

Planning Commission Chair & Members

c/o Mr. Ben Dennis  
York County Zoning Administrator  
510 Lincoln Avenue  
York, NE 68467

Mark Johnson  
Stakeholder Relations  
TransCanada Keystone Pipelines  
13710 FNB Parkway  
Omaha Nebraska 68154

Tel: 1.402.492.7435  
Email: [marke\\_johnson@transcanada.com](mailto:marke_johnson@transcanada.com)  
Web: [keystone-xl.com](http://keystone-xl.com)

**Transmittal of Keystone Comments to the York County Planning Commission regarding proposed modifications to zoning, ordinances, and related requirements**

July 10, 2014

The attached comments are submitted on behalf of TransCanada Keystone Pipelines. We appreciate the opportunity to comment and look forward to discussing these comments with the Planning Commission and with other interested stakeholders.

Our comments reflect only practical concerns with the proposed regulations but not legal concerns. As is the case with any significant expansion of the scope of county zoning, we also encourage the Planning Commission to seek the advice of the county's legal counsel on these issues.

If you have questions, please let me know.

Sincerely,



Mark Johnson  
Stakeholder Relations  
TransCanada Keystone Pipelines

Copy to:

William H. Bamesberger, Chairman, York County Board of Commissioners  
Kelly Turner, York County Clerk

Attachment:

Keystone Comments to the York County Planning Commission regarding proposed modifications to zoning, ordinances, and related requirements

**Keystone Comments to the York County Planning Commission regarding proposed modifications to zoning, ordinances, and related requirements**

**A. Executive Summary**

**A.1 We agree conceptually with the stated intent of new regulations, which largely replicate existing requirements**

We agree with the stated intent of the proposed Cropland Production Protection Overlay District (CPPO) of ensuring that underground transmission systems, including our proposed pipeline, do not have adverse effects on York County economic interests.

Ensuring that our pipeline does not cause adverse economic effects has been and will remain a guiding principle in the way we conduct business in York County, Seward County, and other counties in Nebraska and other states. It is also consistent with federal laws and regulation that govern different aspects of pipeline construction, operation, and maintenance. In Nebraska, it largely duplicates the requirements of existing state law.

Keystone is responsible, both by statute and common law for damages we cause. During construction, we anticipate that land will be taken out of production temporarily and we compensate landowners for those impacts as well as for impacts while the land recovers. With the use of modern construction techniques, we do not anticipate longer-term impacts on productivity. In the unlikely event that there are longer-term impacts, any future reduced productivity caused by our pipeline is our responsibility. Keystone easements are non-exclusive, which means that other facilities may cross our easement, provided proper safety precautions are taken. We routinely facilitate the installation of new irrigation lines and systems across our existing pipelines. And we work with landowners to minimize the impacts of our activities on their land and compensate them for the impacts we cause.

The fact that we have diligently addressed these and similar topics has been an important impetus for York County landowners to grant easements for more than 90 percent of the required Keystone XL right of way in York County. The discussions we routinely have with landowners when negotiating easements allow for customization of the approach to reduce impacts to landowners and to suit their preferences, where feasible. We look will continue to work with remaining landowners who have not yet signed easements in an effort to reach agreement.

**A.2 We disagree with prescriptive measures mandated in proposed regulation as the means to achieve the stated intent**

While we are comfortable with the stated goal of the proposed CPPO district, we are very concerned with the prescriptive measures specified to achieve those goals. Compared to the stated intent, these measures would introduce significant unintended consequences, including:

- Denying landowners the ability to manage the process to suit their needs or preferences by mandating increased disturbance. (See for instance the discussion of requirements in Sections 509.07.1, 509.07.2, and 509.07.11.)

- Forcing the mandated rerouting of the pipeline in response to the erection of a farm-associated building or planting of a wind break by parties seeking to force the rerouting of the pipeline. (See 509.07.9.)
- Requiring rerouting of the pipeline to avoid existing wind breaks or other features. (See 509.07.9.)
- Putting landowners in a conflicted position of acting as inspectors for the county to enforce new requirements. (See 509.07.9.3.)
- Introducing significant impacts associated with pipeline construction with no commensurate benefit for landowners or the county. (See discussion of requirements in Sections 509.07.1, 509.07.2, and 509.07.11.)

**A.3 We disagree with the elimination of pipelines from the list of outright allowable principal uses and conditional uses in one of the districts the project route would cross**

In most districts, pipelines have been listed as a conditional use, subject to the requirements of the new regulations discussed above. However, we are very concerned that pipelines have not been listed as an Outright Allowable Principal Use and Structure, a Principal Use and Structure, or as a Conditional Use in the Rural Residential District, a district through which the proposed Keystone XL route passes in at least two locations. (Pipelines have been listed as a Conditional Use in other districts.) There is no apparent rationale for this zoning district difference, which could ultimately force rerouting of a pipeline that has otherwise received necessary state or federal route approvals.

The fact that pipelines are listed as a conditional use in other districts in the county also requires that, even without the new CPPO District provisions, each pipeline project will come before the Planning Commission and the County Board for review prior to construction. Consequently, the prescriptive and, in many cases, harmful measures contained in the proposed CPPO District are not necessary for the county to be assured of the opportunity to review the specifics of any proposed pipeline project.

**A.4 The Proposed county regulation does not take into account the collaborative recommendations of stakeholders in the Pipelines and Informed Planning Alliance**

The proposed York County regulations ignore the collaborative recommendations of the Pipelines and Informed Planning Alliance (PIPA) that can help ensure the safety of the proposed Keystone XL Pipeline, should it be approved, as well as 150 miles of existing hazardous liquid pipelines and natural gas transmission pipelines in York County.

