

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)	
APPLICATION OF DAKOTA)	HP14-002
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO CONSTRUCT)	APPLICANT’S POST HEARING BRIEF
THE DAKOTA ACCESS PIPELINE)	
PROJECT)	

A hearing in this matter was held in Pierre over the course of two weeks beginning on September 29 and ending on October 9, 2015. Pursuant to the South Dakota Public Utilities Commission (PUC) scheduling order, Applicant Dakota Access, LLC (Dakota Access) submits the following initial post-hearing brief in support of its application.¹

Project Description

In its siting application, filed with the PUC on December 15, 2014, Dakota Access proposes to construct the Dakota Access Pipeline Project (Project), a crude-oil pipeline. Once commissioned, the proposed project will then be operated by Sunoco Logistics. Tr. at 523.

The proposed Project is a 1,168-mile-long,² 12-inch to 30-inch diameter³ pipeline that will connect the rapidly expanding Bakken and Three Forks production areas in North Dakota to existing crude oil infrastructure in Illinois. Ex. DAPL-1, Section 8.0.

The project originates in the northwest portion of North Dakota and traverses southeast through South Dakota for 270 miles⁴ then through Iowa, and Illinois and terminates at the existing

¹ References throughout this brief to the hearing transcript are denominated “Tr. at ____.” Exhibits will be labeled, “DAPL ____.”

² Tr. at 56, line 22.

³ The South Dakota portion of the pipeline will be 30 inches in diameter.

⁴ Tr. at 331, line 6.

Patoka, Illinois hub. The pipeline is proposed to transport approximately 450,000 barrels per day (bpd) initially, with an anticipated capacity up to approximately 570,000 bpd. Once the crude arrives at the existing tank farms in Patoka, shippers will be able to access and distribute their crude to multiple markets, including Midwest and Gulf Coast markets via existing and proposed pipeline infrastructure. Ex. DAPL-1, Section 10.

Approximately 270 miles of the 1,168-mile-long pipeline will be constructed within South Dakota, crossing 13 counties in the eastern half of the state. Tr. at 331. The Project enters South Dakota in Campbell County approximately 17 miles east of the Missouri River, and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln Counties. The Project crosses the Big Sioux River approximately 14 miles south of Sioux Falls, and continues in a southeast direction through Iowa. One pump station is located within South Dakota, approximately seven miles southeast of Redfield in Spink County. Ex. DAPL-1, Section 11.

The South Dakota pump station will be located in Spink County, approximately seven miles southeast of Redfield, South Dakota at milepost (MP) 332.2. The pump station consists of approximately nine acres, and was acquired in fee. The pump station will be fenced and contain three pumps driven by electric motors, an electrical and controls building, electrical substation, a surge tank, a communications tower, and parking area for station personnel. Electricity will be utilized for all pumps, lights, and heating in the buildings. Design and construction of the pump station will meet the requirements of the National Electric Code and American Petroleum Institute (API) 500. *Id.* As a new large load, Dakota Access has filed a Petition with the Commission to take electric service from NorthWestern Energy. See PUC Docket EL15-023.

The pump station will be fully automated for unmanned operation. Remote start/stop, set point controls, unit monitoring equipment, and station information will be installed at each location. Backup power at the pump station will consist of batteries to maintain communications between the

pump station and the pipeline control center and to provide lighting and power for minor facility procedures if the local utility power supply is disrupted. The pipe entering and exiting the pump station will be located underground; however, some of the piping within the pump station yard (after entering and prior to exiting the pump station facilities) will be aboveground. *Id.*

Dakota Access plans to install 40 main line valves (MLV) along the route in South Dakota which is far in excess of what is required by federal pipeline safety code. Tr. at 187, line 25. The MLVs will be constructed within the 50-foot permanently maintained ROW, and sites will be approximately 75-feet-long and 50-feet-wide. These valve sites will be located within an easement obtained from landowners. The spacing intervals between the MLVs along the ROW is based upon environmental conditions, pipeline safety regulations and Dakota Access's commitment to install a pipeline equipped with significant safety features. All valves will have remote actuators so that in the unlikely event of an emergency, these valves can be quickly activated from the operational control room to isolate sections of the pipeline to minimize environmental impacts. Ex. DAPL-1, Section 11.

Typically, the pipeline construction corridor will be 125 feet wide, consisting of the 50 foot wide permanent right of way and the remainder for temporary work space. See Typical Drawings attached to Ex. DAPL-32. If a permit is granted, Dakota Access intends to begin construction in the spring of 2016 with construction activities in South Dakota expected to last nine months. Dakota Access plans for 2 partial and 1 full construction spread with 900 to 1,000 construction personnel on each spread. Tr. at 301. It is expected that most non-local Project workers will use temporary housing, such as rental units, hotels, motels, campgrounds, and recreational vehicle parks. Ex. DAPL- 1, Section 23.1. In the South Dakota counties that the pipeline corridor crosses, there are approximately 2,500 available rental units, 4,700 motel rooms, and 1,900 campground/recreational vehicle spaces. *Id.* It is customary and expected that the construction contractor will work around special events and important times of year for tourism within the state. Previous reservations or arrangements made by hotels and campgrounds to meet the needs of residents or tourists will not be

disturbed by the Project. The above listed accommodations are all within approximately 10 to 40 miles of the pipeline corridor. It is anticipated that most of the temporary workers will seek housing in the more populated, service-oriented towns located within a reasonable commuting distance to the work site. Ex. DAPL-1, Section 23.1.

The increased economic activity that results during construction of the pipeline will generate additional sales, use, gross receipts, and lodging taxes of approximately \$36 million for state government, plus \$3 million for local governments. Once the pipeline goes into operation South Dakota State and local governments will realize ongoing annual sales, use, and gross receipts of about \$197,000. Also, during the first full year of operation the pipeline will generate an estimated \$14 million in new property taxes for local governments. Ex. DAPL-1, Section 23.2

The Permit Application

On December 15, 2014 Dakota Access filed a siting permit application with the PUC pursuant to SDCL 49-41B-2.1(3). Dakota Access filed a revised application on December 23, 2014. The revised application, along with all other changes or updates to application attachments and exhibits, was admitted as Exhibit DAPL-1 at the September/October hearing.

After receipt of the initial application, the PUC held public input meetings on January 21, 2015 in Bowdle, and Redfield, SD and on January 22, 2015 in Iroquois and Sioux Falls, SD. On May 4, 2015 the PUC entered an order granting party status to 31 individuals, 9 entities, the Rosebud Sioux Tribe, the Yankton Sioux Tribe and The South Dakota Department of Transportation. In addition, several affected local governments were granted party status including: Lake County, Lincoln County Board of Commissioners, Minnehaha County Board of Commissioners, City of Hartford and the City of Sioux Falls.

On March 11, 2015, the PUC entered an order establishing a procedural schedule which established deadlines for discovery and pre-filed written direct testimony. Dakota Access, PUC Staff, The South Dakota Association of Rural Water, the City of Sioux Falls, and sixteen landowners affected by the proposed pipeline and two landowners not affected by the proposed pipeline filed written direct testimony.

The sixteen affected landowners who filed written testimony represent five individual family groups and six tracts of land in the proposed Project footprint. To date, Dakota Access negotiated easements for 89.64% of the Project footprint. Thus, the landowners who submitted testimony representing six tracts of land are clearly the minority of landowners affected by the Project.

The City of Sioux Falls' concerns were targeted and specific to its landfill and one of its water providers, the Lewis and Clark water system. Dakota Access must cross Lewis and Clark facilities, and Sioux Falls wanted to assure that crossing was properly planned. Dakota Access resolved all Sioux Falls' issues during the course of the hearing. As a result Sioux Falls did not call a witness and did not introduce its pre-filed testimony as an exhibit.

The South Dakota Association of Rural Water Systems (SDARWS) concerns shifted several times but ultimately were targeted and specific to the Lewis and Clark water pipeline, a member of the Association. The interest was again a result of the planned Dakota Access waterline crossing. Every party involved wants to assure the crossing is successful, safe and done in a way. Dakota Access and Lewis and Clark fully negotiated all issues related to crossing and were satisfied with the result. However, Lewis and Clark then refused to execute the crossing agreement unless Dakota Access agrees to pay all costs associated with having Margo Northrup, the Association's Counsel at the two week long PUC hearing. While the

breakdown in negotiations over a non-substantive issue is unfortunate, Dakota Access remains committed to safely cross the Lewis and Clark pipeline and will do so according to applicable federal code, a negotiated agreement or both, whichever is applicable.

Rebuttal testimony was filed by two landowners directly affected by the proposed pipeline and one that is not affected by the proposed Project. In addition, the Indigenous Environmental Network (IEN) and Dakota Rural Action (DRA) aligned their interests and filed rebuttal testimony. The Yankton Sioux Tribe (YST) also submitted rebuttal testimony. Much like the unaffected landowners, IEN, DRA and YST did not provide evidence of direct impacts of the proposed Project and proposed no conditions or solutions during the hearing. Rather, it appears they opposed the project in theory or out of principle only. The concerns of the Tribe intervenors are discussed at length below.

The hearing began on September 29, and concluded on October 9, 2015. Mere hours before the hearing began on September 29, 2015, Rosebud Sioux Tribe (RST), DRA and IEN filed a Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement. The Commission denied the Motion and proceeded with the hearing. However, based on an inquiry by Commissioner Hanson regarding an EIS as a permit condition, Dakota Access submitted a brief on October 6, 2015 and stands by the arguments made therein.

During the evidentiary hearing the PUC heard from witnesses on behalf of Dakota Access, witnesses on behalf of Intervenor and witnesses on behalf of the Commission Staff. A number of exhibits were introduced into evidence including the pre-filed direct and rebuttal testimony of a number of witnesses. In addition to the above listed Intervenor who pre-filed written testimony, RST appeared at the hearing to cross examine witnesses through its Counsel of record. RST did not pre-file testimony and did not call witnesses at the hearing.

Pursuant to SDCL 49-41B-24, the PUC has until December 15, 2015 to make findings of fact and conclusions of law and to determine whether Dakota Access should be granted a permit and, if so, under what conditions.

Dakota Access's Burden of Proof

Dakota Access's burden of proof is established by statute. Dakota Access met the burden of proof and satisfied each of the statutory criteria. Dakota Access must prove, by a preponderance of the evidence, that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. SDCL § 49-41B-22.

Additionally, in its Order for and Notice of Hearing, the PUC listed the following considerations:

- (1) Whether the Application was filed generally in the form and content required by SDCL Chapter 49-41B-11 and ARSD 20:10:22.

Dakota Access's application is in the form and contains information required of SDCL 49-14B-11 and ARSD 20:10:22.

- (2) Whether the Application or any accompanying statements or studies required of the Applicant contain any deliberate misstatements of a material fact?

Neither the application nor accompanying statements or studies required of the applicant contain any deliberate misstatements of material fact.

Argument

I. **Dakota Access will comply with all applicable laws and rules.**

Dakota Access will comply with all applicable laws, rules and regulations. Dakota Access doesn't have a choice. The law is the law and Dakota Access must follow it, as does everyone else without regard to the South Dakota Energy Facilities Siting Act. From pipeline safety down to local government road crossings, Dakota Access is required to understand and follow the law. No witness at the hearing testified that Dakota Access could not, would not, or did not have a plan in place to comply with all applicable laws or regulations.

The South Dakota PUC Staff submitted testimony from sixteen witnesses. None of them identified a law or regulation that Dakota Access failed to consider or did not plan to follow. Sixteen South Dakota landowner intervenors filed testimony and none of them identified a federal, state or local law that Dakota Access failed to identify and did not plan to meet. Five local governments intervened and only one of them filed testimony. Again, none of them identified a federal state or local law that Dakota Access failed to consider and meet. Finally, RST and YST could not point to any federal state or local law that Dakota Access would violate. The tribal intervenors brought forth un-adjudicated legal theories pertaining to water and land rights as the basis of their opposition.

The size and scope of the project requires Dakota Access to put significant resources toward learning, understanding and tracking federal, state and local laws. From employment law and finance and securities regulation to local speed limits, it is unnecessary and impossible to list all laws and regulations that exist within the United States or any particular state along the proposed route. However, a few of the "largest" regulatory schemes at play are implicated and

worth discussing. These very significant laws protect people and the environment and bear discussion, below:

A. Dakota Access will comply with applicable Federal Laws

Pipeline Safety Act

The Pipeline Safety Act is a major Federal act implicated by the Dakota Access project. Both during construction and during operations, Dakota Access's primary regulator is the Pipeline Hazardous Materials Safety Administration (PHMSA) of the U.S. Department of Transportation (DOT). Dakota Access is obligated to follow 49 CFR Part 195 which is enforced by PHMSA. Many witnesses called by Dakota Access testified to the Company's commitment to meet or exceed PHMSA's requirements which contributes to the safety of the proposed pipeline. Tr at 277, 292, 448, 561 573, 576-578,609, 2214-2216, Ex. DAPL-34.

Dakota Access's spill response plan and identification of High Consequence Areas (HCAs) demonstrates its commitment to meet or exceed PHMSA standards. Todd Stamm, an expert in pipeline operations and oil spill response, testified to Dakota Access's operations plans and emergency response planning. The pipeline is not yet permitted, and it already has drafted operational plans to assure the Project utilizes available science and technology to exceed safety regulations. Tr. at 525-527, Ex. DAPL-34. Ultimately PHMSA will review the pipeline's plans to confirm Dakota Access's efforts satisfy code requirements. Tr. at 527.

There was significant testimony regarding the definition of High Consequence Areas (HCA) during the hearing. HCA's are solely a creature of and defined within federal pipeline safety rules at 49 CFR 195.450 and 195.6.⁵ The determination of HCA's implicate the pipeline's

⁵ §195.450 *High consequence area* means:

Integrity Management Plan (IMP). HCA's do not dictate routing or construction techniques. Tr. at 1592. Identification of the HCAs is an essential step to an effective and complete Integrity Management Program (IMP). *Id.* Proper identification of HCA's is done through review of the PHMSA operator maps and through consultation with US Fish and Wildlife Service (USFWS) to identify areas defined as unusually sensitive per 49 CFR 195.6. Tr. at 1594. Dakota Access conducted the analysis and its IMP reflects the fact that at this time, the Project does not pass through any HCAs. Tr. at 2169-2205.

An IMP is required per federal code. As the environment along the route changes, the IMP requirements can also change and thus the IMP must change as well. If it becomes apparent either before or after the pipeline is operational, that an HCA exists along the route, the IMP will change as well. Tr. at 2214. However, it is important to note and remember that nothing about the pipeline routing, design or construction changes as a result of determination of an HCA. Tr. at 1592. Rather, it merely the IMP that is implicated. Dakota Access is situated and prepared to modify its IMP as necessary to account for any HCA that may develop.

