

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
----------------------------------	--------------------------

ORDER DENYING MOTION TO REQUIRE ENVIRONMENTAL IMPACT REPORT

(Issued October 5, 2015)

On January 20, 2015, Dakota Access, LLC (Dakota Access), filed with the Board a petition for a hazardous liquid pipeline permit, pursuant to Iowa Code ch. 479B. The matter has been docketed as Docket No. HLP-2014-0001.

Summary of Pleadings

1. Sierra Club Motion

On September 14, 2015, Sierra Club Iowa Chapter (Sierra Club) filed a "Motion to Require Environmental Impact Report" in Docket No. HLP-2014-0001. Sierra Club argues that at present, there is no governmental agency that will be conducting a comprehensive environmental review of this project because the reviews by the Corps of Engineers and the Iowa Department of Natural Resources are limited to specific areas within the jurisdiction of those agencies. Those reviews will not address Bird Conservation Areas, critical habitat areas, and other areas identified by Sierra Club as environmentally sensitive.

Sierra Club acknowledges that there is no statutory requirement for an environmental impact report for the entire proposed project in Iowa and that Dakota

Access is expected to describe, as part of its prefiled testimony, the environmental permits required and environmental studies conducted for this project. Sierra Club expresses a concern that if Dakota Access fails to provide adequate information regarding environmental issues, the Board may not have all the information it needs to make a fully-informed decision.

More specifically, Sierra Club argues that the limited environmental review being conducted by other agencies is not adequate for the Board's purposes. Sierra Club notes that Iowa Wildlife Action Plan has identified Bird Conservation Areas; critical habitat for protected species; Ducks Unlimited Living Lakes Initiative Emphasis Areas; Iowa Natural Heritage Foundation Priorities; Lake Restoration Program Priority Lakes Watersheds; habitat conservation priorities; Forest Stewardship Potential Areas; mapped prairies; and High Opportunity Areas for Cooperative Conservation Actions, many of which might be affected by the proposed pipeline. The permits and environmental studies being required by other agencies will not address these areas.

Iowa Code § 479B.1 requires the Board to consider the environmental damage associated with a proposed pipeline. Sierra Club asserts that an environmental impact report would address those impacts and urges the Board to require the preparation of an environmental impact report prior to considering the petition for permit in this case.

2. No Bakken Here Joinder

On September 23, 2015, No Bakken Here filed a "Joinder in Motion to Require Environmental Report" and later that day filed an amended joinder (with a

corrected attachment to the pleading). No Bakken Here directs the attention of the Board to a decision from the Minnesota Court of Appeals¹ saying that under Minnesota law, the decision to grant a certificate for a large oil pipeline is a “major governmental action that has the potential to cause significant environmental effects,” and so an environmental impact statement is required before that certificate may be granted or denied. No Bakken Here asserts the court’s decision explains “why a thorough and independent environmental report is important in this case and why the Board should grant the Sierra Club’s motion.” (Joinder at p. 2.)

3. Dakota Access Resistance to Sierra Club Motion

Also on September 23, 2015, Dakota Access, LLC (Dakota Access), filed a “Resistance to Sierra Club Motion to Require Environmental Impact Report.” Dakota Access says it is strongly committed to protecting the environment and a pipeline is the safest, most environmentally-sound way to transport petroleum products from domestic sources. Dakota Access describes the work it has done to identify and avoid environmentally-sensitive areas and the manner in which the design and operation of the pipeline will protect the environment, all as described in the prefiled testimony of witnesses Howard, Frey, and Stamm.

Dakota Access says that numerous governmental agencies will have a role in the environmental review of this project, citing the U.S. Army Corps of Engineers, the Iowa Department of Natural Resources, the Iowa State Historic Preservation Office and the State Archeologist, and the U.S. Fish and Wildlife Service. Dakota

¹ *In the Matter of the Application of North Dakota Pipeline Co. LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota*, Minn. Ct. App. No. A15-0016 (issued September 14, 2015).