**A.5 Recommendations**

- If pipeline regulations are desired, reengage with local stakeholders along with existing pipeline operators in York County (including SourceGas, Tallgrass Interstate Gas Transmission, NuStar, and Magellan) and with representatives of the proposed Keystone XL Pipeline to evaluate PIPA recommendations for inclusion in York County ordinances.
- Reject the proposed CPPO provisions and add pipelines as an outright allowable principal use in each district since the intent of the regulation is duplicative of existing requirements, or

- Reject the proposed CPPO provisions and add pipelines as a conditional use in the Rural Residential District and allow the Board to review pipeline projects under the conditional use provisions for all zoning districts, or
- If the CPPO provisions will be advanced, allow flexibility on how the general intent is to be met, including those which landowners might choose.

## **B. Background & History**

In late 2013, the York County Planning Commission formed a special committee to consider zoning regulations for pipelines in response to the proposed Keystone XL pipeline. Proposed regulations introduced in June reflect the input of that subcommittee. The meetings of the subcommittee were closed to TransCanada. While the resulting regulations would apply to certain other types of buried infrastructure, the proposed TransCanada Keystone XL Pipeline is the only project currently proposed that would be affected by these regulations. Also, listings of allowable and conditional uses in proposed districts affects the proposed pipeline in ways that are different from other infrastructure covered by the proposed Cropland Production Protection Overlay District regulations.

For these reasons, we wish to take this opportunity to share with the Planning Commission some of our comments on the proposed regulations.

### **B.1 Timeline and Regulatory reviews**

TransCanada began discussing the proposed Keystone XL Pipeline with landowners and community officials in York County in mid-2008. An application was filed with the U.S. Department of State in the fall of 2008, reflecting a proposed route through York County. To date, the proposed route for the Keystone XL Pipeline has been the subject of a federal review under the requirements of the National Environmental Policy Act (NEPA) and other applicable federal legislation.

The environmental analysis within the Final Supplemental Environmental Impact Statement (FSEIS) for the Keystone XL Project supports the conclusion that this pipeline would safely provide oil that is needed by U.S. refineries, would have minimal impact on the environment, including groundwater, and would cause billions of dollars in positive economic activity.

With respect to safety, the FSEIS noted that the incorporation of 59 Special Conditions and dozens of other extra spill prevention and mitigation measures will ensure that Keystone XL will "have a degree of safety over any other typically constructed domestic oil pipeline system under current code." The assessment goes on to say that the pipeline would have a degree of safety throughout its entire length similar to that required in wellhead protection areas or other "high consequence areas"<sup>2</sup>. (See FSEIS, Section 4.13, page 4.13-5.)

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<sup>2</sup> Pipelines that carry gasoline, diesel fuel, crude oil or other hazardous liquids must implement additional safety measures if they cross a particularly sensitive area such as a wellhead protection area for a municipal drinking water supply. (More information is available in the FEIS, Section 3.13.4.1.)

The FSEIS also explicitly addressed groundwater: If, despite the additional measures referenced above, oil were released such that it reached groundwater, aquifer characteristics would inhibit the spread of released oil. Impacts on water quality would be limited, typically from tenths of a mile up to less than one-half mile. (See FSEIS, Section 4.3, page 4.3-8.)

The State of Nebraska also reviewed and approved the project under legislation that was initially put in place three years into the federal review of the Keystone XL Pipeline Project in 2011.<sup>3</sup>

## **B.2 Keystone's work with York County Landowners**

We are pleased that more than 90 percent of the York County landowners along the updated route in York County have signed easement agreements to allow for the construction and operation of the Keystone XL Pipeline. The York County zoning discussion has helped provide a forum for the identification of concerns and issues to be addressed with many of these landowners. We remain committed to working with remaining landowners in the county who have not yet signed easements to reach agreement.

## **B.3 Pipeline Safety**

Federal, state, and local governments work together with pipeline operators to ensure pipelines operate safely and efficiently.

### **B.3.1 Federal Government Role in Pipeline Safety**

The US Department of Transportation (DOT) is the federal safety authority for ensuring the safe, reliable, and environmentally sound operations of our nation's pipeline transportation system. DOT regulates pipeline safety under federal law (Title 49, USC Chapter 601) and does so through the Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA is responsible for protecting the American public and the environment by ensuring the safe and secure movement of hazardous materials to industry and consumers by all transportation modes, including the nation's pipelines.<sup>4</sup> Through PHMSA, the DOT develops and enforces regulations for the safe, reliable, and environmentally sound operation of the nation's 2.3-million-mile pipeline transportation system and the nearly one million daily shipments of hazardous materials by land, sea, and air. PHMSA administers the national regulatory program to ensure the safe transportation of hazardous liquids, including crude oil, by pipeline. PHMSA develops regulations that address safety in the design, construction, testing, operation, maintenance, and emergency response for hazardous liquid pipelines and related facilities. PHMSA is

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<sup>3</sup> Subsequent to the completion of the review, the statute governing that review was challenged. A court ruled that Keystone XL's route through Nebraska, which had been reviewed and approved by the Nebraska Department of Environmental Quality and the Governor, was no longer valid because the law passed by the Nebraska Legislature authorizing that process was struck down. The State of Nebraska then appealed the decision. An appeal by Nebraska's Attorney General supersedes the lower court's ruling "until the time that final judgment in the Court of Appeals or Supreme Court is rendered." (See Neb. Rev. Stat. § 25-21,213.) That appeal is currently pending before the Nebraska Supreme Court and oral arguments are anticipated to be heard this fall.

<sup>4</sup> While PHMSA regulates movement of hazardous substances by all modes, within PHMSA, the Office of Pipeline Safety (OPS) regulates movement of hazardous substances by pipeline.

responsible for regulations that require safe operations of hazardous liquid pipelines to protect human health and the environment from unplanned pipeline incidents.

The siting of hazardous material pipelines can involve the federal government. In the case of Keystone, the environmental aspects of proposed siting have been reviewed under the National Environmental Policy Act and other federal legislation.<sup>5</sup> Because the U.S. Department of State (DOS) is responsible for issuance of Presidential Permits for certain cross-border facilities, DOS has served as the lead agency for the environmental review and directed the preparation of the FSEIS.