The Dakota Access pipeline design meets or exceeds the requirements of the Pipeline Safety Act. Specifically, Chuck Frey testified that:

(1) A *commercially navigable waterway*, which means a waterway where a substantial likelihood of commercial navigation exists;

(2) A *high population area*, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile;

(3) An *other populated area*, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area;

(4) An *unusually sensitive area*, as defined in §195.6.

(i) Dakota Access performed quality control inspections of the pipe mills prior to any of those mills being allowed to bid on supplying pipe;

(ii) Dakota Access placed an inspector in each of the mills for the duration of the time the pipe was being rolled and produced for Dakota Access;

(iii) Dakota Access required all the mill pipe meet a specification that has more stringent testing and recordkeeping requirements than are established in the code;

(iv) Dakota Access requires nondestructive testing of 100% of the welds on the Project;

(v) Dakota Access will provide a minimum cover of 48 inches in cultivated land whereas code only requires 36 inches;

(vi) Dakota Access will provide a minimum of 60 inches of cover at road ditches where the code requires 36 inches;

(vii) Dakota Access will provide 60 inches of cover at all water crossings where the code requires 48 inches;

(viii) Dakota Access will provide a minimum separation of 24 inches between the pipeline and existing drain tile where the code only requires 2 inches;

(ix) Dakota Access will construct 40 mainline valves on the pipeline;

(x) all valves have actuators with the ability for them to be monitored and controlled from the control center;

(xi) Dakota Access is using heavier wall and thicker pipe at all drills and bores (and all crossings there where the Topeka Shiner is present);

(xii) Dakota Access has not and will not make a request for an alternate operating pressure or any other special conditions;

(xiii) Dakota Access performs aerial patrols weekly when code requires 26 times per year; and

(xiv) Dakota Access prepared a Spill Response Plan in accordance with a new API recommended practice 1174. Tr. at 2139-2141.

Staff witness Robert McFadden reviewed the application for compliance with federal code and he confirmed that the pipeline is in compliance with all PHMSA regulations. Tr. at 1558. No one contradicted him.

Section 404/401 of the Clean Water Act

The Clean Water Act is another Federal Act which applies to the Project. Specifically, Section 404(e) and 401 of the Clean Water Act applies and requires Dakota Access submit an application for a Nationwide Permit 12 which is enforced by the U.S. Army Corps of Engineers. Ex. DAPL-1 at Table 5.0-1, DAPL-33. More specifically, the U.S. Army Corps of Engineers (USACE) has the authority to issue general permits on a nationwide basis for certain classes of activities involving discharge into waters of the United States including wetlands. The USACE uses nationwide permits for projects which the USACE believes, when conducted in accordance with the permit general conditions, will have minimal or insignificant impacts, both individually and cumulatively, on the waters of the United States. 33 U.S.C. §1344. Dakota Access applied for the permit, consulted with the USACE regarding the permit and expects it will be issued. Ex. DAPL-33. Dakota Access will comply with the permit and any other requirements or conditions imposed upon it by the USACE. *Id.*

Section 7: Endangered Species Act

The Nationwide Permit 12 process also requires a determination whether the Project will affect federally listed threatened and/or endangered species. The determination is required per

Section 7 of the Endangered Species Act. 16 U.S.C. § 1531 et seq. Under the Act, Federal agencies (such as the USACE in this case) must consult with USFWS when any action the agency carries out, funds, or authorizes such as through a Nationwide Permit 12 *may affect* a listed endangered or threatened species. In this case, the Topeka Shiner is the only protected aquatic species potentially affected by the Nationwide Permit 12. Ex. DAPL-1, Section 17.4. Between Dakota Access’s decision to use HDD as a water crossing method where the Topeka Shiner is implicated, and Dakota Access’s use of the Programmatic Biological Opinion for a Nationwide Permit in South Dakota, an inadvertent “taking” is permissible. Dakota Access is in compliance with the Endangered Species Act. *Id.*, Tr. at 2173-2174.

National Historic Preservation Act

Similar to Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act requires federal agencies and their authorized designees to consider the effects of their undertakings. 16 U.S.C. § 470. Section 106 requires consultation to determine the effect on archeological and historic properties listed on or eligible for the National Register of Historic Places. Projects that have been determined by a federal agency to be federal undertakings (involving federal funding, a federal license or permit, or some other federal assistance) are submitted by the federal agency to the state and tribal historic preservation office for consultation under Section 106 of the Act. *Id.*, Tr. at 799. The law is very clear that it is the federal agency that initiates the consultation. In this Project, the only “federal undertaking” where the USACE has jurisdiction is over waters of the U.S. which includes rivers, lakes and wetlands. Tr. at 2168. In those jurisdictional areas, the Corps must initiate consultation with state and tribal historic preservation offices. Dakota Access is and will remain in complete compliance with the National Historic Preservation Act.

IEN called a witness, Waste'Win Young, who seemed to attempt to expand the application of Section 106 of the National Historic Preservation Act. Specifically, she testified on behalf of IEN that the Act applies to all lands on the project route. Tr. at 1543. Her testimony in that regard is simply not correct. Upon cross-examination it became apparent Ms. Young was not an expert on the application of Section 106 of the National Historic Preservation Act. Tr. at 1543-1544. The application of Section 106 of the National Historic Preservation Act is not a matter of argument, interpretation or application. Rather, it is a matter of law and Ms. Young was often mistaken. However, Ms. Young was correct when she testified the USACE, not Dakota Access, coordinates the Section 106 consultation. Tr at 1541. While it appears that Ms. Young and IEN take issue with how the USACE implements or reads Section 106 of the National Historic Preservation Act, the Commission need not consider their arguments. The inaccurate testimony has no bearing on this matter and should be disregarded.

Section 10 Permit: Navigable Waters Act

In addition to the Nationwide Permit 12, Dakota Access also submitted an application for a Section 10 Permit which, if granted, authorizes the Project to cross navigable waters of the United States. Ex. DAPL-1, Table 5.0-1. 33 U.S.C. §403. The permit application, again submitted to the USACE, was submitted in December 2014, and the USACE review and consultation process is ongoing. Dakota Access expects the permits will be issued. Dakota Access will follow the conditions in the federal permit.

The Project will also pass through private land subject to USFWS wetland and grassland easements. Ex. DAPL-1, Table 5.0-1. The land is privately held and is not government land. Rather the land is under an easement bought by the Government through the USFWS and has restricted uses as a result. Project review by USFWS and consultation with USFWS is ongoing.

Dakota Access is committed and required to follow any and all recommendations and requirements made by USFWS. Tr. at 2214, 2045, Ex. DAPL-1, Table 5.0-1. Dakota Access will comply with all applicable federal law.

B. Dakota Access will comply with applicable State and Local Law

Just as it would take a book to fully recite all the federal laws applicable, the same situation exists for state law. Commission Staff called witnesses from the Department of Revenue, Department of Game, Fish and Parks, Department of Environment and Natural Resources (DENR), and SD State Historical Preservation Office. None of these agencies, all with jurisdiction over the Project, identified a state law that Dakota Access had failed to consider or planned to meet.

In addition to state agencies, Dakota Access will affect local governments. For example, Dakota Access will use local roads and is very aware of concerns that result therefrom. Local roads are some times unable to withstand heavy construction traffic and can be damaged in the construction process. Dakota Access will work with local governments to meet their expectations and comply with ordinances pertaining to road use and crossing. In addition, Dakota Access will repair all roads damaged in the construction process. Ex. DAPL-1, Section 23.1.

SDCL 49-41B-38 dictates that the Commission shall set the form, terms and conditions of an indemnity bond for damage to roads and bridges caused by construction or survey work. The required bond shall be in lieu of any county or township indemnity bond pursuant to SDCL §§ 31-12-43 and 31-13-55, and shall run in favor of, and for the benefit of, such townships, counties, or other governmental entities whose property is crossed by such trans-state transmission facility or transmission facility to insure that any damage beyond normal wear to

public roads, highways, bridges, or other related facilities shall be adequately compensated. Dakota Access will meet this obligation. Initially Dakota Access offered testimony supporting a bond amount of \$15 million based upon the proposed construction schedule and the particular route. Ex. DAPL-36. However, Commission Staff proposed a much higher bound of \$24 million. Ex. PUC STAFF-1. Rather than debate the formula or the amount, Dakota Access agrees to supply a bond in the amount requested by Staff. Tr. at 1925. Dakota Access is confident in its construction process and fully prepared to ensure post-construction roads in the same or better condition than when construction begins.

Dakota Access had extensive conversation with all of the affected governing bodies along the route. Some of those government bodies intervened in the PUC process. The list of local government entity intervenors includes: Lake County, Lincoln County, Minnehaha County, the City of Hartford, and the City of Sioux Falls. None of local governments offered testimony at the hearing. The Commission did not hear from any local government that Dakota Access has not fully planned to comply with their local ordinances.

At the time of hearing, Dakota Access had easements to cross over 88.14% of the proposed pipeline route. To negotiate those easements Dakota Access followed South Dakota laws regarding property rights. South Dakota law separates the permitting process from the land acquisition process, completely. Other states may require a permit to construct before eminent domain can be utilized. South Dakota does not. South Dakota requires a pipeline to hold itself out as a common carrier in order to seek remedies through eminent domain. Dakota Access has and does hold itself out as a common carrier, through the Open Season process. The shipper contracts reached as a result of the Open Season are incontrovertible evidence that Dakota Access is a common carrier pipeline entitled to eminent domain. No statute holds to the contrary.

Ironically, the property owners who testified expressed their dissatisfaction with Dakota Access's decision to follow the law. Dakota Access followed and is following all SD laws on the books pertaining to a common carriers right to condemn private property if easements cannot be negotiated.

The first phase of crossing private property is the survey process. Dakota Access requests landowners allow the company to access private property for purposes of a survey. Very simply, Dakota Access has no ability to study unique or individual land characteristics or landowner concerns if it does not have access to the land. Furthermore this survey process provides landowners and Dakota Access with an opportunity to have an open dialogue to best facilitate proper routing. Fostering an open dialogue with impacted landowners is important to Dakota Access and to the landowners and according to the numbers of easements obtained, has been successful. As such, Dakota Access appreciates the Commission's open and transparent process for communication and dedicating nearly two full weeks to this hearing. However, as was shown by the testimony, some landowners chose not to engage in any sort of communication prior to the hearings and as a result came to the hearing and testified against the pipeline without an actual understanding of where the pipeline was even proposed to be located.⁶

After surveys are complete, the process requires easement negotiation. The PUC does not have any jurisdiction over land acquisition. However, as the Commission is well aware, South Dakota has various statutes, under the jurisdiction of the Circuit Courts, which address easements.⁷ Dakota Access is in compliance with those statutes. There was not a single

⁶ The Stofferahn family based its opposition and testimony on an initial surveyed pipeline route that is no longer valid. Had the family been willing to communicate with Dakota Access representative, they would have understood the route was altered. Additional routing adjustments may occur. However, to date the family has denied survey access and cut off all communication. Tr. at 1157.

⁷ SDCL 43-13.

landowner at the hearing that testified that Dakota Access easements violate South Dakota law. Rather, those that testified refuse to negotiate an easement, and do not believe Dakota Access should utilize the laws which permit eminent domain. None of the landowners offered any evidence to show Dakota Access has not or will not follow the law. Quite the opposite, they don't want Dakota Access to follow the law. The landowners who testified don't want Dakota Access to use the laws codified in chapters SDCL 49-7 and 21-35. Our government and court systems do not permit nullification of law because the judge, jury or administrator of the law does not like the result of compliance. The landowners want the Commission to make a decision it cannot make. If the siting burden of proof is met, the Commission cannot deny the pipeline simply because a group of landowners do not believe it is "fair" that the proposed route impacts them.

The tribal intervenors also asked the Commission to either violate existing private property law or make new property law by requesting that tribal consultations take place at all places along the route on private property. However, the Commission appears to lack the authority to order that the Tribes be allowed on to private property for purposes of seeking cultural objects which might have been left behind by prior inhabitants. The landowners are vested with all rights conferred upon them by South Dakota law as property owners. If those people want to open their property to tribal representatives for inspection, they are certainly able to do so. However, per South Dakota law, neither Dakota Access nor the Commission can force that upon any of the private property owners in our State. Dakota Access is following the law with regard to surveys for cultural objects.

In conclusion, intervenors appeared to take opposing positions among themselves. First, intervenors worked hard to try to show Dakota Access is out of compliance with the law.

However, some intervenors also don't want Dakota Access to follow the law. The Justice system of this Nation does not permit the legal administrators to select the laws they want to follow. Rather, all laws must be followed as they are passed by the legislature. Dakota Access must follow those laws that restrict its actions and may take advantage of those laws that permit it to take action. Dakota Access cannot be punished for doing so.

II. The proposed Project does not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area.

The credible testimony was that the normal operation of the pipeline poses absolutely no threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area. The testimony was also that abnormal operations of the pipeline are and can be mitigated without permanent damage. All normal facets of everyday life along and through the siting corridor can and will be maintained. The existence of the pipeline is compatible with existing land uses.

A. The Project does not pose a threat of serious injury to the environment under normal operating conditions.

Under normal operating conditions, the pipeline will be mostly invisible to all who host it or cross it on a daily basis. It will lie in the ground, four or more feet deep, performing its task and without fanfare or recognition. It is silent, emits no fumes or odor, and invisible. The sophisticated and complex routing process, the open and transparent permitting process, the federal and state regulations pertaining to construction, operations and integrity management requirements combine to protect people and the environment from permanent effects and mitigate the threat of serious injury.

To completely prevent any and all risk at all is to prevent any construction of infrastructure of any type and to cause our society and state development to freeze as it remains now. Stagnant development is not the goal or purpose of this second factor in the siting law. See. *In the Matter of OtterTail Power Company on Behalf of BigStone II*, 744 N.W.2d 594, 2008.

The South Dakota PUC Staff was the only party to call witnesses to testify regarding whether the proposed Project posed a threat of serious injury to the environment. The Staff offered testimony from Mr. Tom Kirschenmann, from SD Game Fish and Parks. Staff also called Mr. Derric Iles, Ms. Kim McIntosh and Mr. Brian Walsh from SD Department of Environment and Natural Resources. In addition Staff hired outside consultants David Nickel, Ann Curnow, Andrea Thorton, Camron Young and Ryan Ledin regarding this second aspect of Dakota Access's burden of proof.

In his written and oral testimony, Staff witness, Mr. Kirschenmann noted areas of concern for his agency, the SD Game Fish and Parks. For example, he expressed concern about loss of native prairie and other habitat, concern for waterfowl production and other conservation easement areas in addition to a general concern for the sensitive species found in the state of South Dakota. However, Mr. Kirschenmann also testified, the best practices that Dakota Access will utilize, which include consultation with USFWS, resolved his concerns. Tr. at 931-940. Mr. Kirschenmann left nothing open for question or debate. To the extent possible, Dakota Access addressed and resolved all his concerns.

