

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 REPLY BRIEF
THE DAKOTA ACCESS PIPELINE)	
PROJECT)	

Pursuant to the briefing schedule established by the South Dakota Public Utilities Commission (“Commission”) at the close of the evidentiary hearing in this proceeding, Dakota Access, LLC (“Dakota Access”) hereby submits its reply brief in support of its application for a permit under the South Dakota energy conversion and transmission facility act, with respect to the Dakota Access Pipeline Project (“the Project”).

Dakota Access asserted that the Commission should grant its permit application, with conditions. Various other parties to the proceeding also filed initial briefs. In this reply brief, Dakota Access responds to certain positions taken by other parties in their initial briefs.

In addition, since the close of the hearings, Dakota Access and the Commission Staff (“Staff”) engaged in discussions to incorporate Staff’s independent concerns into the permit conditions proposed by Dakota Access with its initial brief. As a result of those discussions, Staff and Dakota Access were able to stipulate to proposed permit conditions. Dakota Access requests the Commission consider the stipulated proposed permit conditions submitted with this brief as Exhibit A.

In its initial brief, Dakota Access demonstrated that it satisfied its burden of proof under the South Dakota Energy Conversion and Transmission Facilities Act, as established at SDCL 49-41B-22. Specifically, Dakota Access demonstrated that:

- (i) The proposed facility will comply with all applicable laws and rules;
- (ii) 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;
- (iii) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (iv) The facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government.

Nothing in the arguments or briefs of the intervenors should be read to persuade otherwise.

I. THE PROPOSED FACILITY WILL COMPLY WITH ALL APPLICABLE LAWS AND RULES: Intervenors failed to prove otherwise.

A siting permit in this matter should be conditioned on its compliance with all applicable laws and rules. See Stipulated Condition 1, Exhibit A. Dakota Access has a process in place to not only identify applicable laws, but to assure compliance with the law. Intervenors did not identify a current failure by Dakota Access to follow the law, nor did they identify any flaws in Dakota Access's process to assure future compliance.

In their post-hearing brief, the landowner intervenors argue a position reminiscent of what the Commission heard from intervenors in a 2007 hydrocarbon pipeline siting docket. Specifically, landowner intervenors argue the Commission must analyze "direct evidence of actual compliance." Glenn Boomsma Brief at page 2. In 2007, the Commission rejected this argument. This Commission should view the matter in the same way.

Dakota Access's burden of proof is phrased in future terms, which makes sense given that a facility not yet permitted or constructed cannot be in compliance with all applicable laws and rules. Dakota Access therefore must and did prove, that the proposed facility "will comply with all applicable laws and rules." SDCL 49-41B-22. As Staff wrote, "the Applicant's ability to comply with all applicable laws and rules is demonstrated through the Applicant's awareness of the laws and rules it is subject to, and through the Applicant's compliance with the applicable laws and rules to date." Commission Staff Brief at page 5. Dakota Access agrees with Staff. Intervenor did not positively identify a flaw in the company's method of identifying its obligations or its plans for meeting its obligations.

Also reminiscent of a Commission hydrocarbon pipeline siting docket in 2007, the landowner intervenors relied heavily upon perceived wrongs in the land acquisition process as a basis for their opposition to the Dakota Access Pipeline. As the law contemplates and as the Commission is well aware, land acquisition activities occur before and during the siting process. However, when negotiations are unsuccessful, the law directs parties to the South Dakota Circuit Court.

South Dakota law found at SDCL 49-7 grants pipeline companies the use of eminent domain:

All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B. SDCL 49-7-11.

Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings

necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry. SDCL 49-7-13.

Dakota Access is a common carrier under the facts of the matter, and also under a case on similar facts decided by Judge VonWald. Dakota Access holds itself out, through the Open Seasons and the execution of binding contracts, as engaged in the business of transporting commodities for hire. Dakota Access is a common carrier holding itself out and seeking to construct to deliver the products of third parties. Doing so squarely meets the letter of the statute which grants the use of eminent domain to Dakota Access. SDCL 21-35 is the chapter of law that directs the Circuit Courts in the application of eminent domain process.