Requirements for a pipeline Emergency Response Plan are included in 49 CFR Part 194. In accordance with the requirements of that code section, a response plan would be prepared and submitted to PHMSA prior to initiating operation of the pipeline. The plan will likely be similar to the existing plan for the operating Keystone assets. Details of spill response planning are covered in the FSEIS.<sup>6</sup> Keystone personnel and contractors would be responsible for stopping the flow of oil and for clean-up. In addition, Section 3.13 of the FSEIS presents more information on the physical and chemical properties of crude oils that would be transported through the proposed pipeline. Appendix Q to the FEIS provides representative Material Safety Data Sheets (MSDS) that identify the chemical composition and maximum volumes of those chemicals that would be present in the oils transported.

Because the oil flows through the pipeline in batches, in the event of a release, the specific MSDS and exact composition of the product released would be provided to emergency responders, including any federal, state, or local agencies involved in spill response actions, upon release. The FEIS also details how an MSDS detailing the specific qualities of the oil released in the affected area of the pipeline would be provided to local responders in the event of a pipeline release.<sup>7</sup> This procedure has already been tested in a drill observed by the NDEQ in Omaha.

### **B.3.2 State Government Role in Pipeline Safety**

State Governments may assume authority to inspect, regulate and take enforcement action against the operators of pipelines, when the pipelines are entirely within their borders (intrastate). In Nebraska, the State Fire Marshal has been certified by PHMSA to inspect and enforce the pipeline safety regulations for intrastate natural gas pipeline operators in Nebraska. This work is performed by the Pipeline Safety Section of the Fuels Safety Division of the Nebraska State Fire Marshal.<sup>9</sup>

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<sup>5</sup> See FSEIS, Section 1.5, for a detailed discussion of federal agency roles and related laws.

<sup>6</sup> See FSEIS, Section 2.1 and section 4.13.

<sup>7</sup> See FSEIS, "Notification Procedures," pp. 4.13-99 – 4.13-100.

<sup>9</sup> See [http://primis.phmsa.dot.gov/comm/FactSheets/States/NE\\_State\\_PL\\_Safety\\_Regulatory\\_Fact\\_Sheet.htm](http://primis.phmsa.dot.gov/comm/FactSheets/States/NE_State_PL_Safety_Regulatory_Fact_Sheet.htm).

In 2011, the State of Nebraska also assumed responsibility for the siting of pipelines larger than six inches in inside diameter constructed in Nebraska to transport crude oil or other petroleum within, through, or across Nebraska, except for local gathering lines.<sup>10</sup>

### B.3.3 Local Government Role in Pipeline Safety – Pipeline Informed Planning Alliance

Local governments have traditionally exercised broad powers to regulate land use and property development, including in the vicinity of pipelines. The importance of this role was underscored in a stakeholder initiative led and supported by PHMSA, referred to as the Pipeline Informed Planning Alliance (PIPA), launched in 2010.<sup>11</sup>

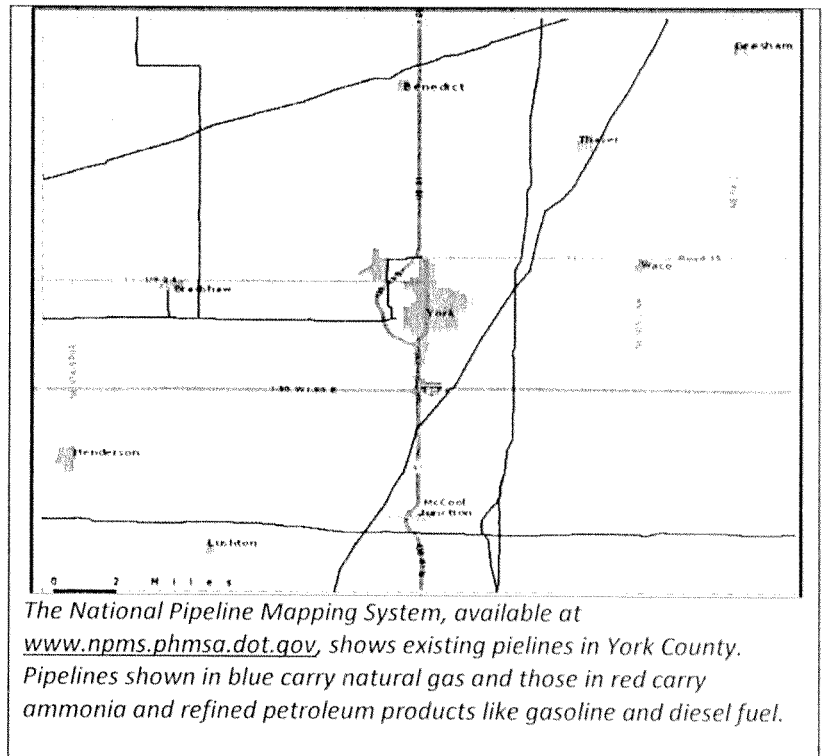
PIPA brought together stakeholders representing safety regulators, local governments, public stakeholders and pipeline operators, with a goal of reducing risks and improving safety of communities and transmission

pipelines through implementation of recommended practices related to risk-informed land use and development near all transmission pipelines.

Included in the PIPA Report is a model ordinance focusing on the need for consultation that has been adopted elsewhere to improve the safety of pipelines in the county, though it does not provide guidance for siting pipelines.

Based on National Pipeline Mapping System data, pipelines carry the following in Nebraska:

- Natural gas
- Crude oil
- Petroleum Products (such as gasoline, diesel fuel, aviation products)
- Anhydrous Ammonia
- Liquefied Petroleum Gas
- Butane, Isobutane, Natural Gasoline



<sup>10</sup> See Nebraska Revised Statutes, 57-1401 and following.

<sup>11</sup> See <http://www.pipa-info.com> for more information.

York County has 18 miles of ammonia pipeline, 100 miles of refined products pipelines (carrying products like gasoline, diesel fuel and jet fuel) and 31 miles of natural gas transmission pipelines.

