper*, 2004 SD 27, ¶32, 676 NW2d 823, 834 (“all water within the state is the property of the people of the state.”). Therefore, even if DRA had cited some authority to argue that a higher burden is imposed, that burden would only apply to water resources.

III. Conclusion

The Legislature gave the Commission the authority to protect the environment through the permit process. Final conditions attached by the Commission during this permit process ultimately safeguard the integrity of the environment. Stringent conditions were set forth in the 2010 permit. These conditions will have to continue and Keystone is legally obligated to ensure that they do, but certification as found in SDCL 49-41B-27 does not create a forum to litigate those conditions again. Certification is merely a statement of verification that Keystone continues to meet the conditions upon which the permit was issued.

For these reasons and those identified in Staff’s Post-Hearing Brief, Staff maintains its previously-stated position.

Respectfully submitted this 28th day of October, 2015.



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