It seems the landowner intervenors and Dakota Access interpret language contained in these chapters of laws differently. Arguments pertaining to the condemnation process have been, are and will continue to be made to the Circuit Court and the Supreme Court. However, it is not appropriate to ask the Commission to enter an order or decision which interprets any of the statutes in SDCL 21-35. Nothing in Title 49 (or any other Title of the Code) requires or allows the Commission to make any determinations with respect to the grant or usage of eminent domain. The Commission is without responsibility, jurisdiction or authority to determine whether Dakota Access has properly sought Court orders. Those determinations are for the Courts.

The Indigenous Environmental Network (“IEN”) and Dakota Rural Action (“DRA”) continue to argue, as their witness Waste’Win Young testified at hearing, that the Section 106¹ process applies to every mile and acre of affected land along the route. That position is incorrect. As a result of EIN and DRA’s mistaken belief, the organizations continue to argue that Dakota

¹ See 16 USC §470 *et seq.* and 36 CFR 800 *et seq.*

Access violated the law. Dakota Access expresses surprise that an organization like Dakota Rural Access, which began as a landowner organization and ostensibly still is, would promote a position seeking Federal control over private property. The organizations apply Section 106 incorrectly and try to expand its application to support its argument that Dakota Access has a legal obligation to consult with Native American Tribes regarding cultural resources along the entire proposed route. IEN and DRA are simply not correct.

With that said, Dakota Access understands cultural resources are of great importance to the tribes and demonstrated the efforts it will take to avoid impacting those resources. For example, at a crossing point near the James River, where significant cultural resources are located, Dakota will utilize the Horizontal Directional Drill construction method to avoid impacts. The decision to use that crossing method comes at financial cost to Dakota Access. However, upon discovery of the cultural resources in the area, the company did not consider any other way to address the crossing. See Ex. DAPL 53.

The Section 106 process is part of a federal Act known as the National Historic Preservation Act (“NHPA”). Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the affects of their undertakings on historic properties and afford ... a reasonable opportunity to comment on such undertakings. 36 CFR §800.1(a). In carrying out its responsibilities under this section, a federal agency shall consult with any Native American tribe, “... that attaches religious and cultural significance to properties that may be affected by an undertaking...” 36 CFR §800.2.

As a matter of law, there are limited areas of “federal undertaking” along the proposed Project route. Federal law defines “an undertaking.” Pursuant to law, an undertaking means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of

a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.” 36 CFR §800.16 (y). The Section 106 process is not initiated unless an action meeting the definition of an “undertaking” occurs. In this case, the US Army Corps of Engineers is the federal agency with jurisdiction over waters of the US which includes rivers, lakes and wetlands. That federal agency must issue permits as the Project impacts those areas, and as part of that process causes an “undertaking” to occur which then triggers the Section 106 process. Tr. at 2168. The federal government does not have any jurisdiction to conduct a “Section 106” consultation process on private property. The intervenors cannot rely on the Section 106 consultation process as the basis for their request that consultation occur on private property along the route and Dakota Access is not in violation of the Section 106 process.

IEN and DRA next attempt to broaden the application of the Section 106 process by arguing that the entirety of the Project crosses tribal aboriginal land and as a result the previously sited federal code applies. The Commission does not have the responsibility, authority or jurisdiction to consider legal claims to land in South Dakota whether that be private property, state or federal land. As such, the Commission is bound by settled law, which very clearly states the Section 106 process applies to federal “undertakings” only. As such, IEN and DRA’s arguments in an attempt to change settled law are outside the Commission’s jurisdiction and the scope of this proceeding. Their arguments must be disregarded.

IEN and DRA’s reliance on *Montana Wilderness Association v. Fry*², *Hough v. March*³ and *Colorado River Indian Tribes v. March*⁴ as the basis for its argument is also flawed. In all

² 310 F. Supp.2d 1127 (D. Mont. 2004)

³ 557 F. Supp. 74 (1982 U.S. Dist)

⁴ 605 F. Supp. 1425 (D. Cal. 1985)

three cases, a federal agency was held accountable for NHPA compliance. The sited cases do not pertain to an enforcement action against a non-government entity. The sited cases do not indicate that a private, non-government entity must take action under NHPA or stand for the proposition that IEN and DRA propose. To the contrary, the cited cases make it clear the Section 106 process pertains to federal agency undertakings only. With that said, DAPL is aware that the Section 106 consultation process has been initiated by the US Army Corps of Engineers in applicable limited “federal undertaking” areas along the proposed Project route. Tr. at 2167.