The PIPA report and model ordinance offer insight into how, through local zoning requiring consultation, York County could improve the safety of all pipelines in York County – including Keystone XL – should the project be approved.

**Recommendations:**

If York County seeks to put local zoning in place related to pipelines, the County should reengage with local stakeholders, with existing pipeline operators in York County (including SourceGas, Tallgrass Interstate Gas Transmission, NuStar, and Magellan), and with representatives of the proposed Keystone XL Pipeline to evaluate PIPA recommendations for inclusion in York County ordinances. Through effective consultation embodied in the PIPA recommendations, the safety of all pipelines in York County would be enhanced.

**C. York County proposed zoning that would affect Keystone XL**

Two significant changes are proposed to York County zoning as it relates to the Keystone XL Pipeline. First, revised regulations would redraw boundaries of zoning districts and overlays and establish and/or update lists of acceptable and conditional uses. Second, a new set of zoning requirements – contained in the Cropland Production Protection Overlay District – would apply.

**C.1 Revised Zoning Districts and Uses**

Proposed revised zoning districts and the zoning map would require a Conditional Use Permit for Keystone XL in most zoning districts. This is a new requirement. In accordance with the procedures listed in Article 10 of the proposed regulations, the proposed project would be reviewed, researched and considered by the Planning Commission. Following Planning Commission consideration, the project would be considered by the County Board. Each consideration would include a public hearing with notice to neighbors of the facility.

This process offers the opportunity for the County to review the specifics of any proposed pipeline project.

However, in the Rural Residential District, through which the route proposed for Keystone XL would pass (in the vicinity of McCool Junction), pipelines are not listed as an outright allowable principal use, a permitted principal use, or as a conditional use. No rationale or criteria is given for this zoning district difference.

Below are the pertinent sections of the revised zoning regulations, including a description of the proposed pipeline’s treatment:

- **General Agricultural District** – Pipeline is allowed as a Conditional Use, according to Section 501.06.12: “Below ground pipeline transmission systems conveying gases, petroleum products



and other materials defined as hazardous materials by the U. S. Environmental Protection Agency, all subject to the limitations and requirements of Section 509 of this Resolution.” The proposed Keystone XL route would be located primarily in the General Agricultural District.

- **Rural Residential District** – Pipelines are not listed as an allowable or as a conditional use. However, the proposed pipeline could be permitted in accordance with Section 502.05.5: “Other uses, determined by the County Board of Commissioners, to be comparable with the other uses permitted as conditional uses in this district, compatible with the uses permitted in the district and consistent with the intent of this district.” The proposed Keystone XL route would cross two segments of the Rural Residential District, northeast and east of McCool Junction. Existing hazardous liquid pipelines also cross these districts (east of Benedict, south of Thayer, south of Henderson, and east and northeast of McCool Junction).
- **Interstate Commercial /Industrial District** – Pipeline is allowed as a Conditional Use, according to Section 503.05.4: “Below ground pipeline transmission systems conveying gases, petroleum products and other materials defined as hazardous materials by the U. S. Environmental Protection Agency, all subject to the limitations and requirements of Section 509 of this Resolution.” The proposed Keystone XL route also passes through two segments of the Interstate Commercial /Industrial District, east of Bradshaw and south of York.
- **Rural Commercial /Industrial District** – Pipeline is allowed as a Conditional Use, according to Section 504.05.7, “Below ground pipeline transmission systems conveying gases, petroleum products and other materials defined as hazardous materials by the U. S. Environmental Protection Agency, all subject to the limitations and requirements of Section 509 of this Resolution.” The proposed Keystone XL route also passes through two segments of the Rural Commercial /Industrial District, east of Bradshaw and south of York.
- **Water Demand Industrial District** – Allowed as a Conditional Use, according to Section 505.05.2, “Below ground pipeline transmission systems conveying gases, petroleum products and other materials defined as hazardous materials by the U. S. Environmental Protection Agency, all subject to the limitations and requirements of Section 509 of this Resolution.” The proposed Keystone XL route does not cross any land in the Water Demand Industrial District.

#### **C.2 Requirements for pipelines contained in the Cropland Production Protection Overlay District**

The CPPO District would apply to all land in York County used for crop and pasture production as of the effective date of the provision. Provisions of the underlying district would also continue to apply.

We agree with the stated intent of the proposed CPPO District of ensuring that underground transmission systems, including our proposed pipeline, do not have adverse effects on York County economic interests.

Ensuring that our pipeline does not cause adverse economic effects has been and will remain a guiding principle in the way we conduct business in York County, Seward County, and other counties in Nebraska and other states. It is also consistent with federal laws and regulation that govern different aspects of pipeline construction, operation, and maintenance. In Nebraska, it duplicates the intent of existing state law and of common law.

The stated intent of the proposed regulation is similar to the intent of the Nebraska Oil Pipeline Reclamation Act (NOPRA)<sup>12</sup>. According to NOPRA, the purpose of the legislation is as follows:

(1) The purpose of the Oil Pipeline Reclamation Act is to ensure that a pipeline carrier which owns, constructs, operates, or manages a pipeline through this state for the transportation of oil is financially responsible for reclamation costs relating to the construction, operation, and management of the pipeline in this state as prescribed in the act.

(2) It is the intent of the Legislature that proper reclamation is accomplished as part of the oil pipeline construction process, including restoration of areas through which a pipeline is constructed as close as reasonably practicable to the condition, contour, and vegetation that existed prior to construction, including stabilizing disturbed areas, establishing a diverse plant environment of native grasses and forbs to create a safe and stable landscape, **restoring active cropland to its previous productive capability**, mitigating noxious weeds, and managing invasive plants, unless otherwise agreed to by the landowner.<sup>13</sup>

Keystone is responsible both by statute and common law for damages we cause. During construction, we anticipate that land will be taken out of production and we compensate landowners for those impacts, as well as for impacts while the land recovers. With the use of modern construction techniques, we do not anticipate longer-term impacts on productivity. In the unlikely event that there are longer-term impacts, any future reduced productivity caused by our pipeline is our responsibility. Keystone easements are non-exclusive, which means that other facilities may cross the easement, provided proper safety precautions are taken. We routinely facilitate the installation of new irrigation lines and systems across our existing pipelines. And, we work with landowners to minimize the impacts of our activities on their land and compensate them for the impacts we cause.