Access argues there is no reason to believe that review by each agency working within its own area of expertise will not be just as effective as a single agency reviewing all environmental issues.

Dakota Access argues the Sierra Club motion is without legal support. While § 479B.1 authorizes the Board to consider environmental factors in this proceeding, the Board has normally done that through prefiled testimony and a hearing, rather than a special, independent report. Dakota Access says that if Sierra Club wants an overall review of the environmental impact of the project, it should commission one and then have its own witness sponsor it at hearing.

Dakota Access argues that the statute and rules applicable to HLP dockets were promulgated long before this docket, and to change the requirements in the middle of the process would raise due process concerns. In fact, Dakota Access says, if the Board were to impose new requirements not covered by any rule, it would commit error of law.² Finally, Dakota Access says that if Sierra Club truly believed a third-party environmental report were necessary, it should have raised the issue much earlier in this proceeding. Because Sierra Club waited until 60 days prior to the hearing, Dakota Access suggests the motion is "a mere tactic of opposition." (Resistance at p. 4.)

4. MAIN Resistance to Sierra Club Motion

On September 24, 2015, the MAIN Coalition (MAIN) filed a resistance to the Sierra Club motion. MAIN argues that § 479B.1 limits the Board's consideration of environmental issues to the protection of landowners and tenants; it does not give

² Citing *Office of Consumer Advocate v. Iowa Utilities Bd.*, 744 N.W.2d 640, 643-46 (Iowa 2008).

express authority to require a comprehensive environmental study. MAIN points out that 199 IAC rule 13.14(1), which states that “environmental agencies may have a jurisdictional interest in the routing of the pipeline...,” is an acknowledgement that other agencies may express their environmental concerns, if any, in this docket. MAIN asserts that any such issues should be raised in prefiled testimony and considered at the hearing. Finally, MAIN argues that the recent decision of the Minnesota Court of Appeals, cited by No Bakken Here, is based on a Minnesota statute that does not apply in Iowa and Iowa has no comparable statute. Accordingly, MAIN concludes, the Board should give no credence to the arguments of No Bakken Here.

5. Sierra Club Reply to MAIN Resistance

On September 25, 2015, Sierra Club filed a reply to MAIN's resistance. Sierra Club says that while there may not be a statute or rule explicitly requiring a comprehensive environmental review in this proceeding, there is no statute or rule that limits the Board's discretion to require such a review, either. Sierra Club argues that the Board has that authority and should exercise it, especially when the jurisdiction of other agencies with environmental authority is limited.

Sierra Club argues that No Bakken Here clearly understood and stated that the Minnesota court decision is factually and legally distinguishable; No Bakken Here directed the Board to the decision for its explanation of why an environmental impact report should be required before a permit is issued.

6. Sierra Club Reply to Dakota Access Resistance

On September 28, 2015, Sierra Club filed a reply to the Dakota Access resistance. In response to the argument that Sierra Club has delayed filing its motion for an environmental impact report, Sierra Club says that Dakota Access did not file its prepared direct testimony describing its environmental review until September 8, 2015, and “prior to that time, Sierra Club did not know specifically what sort of environmental review Dakota Access was conducting.” (Reply at p. 1.) Sierra Club says that all of its motions have been filed in good faith, not for purposes of delay.

Sierra Club says that the resistance filed by Dakota Access makes it clear that the company will do no more to protect the environment than that which is absolutely required, so a thorough environmental review is required, particularly where each of the other environmental agencies cited by Dakota Access has only limited jurisdiction.

Sierra Club says Dakota Access is disingenuous when it argues on the one hand that Sierra Club has waited too long to request an environmental report and then argues on the other hand that Sierra Club and the Board should wait until all the evidence is in. Sierra Club requests that the Board grant its motion to require an environmental impact report.