Other intervenor criticisms or arguments that applicable law or rules were not followed are generally non-substantive and pertain more to application completeness than legal compliance. The “application process” in the case of a siting docket is ongoing from the initial submission through evidentiary hearing. All information required per South Dakota law is in evidence. The Commission Staff conducted a completeness review and finds Dakota Access complied with the applicable South Dakota statutes and submitted all information as required by law. Ex. Staff-1. Commission Staff, in conducting its completeness review made multiple, detailed inquiries of the Applicant, as it does in all dockets, siting or otherwise. All requests for information were answered and made part of the docket and evidence. As with all evidentiary proceedings, the finder of fact must base its decision on the totality of the evidence. In doing so, the Commission must review all evidence on record. Evidence on record includes the information submitted as Staff’s Exhibit 1 and testimony from all parties.

Finally, the tribes allege tribal participation is required to accurately determine community impacts. However, their arguments lack credibility due to the sheer distance in miles between the reservations and the proposed pipeline route. Indian tribes in South Dakota will not

experience direct impacts as a result of construction or operation because the proposed Project does not pass through or adjacent to Indian Reservations.

II. THE FACILITY WILL NOT POSE A THREAT OF SERIOUS INJURY TO THE ENVIRONMENT, NOR TO THE SOCIAL AND ECONOMIC CONDITIONS OF INHABITANTS OR EXPECTED INHABITANTS OF THE SITING AREA: Intervenors failed to prove otherwise.

Landowner intervenors who testified all clearly articulated their preference that someone else in some other place be directly affected by the proposed pipeline. However, they did not provide any evidence to contradict the Applicant and Staff expert witnesses who concluded that the facility will not pose a threat of serious injury to the social and economic condition of inhabitants or expected inhabitants. Experienced experts were in agreement at the hearing as to this critical point.

Aaron Dejoia on behalf of Dakota Access provided credible evidence and history to prove that drain tiles can be repaired and that the Dakota Access plan for drain tiles will be successful. Tr. 1878 – 1881. Despite the information, testimony, evidence and history provided, landowner intervenors seem convinced that affected drain tile will forever be destroyed, can't be fixed and that the only method of repairing or mitigating effects is to use a tile bridge. The evidence is that tile damage can be fixed, and is fixed frequently. The evidence also is that the use of tile bridges is a relatively new construction method without sufficient historical results to determine its success. Tr. at 1880.

The landowners' refusal to hear even their own voices in the facts and evidence is confusing. The evidence simply does not support the position landowner intervenors take.

Despite Applicant's hearing testimony and the documents provided to landowners, landowner intervenors argued that Dakota Access will provide only one-time compensation to

landowners and then “landowners are on their own.” This is simply not true. Dakota Access is already obligated by its own easement documents to completely and fully remediate any and all damage that results from their facility construction. In an effort to make landowner negotiations and transactions as easy as possible, Dakota Access pays landowners upfront, preconstruction, for crop losses for three (3) years, whether or not crop loss is experienced. Beyond those three (3) years, Dakota Access pays for damages on an individual case by case basis. Dakota Access is committed to full reclamation and expects crop production to be as it was prior to construction, by the end of the third year. However, Dakota Access will reimburse landowners for actual damages past the three years. As evidence of its commitment, Dakota Access stipulates to the imposition of conditions. See conditions 44 through 50, Exhibit A.

IEN and DRA argue that the Project’s proposed crossing of the Missouri River in North Dakota poses a threat of serious injury to the environment. The construction techniques utilized for such crossings, combined with the hydrostatic testing and the integrity management plan show otherwise. It is important to note that the pipeline route in other states is not subject to the Commission’s review. The South Dakota Public Utilities Commission has responsibility and jurisdiction to examine and review the proposed project route in the state of South Dakota only.