The fact that we have diligently addressed these and similar topics has been an important impetus for York County landowners to grant easements for more than 90 percent of the required Keystone XL right of way in York County. The discussions allow for customization of the approach to reduce impacts to landowners and to suit their preferences, where feasible. We look forward to continuing to work with remaining landowners to reach agreement.

While we are comfortable with the stated goal of the proposed CPPO district, we are very concerned with the prescriptive measures specified to achieve those goals. Compared to the stated intent, these measures would introduce significant unintended consequences, including:

- Denying landowners the ability to manage the process to suit their needs or preferences by mandating increased disturbance. (See for instance the discussion of requirements in Sections 509.07.1, 509.07.2, and 509.07.11.)

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<sup>12</sup> Nebraska Revised Statutes, 76-3301 and following.

<sup>13</sup> Nebraska Revised Statutes, 76-3303.

- Forcing the mandated rerouting of the pipeline in response to the erection of a farm-associated building or planting of a wind break by a landowner seeking to force the rerouting of the pipeline. (See 509.07.9.)
- Requiring rerouting of the pipeline to avoid existing wind breaks or other features. (See 509.07.9.)
- Putting landowners in a conflicted position of acting as inspectors for the county to enforce new requirements. (See 509.07.9.3.)
- Introducing significant impacts associated with pipeline construction with no commensurate benefit for landowners or the county. (See discussion of requirements in Sections 509.07.1, 509.07.2, and 509.07.11.)

The fact that pipelines are listed as a conditional use in most districts in the county also requires that, even without the new CPPO District provisions, each pipeline project will come before the Planning Commission and the County Board for review prior to construction. Consequently, the prescriptive and harmful measures contained in the proposed CPPO District are not necessary for the county to be assured of the opportunity to review the specifics of any proposed pipeline project.

### **C.3 Recommendations**

Below are recommendations associated with the two proposed zoning changes listed above.

- Reject the proposed CPPO provisions and add pipelines as an outright allowable principal use in each district since the intent of regulation is duplicative of existing requirements or,
- Reject the proposed CPPO provisions and add pipelines as a conditional use in the Rural Residential District and allow the Board to review pipeline projects under the conditional use provisions for all zoning districts or,
- If the CPPO provisions will be advanced, allow for flexibility in how the intent is to be met, including those which landowners might choose.

Detailed discussion of specific concerns is included below.

#### **C.2.1 Five Foot Depth of Cover provides no benefit and imposes significant impacts**

##### **Proposed Section 509.07.1**

All such non-irrigation underground transmission systems shall be installed at a depth which is at least sixty (60) inches below the surface of the land to avoid conflict with the underground piping requirements of pivot and drip irrigation systems. Such depth measurement shall be from the surface of the land to the top of the non-irrigation underground transmission system.

TransCanada/Keystone routinely facilitates supply line crossings of existing pipelines, including the Keystone Pipeline which is installed a minimum of 48" below the ground throughout Nebraska, and our easement agreement does not prohibit such crossings. To cross a pipeline easement with a new line,

Nebraska law requires landowners to call Diggers Hotline<sup>17</sup> to ensure the excavation work is done safely. This requirement does not vary based on depth of infrastructure. TransCanada will have a representative onsite to ensure the work is done safely and compensates the landowner for increased costs associated with completing this work safely in the vicinity of the pipeline. Relative to the costs, the increased environmental footprint required to construct our pipeline one foot deeper than proposed, and the potential for this measure to be ineffective in accomplishing its intended result, helping landowners safely and effectively cross our pipeline is a more reasonable approach.

While most local irrigation consists of center pivot, drip irrigation systems are being added in the area, including at least one case of a system installed over the operating Keystone Pipeline. Based on discussions with drip irrigation experts in Nebraska and nationally (including leading Nebraska vendors, subsurface drip irrigation pioneer Professor Freddie Lamm, Research Agricultural Engineer at Kansas State University, and the Irrigation (trade) Association), the proposed construction of the Keystone XL Pipeline at the planned 48" depth of cover will not impede subsurface drip irrigation systems.

The systems are individually engineered and routinely work with below-ground obstructions. Supply and flush manifolds are typically installed above frost line, with emitters or drip lines at depth to drain these manifolds.

**Recommendations:**

Because the practice of requiring five foot depth of cover is not necessary to accommodate the installation or maintenance of irrigation systems, the provision should be deleted.

**C.2.2 Stripping up to 36" of topsoil is counterproductive to restoring soil productivity**

Proposed Section 509.07.2

To preserve the productivity of the soils, particularly the topsoils in the County, during construction of any non-irrigation underground transmission system the depth of topsoil to be removed, separately stored and replaced shall be determined by use of the latest version of the York County Soil Survey. Said Survey identifies the depth of topsoil for each type of soil and the location of each type of soil. The topsoil shall be stripped from the area to be excavated for installation of the underground transmission system to the depth of the topsoil, as identified for each type soil in said Soil Survey in the locations where each type of soil occurs, provided that such topsoil excavation shall not exceed 36 inches.

In disturbing soils for pipeline construction, maintenance or operation, Keystone is responsible for adverse impacts to soil productivity. Keystone pays for crop loss caused by our activities or by the pipe. Our goal is to restore soil productivity quickly and as completely as we can. The plans for soil management along the proposed Keystone XL Pipeline reflect best practices to ensure restoration of

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<sup>17</sup> See the Nebraska One Call Notification System Act, Nebraska Revised Statute 76-2301 and following.

productivity of the land. These plans call for stripping and segregating up to the top 12 inches of soil – the area rich in organic matter and key to restoring productivity.