In his written and oral testimony, Staff witness, Mr. Derric Iles noted no areas of concern for his agency, the SD Geologic Survey. The types of soils underlying Dakota Access make it almost inconceivable that ground water could be affected. Tr. at 1802-1803, 1808. Mr. Iles left

nothing open for question or debate. To the extent possible, Dakota Access addressed and resolved all his concerns.

The testimony Staff submitted from outside consultants originally included a list of recommendations. However, after receipt of Dakota Access's rebuttal, all concerns were resolved or Dakota Access agreed to comply with the recommendation. More specifically Staff witnesses include:

Ann Curnow

Ms. Curnow provided testimony regarding air quality issues. Dan Flo adopted her testimony at hearing. Dakota Access already has plans to implement her recommendations.

Cameron Young

Ms. Young provided testimony regarding whether Dakota Access adequately assessed and dealt with impacts to threatened and endangered species and water bodies. Dan Flo adopted her testimony and agreed with Mr. Kirschenmann that Dakota Access's consultation and compliance with USFWS recommendations resolves the concern for identified sensitive species. Tr. at 1782, 1785, 1786. Furthermore, the recommendations made pertaining to construction and to mitigation of impact on water bodies are all already incorporated into Dakota Access's best management and practice plan and compliance with the Corps and SD DENR recommendations further satisfies all concerns. Tr. at 1782. As a result, there are no open issues pertaining to Cameron Young's recommendations. Dakota Access satisfies all Cameron Young's concerns.

Ryan Ledin

Mr. Ledin provided testimony regarding the impact on hydrology, the Agricultural Impact Mitigation Plan and the Draft Storm water Pollution Prevention plan. Dan Flo testified at

the hearing and adopted the written testimony prepared by Mr. Ledin. Through rebuttal and clarification, once again, Dakota Access satisfied all stated concerns.

Dakota Access explained how it utilizes environmental inspectors to make the most environmentally prudent water body crossing decision based on the environmental conditions in “real time.” As such, the purpose and reason for Mr. Ledin’s recommendation regarding inclusion of a wetland and water body table is satisfied and the table is not necessary. Tr. at 1636-1638. Dakota Access also demonstrated that its best management practices fully satisfy all of Mr. Ledin’s concerns regarding weed management and in-stream activities. Tr. at 1789. Staff witness Dan Flo did not leave the witness stand without resolving of all his and Ryan Ledin’s concerns.

Andrea Thornton

Ms. Thornton provided written testimony which was adopted by Mike Timpson at the hearing. Specifically, the consultant agreed that in and out tables to reflect soil types and areas of erosion concern are unnecessary as Dakota Access collected, recorded and accounted for the information in a different format. Tr. at 1636-1638. Content rather than formatting is important and proper content is not in question. Neither Ms. Thornton nor Mr. Timpson take issue with the format Dakota Access used after understanding that the proper content is included. The consultants are satisfied that Dakota Access has and will utilize best practices which resolves any concerns pertaining to erosion control, Dakota Access will consult with NRCS to get a correct seed mix and for noxious weed control and finally Dakota Access agrees to use 70% as the measure for successful measure for re-vegetation. Tr. at 1636-1641, 2150.

Dakota Access also agrees to prepare and produce a winter stabilization plan, should one be necessary for reclamation purposes. Tr. at 2150. However, all parties agreed, a winter

construction plan is unnecessary as Dakota Access does not plan winter construction. Mr. Timpson did not leave the witness stand without resolving all of his and Ms. Thorton's concerns. Dakota Access already has plans in place to address and resolve all of the expert's concerns or questions.

Michael Timpson

In addition to adopting the testimony of Ms. Thorton, Mr. Timpson submitted his own written testimony. Ex. Staff-17. He specifically reviewed the Agricultural Impact Mitigation Plan and found that it adequately addresses all agricultural based reclamation concerns. Tr. at 1638.

Other intervenors cross examined both Dakota Access and Staff witnesses in an attempt to identify an environmental concerns that were missed. However, they were ineffective. None of the intervenors pointed to any potential serious environmental injury that can occur during normal pipeline operations. In the end, the Commission did not hear any testimony to contradict Staff Expert David Nickel's testimony, "the project is not likely to pose a threat of serious injury to the environment." Ex. Staff-11, Page 4.

B. The Project does not pose a threat of serious injury to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

The social and economic condition of any given area change as our South Dakota communities grow and evolve. The Project does not currently threaten the social and economic condition of the inhabitants or expected inhabitants in the area. Regardless of growth and evolution, the Project will not threaten the condition of inhabitants or expected inhabitants in the Project footprint in the future.

An aspect of an area's "social condition" includes preservation of its history. Dakota Access appreciates the concern that Tribal intervenors in particular have regarding cultural resources along the Project route. Dakota Access views it as imperative to establish the proper process to protect those resources before during and after development so as not to impair or damage the historic aspect of social health. Dakota Access has a process and has followed it.

The first step in the process is to follow the law. The federal government established the Historic Preservation Act on Federal undertaking areas. The Act was previously discussed. In addition South Dakota has law on topic. Dakota Access exceeded South Dakota law and not only identified all listed cultural resources along the route (as SD law requires), it identified all cultural resources *eligible* for listing along the route. Tr. at 2165. The result is a Level III cultural resource survey. Dakota Access also established an unidentified cultural resource plan, approved by the State Historic Preservation Office, in the event resources not previously identified are found during construction. Tr. at 2191.

The Level III Cultural Resource survey has 341 pages of detailed maps. Of those 341 pages, RST identified eight maps or areas of particular concern and sensitivity to the Tribes. Tr. at 815-832. Dakota Access understands all eight of those areas are sensitive and has plans in place to address that sensitivity. Specifically, Dakota Access incorporated the sensitive nature of those areas into its routing process. Tr. at 2155-2165. In seven of the identified areas Dakota Access simply rerouted the Project for complete avoidance. *Id.* In one of the identified areas, Dakota Access chose to utilize Hydrologic Directional Drilling, and plans to bore ninety feet below the surface. Ex. DAPL-53, Tr. at 2157-2158. Further, Dakota Access agreed to prohibit all traffic of any kind on top of the HDD. *Id.* History is an important part of an area's social condition. Dakota Access conducted robust studies to avoid impacting historically important

areas by either routing around or utilizing construction techniques to minimize or avoid impacts altogether.

From water lines to power lines to gas lines, communities depend on utility infrastructure and grow around them. As to those impacted areas wherein landowners desire development, the pipeline will not stunt it or prevent it. Not only is this evident by looking at communities across the country, but we can look as close as Sioux Falls for an example of pipeline integration into a community. DAPL Exhibits 51 and 52 demonstrate how the city has developed among and around various pipelines including refined petroleum product pipelines. The impacted landowners testified that their social and economic condition will forever be negatively impacted as a result of the pipeline. They believe, if the pipeline is built, development around it will stop. Tr. at 1078, 1087, 1171, 1176, 1248, 1414, 1429. However, none of the landowners could utilize facts or history to prove their intended point. Rather, they all relied on emotion as there are simply no facts or historic examples that support their statements. Pipelines, as one of many types of utility infrastructure, do not negatively impact the social or economic condition of an area whether the land is intended for development, used as a corn field or rangeland.

With that said proper reclamation of the impacted land is very important and if not properly done can negatively affect the social and economic condition of an area. Dakota Access will utilize an Agricultural Mitigation Plan to properly, efficiently and uniformly reclaim affected land. Ex. DAPL-5. All of the impacted landowners who testified against the project questioned Dakota Access's commitment to reclamation. However, none of them testified to any flaw in the agricultural mitigation plan and many of the admitted they had not read it. Tr. at 1090, 1204, 1455. Several others tried to compare reclamation done on the Lewis and Clark

waterline without any basic understanding of the reclamation plan in that case and how it differs from the reclamation plan Dakota Access will utilize. Tr. at 1096, 1126.

The intervening landowners also called Sue Sibson and Kent Moeckly to testify. Ms. Sibson and Mr. Moeckly claim to have been negatively affected by a different pipeline, a different pipeline company with a different restoration plan. Ex. I-11, I-18. Not only is their experience unrelated and irrelevant to the proceeding at hand, but neither of the landowners utilized the complaint process available for them at the PUC. Tr. at 1207, 1388. Had they done so, due process and the rules of evidence would have been applied to determine the facts and fashion a remedy for the alleged problems. As a result of her failure to utilize the PUC process, we are left with Mr. Moeckly's unsubstantiated angry statements and Sue Sibson's photos of recently sprayed and killed vegetation without any other context, foundation or story. Tr. at 1215. It is not a mystery why the brown dead area has nearly perfectly straight lines, nor is there any question why it abruptly ends. The purpose of the Dakota Access hearing was not to determine what a different pipeline company did or did not do on a different project in a different location years ago. Rather, the question is whether Dakota Access's agricultural and mitigation plan is lacking in some regard. Sue Sibson's photos of recently sprayed vegetation don't help answer the question. Her testimony was as unreliable, irrelevant and useless as Kent Moeckly's testimony. Neither of the witnesses read Dakota Access's agricultural mitigation plan. Tr. at 1204, 1391. Neither of the witnesses could testify whether it was different in any way from the plan utilized by the company that constructed a pipeline on their land.

The landowners hired Brian Top as an expert witness regarding farm land reclamation. While Mr. Top has a significant amount of experience, he does not have any experience reclaiming land. Ex. I-23. Mr. Top did not testify regarding any deficiency in the agricultural

mitigation plan. *Id.*, Tr.at 1102-1119. Rather, he tried to make one point: it will be better if the land is just not disturbed to begin with. However, that is not the question.

The question is, whether Dakota Access will cause a serious threat to the environment or social and economic condition of the inhabitants. Dakota Access has extensive plans to reclaim the land such that neither the environment nor social and economic condition of the inhabits is threatened. Mr. Top was not able to testify to the actual burden of proof, because he has no experience in designing or completing reclamation of this type. As a result, he could not testify to the completeness or deficiency of the agricultural mitigation plan. *Id.*

In contrast to Mr. Top, Aaron Dejoia, an expert called by Dakota Access to testify, has extensive experience in reclamation. Mr. DeJoia testified to the completeness of the agricultural mitigation plan. If the plan is followed, he expects reclamation to be a success. Tr. at 1875, Ex. DAPL-39. In addition to Mr. DeJoia, Mike Timpson testified regarding the completeness of the agricultural and mitigation plan. Mr. Timpson, a Staff expert witness, has performed agricultural impact and mitigation assessments for more than 3,000 miles of natural gas and petroleum pipelines across the Unites states. He found the plan sufficient and he had no concerns and had no recommendations regarding amendments, additions or changes. Tr. at 1664.

During any type of construction project wherein the population changes whether short or long term, social impacts are possible. However, the only intervener group to express concern regarding the influx of employees was the Tribal groups who do not own land or have members residing in the immediate pipeline vicinity. Faith Spotted Eagle testified on behalf of Yankton Sioux Tribe testified regarding the social impact an influx of construction workers will have on Native People. Ex. YST-7. She did not provide any evidence. Rather, she testified merely

regarding her biased opinion based on her perception of the pipeline industry despite the fact she has no actual experience in the industry. Tr. at 1031-1048.

Opening the ground, digging trenches and running large heavy equipment across the land certainly has the potential to cause serious problems and that is where the opposition likes to end its exploration of the pipeline construction process. The opposition tends to gloss over what happens after construction. The history of pipeline construction in general, Dakota Access's extensive reclamation plans along with its offered commitment to reclaim the land tells the rest of the story. The Project does not pose a threat of serious injury to the social and economic conditions of inhabitants or expected inhabitants in the citing area.

C. Dakota Access plans to implement all appropriate measures to prevent an accident or incident on the pipeline.

From construction to operation, safety is a priority. Exceeding PHMSA's safety requirements demonstrates the efforts Dakota Access puts into prevention of accidents or incidents along the pipeline. In addition to the design efforts, Dakota Access operates its control center, utilizes an Advanced Supervisory Control and Data Acquisition system, maintains and inspects the pipeline and educates the public to prevent accident or incident. There is no one thing that prevents accidents or abnormal operations. Rather it is a combination of elements, all which will be utilized by Dakota Access. Ex. DAPL-34, Tr. at 600-602.

The operations control center (OCC) is state of the art. The OCC coordinates all operations through the system, including flow rate, pressure and the opening and closing of valves. *Id.* The control center is operated all day, every day, year round. Strict operations procedures will be prepared and used to direct the OCC operator's actions. *Id.*

The pipeline will be equipped with a SCADA system, or an Advanced Supervisory Control and Data Acquisition system. The SCADA system constantly monitors sensing devices along the pipeline to track the pressure, temperature, density and flow of liquid petroleum and displays status to the control room. *Id.* Through these systems the pipeline operators can maintain the pipeline within established operating parameters and can remotely shut down the pump stations and isolate pipeline segments if conditions so warrant. In addition to remote monitoring, the pipeline can be controlled locally. *Id.*

Corrosion prevention, mitigation and control are also paramount in pipeline safety. The pipeline is coated with Fusion Bonded Epoxy which provides a barrier between the steel pipe surface and corrosive environments such as soil or water. The pipeline will also be protected by a cathodic protection system. The system will be an impressed current system consisting of multiple transformer/rectifier units and anode installations along the pipeline route. *Id.* The coating prevents corrosion of the underlying steel pipeline surface and the cathodic protection system prevents corrosion in areas where the coating may be damaged. *Id.*

The next element in safe operations is the inspection, surveillance and maintenance program utilized by Dakota Access. The pipe undergoes testing to verify integrity of the coating. *Id.* In addition to coating tests, the welds are all examined by non-destructive testing and the entire length of the line is hydrostatically tested prior to putting the pipeline in operation. Tr. at 608-609. Maintenance on a pipeline such as this is very detailed and again, Dakota Access will exceed PHMA regulations in this regard. Also, visual patrols both from the ground and the air serve as a less technical form of inspection. Not only do the patrol personnel look for signs of abnormal conditions, they look for nearby construction or other 3rd party activity that could interfere with normal operations. Tr. at 600-602, 533-534.

Public education is the final element in the combined effort to keep the pipeline, the environment and those around it safe. A public awareness program, signage and use of the SD one call system together build the foundation of proper community awareness. Tr. at 533-535. Communities across the nation are dependent on utility infrastructure and those that live around the infrastructure are positioned to play a role in keeping it safe. With that said, local communities are not expected to bear the burden of any type of emergency response should the need arise. Rather, Dakota Access has an emergency response plan in place.

D. The Project does not pose a threat of serious injury to the environment or to the social and economic conditions of inhabitants or expected inhabitants in the siting area under abnormal operating condition

Although infrequent, and despite Dakota Access's state of the art operations plans, abnormal operating conditions and spills and/or leaks cannot always be prevented. As a result of the possibility, Dakota Access plans, trains and prepares for abnormal operations. Abnormal operations, such as a spill can negatively affect the environment and the people around it. However, the goal is for the negative effect to be short-term. As a result, Dakota Access developed a spill model and a resulting Spill Response Plan to minimize impacts. See Ex. DAPL- 6 and 7.