IEN and DRA, in support of their argument, state that downstream jurisdictions may impose rules on upstream polluters. However, no pollution has occurred. In the event of a spill, if oil enters the Missouri River north of South Dakota’s border and makes its way down stream prior to containment, South Dakota authorities may indeed have some jurisdiction regarding the matter. More likely it would be a matter of federal involvement. However, neither IEN nor DRA offered any authority by which South Dakota can involve itself in the proposed project siting outside the border of South Dakota.

III. THE FACILITY WILL NOT SUBSTANTIALLY IMPAIR THE HEALTH, SAFETY OR WELFARE OF THE INHABITANTS: Intervenor did not prove otherwise.

It was argued that the Project will cause an increase in sexual violence against Native American women. It was also argued that the Project will cause an increase of crime within Indian reservation borders. However, the witnesses could not connect facts to their fears and no credible evidence was introduced to support their claims. When Mr. Cooke, an elected member of the Business and Claims Committee of the Yankton Sioux Tribe was asked about the impact of the Keystone pipeline on the crime within the Yankton Sioux Tribe Reservation, he stated that he “did not know.” Tr. 1069. The tribal intervenors whose fears drove these arguments had a full opportunity to provide the Commission with real facts and figures, and did not or possibly could not do so. Either way, no credible evidence was provided in support of the argument.

IV. THE FACILITY WILL NOT UNDULY INTERFERE WITH THE ORDERLY DEVELOPMENT OF THE REGION: The record is completely void of any evidence to the contrary.

The only City or County intervenor to provide written testimony and appear at the hearing was the City of Sioux Falls. The City of Sioux Falls explicitly wrote in its brief that it “does not object to the route along its landfill.” Sioux Falls Brief page 1. Dakota Access acknowledges the proximity of its route to the City of Sioux Falls and Minnehaha and Lincoln Counties. However, the evidence shows its routing location and proximity to those communities does not cause an “undue interference with orderly development of the region.” Of note, the statute does not require the Commission to examine the orderly development of particular communities with close proximity to the project. Rather, the statutory burden of proof directs the Commission to examine the orderly development of the region. SDCL 49-41B-22.

All regions throughout the United States have incorporated pipeline infrastructure into their development plans and are some of the United States' largest individual communities, despite the presence of the underground infrastructure. It was not and cannot be shown that the presence of pipelines, by their very existence, interferes with the development of a region. Tr. at 399-400, 486-487. The evidence showed that communities, including Sioux Falls, both for this and previous pipelines, incorporate pipelines into their planning, including green space and other considerations. Id. No party to this proceeding provided the Commission with any evidence that the Dakota Access pipeline or South Dakota is unique or different than any other pipeline located anywhere else in the United States, and thus must be sited in an unpopulated or under-populated area of our state.

Furthermore, by statute, the Commission does not have jurisdiction to do what intervenors would seem to prefer, that is, move the pipeline. The Commission is not vested with authority or jurisdiction to dictate pipeline route.

V. ADDITIONAL ARGUMENTS OUTSIDE THE BURDEN OF PROOF

Intervenor parties made other arguments or points outside of the statutory burden of proof. Some deserve a reply, and they are as follows:

Dakota Access did not ask and does not expect the Commission to “rubber stamp” its plan. See Glenn Boomsma Brief, page 22. That term in that argument seems to somehow wish that Dakota Access had offered an irresponsible plan for its project. To the contrary, it should surprise no one that Dakota Access put significant time, resources and planning into the Project engineering, its Commission application and the proposed route. Nor should it surprise or offend that the Dakota Access project meets the letter of the law. Rather it should be expected that it does. The proposed route does not threaten the safety of South Dakota's residents. Whether in a

highly populated area or a slightly populated area, Dakota Access is responsible for all impacts and effects of the Project. As such, Dakota Access made a great effort to choose a responsible route and mitigate impacts to others, yet fulfill its business goals of meeting the nation's growing energy demand.

Part of Dakota Access' responsibility and commitment to landowners and owners of other facilities is to negotiate easements and crossing agreements openly and honestly. Dakota Access is committed and required to follow all the laws of every state it traverses. Dakota Access is also permitted to follow and utilize the laws of every state it traverses when acquiring land. Dakota Access cannot be punished for using the laws of the state of South Dakota. If that law changes, either legislatively or through Supreme Court rulings, Dakota Access is obligated to follow the same. However, it is unfair to accuse the company of proceeding in bad faith or with malicious intent simply because legal theories upon which intervenors rely are yet to be heard by a Court with proper jurisdiction.