Stripping more than 12 inches of soil, particularly as deep as 24 or 36 inches, would result in mixing and diluting organic matter found in that top 12 inches of topsoil, thereby reducing fertility and the existing crop production capability of the conjoined soils. Further, stripping more than 12 inches of soil would result in a larger construction footprint on a landowner’s property and thus more disturbance.

Recent consultation on this issue with local NRCS offices in Nebraska confirmed that a functional and practical definition of topsoil is the “A horizon” and that there is, at minimum, no added benefit to soil health, soil tilth, or soil fertility in stripping and segregating any deeper than 12 inches.

**Recommendations:**

If the practice of conserving up to 36” of soil were advisable, it should apply to all soil disturbances in the county, including irrigation line work. However, because this practice is not necessary to restore productivity and because it could harm productivity, the provision should be deleted.

**C.2.3 Limitation on movement of soil is unnecessary, inconsistent with other regulation, not well-defined and should be eliminated**

Proposed Section 509.07.3

During construction or subsequent repair of any non-irrigation underground transmission system, soils shall not be moved from one parcel, defined in Section 303.77 of this Resolution, to another parcel to avoid spread of weed seed and to avoid conflict with production of genetically modified crops and non-genetically modified crops. The property owners of all property where any non-irrigation underground transmission system shall be responsible for monitoring construction and any repair of any underground transmission system to assure compliance with this limitation.

To restate, Keystone is responsible, both by statute and common law, for damages we cause, including addressing the consequences of any spread of weed or of genetically modified crops, should it occur. This prescriptive means of preventing spread of noxious weeds required by this proposed ordinance introduces unnecessary consequences and creates ambiguity that could lead to uncertainty about compliance.

NOPRA already requires that the “areas through which a pipeline is constructed” be restored “as close as reasonably practicable to the condition, contour, and vegetation that existed prior to construction”.<sup>18</sup> In addition, the Keystone Construction Mitigation and Reclamation Plan (CMRP)<sup>19</sup> includes measures to mitigate any such spread.

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<sup>18</sup> Nebraska Revised Statutes, 76-3302.

<sup>19</sup> The CMRP is available as Appendix G of the FSEIS.

Construction activity represents an unlikely source of the spread of genetically modified crops into neighboring parcels. More likely are pollination-related activities. York County has no similar restriction on work that could result in soil movement from parcel to parcel (such as could occur for wind facility construction under Section 611 of this proposed resolution or for electric line work, for instance).

Additionally, if an area experiences settling following pipeline construction, the beneficial addition of soil from another parcel to remedy the situation could be prohibited by this regulation.

Finally, the regulation assigns landowners the responsibility for monitoring work to assure compliance with this ordinance. This places an unnecessary burden on landowners and opens the possibility of subjective interpretations of compliance.

**Recommendations:**

Because this regulation is not necessary to protect York County economic interests, and because it could prevent effective restoration, and because terms are not well-defined, and because it puts burdens on landowners and raises the likelihood of subjective interpretations of compliance, it should be eliminated.

**C.2.4 Requirement to restore pipeline right-of-way is already required by Nebraska law and we are responsible for any adverse consequences we cause, including ponding**

Proposed Section 509.07.4

The owner of any non-irrigation underground transmission system which is installed across crop, pasture land or county road ditches shall restore all underground transmission system rights-of-way to original pre-construction elevations and contours, with allowance for soil settling, to avoid surface drainage problems, ponding of water or other condition which could decrease crop production or result in blockage of drainage in road ditches which could result in flooding of crop or pasture land.

Provisions already exist in Nebraska law<sup>20</sup> that require right of way restoration and make Keystone responsible for any adverse impacts we cause. Similar requirements exist in our easements and in regulatory documents by which we must abide.<sup>21</sup> Repeating requirements at the county level introduces conflict between the requirements of the state and the county and unnecessarily increases the county's operating costs.

Although we will take care to restore disturbed land as close as reasonable to original conditions, the language of the regulation does not allow for inevitable differences. One example is that to help assure the safety and integrity of the pipeline, trees will not be restored in the permanent right of way. We compensate landowners for these impacts. The language in NOPRA allows for inevitable differences:

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<sup>20</sup> See NOPRA.

<sup>21</sup> See in particular the CMRP.

Reclamation means restoration of the areas through which a pipeline is constructed as close as reasonably practicable to the condition, contour, and vegetation that existed prior to construction<sup>22</sup>

**Recommendations:**

- Eliminate this provision.
- If the provision remains, adopt the language referenced above to allow for anticipated differences and to be consistent with the language in state law.

**C.2.5 Requirement to restore grassed terraces, grassed waterways or roadway ditches seeding or sodding of the same grasses is already required by state law**

Proposed Section 509.07.5

The owner of any non-irrigation underground transmission system which is installed across grassed terraces, grassed waterways or roadway ditches shall restore such grassed terraces, grassed waterways or roadway ditches to pre-existing conditions through seeding or sodding of the same grasses as exist in each such terrace, waterway or ditch to minimized erosion and potential reduction in crop or pasture land productivity.

Provisions that require restoration already exist in Nebraska law<sup>23</sup> and in our easements and in regulatory requirements by which we must abide.<sup>24</sup> The final seed mix applied would be based on input from NRCS, state and local agencies, and landowners.

Although we will take care to restore disturbed land as close as reasonable to original conditions, it will not be exactly the same and this provision should allow for that. Examples: trees, pipeline ROW markers, possible changes – that’s why we are responsible to pay damages.

