

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

<b>IN THE MATTER OF THE APPLICATION BY )</b>	<b>ORDER GRANTING IN PART</b>
<b>TRANSCANADA KEYSTONE PIPELINE, LP )</b>	<b>MOTION TO RECONSIDER</b>
<b>FOR A PERMIT UNDER THE SOUTH DAKOTA )</b>	<b>AND AMENDING CERTAIN</b>
<b>ENERGY CONVERSION AND TRANSMISSION )</b>	<b>CONDITIONS IN FINAL</b>
<b>FACILITIES ACT TO CONSTRUCT THE )</b>	<b>DECISION AND ORDER</b>
<b>KEYSTONE XL PROJECT )</b>	

**HP09-001**

On March 12, 2010, the South Dakota Public Utilities Commission (“Commission”) issued its Final Decision and Order; Notice of Entry in this proceeding (“Decision”)<sup>1</sup>. The permit to construct approved in the Decision was granted subject to fifty Permit Conditions (“Conditions”) appended as Exhibit A to the Decision. On April 14, 2010, TransCanada Keystone Pipeline, LP (“Keystone” or “Applicant”) filed Applicant’s Motion for Limited Reconsideration of Certain Permit Conditions (“Motion”). On April 19, 2010, intervenors David Niemi (“Niemi”) and Paul Seamans (“Seamans”) filed responses to the Motion. On April 19, 2010, Peter Larson (“Larson”) filed two comments responsive to the Motion. On April 27, 2010, Keystone filed Applicant’s Reply Brief In Support of Motion for Limited Reconsideration responding to the responses and comments filed by Niemi, Seamans and Larson. On April 28, 2010, the Commission’s Staff (“Staff”) filed a response to the Motion. On April 29, 2010, intervenor Dakota Rural Action (“DRA”) filed the Answer of Dakota Rural Action in Opposition to Applicant’s Motion for Limited Reconsideration of Certain Permit Conditions (“Answer”).

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-41B, specifically SDCL 49-41B-24, and ARSD 20:10:01:29 through 20:10:01:30.02.

At its regularly scheduled meeting on May 4, 2010, the Commission considered the Motion and the responses and comments filed by the parties and Larson. Applicant, Staff, intervenor John H. Harter, DRA and Larson appeared and participated in the hearing on the Motion. After an extensive discussion among the Commission and participants, the Commission made the following rulings on the specific requests in the Motion and voted to grant the Motion in part and deny in part and amend certain of the Conditions as set forth herein with respect to each action taken.

Condition 16(j) – Chairman Johnson moved to amend the last sentence of Condition 16(j) to read as follows: “Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer’s representative.” The Commission voted unanimously in favor of the motion.

Condition 20(a) - Chairman Johnson moved to amend Condition 20(a) by substituting for the current language Staff’s proposed language on page 2 of its response to the Motion, with the second sentence modified as proposed by DRA on page 11 of its Answer to read as follows: “Keystone shall use floating sediment curtains to maintain sediments within the construction right of

<sup>1</sup>The transcript of the May 4, 2010 hearing on the Motion and all other filings and documents in the record are available on the Commission’s web page for Docket HP09-001 at: <http://puc.sd.gov/dockets/hydrocarbonpipeline/2009/hp09-001.aspx>

way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan." The Commission voted unanimously in favor of the motion.

Condition 22(a) – Chairman Johnson moved to amend Condition 22(a) as requested by Keystone by adding the following language to the end of the subparagraph: "unless a different width is approved or required by the United States Army Corps of Engineers." The Commission voted unanimously in favor of the motion.

Condition 22(c) – Chairman Johnson moved to amend Condition 22(c) as requested by Keystone to correct an editing error in the original by deleting "greater than" and substituting "up to." The Commission voted unanimously in favor of the motion.

Condition 22(e) – Chairman Johnson moved to amend Condition 22(e) as requested by Keystone to clarify that the 15-foot buffer need only be maintained where practicable for streams other than non-flowing streams. The Commission voted unanimously in favor of the motion.

Condition 41 – Commissioner Kolbeck moved to amend Condition 41 as requested by Keystone to clarify that the measures to be followed for buffering and protection of wildlife, including greater prairie chicken and greater sage and sharp-tailed grouse, will be those specified by the U.S. Fish and Wildlife Service ("USFWS") and the South Dakota Department of Game, Fish and Parks ("SDGFP"). The Commission voted unanimously in favor of the motion.

Condition 43 – Commissioner Hanson moved to approve the amendments requested by Keystone dealing with cultural resource discovery but with the re-inclusion of notice to the landowner of a discovery as provided in the original language. The Commission voted unanimously in favor of the motion.

Condition 44 – Chairman Johnson moved to not allow the striking of economic value or significance from the Conditions, particularly Condition 44. The Commission voted unanimously in favor of the motion.

Condition 44(c) – Commissioner Hanson moved to adopt the Applicant's suggestion of substituting "BLM permitted paleontologists" for "monitors" Condition 44(c). The Commission voted unanimously in favor of the motion.