In its brief, the Yankton Sioux Tribe requested several conditions. The Tribe requests a condition that Dakota Access will survey 100% of the land affected by the proposed project prior to construction. Dakota Access already had plans to do so. As such, the company agrees and furthermore, it is bound to do so per the law. However, tribal consultation as requested by the Yankton Sioux Tribe is not possible. Absent landowner consent or direction, Dakota Access cannot conduct tribal consultations on private property. The Commission does not have jurisdiction to Order private property landowners to permit such a consultation. If landowners along the route desire to initiate such a process, they can reach out to tribal offices independent of this proceeding. However, if the Commission were to order it, it would infringe upon their private property rights inherent in the ownership of land.

VI. CONCLUSION

The burden of proof the Commission must examine is codified at SDCL 49-41B-22. The law does not permit the Commission to weigh “harm” to individual South Dakota intervenors against the benefit to South Dakota residents or the state as a whole. Rather, the Commission must determine whether Dakota Access met the statutory burden of proof by a preponderance of the evidence. Dakota Access respectfully requests the Commission grant the requested permit and consider imposing all conditions stipulated by Dakota Access and Staff.

Dated this 20 day of November, 2015.

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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 updated 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 (including when construction is expected to commence), 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. Continuing until landowner reclamation is complete, 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. The liaison officer shall collect all reports generated per Condition 13 and provide them to the Commission or Commission Staff upon request.

For the period of three years following completion of construction, Dakota Access shall report to the Commission annually on the status of road repairs, road reconstruction 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.

III. Construction

11. 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.

12. 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.

13. Dakota Access shall record and keep 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) environmental compliance concerns with regard to the Commission order or other law, rule or regulation, (iv) unique reclamation activities

based on landowner request or field factors such as problematic soils, large weed plots, or other such unanticipated conditions, (v) any action items as ordered, directed or recommended by the environmental inspector.

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

15. Prior to construction, Dakota Access shall consult with the South Dakota Department of Agriculture, the NRCS, and local county officials 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.

16. 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) Throughout the construction duration, Dakota Access shall employ weed control measures as soon as reasonably practical and immediately when noxious weeds are observed to mitigate weeds on the temporary soil piles and within the construction right-of-way. To implement this additional weed control mitigation, the environmental inspector or agricultural inspector should be capable of identifying multiple species of weeds at a number of life stages, and be able to recommend and implement weed control measures early enough in the life cycle of the weed species in question to minimize or prevent the plant from setting seeds.
- h) 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.
- i) 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.
- j) Dakota Access shall employ adequate measures to de-compact subsoil as provided in its agricultural impact mitigation plan. Dakota Access shall conduct compaction testing of areas on and off the construction right-of-way, using a penetrometer or other equivalent measuring device, to provide an adequate means of determining whether such measures have reduced compaction to levels similar to adjacent sections of cropland undisturbed by construction.
- k) 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.
- l) 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.
- m) Dakota Access shall reseed all impacted vegetated land, excluding commodity or row crops. This is intended to include, but is not limited to a reseeded of all 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.

n) 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.

o) 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.

p) 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.

q) Temporary sediment barriers shall remain in place until the permanent revegetation coverage has reached a minimum of 70 percent cover as compared to similar cover in an adjacent area that is undisturbed by construction. 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.

17. 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.

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

19. Dakota Access shall require that its primary contractor ensure that all construction equipment is properly tuned and maintained and that idling be minimized during construction.

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 state, 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. If Dakota Access determines the use of a chemical dust suppressant is not feasible, the company shall notify the landowner of its decision and reason.

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.

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.