The Nebraska Oil Pipeline Reclamation Act requires restoration. The Act defines “reclamation” as follows: “Reclamation means restoration of the areas through which a pipeline is constructed as close as reasonably practicable to the condition, contour, and vegetation that existed prior to construction” (Nebraska Statutes 76-3302.3). NOPRA also requires that “reclamation, including, but not limited to, choice of seed mixes, method of reseeding, and weed and erosion control measures and monitoring, is conducted in accordance with the Federal Seed Act, 7 U.S.C. 1551 et seq., the Nebraska Seed Law, and the Noxious Weed Control Act.” NOPRA also requires that “A pipeline carrier shall ensure that genetically appropriate and locally adapted native plant materials and seeds are used based on site characteristics and surrounding vegetation as determined by a preconstruction site inventory.”<sup>25</sup>

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<sup>22</sup> Nebraska Revised Statutes 76-3302(3).

<sup>23</sup> See NOPRA.

<sup>24</sup> See in particular the CMRP.

<sup>25</sup> Nebraska Revised Statutes, 76-3308.

**Recommendations:**

- Eliminate this provision.
- If the provision remains, adopt the language to be consistent with the language in state law.

**C.2.6 Requirement to remove all equipment within 7 days is inconsistent with Nebraska law and could disrupt the efficient pipeline work, for which landowners are compensated**

Proposed Section 509.07.6

To minimize interference with seed bed preparation, crop planting, cultivation, irrigation and harvesting of crops, all equipment, open trenches, material storage or other element associated with construction and future repair of any non-irrigation underground transmission system shall be removed from any premises within seven (7) calendar days after completion of construction or repair.

Typically, equipment would be removed from land as a part of the completion of construction or repair activities. We compensate landowners for the impacts associated with our pipeline construction operation and maintenance activities, including and beyond removal of all equipment. There may be circumstances where it is reasonable to leave equipment of land for more than seven days after the completion of construction or repair. The landowner is compensated for the temporary loss of use of land.

NOPRA broadly already addresses timing of completion of work, requiring that we “commence reclamation of the area through which a pipeline is constructed as soon as reasonably practicable after backfill.”<sup>26</sup>

**Recommendation:**

Eliminate this provision.

**C.2.7 Requirement to allow for irrigation is not required**

Proposed Section 509.07.7

The owner of any non-irrigation underground transmission system which is installed across crop or pasture land in the County shall allow for the installation and operation of underground piping and guidance wires for pivot irrigation systems and underground supply and flush lines and drip lines for drip irrigation systems above and across such non-irrigation underground transmission systems of any type.

As addressed in comments on Section 509.07.1, we accommodate irrigation work across our pipeline. Our easement is non-exclusive.

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<sup>26</sup> Nebraska Revised Statutes, 76-3304(2).



**Recommendation:**

Eliminate this unnecessary provision.

**C.2.8 Requirement to repair any damage to irrigation systems is unnecessary and duplicative**

Proposed Section 509.07.8

The owner of any non-irrigation underground transmission system which is installed across crop or pasture land in the County shall provide that any damage to any irrigation system resulting from the installation, repair, replacement or removal of such non-irrigation underground transmission systems shall be repaired at the expense of the owner of the such non-irrigation underground transmission system.

This provision provides unnecessary duplication of NOPRA requirements which includes damage to real property<sup>27</sup> such as irrigation systems. In addition, Keystone's easement agreements provide similar protections to landowners.

**Recommendation:**

Eliminate this provision.

**C.2.9 Requirement to reroute pipeline to avoid wind breaks, wells, "farm structures" are inappropriate**

Proposed Section 509.07.9

All such non-irrigation underground transmission systems shall be installed in locations so that all existing irrigation, other groundwater wells, existing farmstead buildings, wind breaks, grain bins and other associated buildings and structures shall be located outside of the permanent easements established for such underground transmission systems to allow adequate area for on-going maintenance and repair of such wells without delay and to provide for on-going use of such farmstead buildings, wind breaks, grain bins and other associated buildings and structures.

The proposed route of the Keystone XL Pipeline has been the subject of extensive state and federal reviews. To date, more than 90 percent of affected York County landowners have signed easements allowing the construction of the pipeline on the proposed route.

As a part of the compensation paid to landowners, Keystone already compensates for any interruptions to wind breaks and for interruptions to use of facilities.

This provision would mandate rerouting of the pipeline in response to the erection of a farm-associated building or planting of a tree line by parties seeking to force the rerouting of the pipeline. In addition, it could require rerouting of the pipeline to avoid existing wind breaks. Absent this provision, we have

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<sup>27</sup> Nebraska Revised Statutes, 3302(4).

already and will continue to work with landowners under existing Nebraska law to ensure appropriate compensation for impacts.

**Recommendations:**

Delete this requirement.

**C.2.10 Keystone has committed to being responsible for any road damage caused by our construction activity and has signed one road agreement with York County already.**

Proposed Section 509.07.10

To avoid additional costs to the taxpayers of the County, the owner of any non-irrigation underground transmission system shall cooperate with the County in identifying roads which will be used to be used to provide access and egress to the installation sites of such transmission system in order to minimize the impact on the roads, bridges and related infrastructure in the County and the owner of any non-irrigation underground transmission system shall repair any damage to such roads, bridges and related infrastructure to specifications which shall be outlined in a written agreement with the County.

In July of 2010, Keystone committed in writing to York County that it is responsible to ensure roads are restored to pre-construction condition. In that letter, Keystone committed to work with the county to identify roads in advance and to conduct a detailed pre-inspection of roads that might be used by the project so that both the county and Keystone would have a solid basis for evaluation of impacts following construction. Keystone also offered to file bonds to ensure performance of road restoration, should it be required.



In September of 2011, a road agreement was executed by Keystone and the county, covering pipeline road crossing plans (primarily by boring under roads) as well as plans for road use, inspection and restoration as required.

Keystone remains committed to ensure roads are restored to pre-construction condition with or without zoning language.

**Recommendations:**

We recommend that the county adopt requirements for the CPPO District that are consistent with the requirements indicated in Section 611.07.2.L for Wind Energy Installations:

The applicant shall, in coordination with representatives from York County and other appropriate jurisdictions, conduct a pre-construction survey of road and bridge conditions which shall include photographs and written agreement documenting the condition of the public roads, to determine all county, township or municipal roads or streets to be used for the purposes of transporting WECS, substation parts, concrete and /or equipment for construction, operation and maintenance of the WECS and to determine all applicable weight and size permits

from the impacted jurisdictions prior to construction. The owner of the WECS shall be responsible for restoring the roads, streets and bridges to preconstruction conditions.