Personnel and equipment necessary in an emergency are placed along the pipeline route by Dakota Access. Tr. at 536-538. The equipment is maintained and the people are trained to respond if necessary. A detailed plan is currently in draft form and will be finalized prior to pipeline operation. Tr. at 526. For planning purposes Dakota Access examined both ideal conditions and the extreme worst-case scenario and has equipment and people ready to handle all

such scenarios. Intervenors did not identify a worst case scenario that Dakota Access had not already included in its planning.

A spill of any size will likely be a temporary and isolated emergency. However, the science and history shows that containment, clean up and remediation is very possible. Not only is it possible, but historically it has been very successful. Kim McIntosh, a staff expert witness and employee from the SD DENR testified that she “is not aware of any permanent natural resource damage from a petroleum pipeline release in South Dakota.” Ex. Staff-3. She also testified that, “I do not believe there are any petroleum spills that can’t be remediated given sufficient time and resources.” *Id.*

Dakota Access is responsible for any spill and has sufficient resources to do so. As Joey Mahmoud testified, “the Dakota Access, LLC as the company would be the initial primary company that would have responsibility. If they were to fail in their actions, then that liability transfers upward into the corporate structure of the affiliates and parents of those companies.” The parent companies include are Energy Transfer Partners, Phillips 66 and Sunoco Logistics. Tr. at 66, 1974. The parent company “Energy Partners” is the largest in the U.S. from an administering perspective, the third large energy company in the U.S. and the fifth largest energy company in the world. Tr. at 1971. Dakota Access does and will have sufficient resources to remediate a spill should it be necessary. Tr. at 237, 248.

III. The facility will not substantially impair the health, safety or welfare of the inhabitants

The historically tested, well known science of reclamation along with the state of the art operating, monitoring and safety plans all discussed in the above subsections also apply to this “health, safety and welfare” standard. Despite hours and days of cross examination, the

Commission did not hear any testimony to contradict Staff Expert David Nickel’s testimony, “the proposed Project is not likely to substantially impair the health, safety or welfare of the inhabitants of South Dakota.” Ex. Staff-11.

IV. The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

Local South Dakota Government intervenors include: Lake County, Lincoln County Board of Commissioners, Minnehaha County Board of Commissioners, City of Hartford and the City of Sioux Falls. None of them provided testimony at hearing. None of the parties with actual responsibility for orderly development appeared to say they hadn’t been consulted or their views considered or to claim the Project will interfere with the orderly development of their community. Rather, landowners and Tribal entities desiring to stop the project repeatedly played the “orderly development” card. However, none of them called a single witness to contradict Dakota Access’s testimony on the subject. Dakota Access testified that it communicated with, worked with, adjusted for and ultimately received no objection from communities along the proposed pipeline path. Tr. at 1944-1947. Joey Mahmoud testified at great length regarding the efforts made to work with affected communities. Mr. Mahmoud explained the process by which the affected communities ultimately helped design the route that those communities believe will have the least impact. *Id.*

Dakota Access consulted extensively with cities and counties along the route, as seen in Dakota Access Exhibit 54 and 55 prepared at a Commissioner’s request and entered into evidence. Ex. DAPL-54 and 55.

Sioux Falls, SD and the surrounding areas are developing, and doing so around pipelines. With proper planning such as seen here, pipelines are easily incorporated into city growth plans. Cities are able to incorporate pipeline routes into green space or other similar plans. The patterns are clear here and elsewhere across the nation. Pipelines are a part of and compatible with modern life. Cities can take advantage of the “no build” directly on top of pipelines in a way that can add to quality of life in large cities. Tr. at 399-400. Dakota Access is confident the proposed route will work with and become part of the affected community growth and development plans. The silence heard by the Commission from the affected communities is telling. For example, after satisfying its concern regarding the city landfill, the City of Sioux Falls chose not to further participate in the hearing in any way. Tr. at 1521-1522, 1528. The City of Sioux Falls did not call any witness, and did not present any testimony. The joint motion offered regarding the landfill, by its terms, resolves the issues. Tr. at 1514-1528. None of the local governments directly affected by the project take a position contrary to that of Dakota Access. None of the local governments directly affected by the project shared with the Commission a concern that the Project will unduly interfere with their orderly development.

Dakota Access consulted all local bodies of government along the pipeline route or affected by the proposed pipeline. Due to their lack of proximity to the project, Dakota Access does not consider either the Yankton Sioux Tribe or the Rosebud Sioux Tribe to be an affected local body of government. Due to the distance from the reservations, Dakota Access takes a position that neither the Yankton Sioux Tribe nor the Rosebud Sioux Tribe are directly affected. If a pipeline incident occurs, neither YST nor RST emergency response groups will not be asked to participate.

V. Additional Noticed Hearing Issues.

In addition to the statutory burden of proof, the Commission noticed two issues for consideration: (i) whether the Application was filed generally in the form and content required by SDCL Chapter 49-41B-11 and ARSD 20:10:22 and (ii) whether the Application or any accompanying statements or studies required of the Applicant contain any deliberate misstatements of a material fact?

The SD PUC Staff examined the Application for completeness. The PUC Staff finds the Application is complete and in the appropriate form. Ex. Staff-1. Dakota Access agrees.

As to the second question: neither the application nor accompanying studies contain any deliberate misstatements of material fact. However, there were two items where in Staff witness Michael Shelly misunderstood the economic study performed on behalf of Dakota Access. While not major issues they are worth clarification.

The first misunderstanding pertained to the pool of employees expected to work on the pipeline. More specifically, Section 23.1 of the application states, “It is estimated that up to 50 percent of the total construction work force could be hired locally, with the remaining portion consisting of non-local personnel.” Ex. DAPL-1. This statement was contrasted to the report titled, “An assessment of the Economic and Fiscal Impacts of the Dakota Access Pipeline in North Dakota, South Dakota, Iowa and Illinois.” Exhibit A to Ex. Staff-1. Page 22, footnote 13 of that report states, “at least 50% of the construction jobs in each state” will be filled with residents of that state. This misunderstanding appears to arise from the notion of local union halls. The local union halls for South Dakota are in some circumstances located out of state, due to our population and right to work laws. However the project traverses states where labor unions are a large social and political presence. The resulting discussions about the use of union labor

based on the expected contract language have resulted in misunderstandings as to the residence of laborers on the project. This appears to be one of those misunderstandings.

The construction contracts were awarded to Michels Corporation based in Wisconsin. The contract requires Michels to use up to 50% of the labor for the project from local union halls, which in this case are outside South Dakota but tied by their own rules to this jurisdiction. Some laborers will come along with Michels from Wisconsin, some will be from South Dakota and some from surrounding states, all based not necessarily on the residence of the laborer but instead to what local union hall he belongs.

The second misunderstanding pertained to the number of full-time jobs created by the Project. Mr. Shelley again seemed to misunderstand Dakota Access's report, and as a result testified that Dakota Access erred. Dakota Access believes it is a misunderstanding rather than error. Mr. Shelley believed page 5 of the report⁸, which indicates the Project will add 31 permanent jobs is inconsistent with Page 38 of the application⁹ which indicates 12 "permanent employees will be hired in South Dakota." However, the 31 permanent jobs indicated the economic report refers to the total number of employees across the whole project versus just those in South Dakota. The report and the application are consistent. It appears Mr. Shelly was simply comparing two different estimates which lead to his belief that there was an error or inconsistency.

VI. SDCL 49-41B-1

49-41B-1. Legislative findings--Necessity to require permit for facility. The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. *The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are*

⁸ Exhibit A to Staff Exhibit 1.

⁹ Ex. DAPL-1.

constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission.

In 1977, the South Dakota Legislature found that prior to constructing an energy conversion or transmission facility, a permit must be granted. The Legislature codified its intent starting with a legislative finding at SDCL 49-41B-1. In that section, the Legislature clearly expressed its findings that energy development needs to be done in an orderly manner with the interests of the citizens, environment and industry in mind. From the hearings, it appears several intervenor groups isolated and misinterpreted the following statutory language, "...that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled."

The noted statutory language does not require that facilities begin and end in the state of South Dakota to serve only South Dakota needs. In fact, if the statute were written in that way, it would be unconstitutional. While a state has the inherent and reserved right to regulate its domestic commerce, per the U.S. Constitution's Tenth Amendment, it cannot exercise that right in a manner that interferes with, or place a burden on, interstate commerce.

Furthermore, the position taken is inconsistent with how the statute is written and required to be read. SDCL 49-41B-1 (along with the rest of the chapter) does indicate that the Commission must keep the needs of South Dakota citizens in mind when considering siting applications for energy conversion and transmission projects. The Commission should certainly keep the Legislature's intent in mind when considering the Project. Currently, the U.S. produces about 10 million barrels of oil per day and then imports approximately another 7.5 to 10 million barrels per day. Tr. at 1933. Consumption ranges between 17.5-20 million barrels

per day. *Id.* Hard facts and figures regarding the petroleum needs and requirements of both South Dakotans and citizens of the United States as a whole must be considered. Oil produced in North Dakota, which will be transported to existing refineries elsewhere in the United States, will come back to this state and others, and will be used to meet domestic needs, providing products and fuel for consumers and producers, all of which are essential to the South Dakota economy. South Dakota has no refinery yet consumes oil on a per capita basis above the national average. South Dakota ranks 8th in the nation in terms of per capita consumption of oil products. South Dakota consumes approximately 60,000 barrels per day, yet only produces 5 barrels per day. Tr. at 1934. Dakota Access will transport a resource essential to the South Dakota and American way of life. The application is precisely the type the Legislature intended for the Commission to consider when issuing siting permits.

VII. Tribal Issues

The Yankton Sioux Tribe and the Rosebud Sioux Tribe intervened, along with the Indigenous Environmental Network. They were asked repeatedly by Dakota Access in discovery to engage on issues and concerns and largely declined to discuss issues. Their intervention, conduct and tactics at hearing appeared to be directed toward stopping the project. They offered no conditions under which Dakota Access could exist.

The tribal intervenors appeared focused on two legal schemes, arguing legal non-compliance. They offer that they are local units of government who were not consulted, that they have aboriginal land rights which require respect and that they have water rights which are violated by the proposed pipeline. Those arguments are flawed both in fact and in law. They relied on facts and interpretations of law which have not been adjudicated or determined by any

court and thus the Commission lacks jurisdiction and facts to make a finding the tribal intervenors desire.

The first principle argued by Tribe intervenors is their claim to the lands of South Dakota. Dakota Access traverses through no land in South Dakota recognized to be controlled by a Tribe. The Yankton Sioux Tribe has a diminished reservation, calling into question its borders and what function and control over land remains with the Tribe. The Yankton Sioux Tribe appears to be almost 100 miles away from the route. The Rosebud Sioux Tribe reservation is West River, well over 100 miles and the Missouri basin away. Neither can claim to be affected by Dakota Access. They are simply too far removed geographically from the route.

The Tribes also claimed aboriginal territory rights to large portions of South Dakota land. However they point to no statute or case law giving them rights or control of the lands they so claim. Instead, the land to which the tribes claim aboriginal rights is owned and deeded according to state law and is under the control of state and local government as we understand it in South Dakota. South Dakota, the courts, the Commission, Dakota Access, and landowners and local governments who are really affected do not recognize the Tribes as having any jurisdiction or control over the route. The Commission lacks the facts or jurisdiction to alter that system.

With respect to water rights, the Tribe intervenors argued the application of the 1908 Supreme Court Decision, *Winters v. Unites States*,¹⁰ to this siting application. The doctrine states that reservations of the land for Indian Tribes carries with them implied rights to use water.

¹⁰ 207 U.S.564 (1908).

IEN provided legal argument through a witness, Peter Capossela. However, Mr. Capossela failed to fully explain the un-adjudicated nature of the Tribe's "Winters Doctrine" rights.

Adjudication is a legal process to determine who has a valid water right, whose rights are senior and junior, how much water is subject to the rights, and thus who has priority use during shortages. Persons claiming a water right, such as the Tribe, under the Winters Doctrine, must have their rights adjudicated by a court of competent jurisdiction. That adjudication has not occurred for these tribes in this state. It is clear that the Commission has not heard evidence and lacks jurisdiction to adjudicate their claim of water rights. The Commission can only hold Dakota Access to the laws, rules and regulations adjudicated and known to it presently.

Dakota Access has minimal needs to use water. The only uses are during construction, for hydrostatic testing and for HDD mud. The hydrostatic testing water will be returned to the environment and thus not consumed. The HDD mud will be land farmed or disposed of in accord with the law. Should the tribes have adjudicated rights in the future, such adjudication is unlikely to affect Dakota Access based on these facts. There's no ongoing use of water by Dakota Access. With that said, on the chance that tribal water rights are somehow adjudicated in the future, it is clear that the remedy for water used is monetary in nature. Any such payment would have to be ordered by a Court of competent jurisdiction and would likely be very small.

There are no facts indicating that the Tribe intervenors are affected by Dakota Access. Presently there are no effects on adjudicated Tribal land or water rights that Dakota Access would violate. If future adjudications are made by courts of competent jurisdiction, Dakota Access (and the rest of South Dakota) will comply. The commission lacks facts or jurisdiction to rule on these legal theories put forth by YST, RST or IEN.

CONCLUSION

The PUC offers an open, transparent, and available process which welcomes and accommodates all interested people to testify in contested case hearings. In its efforts to do so, the PUC presided over 8 days of hearing at which it heard testimony from 43 witnesses and heard cross examination and argument from 10 lawyers. Witnesses included outside expert consultants, landowners and various state agencies with jurisdiction over the Project.

As the only party without a vested interest of any type, the PUC Staff did not express any concern that the burden of proof has not or cannot be met. Among landowners and various groups with a special interest in stopping the Project, opinions varied between a desire that the pipeline simply be placed somewhere else, to sweeping and broad requests that further development of fossil fuels be stopped. However, none of the intervenors could demonstrate that Dakota Access failed to meet its burden of proof.

While intervenors were not able to support their positions with evidence, fact and law, Dakota Access did thoroughly support its request to the Commission for a siting permit. Dakota Access proved it is committed to engage in business as a responsible corporate citizen and does plan to educate itself on and follow all applicable laws. Dakota Access proved its construction and operations utilize the best technology and science available to build and operate a safe pipeline. Dakota Access proved it is committed to proper and complete reclamation of land impacted by construction. Finally, through its consultation, conversation and discussion with local units of government, Dakota Access is aware of the regions development plans and it will not negatively impact those plans.

Dakota Access met its burden of proof and respectfully requests the Commission issue a siting permit.