7. Dakota Access Reply to No Bakken Here Joinder

On September 29, 2015, Dakota Access filed a reply to No Bakken Here’s joinder in the original Sierra Club motion. Dakota Access says that reliance on the Minnesota Court’s decision is misplaced because Iowa does not have an

environmental protection act similar to Minnesota's. Because the law analyzed by the Minnesota Court does not exist in Iowa, the Minnesota decision "offers nothing to inform the Board's decision in this matter and the Board should give no consideration to the facts or reasoning contained therein." (Reply at p. 3.)

Analysis

All parties agree that there is no explicit statutory or rules requirement for an independent environmental impact report. Further, all parties agree that the Board has the authority, and even the obligation, to consider environmental issues in this docket. MAIN asserts that authority is limited to the environmental damages that might be caused for landowners and tenants on affected property, but that argument does not directly impact the question of whether an environmental report should be required, which is where the parties disagree.

Sierra Club says that § 479B.1 requires the Board to consider the environmental damage the proposed pipeline might do and asserts that "the Board cannot adequately do so without an accurate independent environmental report." (Motion at p. 3.) However, Sierra Club never explains why a report is the only, or even the most, suitable means for evaluating environmental considerations. The Board has granted many permits in the past without requiring an environmental impact report, so the burden is on Sierra Club to show that the Board's normal procedures are not adequate in this case. Sierra Club has not met that burden; it has not identified any environmental issue that cannot be addressed using the

standard procedures, that is, prefiled testimony, hearing with cross-examination, and briefing.

No Bakken Here relies upon a recent decision from the Minnesota Court of Appeals to try to establish the need for an independent environmental impact report. In that case, the Minnesota Public Utilities Commission was considering an application for a certificate of need and a routing permit for a proposed oil pipeline. All parties agreed that the Minnesota Environmental Policies Act required an environmental impact statement (EIS) before a permit could be issued, but the commission bifurcated the proceeding and proposed to consider the certificate of need issues separately from the permit issues. The commission intended to require the EIS as part of the second phase of the proceedings, concluding that a "high-level" environmental review would be adequate for the first phase. The Court reversed, finding that the EIS must be completed before a final decision may be made on the certificate of need.

No Bakken Here argues that the Minnesota decision explains why a thorough and independent environmental report is important in this case, but the Board disagrees. The Court found that the relevant Minnesota statutes require that the EIS be completed before a "final governmental decision" may be made. The Court further found that the decision to grant or deny the certificate of need was unambiguously a "final governmental decision" and therefore the environmental review is required as part of the first phase of the bifurcated proceedings. The Court noted that this result is consistent with other language in the Minnesota statutes, language that emphasizes the desirability of conducting the required

environmental review early in the decision-making process, but the Court's decision begins with the notion that in Minnesota an EIS is required, by statute, at some point in the proceedings.

The decision does not support the argument that an environmental report is required as a matter of policy. The decision is based entirely on Minnesota law that requires an EIS before certain governmental actions may be taken. No party has identified any similar Iowa law. The Board understands that No Bakken Here and Sierra Club consider the reasoning of the Minnesota decision to be persuasive, but even that reasoning is based on the language of the Minnesota statutes, which have no Iowa equivalent.

Dakota Access argues that the existing process for evaluating environmental issues (prefiled testimony, cross examination at hearing, and briefing) is sufficient to allow the Board to fulfill its statutory duties and Dakota Access asserts it has provided sufficient information in its prefiled testimony to serve that purpose. Moreover, Dakota Access claims that imposing a requirement for an environmental report at this stage would be a violation of Dakota Access's right to due process of law.

The Board will not address in this order the sufficiency of the testimony Dakota Access has filed, as that is something for the Board to decide after the hearing. Nor will the Board address the alleged due process issues; if after hearing the Board decides that Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project, then the Board can deny the petition for permit and explain the basis for that decision. The

fact remains that the existing agency process has been sufficient to address environmental issues in the past and so far, no one has shown that it will not be sufficient here.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion to Require Environmental Impact Report" filed by Sierra Club Iowa Chapter on September 14, 2015, is denied.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

/s/ Nick Wagner

Dated at Des Moines, Iowa, this 5th day of October 2015.