29. Dakota Access shall contract with an independent third-party to monitor compliance with this permit. More specifically, prior to construction, Dakota Access shall file with the Commission its selection of a monitor which shall include the individual's name, qualifications and a description of how Dakota Access proposes for the selected individual to monitor for compliance. At least 30 days prior to construction, Dakota Access shall file with the Commission a plan that will be developed jointly with the selected third-party monitor. The plan will outline the specific terms and conditions of the third-party monitoring program that will include a minimum of the following considerations:

- a) The third-party monitor will be paid for by Dakota Access, but will report directly to the Commission.
- b) The third-party monitor will work directly with the Public Liaison Officer, the Dakota Access Environmental Inspectors and Agricultural Inspectors to ensure compliance with the various conditions of the permit. In the event of a non-compliance, the monitor will have the obligation to timely notify Dakota Access via the Environmental or Agricultural Inspector so as Dakota Access can take the appropriate action to mitigate or correct the noncompliance. Should the third-party monitor report any noncompliance to the Commission or Staff, the report shall simultaneously be shared with Dakota Access.
- c) The third-party monitor will have direct access to the company construction manager, project manager or other company management staff and will have the ability to communicate any non-compliance issues or concerns that are not addressed or mitigated by the Environmental or Agricultural Inspectors.
- d) This condition will not include the monitoring of laws or processes that are otherwise under the inspection or jurisdiction of a different agency such as the USACE, USFWS or PHMSA. The monitor will not inspect report on any technical design standard or requirement pursuant to 49 CFR Parts 194 and 195. However, Should Dakota Access be notified in advance of a compliance inspection to be conducted by

any regulatory agency, Dakota Access shall notify the 3rd party monitor of the inspection date, time, and location and afford the 3rd party monitor the opportunity to participate in the inspection for the purpose of submitting a summary report of the inspection to the Commission.

- e) The third-party monitor's contractual obligation to the Commission will begin and will end their monitoring responsibilities with the onset and conclusion of mainline construction activities and will not include post construction restoration activities.
- f) The third-party monitor will comply with all Dakota Access safety requirements. This includes the obligation to safely work, travel and traverse within the limits of the construction work area and will be subject to Dakota Access safety standards and processes at all times, under no exceptions. The third-party monitor must comply with all access points, travel restrictions within the construction work areas and any special conditions or safety exclusion areas throughout the duration of construction. The third-party monitor must comply with all local, state and federal laws and regulations.
- g) The monitor will not have any stop work authority.
- h) The third-party monitor shall prepare a report to the Commissioners or Staff as determined by the PUC that will include at a minimum the work areas that were monitored, any concerns, noncompliances, any remediation or mitigation measures employed to ensure compliance with the various conditions of the permit, any additional steps to correct or remedy a noncompliance and last, provide a list of any areas of concerns.

IV. Pipeline Operations, Detection and Emergency Response

30. 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 the conditions of this Order and the construction permit granted herein.

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

32. 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.

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

34. 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.

35. To facilitate periodic aerial patrol pipeline leak surveys during operation of the facilities: in wetland and 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. Trees within the corridor greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

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. DAPL shall comply with all applicable state and federal laws pertaining to the protection of sensitive species, including the Endangered Species Act, Migratory Bird Treaty Act, and Bald & Golden Eagle Protection Act, as well as the Programmatic Biological Opinion for the Issuance of Selected Nationwide Permits Impacting the Topeka Shiner in South Dakota. The U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service will determine the scope of DAPL's compliance with such laws and the Biological Opinion. Any correspondence received from U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service shall also be filed with the Commission.

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.

40. Waterbody crossing methods shall be determined prior to construction of each particular water body crossing, as a best management practice. The purpose of this requirement is to allow the construction contractor to plan ahead for the right equipment at the right locations and times, and provide Dakota Access's environmental inspectors sufficient time and ability to advise the contractor regarding potential changes to the planned crossing method based on field conditions.

VI. Cultural Resources

41. 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.

42. Dakota Access shall provide and/or work with the lead Federal agency to provide data, avoidance plans or mitigation plans to the SHPO that are agreed to for areas that are subject to jurisdiction under the National Historic Preservation Act. In the event archaeological resources are identified outside of Federal jurisdictional areas where the National Historic Preservation Act applies, Dakota Access shall provide SHPO any data, avoidance or mitigation plans that are agreed upon or approved for release from the landowners for archaeological resources that have the potential to be or that have been listed as eligible for listing on the National Register of Historic Places

43. 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

44. 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, loss of organic certification, or loss of value to a paleontological resource damaged by construction or other activities.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.