Dated this 6th day of November, 2015.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)	
APPLICATION OF DAKOTA)	HP14-002
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO CONSTRUCT)	APPLICANT'S PROPOSED FINDINGS OF
THE DAKOTA ACCESS PIPELINE)	FACT AND CONCLUSIONS OF LAW
PROJECT)	

PROCEDURAL HISTORY

On December 15, 2014, Dakota Access, LLC (herein "Dakota Access") filed a siting permit application with the South Dakota Public Utilities Commission (herein "Commission") pursuant to SDCL 49-41B-2.1(3) for the South Dakota portion of the Dakota Access Pipeline Project (Project). Dakota Access also filed a Motion for a waiver of ARSD 20:10:22:39 which requires all related testimony is filed with the siting permit application.

The Project is a 1,168-mile-long, 12-inch to 30-inch¹ diameter crude oil pipeline. The Project is designed to transport crude oil from the Bakken and Three Forks production areas in North Dakota to existing crude refining facilities in Illinois. The Project is proposed to transport approximately 450,000 barrels per day (bpd) initially, with an anticipated capacity up to approximately 570,000 bpd. The Project originates in the northwest portion of North Dakota and traverses southeast through South Dakota for 270 miles. The Project enters South Dakota in Campbell County approximately 17 miles east of the Missouri River, and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln Counties.

On December 16, 2014 the Commission issued its Notice of Application; Order for and Notice of Public Input hearings; and Notice of Opportunity to Apply for Party Status in this docket. The notice provided that pursuant to SDCL 49-41 B-17 and ARSD 20:10:22:40, each municipality, county, and governmental agency in the area where the facility is proposed to be sited; any non-profit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the area in which the facility is to be sited; or any interested person, may be granted party status in this proceeding by making written application to the Commission on or before February 13, 2015.

On January 8, 2015, Commissioner Fiegen filed a letter delivered to Governor Dennis Daugaard advising of a conflict of interest under SDCL 49-1-9 after learning of family ownership of land on the proposed Project route. On January 14, 2015, Governor Daugaard filed

¹ The South Dakota portion of the pipeline will be 30 inches in diameter.

a letter to Secretary of State Shantel Krebs appointing State Treasurer Rich Sattgast to serve as Acting Commissioner in place of Commissioner Fiegen pursuant to SDCL 49-1-9.

Pursuant to SDCL 49-41 B-15 and 49-41 B-16, and its Notice of Application; Order for and Notice of Public Hearings and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Dakota Access's application at the following times and places:

Wednesday, January 21, 2015, from noon (12:00 p.m. CST) until 3:00 p.m. in the Bowdle School Gymnasium, 3083 2nd Ave., Bowdle, South Dakota;

Wednesday, January 21, 2015, from 6:00 p.m. CST until 9:00 p.m. in the Redfield, School Auditorium, 502 E. 2nd St., Redfield, South Dakota;

Thursday, January 22, 2015, from 10:30 a.m. CST until 1:30 p.m. in the Iroquois School Gymnasium, 111 E. Washita Ave., Iroquois, South Dakota; and

Thursday, January 22, 2015, from 5:30 p.m. CST until 8:30 p.m. in the Roosevelt Room at the Ramkota Hotel & Conference Center, 3200 W. Maple Street, Sioux Falls, South Dakota

The purpose of the public input hearings was to hear public comment regarding Dakota Access' application. At the public input hearings, Dakota Access presented a brief description of the project, following which interested persons appeared and presented their views, comments and questions regarding the application.

At its regularly scheduled meeting of February 13, 2015, the Commission considered and granted the ARSD 20:10:22:30 Waiver Ordering that written testimony be submitted pursuant to a Scheduling Order. In addition, the Commission considered Applications for Party Status received from numerous parties. Additional Applications for Party Status, filed after the February 13, 2015, Commission meeting were heard at the Commission's regularly scheduled March 2, 2015, meeting.

The Commission found, pursuant to ARSD 20:10:22:40, that good cause existed to allow intervention for all Applications for Party Status received and the Commission voted unanimously to grant party status to South Dakota Department of Transportation, Lake County, WEB Water Development Association, Inc., Randy Kuehn, Lincoln County Board of Commissioners, Pente Farms, LLC, Minnehaha County Board of Commissioners, Peggy A. Hoogestraat, Joy A. Hohn, Marilyn J. Murray, City of Hartford, Rocky Acres Land Investment, LLC, Linda Goulet, Dale E. Sorenson Life Estate, Dakota Rural Action (herein "DRA"), Daie and Debra K. Sorenson, Duane Sorenson, Dennis Sorenson, Douglas Sorenson, Haugen Investments, LP, Phillip Fett, Orrin E. Geide, Shirley M. Ollmann, Bradley F. Williams, Craig L. Walker, Datta-Jo A. Walker, Kevin J. Schoffelman, City of Sioux Falls, Delores Andreessen Assid, Charles J. Johnson, Janice El Petterson, Corliss F. Wiebers, Paul A. Nelsen, and Paul A. Seamans. John Wellnitz, John Stratmeyer, Lorin Brass, Indigenous Environmental Network (herein "IEN"), Rosebud Sioux Tribe-Sicangu Oyate Land Office (herein "RST"), Rosebud

Sioux Tribe-Sicangu Lakota Treaty Office (herein “RST”), Yankton Sioux Tribe (herein “YST”), KKKP Property, LLLP, Calvin Schreiber, DLK&M, LLC, Pederson Ag, LLC, Jean Osthus, Daniel & Marcia Hoiland, and Mavis Parry.

Well after the deadline for submitting an Application for Party status, on April 20, 2015 the Commission received an Application from the South Dakota Association for Rural Water Systems, Inc. Dakota Access did not object to the late filed Application, and Party Status was granted to the South Dakota Association for Rural Water Systems, Inc. at the Commission’s regularly scheduled April 30, 2015 meeting.

Thereafter, on March 11, 2015, the Commission entered a Scheduling Order and the parties proceeded accordingly with Discovery. On May 5, 2015, the Yankton Sioux Tribe (YST) filed a Motion to Compel Discovery. The Commission considered the Motion and briefs submitted, as well as arguments at its May 12, 2015, regularly scheduled meeting. The Commission denied the Motion in part and granted the Motion in part.

On May 8, 2015, YST, Rosebud Sioux Tribe (RST), Indigenous Environmental Network (IEN) and Dakota Rural Action (DRA) filed a Joint Motion to Amend the Procedural Schedule. At an ad hoc Commission meeting on May 19, 2015, the Commission considered the Joint Motion briefs submitted, as well as argument. The Commission voted unanimously to amend the procedural schedule as it pertained to the due date for second round discovery requests for parties who issued first round discovery requests and to extend the date for all parties to file pre-filed direct testimony.

In accordance with the original and amended scheduling and procedural orders in this case, Applicant, Commission Staff and certain Intervenor filed pre-filed testimony. The formal evidentiary hearing was held as scheduled to take place on September 29, 30 and October 1, 2, 6, 7, 8 and 9, 2015, in Room 414, State Capitol, Pierre, South Dakota.

On the first day of hearing, September 29, 2015, the YST, RST, IEN and DRA filed a Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement. Argument on the Motion was heard on September 29, 2015 prior to the evidentiary hearing. The Motion to stay was denied. The Commission proceeded with the evidentiary hearing as scheduled.

On October 21, 2015, the Commission established the following briefing schedule: (i) initial briefs and proposed findings of fact and conclusions of law from all parties wishing to submit them due by November 6, 2015; and (ii) reply briefs and objections and revisions to proposed findings of fact and conclusions of law due from all parties wishing to submit them on or before November 20, 2015.

On November 6, 2015, along with initial briefs, the Commission Staff and Dakota Access filed Stipulated Proposed Findings of Fact and Conclusions of Law and Permit Conditions. On November 30, 2015, at its regular meeting, the Commission voted unanimously to grant a permit to Dakota Access to construct the Project, subject to conditions.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

PARTIES

1. Petitioner, Dakota Access, LLC, (“Dakota Access”) is a Delaware limited liability company having its principal place of business in Dallas, Texas. As of the hearing dates, the companies with membership in Dakota Access include: Energy Transfer Partners, Phillips 66 and Sunoco Logistics. Tr. at 65-66.

2. At the February 13 and March 2, 2015, regularly scheduled Commission meetings, the Commission unanimously voted to grant party status to all persons that had requested party status prior to the commencement of the meeting. Those that intervened and were granted party status include: South Dakota Department of Transportation, Lake County, WEB Water Development Association, Inc., Randy Kuehn, Lincoln County Board of Commissioners, Pente Farms, LLC, Minnehaha County Board of Commissioners, Peggy A. Hoogestraat, Joy A. Hohn, Marilyn J. Murray, City of Hartford, Rocky Acres Land Investment, LLC, Linda Goulet, Dale E. Sorenson Life Estate, Dakota Rural Action, Daie and Debra K. Sorenson, Duane Sorenson, Dennis Sorenson, Douglas Sorenson, Haugen Investments, LP, Phillip Fett, Orrin E. Geide, Shirley M. Ollmann, Bradley F. Williams, Craig L. Walker, Datta-Jo A. Walker, Kevin J. Schoffelman, City of Sioux Falls, Delores Andreessen Assid, Charles J. Johnson, Janice El Petterson, Corliss F. Wiebers, Paul A. Nelsen, and Paul A. Seamans. John Wellnitz, John Stratmeyer, Lorin Brass, Indigenous Environmental Network, Rosebud Sioux Tribe-Sicangu Oyate Land Office, Rosebud Sioux Tribe-Sicangu Lakota Treaty Office, Yankton Sioux Tribe, KKKP Property, LLLP, Calvin Schreiver, DLK&M, LLC, Pederson Ag, LLC, Jean Osthus, Daniel & Marcia Hoiland, and Mavis Parry. See Commission Orders.

3. The Commission’s Staff also participated in the case as a full party.

PROCEDURAL FINDINGS

4. Dakota Access filed an application for a siting permit with the Commission on December 15, 2015. Ex. DAPL-1.

5. The Commission issued the following notices and orders in the case as described in greater detail in the Procedural History above, which is hereby incorporated by reference in these Findings of Fact and Conclusions of Law:

- 12/16/14 - Notice of Application; Order for and Notice of Public Input Hearings; Notice of Opportunity to Apply for Party Status
- 12/30/14 - Order Assessing Filing Fee

- 2/18/15 - Order Granting Waiver and Intervention and Party Status (South Dakota Department of Transportation, Lake County, WEB Water Development Association, Inc., Randy Kuehn, Lincoln County Board of Commissioners, Pente Farms, LLC, Minnehaha County Board of Commissioners, Peggy A. Hoogestraat, Joy A. Hohn, Marilyn J. Murray, City of Hartford, Rocky Acres Land Investment, LLC, Linda Goulet, Dale E. Sorenson Life Estate, Dakota Rural Action, Dale and Debra K. Sorenson, Duane Sorenson, Dennis Sorenson, Douglas Sorenson, Haugen Investments, LP, Phillip Fett, Orrin E. Geide, Shirley M. Oltmanns, Bradley F. Williams, Craig L. Walker, Dotta-Jo A. Walker, Kevin J. Schoffelman, City of Sioux Falls, Delores Andreessen Assid, Charles J. Johnson, Janice E. Petterson, Corliss F. Wiebers, Paul A. Nelsen, and Paul A. Seamans)
- 2/25/15 - Prehearing Scheduling Conference Order
- 3/05/15 - Order Granting Intervention and Party Status (John Wellnitz, John Stratmeyer, Lorin Brass, Indigenous Environmental Network, Rosebud Sioux Tribe-Sicangu Oyate Land Office, Rosebud Sioux Tribe-Sicangu Lakota Treaty Office, Yankton Sioux Tribe, KKKP Property, LLLP, Calvin Schreiber, DLK&M, LLC, Pederson Ag, LLC, Jean Osthus, Daniel & Marcia Hoiland, and Mavis Parry)
- 3/11/15 - Prehearing Scheduling Order
- 5/04/15 - Order Granting Intervention (South Dakota Association of Rural Water Systems, Inc.)
- 5/07/15 - Order for and Notice of Motion Hearing
- 5/11/15 - Order for and Notice of Motion Hearing
- 5/12/15 - Protective Order
- 5/12/15 - Order for and Notice of Motion Hearing on Less Than Ten Days Notice
- 5/13/15 - Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel
- 5/14/15 - Order Granting Motion to Reconsider and Order for and Notice of Motion Hearing on Less Than Ten Days Notice
- 5/20/15 - Order Granting in Part Motion to Amend Procedural Schedule
- 8/18/15 - Order for and Notice of Motion Hearing on Less than 10 Days' Notice
- 8/20/15 - Order for and Notice of Evidentiary Hearing
- 8/21/15 - Order Allowing Late Filed Testimony
- 9/22/15 - Order for and Notice of Motions Hearing on Less Than 10 Days' Notice
- 9/25/15 - Order Granting Motions
- 10/21/15 - Order Setting Post-Hearing Briefing Schedule and Decision Date
- 10/22/15 - Order Denying Motion to Stay Proceedings for Preparation of an Environmental Impact Statement
- 10/26/15 - Order Denying Motion to Strike and Preclude Introduction of Exhibits

6. Pursuant to SDCL 49-41B-15 and 49-41B-16, and its Notice of Application; Order for and Notice of Public Hearings and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Dakota Access's application at the following times and places: Wednesday, January 21, 2015, from noon (12:00 p.m. CST) until 3:00 p.m. in the Bowdle School Gymnasium, 3083 2nd Ave., Bowdle, South Dakota; Wednesday, January 21, 2015, from 6:00 p.m. CST until 9:00 p.m. in the Redfield, School Auditorium, 502 E. 2nd St., Redfield, South Dakota; Thursday, January 22, 2015, from 10:30 a.m. CST until 1:30 p.m. in the Iroquois School Gymnasium, 111 E. Washita Ave., Iroquois, South Dakota; and Thursday, January 22, 2015, from 5:30 p.m. CST until 8:30 p.m. in the Roosevelt Room at the Ramkota Hotel & Conference Center, 3200 W. Maple Street, Sioux Falls, South Dakota.

7. The purpose of the public hearings was to afford an opportunity for interested persons to present their views and comments to the Commission concerning the Application. At the hearings, Dakota Access presented a brief description of the project after which interested persons presented their views, comments and questions regarding the application. See Public Hearing Transcripts.