### **C.2.11 Federal requirements cover facility decommissioning, should it be required**

Proposed Section 509.07.11

The owner of any non-irrigation underground transmission system shall notify York County of the date that the use of any such underground transmission system is to cease or has ceased. Further, any such non-irrigation underground transmission system which has not been used for its intended purpose for a period of ten (10) years from the original date of the beginning of non-use of such transmission system shall be considered abandoned and the owner of such transmission system shall remove such system and reclaim the land in accordance with the requirements of applicable federal and state laws and regulations and the requirements of this Resolution or the owner of such transmission system shall relinquish all easements associated with such transmission system.

Keystone used a design life of 50 years to develop the engineering standards for the proposed Project. However, with implementation of the pipeline integrity management plan, the PHMSA Special Conditions developed by PHMSA, Keystone anticipates that the life of the proposed Project would be much longer.

Because Keystone connects areas of North America rich in oil resources, including the Bakken in the United States and the oil sands in Canada, with the largest refining center in the world, we anticipate that this pipeline will continue to provide useful service for the foreseeable future.

Typically, we would idle or deactivate a pipeline as market conditions dictate rather than abandoning it. This allows a dormant pipeline to be reactivated in the future, subject to applicable approvals. When a pipeline or a segment of a pipeline is idled or deactivated, the pipe is purged of its contents and is generally filled with an inert gas and left in place with warning signage intact. Corrosion protection would likely be left functional as would other integrity measures such as periodic inspections under the integrity management plan.

If the pipeline will not be returned to service, Keystone would comply with the PHMSA requirements for decommissioning crude oil pipelines in place at the time.<sup>28</sup> These regulations currently require that the pipeline procedural manuals must include procedures for abandonment, including safe disconnection from an operating pipeline system, purging of combustibles, and sealing abandoned facilities left in place to minimize safety and environmental hazards.<sup>29</sup>

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<sup>28</sup> As outlined in the Code of Federal Regulations (CFR) Title 49 Section 195.402(c)(10) (Procedural Manual for Operations, Maintenance, and Emergencies) and in 49 CFR 195.59 (Abandonment or Deactivation of Facilities).

<sup>29</sup> Further details are provided in the FSEIS, Section 2.1.13, "Proposed Project Decommissioning".

The regulations recognize that forced removal of underground facilities would have an environmental impact similar to the construction of the project. These impacts may be significantly greater than that associated with responsibly securing the facility and leaving it in place below ground.

Whether active, idled, or decommissioned, Keystone remains responsible for environmental impacts of a release.

Note that the wind energy regulation in these ordinances also reflects that buried facilities below cultivation depths abandoned in place may be preferable to requiring the disruption of the land to remove those facilities: "All WECS and accessory facilities shall be removed to four (4) feet below ground level."<sup>30</sup>

**Recommendations:**

Eliminate this provision. However, if the provision is to be retained, it should be modified to read as follows:

The owner of any non-irrigation underground transmission system shall notify York County of the date that the use of any such underground transmission system is to cease or has ceased. Further, any such non-irrigation underground transmission system which has not been used for its intended purpose for a period of ten (10) years from the original date of the beginning of non-use of such transmission system shall be considered abandoned and the owner of such transmission system shall remove **any portions of such system which are above a depth of four (4) feet below ground level** and reclaim the land in accordance with the requirements of applicable federal and state laws and regulations and the requirements of this Resolution or the owner of such transmission system shall relinquish all easements associated with such transmission system. **Use of a non-irrigation underground transmission system shall not be deemed to have ceased in cases where the system is deactivated, but the owner or operator of the system is actively maintaining and managing the integrity of the system on the affected land in York County for potential future reactivation.**

**C.2.12 Requirements to allow the county to inspect the pipeline are unnecessary**

Proposed Section 509.07.12

The owner of any such non-irrigation underground transmission system shall agree to incorporate into any such transmission system construction plans a provision to allow access to the construction sites during construction of such systems by representatives of the County to permit on-going or periodic inspections to verify compliance with these regulations. Such inspections shall be conducted in accordance with the transmission system contractor safety standards and procedures.

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<sup>30</sup> See proposed York County Ordinances, Section 611.07.2.H

With or without this ordinance, we welcome inspectors working for the county to our construction Right of Way to conduct reasonable reviews and/or inspections, provided the appropriate safety precautions are followed.

**Recommendations:**

Remove this unnecessary provision.

**C.2.13 Allow for landowner options**

Section 509.07 CROP AND PASTURE PRODUCTION PROTECTION REQUIREMENTS: The following requirements and restrictions shall apply to all underground transmission systems of any type, including but not limited to underground electrical power cables, gas lines, telephone and data cables, pipelines and any other non-irrigation underground transmission systems which are installed across crop and pasture land in the County:

Overall, the regulations contained in the preceding discussion impose requirements that many landowners may find objectionable. For instance, if the county chooses to require up to 36" of soil to be conserved, some may choose to follow NRCS guidance to use 12" instead in order to minimize impacts. Some may also object to increased footprint of activities on their property associated with a five-foot depth of cover or with mandatory pipe removal.

**Recommendations:**

If these regulations will go forward, allow landowners to make choices about how they want to manage the process to suit their own needs by updating the proposed language of Section 509.07 to read

Section 509.07 CROP AND PASTURE PRODUCTION PROTECTION REQUIREMENTS: The following requirements and restrictions shall apply to all underground transmission systems of any type, including but not limited to underground electrical power cables, gas lines, telephone and data cables, pipelines and any other non-irrigation underground transmission systems which are installed across crop and pasture land in the County, **unless otherwise agreed to by the landowner:**