Condition 44(d) – Chairman Johnson moved to adopt the Applicant's change to paragraph Condition 44(d) to allow only BLM permitted paleontologists the ability to trigger the chain of events listed in Condition 44(d). Prior to action on the motion, Chairman Johnson made a substitute motion that that instead of wording proposed by the Applicant, that Condition 44, and in particular the provisions of Condition 44(d) dealing with responsibility for the costs of a reroute or excavation to avoid or mitigate damage to a paleontological discovery, be revised to make it clear that the same legal framework that BLM operates under and the Applicant has to operate under on BLM lands would apply between the landowner and the Applicant, as applicable (e.g. curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner). The Commission voted unanimously in favor of the motion.

Condition 44 – Commissioner Kolbeck moved to adopt DRA’s change to have the Applicant take appropriate steps within its control to maintain the confidentiality of the location of sensitive and valuable resources. The Commission voted unanimously in favor of the motion.

Condition 44 – Chairman Johnson moved to adopt the Applicant’s remaining changes to Condition 44 that had not been addressed in prior motions. The Commission voted unanimously in favor of the motion.

Condition 45 – Chairman Johnson moved to deny the request of the Applicant to change Condition 45 of the Conditions by deleting or loss of value to a paleontological resource. The Commission voted unanimously in favor of the motion.

General – Chairman Johnson moved to allow Mr. John Smith, Commission Counsel, the ability to bring issues regarding these changes before the Commission for further clarification. The Commission voted unanimously in favor of the motion.

It is therefore

ORDERED, that certain of the Conditions to the Permit set forth in Exhibit A of the Decision, as denoted by Condition and subparagraph number, shall be amended to read as follows, with the changes indicated by overstrikes and underlines:

- 16. j) Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected. Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.
  
- 20. a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in lieu of straw bales in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan.
  
- 22. a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone’s proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.
  - c) Water body crossing spoil, including upland spoil from crossings of streams greater than up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water’s edge or in additional extra work areas and only on a temporary basis.

e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.

41. Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service (“USFWS”) 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 Application, Section 5.5.2.4, Table 10 ~~the FEIS and Biological Assessment (BA) prepared by DOS and USFWS.~~ In accordance with its commitments in Application, Section 5.5.2 and Exhibit TC44, ¶¶ 25 and 26 ~~the FEIS and BA,~~ Keystone shall avoid or restrict construction activities as specified by USFWS and SDGFP within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

43. 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~~ DOS 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, the affected landowner(s) and the ~~State Historical Preservation Office~~ SHPO. If the DOS and SHPO determines that a protectable significant resource is present, Keystone shall develop a plan that is acceptable to the SHPO 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. Keystone shall implement and comply with the following procedures regarding paleontological resources:

a) Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Geology Technology (“SDSMT) to identify known fossil sites along the pipeline route and areas where the probability is high of encounter during construction of fossils identify locations of surface exposures of scientific or economic significance 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.

b) 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 as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, 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 or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically 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.

c) 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 a trained on-site BLM permitted monitors in high probability areas and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. In all areas where the trench will be located in the Hell Creek Formation, Keystone shall, if requested by the landowner, utilize a trained on-site paleontological monitor, which may be the environmental monitor if trained in paleontological resource identification. 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.

d) If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific or economic 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 landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. or if an economically or scientifically significant paleontological resource is discovered on state or federal land, Keystone will notify the Museum of Geology at the SD School of Mines and Technology SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone shall, upon discovery, turn over any fossils in its possession to the owner of the land from which excavated or, if on state or federal land, the Museum of Geology and shall not return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or Museum of Geology SDSMT determines that a valuable economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or Museum of Geology SDSMT, as applicable, to accommodate the landowner's or Museum of Geology's salvage or avoidance of the paleontological resource at their expense or to avoid and protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). 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 and

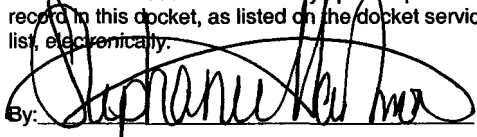
monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.

e) To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

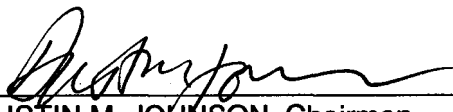
and it is further

ORDERED, that the Permit Conditions of the Final Decision and Order; Notice of Entry shall be so amended as to incorporate the amendments approved in this Order and an Amended Final Decision and Order shall be issued in non-redlined form with the Notice of Entry amended to conform to the issuance date.

Dated at Pierre, South Dakota, this 29<sup>th</sup> of June, 2010.

<b>CERTIFICATE OF SERVICE</b>
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: 
Date: 06/29/10
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

  
DUSTIN M. JOHNSON, Chairman

  
STEVE KOLBECK, Commissioner

  
GARY HANSON, Commissioner