8. The following testimony was prefiled in advance of the formal evidentiary hearing held September 29, 30 and October 1, 2, 6, 7, 8 and 9, 2015 in Room 414, State Capitol, Pierre, South

Direct Testimony:

- Dakota Access: Joey Mahmoud, Monica Howard, John (Jack) H. Edwards, Chuck Frey, Todd Stamm.
- Commission Staff: Paige Olson, Tom Kirschenmann, Derric Iles, Kim McIntosh, Darren Kearney, Michael Houdyshell, Todd Bailey, David Nickel, Ann Curnow, Andrea Thornton, DeAnn Thyse, Michael Shelly, Robert McFadden, Cameron Young, Ryan Ledin
- Landowner Interveners: Corliss Fay Wiebers, Delores (Andreessen) Assid, Devona B. Smith, Janice Elaine Petterson, Kevin John Schoffelman, Linda Ann Goulet, Margaret (Andreessen) Hilt, Marilyn Jean Murray, Matthew L. Anderson, Mavis Arlene Parry, Nancy J. Stofferahn, Peggy A. Hoogestraat, Rod & Joy Hohn, Ronald H. Stofferahn, Shirley Mae Oltmanns, Thomas E. Stofferahn, Brian Top (Expert witness on behalf of landowners), Ruth E. Arends, Allan C. Arends, Lorrie L. Bacon, and Sherrie K. Fines-Tracy, Orrin Geide, Kent Moeckly, Sue Sibson, Laurie Kunzelman
- City of Sioux Falls
- South Dakota Association of Rural Water Systems

Rebuttal Testimony:

- Dakota Access: Joey Mahmoud, Monica Howard, Chuck Frey, Micah Rorie, Stacey Gerard, Aaron Dejoia
- Commission Staff : Michael E. Timpson
- Landowner Interveners: Peggy A. Hoogestraat, Sue Sibson, Janice Elaine Petterson
- Indigenous Environmental Network and Dakota Rural Action: Lisa Deville, Wasté Win Young, Peter Capossela, Robert P. Gough, Dallas Goldtooth
- Yankton Sioux Tribe: Faith Spotted Eagle, Chris Saunsoci, Jason Cooke

9. Landowner Interveners that filed testimony did not request conditions in the event the siting permit is granted. Rather, they opposed the Project as a whole.

10. Neither the Indigenous Environmental Network nor Dakota Access requested conditions in the event the siting permit is granted. Rather, they opposed the Project as a whole.

11. Neither the Rosebud Sioux Tribe nor the Yankton Sioux Tribe requested conditions in the event the siting permit is granted. Rather, both oppose the Project as a whole

12. The City of Sioux Falls resolved its concerns through negotiations with Dakota Access and did not offer its prefiled testimony as evidence.

APPLICABLE STATUTES AND REGULATIONS

13. The following South Dakota statutes are applicable: SDCL 49-41B-1 through 49-41B-2.1, 49-41B-4, 49-41B-11 through 49-41B-19, 49-41B-21, 49-41B-22, 49-41B-24, 49-41B-26 through 49-41B-38 and applicable provisions of SDCL Chs. 1-26 and 15-6.

14. The following South Dakota administrative rules are applicable: ARSD Chapter 20:10:01 and ARSD 20:10:22:01 through ARSD 20:10:22:25, ARSD 20:10:22:36 through ARSD 20:10:22:40.

15. Pursuant to SDCL 49-41B-22, the Applicant for a facility construction permit has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

THE PROJECT

16. The Project will be owned by Dakota Access, LLC. Dakota Access, LLC members include Energy Transfer Partners, Phillips 66 and Sunoco Logistics.

17. The Project will be operated by Sunoco Logistics. Tr. at 523.

18. The purpose of the Project is to connect the rapidly expanding Bakken and Three Forks production areas in North Dakota to a crude oil hub Illinois. This supply will serve to replace the United State's reliance on less stable and less reliable sources of offshore crude oil. Ex. DAPL-1, Section 8.0

19. The Project is approximately 1,168-miles-long. The South Dakota portion of the pipeline will be approximately 270 miles in length. The project enters South Dakota in Campbell County approximately 17 miles east of the Missouri river and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner and

Lincoln counties. Detailed route maps are presented in Exhibit A to the Siting Application, admitted into evidence as Ex. DAPL-2.

20. The pipeline is proposed to initially transport approximately 450,000 barrels per day, with an anticipated capacity up to 570,000 barrels per day. Ex. DAPL-1, p. 1.

21. Construction of the Project is proposed to commence in the spring of 2016, with construction in South Dakota to last approximately 9 months. Construction in South Dakota will be constructed in two partial and one full construction spread with 900 to 1,000 construction personnel on each spread. Tr. at 301². Dakota Access has entered into binding contracts for the shipment of crude oil product pursuant to the Project plan. The contractual commitments, which are already in existence, demonstrate the viability and need for the project. Ex. DAPL-1, Section 10.0.

22. The pipeline will have a 12-30 inch diameter and be constructed using high-strength steel pipe API 5L. Ex. DAPL-1, Section 38. The pipeline will be coated with fusion-bonded epoxy which provides a barrier between the steel pipe surface and corrosive environments such as soil or water. The pipeline will also be protected by a cathodic protection system. Id.

23. The pipeline will operate at a maximum operating pressure of 1,440 psig. Ex. DAPL-1, Section 38.3.

24. The Project will have one pump station in South Dakota located approximately 7 miles southeast of Redfield in Spink County at mile post 332.2. The pump station consists of approximately 9 acres of land acquired by Dakota Access in fee. Ex. DAPL-1, Section 38.

25. The pump station will be electrically driven and will pump crude oil through the pipeline. Design and construction of the pump station will meet the requirements of the National Electric Code and American Petroleum Institute (API) 500. The pump station will be fully automated for unmanned operation. Remote start and stop, set point controls, unit monitoring equipment and station information will be installed at the pump station. Backup power at the pump station will consist of batteries to maintain communication between the pump station and the pipeline control center, and operate lighting and power from minor facility procedures if local utility power supply is disrupted. Id.

26. Dakota Access will install 40 main line valves (MLV) in South Dakota. Main line valves have the capacity to isolate sections of the line in the event of an emergency to minimize impacts incase of abnormal operations or for operational maintenance reasons. All valves have remote actuators so that in the unlikely event of an emergency, the valves can be quickly activated from the operational control room to isolate sections of the pipe. Ex. DAPL-1, Section 11 and Tr. at 2141.

27. The use of 40 MLV's is in excess of code requirements and was incorporated into the design of the Project to increase safety and Dakota Access' ability to respond to abnormal

² References to the hearing transcript will be made as, "Tr. at ____."

operating conditions. The use of excessive valves demonstrates Dakota Access' commitment to build a pipeline with state-of-the-art safety features. Id.

28. The pipeline will be constructed within a 125-foot wide corridor, consisting of a 50-foot wide permanent right-of-way with the remaining area consisting of a temporary construction right-of-way. See typical drawings attached to Ex. DAPL-32 and Ex. DAPL-1, Section 11.

29. The project will be designed, constructed, tested and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195. These federal regulations are intended to ensure adequate protection for the public and the environment, and to prevent crude oil pipeline accidents and failures. Ex. DAPL-31.

30. The current estimated cost of the Dakota Access Project in South Dakota is \$820 million. Dakota Access is subject to South Dakota taxing authorities to pay property taxes. Ex. DAPL-1, Section 9.0.

DEMAND FOR THE FACILITY

31. Currently, the U.S produces approximately 10 million barrels of oil per day and imports approximately 10 million barrels per day. Consumption ranges between 17.5 to 20 million barrels per day. Tr. at 1933.

32. The transport of domestic crude oil to meet domestic refining needs will reduce the United State's dependence on foreign offshore oil. Id.

33. Through this project, Dakota Access will provide a number of opportunities for refiners in the United States to utilize the crude oil production coming out of the Bakken and Three Forks areas in North Dakota. Reliable and safe transportation of crude oil will help ensure that the United State's energy needs are not subject to unstable political events. Ex. DAPL-1, Sections 8.0 and 10.0.

34. Dakota Access secured binding long-term transportation and efficiency contracts from multiple committed shippers to support development of the Dakota Access pipeline with a crude oil transportation capacity of approximately 450,000 barrels per day. These long-term binding shipper commitments demonstrate endorsement and support for the Project, its economics, proposed route and target market, as well as the need for additional pipeline capacity and access to domestic refinery markets. Id.

ENVIRONMENTAL AND LAND USE IMPACTS OF THE PROJECT

35. Exhibit A to the application for a siting permit includes soil type maps and aerial photograph maps of the Dakota Access Pipeline route in South Dakota that indicate topography, land use, project mile posts and sections, township and range location descriptors. The maps were admitted at hearing as DAPL-2.

36. The Project route crosses six terrestrial vegetation community types in South Dakota including: pasture land/range land, native grassland, hay land, row crop agriculture, residences and farmsteads, and ROW corridors. Total acreage of each type of vegetation community:

- a) Pasture land/range land: 969.3 acres
- b) Native grassland: 41 acres
- c) Hay land: 369.5 acres
- d) Row crop agriculture: 3763.1 acres
- e) Residences and farmsteads: 30 acres
- f) ROW corridors: 128.1 acres

See Table 16.1-1, Ex. DAPL-1

37. Temporary impacts to vegetation and land use along the route will occur as a result of the project. Other than the pump station, land use impacts are generally not permanent. After construction, land uses generally will be the same as they currently exist. Dakota Access has appropriate plans in place to reclaim all vegetation areas temporary impacted by the Project to prevent any permanent impact to vegetation.

38. Surficial deposits within the region wherein the Project is proposed for construction are composed primarily of alluvium, eolian deposits, lacustrine sediments, moraine and outwash. Alluvium consists of clay and silt with lesser amounts of sand and gravel deposited by recent streams, and is typically black or dark brown and rich in organic matter. Ex. DAPL-1, Section 14.3.

39. It is not anticipated the project will impact mineral resources, as no identification of industrial mining operations was noted within one mile of the Project area. Ex. DAPL-1, Section 14.4.

40. Soil tables for the route were provided as Exhibit C to the application, which was admitted at hearing as Exhibit DAPL-4. Exhibit C to the application includes total crossing district of each soil-series unit, the areas impacted by construction of the above-ground pump station, and the characteristics of each of the soil map units within the project area. The identified soil types include: prime farm land, hydric properties, compaction potential, erosion, restrictive soil layers, shallow bedrock and revegetation properties.

41. Approximately 37% of the soils crossed by the pipeline are considered to be prime farmland, and approximately 44% of the route is identified as farmland of statewide importance. Ex. DAPL-1, Section 14.5. Following completion of construction, other than the pump station these areas of farmland will be reclaimed and put back to pre-construction condition and use.

42. The majority of the soils within the project area are classified as hydric. Hydric soils are defined as “soils that formed under conditions of saturation, flooding or ponding long enough during growing seasons to develop anaerobic conditions in the upper part” (US Army Corps of Engineers, 1987). Hydric soils can be prone to compaction and rutting. Dakota Access will minimize impacts to hydric soils by implementing mitigation measures as outlined in the Storm

Water Pollution and Prevention Plan, marked as Exhibit D to the application and admitted in the hearing as Ex. DAPL-5.

43. Soils with high erosion potential within the Project area were identified based on NRCS designations of land capability class and sub-class. Exhibit C to the application, admitted as Ex. DAPL-4, identifies the erosion potentials of each map unit within the project area. While the majority of soils within the project area have low erosion potential, those with high erosion potential are properly identified and Dakota Access will utilize proper erosion and sedimentation control devices as provided for in the storm water pollution and prevention plan, Exhibit D to the application Ex. DAPL-4.

44. Exhibit C to the application identified soils with high sodium concentrations. Identification of such soils is necessary as the condition limits growth of plant species and can be a challenge in reclamation. Ex. DAPL-5. Dakota Access properly identified these areas and retained an agricultural consultant to develop specific mitigation measures for work in these areas. In addition, Dakota Access will consult with NRCS to obtain a proper seed mix for use in these areas.

45. Successful restoration and revegetation of the project work spaces and permanent easement areas are important to maintain positive landowner relations, to maintain land productivity and to protect underlying soil from potential damage.

46. Dakota Access plans for areas of low revegetation potential is properly covered by the the storm water pollution and prevention plan, Exhibit D to the application, Ex. DAPL-5. The majority of soils impacted by the project have moderate to high revegetation potential. Ex. DAPL-1, Section 14.

47. The Dakota Access construction and reclamation process involves placement of environmental inspectors along the route to monitor construction personnel and progress. The effectiveness of revegetation and permanent erosion control devices will be monitored by Dakota Access' operating personnel during long-term operation and maintenance of the Project. Ex. DAPL-1, Section 14.6.

48. Dakota Access developed a proper plan for prevention, containment remediation of inadvertent spills or releases of fuel, lubricant, or hazardous materials during construction of the Project. Ex. DAPL-5.

49. High consequence areas, as defined by 29 CFR 195, were not identified in the pipeline corridor. However, if the identification of high consequence areas occurs, or if environmental factors change thus resulting in the existence of a high consequence area, per 49 CFR 195, Dakota Access must integrate that high consequence area into its integrity management plan. Tr. at 2205-2206

Special Considerations: Impact to Water Bodies and Wetlands

50. Dakota Access identified 279 water body crossings located within the Project body footprint. Of those identified, 10 are perennial streams and rivers, 105 are intermittent streams, 139 are ephemeral streams and 25 are open water ponds. Ex. DAPL-1, Section 17.1.
51. Impacts to water bodies will be limited to the construction phase. Impacts during construction may include an increase of sedimentation and turbidity, introduction of water pollutants or entrapment of fish. However, no permanent long-term effects on water quality or fish communities are anticipated to occur as a result of the construction or operation of the pipeline. Ex. DAPL-1, Section 17.1.1.
52. Dakota Access will minimize potential impacts on water bodies by utilizing specialized crossing methods and implementing best management practices to decrease time spent in water crossing areas.
53. Construction methods utilized at water body crossings are highly dependent on characteristics of the water body encountered, environmental constraints, the underlying geology, and other factors. The on-site environmental inspectors will be used to determine the best crossing method based on all environmental factors to reduce potential impacts. Ex. DAPL-1, Section 17.1.1. Potential types of crossing methods include: open-cart crossing method, flume crossing method, dam and pump crossing method, or a horizontal directional drill. Id.
54. The horizontal directional drill crossing method will be utilized at water body crossings or other areas along the route where it is necessary to avoid a particularly sensitive resource. Ex. DAPL-1, Section 17.1.1. The horizontal directional drill method allows for construction across an area without the excavation of a trench, by drilling a hole significantly below conventional pipeline depth, and pulling the pipeline through the pre-drilled hole. Id.
55. Table 17.1-1 (Ex. DAPL-1) of the application identifies the water bodies and wetlands wherein the horizontal directional drill method will be used. In addition, Monica Howard testified to two additional water bodies which will be horizontally drilled. Tr. at 403-403. The HDD method will be used at five water bodies of particular sensitivity and three wetlands of particular sensitivity.
56. Dakota Access routed the project to avoid permanent fill in wetlands. In addition, above ground facilities were sited within upland areas. The result is no permanent loss of wetlands. Ex. DAPL-1, Section 17.2.1. As with water crossings, temporary impacts to wetlands are limited to the construction phase. Table 17.2-1 summarizes all wetlands within the project area. The table includes United States Army Corps of Engineers' jurisdictional wetlands and non-jurisdictional wetlands. To avoid impacts, Dakota Access will cross three of the wetlands via horizontal directional drilling. Where impacts are unavoidable, Dakota Access will implement best management practices to ensure the wetland is restored.
57. Noxious weeds may cause environmental and economic impacts, and can directly or indirectly injure agriculture, waterways, wildlife or public health. A total of 12 species of state and county noxious weeds were documented within the project area. Ex. DAPL-1, Section 16.1. Construction activities result in surface disturbance, which could contribute to the spread of

noxious weeds. Dakota Access will implement best management practices and weed control practices during construction and operation to mitigate an impact from noxious weeds. Dakota Access will also consult with NRCS and the county governments and follow recommendations made by the agencies. Tr. at 1788.

Special Considerations: Impact on Agricultural Land

58. Row crop agriculture and hay lands will be temporarily disturbed and removed from production during construction. Agricultural production will resume during the growing season following completion of the pipeline construction. Dakota Access has appropriate plans in place to restore row crop agriculture and hay lands to pre-construction conditions. Ex. DAPL-5.

59. Dakota Access' restoration of row crop and hay lands to pre-construction conditions will be done pursuant to the Agricultural Impact Mitigation Plan attached to the application as Exhibit D and admitted at the hearing as DAPL-5. In addition, landowners will be compensated for crop loss, short-term reduced yields, and any other damage which results from pipeline construction.

60. To minimize impacts to agricultural vegetation, Dakota Access will segregate topsoil during construction of the pipeline. At a minimum, the depth of topsoil to be stripped will be 12 inches (or actual depth of topsoil if less than 12 inches). However, Dakota Access commits to stripping additional topsoil in areas where the depth of topsoil exceeds 12 inches. Dakota Access will work with individual landowners where topsoil is in excess of 12 inches. Tr. at 1875. Segregated topsoil will then be returned following backfill of the subsoil, ensuring preservation of valuable topsoil within the construction area.

61. Functioning drain tile systems are necessary for landowners to maximize crop production on agricultural land. Dakota Access has taken all available and prudent action to identify drain tiles which exist in the project footprint and will be impacted by the project. Dakota Access has plans in place to repair existing drain tile to its pre-construction condition and maintain the drain tile system's functionality. Tr. at 1878 – 1879, DAPL-5.

IMPACTS ON WILDLIFE AND FISH

62. The Project does not cross any water bodies categorized as high-quality fisheries within South Dakota. A total of three water bodies crossed by the Project are categorized as low-quality and have warm water fishery classifications. The three warm water fishery water bodies are Turtle Creek, James River and Big Sioux River. Ex. DAPL-1, Section 17.1.

63. A comprehensive list of all federal and state sensitive, threatened and endangered species within the counties crossed by the project are listed in Exhibit C to the application, Ex. DAPL- 4. Exhibit C includes habitat assessments and determination of impact or effect on the listed species. Coordination and consultation with U.S. Fish and Wildlife Service and South Dakota Game, Fish & Parks was initiated in 2014, and is continuing. Dakota Access will continue consulting with the resource agencies to develop mitigative measures to minimize potential

impacts to any listed species prior to initiating construction. Dakota Access will implement any recommendations made. Tr. at 2043-2044.

64. Dakota Access and the U.S Fish and Wildlife Service identified potential effects on one listed aquatic species, the Topeka Shiner. Dakota Access will cross water bodies where the Topeka Shiner has been identified as a potentially impacted species. As a result, Dakota Access will utilize the horizontal directional drill crossing method and it will utilize the biological opinion issued by US Fish and Wildlife. As such, US Fish and Wildlife considered that there will be “no impact” on the species.

65. Tom Kirschenmann, the chief of terrestrial resources within the Division of Wildlife for SDGFP concluded that if Dakota Access implements all recommendations made by the U.S. Fish and Wildlife Service, any concern his agency has regarding sensitive areas or species is resolved and satisfied. Tr. at 931 - 940.

IMPACT ON CULTURAL RESOURCES

66. Dakota Access conducted a thorough and complete cultural resource survey along the entirety of the proposed Project route. South Dakota law requires a survey which includes identification of all previously identified cultural resources listed on the Registry of Historic places. However, Dakota Access engaged in a more robust survey. Dakota Access also identified all areas eligible for inclusion on the Registry for National Historic Places. Tr. at 2165.

67. The entirety of the route, with the exception of 12 tracts to which Dakota Access has not received survey permission, has been surveyed for cultural resources. All above-ground facilities for the project have also been surveyed, including the pump station, the valves, the launchers, receivers, as well as all access roads currently identified. As contractor yards and any additional roads are identified, they will also be surveyed. Tr at 2152.

68. Dakota Access developed an unanticipated discovery plan, which was reviewed and approved by Paige Olson of the South Dakota State Historic Preservation Office. TR 2153. The unanticipated discovery plan addresses proper handling of cultural resources, human remains and funerary objects unearthed in the excavation and construction process. Ex. DAPL-9.

69. All areas of particular sensitivity as identified by the Rosebud Sioux Tribe were either avoided in pipeline routing, or avoided through horizontal directional drill methods. Tr. at 2154 – 2165.

DESIGN AND CONSTRUCTION

70. Dakota Access plans to install 40 main-line valves along the route in South Dakota. The valves will have remote actuators, so in the unlikely event of an emergency, the valves can be quickly activated from the pipeline control center to isolate sections of the pipeline to minimize impacts. The valves will also be designed to allow for local operation. Ex. DAPL- 31.

71. Pipeline segments will allow the passage of internal inspection devices, capable of detecting internal and external anomalies in the pipe such as corrosion, dents and gauges. Id.
72. The pipeline will have a design factor of 0.72. Id.
73. The pipeline will have a nominal 30-inch diameter. Id.
74. Pipe material grade will be X-70, and comply with API 5L-PFL2. Pipe wall thickness will be 0.429 inch or 0.625 inch. Id.
75. To protect against corrosion, Dakota Access will apply an external fusion bond epoxy coating to the pipeline and an impressed cathodic protection system will be used. All material will be manufactured, constructed and operated in accordance with applicable regulations. Id., Ex. DAPL-1, Section 38.
76. Current storage of pipeline segments outdoors in preparation for construction does not negatively impact the effectiveness of the fusion bond epoxy coating, nor does it affect pipeline integrity. DAPL-37.
77. Dakota Access has not applied for any waivers from PHMSA.
78. The design of the pipeline is based on a maximum operating pressure of 1,440 PSIG. Various sections of the pipeline will be exposed to lower pressures due to the combined pump station discharge pressure, friction pressure loss and hydrostatic head gain or loss for pipe segments located at elevations that differ from pump station elevations. Ex. DAPL-31.
79. Exhibit B to the application includes a main line valve typical drawing, pump station typical drawing and project flow diagrams. Ex. DAPL-3. Flaws were not identified.
80. Dakota Access is subject to all PHMSA regulations pertaining and inspections to design and construction. Ex. DAPL-31.
81. All pipe welds will be examined around 100% of their circumference using ultrasonic or radiographic inspection. Ex. DAPL 31 and Tr. at 2137.
82. Dakota Access will hydrostatically test the pipeline prior to operations. Hydrostatic testing is done through the use of water to pressurize the pipeline. Ex. DAPL-34.
83. Water used for hydrostatic testing is not consumed but is subsequently released pursuant to applicable permits and will not result in contamination of aquatic ecosystems, since the pipe is cleaned prior to testing and the discharge water is monitored and tested.
84. During construction, Dakota Access will have a number of inspectors on a construction spread, including environmental inspectors who will monitor any environmental issue that arises as well as monitor for compliance with all applicable permits. Ex. DAPL-1, 33.

85. Dakota Access prepared a detailed Storm Water Pollution Prevention Plan, which will be utilized during construction to minimize impacts of storm water runoff during project construction activities. Dakota Access has also developed a spill prevention, containment and countermeasures plan for use during construction to provide preventative and mitigative measures to minimize environmental impact associated with inadvertent spills or releases of fuel, lubricant, or hazardous materials during construction of the project. Finally, the Agricultural Impact Mitigation Plan addresses various aspects of construction intended to mitigate and prevent damage during the construction phase. All three of the plans include the use of experienced environmental and/or agricultural inspectors during the construction phase of the project. Dakota Access thorough implementation of procedures outlined in these plans will minimize the impacts associated with the project. The plans were filed as Exhibit D to the application and introduced into evidence as DAPL- 5.

86. In particular, the Agricultural Impact Mitigation Plan includes many mitigation steps Dakota Access will take during construction which are designed to return the land to its original production. These include topsoil removal and replacement, compaction of the trench line, de-compaction of the work area, and tilling of the topsoil after replacement. Ex. DAPL- 5.

87. Dakota Access is required to acquire permits authorizing the crossing of any county roads and township roads. It's expected the permits will require Dakota Access to restore roads to their pre-construction condition. If its construction equipment causes damage to county or township roads, Dakota Access is responsible for the repair of the roads to pre-construction condition. Pursuant to SDCL 49-41-B-38, Dakota Access is required to post a bond to ensure that any damage beyond normal wear and tear to public roads, highways, bridges or other related facilities will be adequately compensated. Dakota Access and staff agreed the bond amount under SDCL 49-41B-38 for damaged highways, roads, bridges and other related facilities to be set at \$24 million. Tr. at 1925.

88. The Commission finds that procedures in the Storm Water Pollution Prevention Plan, draft Spill Prevention Control and Countermeasures Plan, Agricultural Impact Mitigation Plan, and other construction plans and procedures that Dakota Access has committed to implement, together with conditions regarding construction practices adopted by the Commission herein, will minimize impacts from construction of the Project to the environment and social and economic conditions of inhabitants and expected inhabitants in the project area.

89. Some conditions relate to construction and its affect on landowners and their property. Dakota Access may encounter physical conditions along the route during construction which makes compliance with certain of these conditions infeasible. If, after providing a copy of this order including the conditions, to the landowner and advising commission staff, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearance or right-of-way widths, Dakota Access may follow the alternative procedures and specifications agreed to between it and the landowner.

OPERATIONS AND MAINTENANCE

90. The Dakota Access pipeline will be designed, constructed, tested and operated in

accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (“PHMSA”) regulations at 49 CFR Part 195. These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex. DAPL-31, 34.

91. The safety features of Dakota Access’s operations are also governed by 49 CFR Part 195. Id.

92. The Project will employ a Supervisory Control and Data Acquisition (SCADA) system to remotely monitor and control the pipeline. Data necessary and useful to monitoring the pipeline's operations will be collected and transmitted to the operations control center, which is manned 24 hours per day, 365 days per year.

93. The advanced Supervisory Control and Data Acquisition ("SCADA") systems will be utilized to constantly monitor sensing devices placed along the pipeline to track the pressure, temperature, density, and flow of liquid petroleum under transport, and display each movement's status to operators at the control center. Through these systems, the pipeline's operators can maintain the pipeline within established operating parameters, can remotely shut down pump stations and isolate pipeline segments when they observe abnormal conditions or if safety parameters are exceeded. A subsystem of the SCADA system known as the Computational Pipeline Monitoring system ("CPM"), has the ability to analyze deviations in the flow of liquids to the pipeline, thus improving the operator's ability to identify leaks and other abnormal operating conditions. Id.

94. Additionally, Dakota Access will implement and utilize direct observation methodologies, which include aerial patrols, ground patrols and public and landowner awareness programs designed to encourage and facilitate the reporting of suspected leaks and events that may suggest a threat to the integrity of the pipeline. Id.

95. Dakota Access will implement abnormal operating procedures when necessary and as required by 49 CFR 195.402(d). Abnormal operating procedures will be part of the written manual for normal operations, maintenance activities, and handling abnormal operating and emergencies. Id., Ex. DAPL-6.

96. As required by US DOT state law and regulations, Dakota Access will prepare a facility response plan for the system. Id. The plan is currently in draft form. In drafting the plan, Dakota Access developed a South Dakota Spill Model Discussion. The Spill Model Discussion evaluates worst-case discharges which permits Dakota Access to properly design its facility response plan to address the same. The risk assessment over-estimates the probable size of a spill to ensure conservatism and emergency response in other planning objectives.

97. The facility response plan will be submitted to PHMSA for review prior to commencement of pipeline operations. The Commission finds that the facility response plan as required under 49 CFR 195.402 should also be submitted to the Commission at the time it is submitted to PHMSA to apprise the Commission of its details.

98. Pursuant to the response plan, Dakota Access will strategically locate emergency response equipment along the pipeline route. The equipment will include trailers, oil spill containment and recovery equipment, boats, and a communication office. Dakota Access will also have a number of contractors available to provide emergency response assistance if necessary. Tr. at 528.

99. If the Dakota Access pipeline should experience a release, Dakota Access would implement its facility response plan. The South Dakota Department of Environment and Natural Resources (“DENR”) would be involved in the assessment and abatement of the release, and require the leak to be cleaned up and remediated. Ex. Staff-3. The DENR has been successful in enforcing remediation laws to ensure the effects of any pipeline releases are mitigated. Id.

100. Local emergency responders may be required to initially secure the scene and ensure the safety of the public, and Dakota Access will provide training in that regard. Tr. at 528.

101. The Commission finds that the threat of serious injury to the environment or inhabitants of the State of South Dakota from a crude oil release is substantially mitigated by the integrity management, leak detection and facility response processes and procedures that Dakota Access is continuing to plan and will implement.

ALTERNATIVE ROUTES

102. The currently proposed route most closely meets the objectives of the Project, while minimizing potential impacts to the environment and maintaining the health and safety of the public. Ex. DAPL-1, Section 12.3.

103. SDCL 49-41B-36 explicitly states that Chapter 49-41B “shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility.” The Commission accordingly finds and concludes that it lacks authority to compel the Applicant to select an alternative route or to base its decision on whether to grant or deny a permit for a proposed facility and whether the selected route is the route the Commission itself might select.

SOCIOECONOMIC FACTORS

104. SocioEconomic evidence offered by both Dakota Access and Commission staff demonstrates that the welfare of the citizens of South Dakota will not be impacted by the Project. Intervenors did not offer evidence of negative socioeconomic effects.

105. Dakota Access will pay property taxes to local governments on an annual basis estimated to be in the millions of dollars. An increase in assessed, taxable valuation for school districts is a positive development. In addition Dakota Access will pay sales and use taxes.

106. The project will bring jobs, both temporary and permanent, to the State of South Dakota, and specifically to the areas of construction and operation. The project will not substantially impair the health, safety or welfare of the inhabitants.

GENERAL

107. Applicant has provided all information required by ARSD Chapter 20:10:22 and SDCL Chapter 49-41B. S-1.

108. The Commission finds that the Conditions attached hereto as Exhibit A and incorporated herein by reference are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and should be adopted.

109. The Commission finds that a permit to construct the Project should be granted subject to the Conditions set forth in Exhibit A.

110. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated by reference as a Finding of Fact.

Based on the foregoing Findings of Fact, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Chapter 49-41B and ARSD Chapter 20:10:22. Subject to the findings made on the four elements of proof under SDCL 49-41B-22, the Commission has authority to grant, deny or grant upon reasonable terms, conditions or modifications, a permit for the construction, operation and maintenance of the Dakota Access Pipeline.
2. The Dakota Access Pipeline Project is a transmission facility as defined in SDCL 49-41B-2.1(3).
3. Applicant's permit application, as amended and supplemented through the proceedings in this matter, complies with the applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.
4. The project does not involve federal agency action. As a result, the National Environmental Policy Act (NEPA) does not require preparation of an environmental assessment or environmental impact statement.
5. State law does not require preparation of an environmental impact statement. The application and permitting requirements under the South Dakota Siting Act, SDCL 49-41B, requires substantially the same information as a state environmental impact statement per SDCL 34A-9-2 (3). As such, it is redundant and unnecessary for the Commission to require an environmental impact statement outside and in addition to the information contained in the application for a siting permit.
6. The Project, if constructed in accordance with the terms and conditions of this

decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD 20:10:22.

7. The Project, if constructed in accordance with the terms and conditions of this decision, will not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.
8. The Project, if constructed in accordance with the terms and conditions of this decision, will not substantially impair the health, safety or welfare of the inhabitants in the siting area.
9. The Project, if constructed in accordance with the terms and conditions of this decision, will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.
10. Neither the Rosebud Sioux Tribe or the Yankton Sioux Tribe are affected local units of government.
11. Native American Tribes do not have adjudicated private property land rights to any of the property crossed by the Project. The Commission does not have jurisdiction to adjudicate those land rights.
12. Native American Tribes do not have adjudicated water rights to any hydrological resource used by the Project. The Commission does not have jurisdiction to adjudicate those water rights.
13. Dakota Access followed all existing law regarding the survey and identification of cultural resources.
14. The standard of proof is by the preponderance of evidence. The Applicant has met its burden of proof pursuant to SDCL 49-41B-22 and is entitled to a permit as provided in SDCL 49-41B-25.
15. The Commission has authority to revoke or suspend any permit granted under the South Dakota Energy Facility Permit Act for failure to comply with the terms and conditions of the permit pursuant to SDCL 49-41B-33 and must approve any transfer of the permit granted by this Order pursuant to SDCL 49-41B-29.
16. To the extent that any of the Findings of Fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.
17. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 U.S.C. 60101, et seq.

18. SDCL 49-41B-36 explicitly states that SDCL Chapter 49-41B “shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility.” The Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission might itself select.

19. The Commission concludes that it needs no other information to assess the impact of the proposed facility or to determine if Applicant or any Intervenor has met its burden of proof.

20. The Commission concludes that the Application and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural requirements under South Dakota law, including public hearing requirements, have been met or exceeded.

21. The Commission concludes that it possesses the authority under SDCL 49-41B-25 to impose conditions on the construction, operation and maintenance of the Project, that the Conditions set forth in Exhibit A are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and that the Conditions are hereby adopted.

Dated this 6th day of November, 2015.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Kara Semmler
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Exhibit A

PERMIT CONDITIONS

I. Compliance with Laws, Regulations, Permits, Standards and Commitments

1. Dakota Access shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes codified at 49 U.S.C. § 601 01 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01:32 through 74:02:01 :34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.
2. Dakota Access shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Clean Water Act §404 and Rivers and Harbors Act Section 10 Permits; General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard imposed by any federal agency differs from the requirements of these Conditions, the more stringent shall apply.
3. The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-41B-29.
4. Dakota Access shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.

II. Reporting and Relationships

5. The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit DAPL-2. The Application filed by Dakota Access with the Commission indicates Dakota Access will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. Dakota Access shall do the following as it pertains to routing:

- a) File new aerial route maps that incorporate any route adjustments prior to construction.

- b) Notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route and afford the Commission the opportunity to review and approve such modifications.
- c) Notify affected landowners of any change in the route on their land.
- d) Upon completion of the pre-construction route, Dakota Access shall file maps with the Commission depicting the final preconstruction route.
- e) At the conclusion of construction, Dakota Access shall file detail maps with the Commission depicting the final as-built location of the Project facilities.

6. Dakota Access shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Dakota Access, including its contractors, and landowners, local communities and residents and to facilitate prompt resolution of complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Dakota Access shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Dakota Access without the approval of the Commission. The public liaison officer shall be afforded immediate access to Dakota Access's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Dakota Access shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Dakota Access's public liaison officer has been appointed and approved, Dakota Access shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Dakota Access and the public liaison officer, take action to remove the public liaison officer.

7. Dakota Access shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, and any other plan required pursuant to PHMSA regulations, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending March 31, 2016. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.

8. Until one year following completion of construction of the Project, including reclamation, Dakota Access's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Dakota Access shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

9. Prior to construction, Dakota Access shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.

10. Dakota Access shall conduct a preconstruction conference prior to the commencement of construction to ensure that Dakota Access, and its contractors, fully understands the conditions set forth in this order. At a minimum, the conference shall include a Dakota Access representative, Dakota Access's construction supervisor and Commission Staff.

11. Once known, Dakota Access shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities.

III. Construction

12. Except as otherwise provided in the conditions of this Order and Permit, Dakota Access shall comply with all mitigation measures set forth in the Stormwater Pollution Prevention Plan, and Appendices, Agricultural Impact Mitigation Plan, Horizontal Directional Drill Contingency Plan and Blast Plan as set forth in DAPL-5. If modifications to a plan are made by Dakota Access as it refines its construction plans or are required by any federal or state agency, the plan as so modified shall be filed with the Commission and shall be complied with by Dakota Access.

13. The probability of Dakota Access encountering karst features is low. However, if voids or other signs of karst topography are found during construction, Dakota Access shall conduct further site-specific evaluations by a qualified geologist or geotechnical engineer to provide input on mitigation measures. Dakota Access shall complete site-specific mitigation measures on a case by case basis for each karst feature encountered during construction. Any site specific mitigation plans completed for a karst feature shall be submitted to the Commission for review.

14. The liaison officer (Condition 6) shall obtain reports from the Dakota Access environmental inspectors upon the completion of each construction spread. The reports shall at a minimum include the following information: (i) landowner concerns or requests which differ from the agricultural mitigation plan, (ii) an indication of how Dakota Access responded to any such landowner requests, (iii) compliance concerns noted by the environmental inspector whether it be compliance with the Commission order or other law, rule or regulation, (iv) whether unique reclamation concerns exist based on factors such as unknown or previously unidentified soils or

other such unanticipated discoveries, (v) any action items as ordered, directed or recommended by the environmental inspector. The liaison officer shall provide the reports upon request from the Commission.

15. Dakota Access will coordinate all utility crossings in good faith with existing operators and will follow all One Call Procedures.

16. Prior to construction, Dakota Access shall, consult with NRCS to develop specific plans for the following: proper seed mix for pasture areas, identification of areas of noxious weed concern, and to develop control methods for those areas of noxious weed concern.

17. Dakota Access shall take the following steps to mitigate reclamation challenges and assure proper reclamation occurs:

a) Dakota Access shall separate and segregate topsoil from subsoil in all areas where excavation occurs, as provided in the agricultural impact mitigation plan. If it is discovered during excavation that the topsoil depth is greater than 12 inches, Dakota Access shall inform the landowner of the actual depth of topsoil and afford the landowner the options of either stripping the entire depth of the topsoil or the 12 inches as set forth in the Agricultural Impact Mitigation Plan.

b) Dakota Access shall repair any damage to property that results from construction activities.

c) Dakota Access shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner in writing.

d) Final grading and topsoil replacement and installation of permanent erosion control structures shall be completed as soon as possible. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Dakota Access' control cause for delay, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation. In the event of unacceptable delay, Dakota Access shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.

e) Dakota Access shall draft specific crop monitoring protocols for agricultural lands. If requested by the landowner, Dakota Access shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise. If the landowner foregoes the opportunity to use the independent crop monitor provided by Dakota Access, the landowner retains the right to use an independent crop monitor of their choosing and at their own cost.

- f) Dakota Access shall work closely with landowners, NRCS and county governments in planning for noxious weed control. Landowner permission shall be obtained before the application of herbicides.
- g) Section 6n of the Agricultural Impact Mitigation Plan regarding wet conditions shall apply to improved hay land and pasture lands in add in addition to crop lands.
- h) The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas. Dakota Access shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property in writing. In such case, the rock shall be placed in accordance with the landowner's directions.
- i) Dakota Access shall employ adequate measures to de-compact subsoil as provided in its agricultural impact mitigation plan.
- j) Dakota Access 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. Dakota Access shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands 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.
- k) Dakota Access shall follow the Stormwater Pollution Prevention Plan. On site modification shall be approved by the environmental inspector, documented by the inspector and provided to the Commission upon request.
- l) Dakota Access shall reseed pasture, hay and native species areas with comparable seed or native species mix to be approved by landowner, in writing. Dakota Access shall actively monitor revegetation on all disturbed areas for at least two years.
- m) Dakota Access shall coordinate with landowners regarding his/her desires to protect cattle, shall implement protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.
- n) Prior to commencing construction, Dakota Access shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes.
- o) Dakota Access shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off road vehicles, with a hand held fire extinguisher, and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Dakota Access's fire suppression resources and emergency services.

p) Revegetation shall be considered successfully when the density and cover of vegetation is 70% of the density and cover to adjacent undisturbed lands. This includes a comparative presence of noxious species such that the presence of noxious species shall not be more dominant on the revegetated area when compared to the adjacent undisturbed lands.

18. Dakota Access shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

19. Dakota Access shall position water trucks on gravel roads, for dust control, where conditions warrant.

20. Dakota Access shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.

21. If trees are to be removed that have commercial or other value to affected landowners, Dakota Access shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees.

22. Dakota Access shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, Dakota Access shall notify all government agencies including but not limited to SDDENR as required by the plan and state and federal law.

23. Dakota Access shall comply with the following conditions regarding road protection and bonding:

a) Dakota Access shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.

b) Dakota Access shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

c) Prior to their use for construction, Dakota Access shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.

d) After construction, Dakota Access shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.

e) Dakota Access shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.

f) Pursuant to SDCL 49-41B-38, Dakota Access shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of \$24 million, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. The bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Dakota Access shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.

g) All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

h) Dakota Access shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Dakota Access to reclaim those access roads.

24. In those areas where the Project passes within 500 feet of a residence or farmstead building:

a) To the extent feasible, Dakota Access shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

b) Dakota Access shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Dakota Access and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.

c) Dakota Access shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.

d) Dakota Access shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.

e) Dakota Access shall repair any damage to property that results from construction activities.

- f) Dakota Access shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.
- g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 14 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Dakota Access's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.
- h) When reasonably requested by a landowner, Dakota Access shall evaluate the use of a chemical dust suppressant.

25. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. Prior to the start of construction in South Dakota, Dakota Access shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

26. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

27. If construction, reclamation, and final stabilization will not be completed prior to winter weather, Dakota Access shall put in place a winter stabilization plan to stabilize conditions for reclamation the following spring. The plan shall be provided to the Commission and to landowners upon request.

28. Numerous Conditions of this Order, including but not limited to _____ relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which make compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, Dakota Access may follow the alternative procedures and specifications agreed to between it and the landowner.

IV. Pipeline Operations, Detection and Emergency Response

29. Dakota Access shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Dakota Access's exhibits, in accordance with DOT's

PHMSA regulations, and in accordance with the conditions of this permit and the conditions of this Order and the construction permit granted herein.

30. Dakota Access shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.

31. Dakota Access's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline. In its surveillance and maintenance activities, Dakota Access shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.

32. In accordance with 49 C.F.R. 195, Dakota Access shall continue to evaluate and perform assessment activities regarding high consequence areas.

33. Prior to putting the Dakota Access Pipeline into operation, Dakota Access shall prepare, file with PHMSA and implement a facility emergency response plan as required under 49 CFR 194. Dakota Access shall also prepare and implement a set of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Dakota Access shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452.

At such time as Dakota Access files its Facility Response Plan and Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Dakota Access with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01:41 through 20:10:01:43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.

34. To facilitate periodic aerial patrol pipeline leak surveys during operation of the facilities: in wetland areas, a minimum corridor of 30 feet centered on the pipeline centerline (15 feet on either side), shall be maintained in an herbaceous state. Trees within the corridor greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

35. To facilitate periodic aerial patrol pipeline leak surveys in riparian areas: a minimum corridor of 30 feet centered on the pipeline centerline (15 feet on either side), shall be maintained in an herbaceous state.

V. Environmental

36. Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Dakota Access's pump

station and other noise-producing facilities will not exceed the LDN=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Dakota Access. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Dakota Access shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

37. At the request of any landowner or public water supply system that offers to provide the necessary access to Dakota Access over his/her property or easement(s) to perform the necessary work, Dakota Access shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX. Dakota Access shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Dakota Access shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

38. Dakota Access shall follow all protection and mitigation efforts as identified, and recommended, by the US Fish and Wildlife Service ("USFWS"), US Army Corps of Engineers, pursuant to the federal permits obtained from the agencies.

39. Dakota Access shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile. Dakota Access shall maintain the drain tile location information and tile specifications and incorporate it into its Facility Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release. If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location. The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors and or persons shall be employed to repair drain tiles.

VI. Cultural Resources

40. Dakota Access shall follow the "Unanticipated Discoveries Plan," as reviewed and approved by the State Historical Preservation Office ("SHPO"). If during construction, Dakota Access or its agents discover what may be an archaeological resource, cultural resource, historical

resource or gravesite, Dakota Access or its contractors or agents shall immediately cease work at that portion of the site and follow the “Unanticipated Discoveries Plan.” If the unanticipated discovery is of such a nature that a materially different route than that approved by the Commission is required, Dakota Access shall obtain Commission approval for the new route before proceeding with any further construction.

41. Dakota Access shall have access to a certified archeologist in order to facilitate the training, identification, handling, and impact mitigation of archeological resources, cultural resources, historical resources, or gravesites encountered during construction of the pipeline.

VII. Enforcement and Liability for Damage

42. Dakota Access shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems. Dakota Access shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.

43. In the event that a person's well is contaminated as a result of construction or pipeline operation, Dakota Access shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.

44. Any damage that occurs as a result of soil disturbance on a persons' property resulting from the construction or operations of Dakota Access shall be paid for by Dakota Access.

45. Dakota Access shall compensate the landowner for crop loss beyond the scheduled three years, if it is proven that Dakota Access caused the extended crop loss.

46. No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

47. Dakota Access shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Dakota Access's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

48. The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Dakota Access's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.