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

IN THE MATTER OF THE PETITION OF
DAKOTA ACCESS, LLC PIPELINE, LP FOR
A PERMIT TO CONSTRUCT THE DAKOTA
ACCESS PIPELINE

**YANKTON SIOUX TRIBE’S
POST-HEARING BRIEF**

HP14-002

COMES NOW Yankton Sioux Tribe (“Yankton”), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits the following as its post-hearing brief pursuant to the Public Utilities Commission’s order of October 21, 2015.

STATEMENT OF THE CASE

This matter came before the Public Utilities Commission (“Commission”) on the submission of an application by Dakota Access, LLC (“Dakota Access” or “Applicant”) on December 15, 2014, for a permit to construct a crude oil pipeline through the State of South Dakota pursuant to the Energy Conversion and Transmission Facility Act (SDCL §§ 49-41B-1, et seq.). According to its application, Dakota Access seeks to construct a 12-inch to 30-inch diameter pipeline for approximately 271.6 miles in South Dakota. Revised Application at 1. Dakota Access plans to transport approximately 450,000 to 570,000 barrels per day of crude oil through the proposed project, which “originates in the northwest portion of North Dakota and traverses southeast through South Dakota, Iowa, and Illinois and terminates at the existing Patoka, Illinois hub.” *Id.* Approximately two-thirds of the proposed pipeline would traverse Yankton’s aboriginal territory. Ex. YST 7 at 5-6; Ex. YST 9; Tr. 1032 ln. 13-15; *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 215 and App. A (1970); *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 236 (1970). The project would cross seven South Dakota rural water systems. Revised Application at 16. It would cross 288 waterbodies in the State, including three

waterbodies listed by the EPA as threatened or impaired under the Clean Water Act (Turtle Creek, the James River, and the Big Sioux River). *Id.* at 25, 36. In North Dakota, the project would cross the Missouri River, a primary source of drinking water for South Dakotans. Ex. IEN/DRA 7 at 636 ln. 20 – 637 ln. 2.

Upon notice by the Commission of the Application, Yankton and several other parties applied for and were granted intervention in this proceeding. Following extensive discovery and several hearings on various matters that arose during this proceeding, the Commission conducted an eight-day evidentiary hearing in Pierre, South Dakota. The Commission issued an order setting the post-hearing briefing schedule and setting November 30, 2015, as its decision date.

BURDEN OF PROOF AND BURDEN OF PRODUCTION

Dakota Access bears the burden of proving to the Commission that it meets the statutory requirements under SDCL § 49-41B-22 as well as any other applicable requirements under SDCL Chapter 49-41B and corresponding regulations for the Commission to issue a permit for the project. Dakota Access further bears the burden of production in this case, meaning that Dakota Access must produce sufficient evidence to support its position that each statutory requirement is met. These burdens rest solely on Dakota Access. Other than in rare contexts not applicable here, each and every party seeking any sort of order or relief from an adjudicatory body has the burden to produce the evidence which supports its request and then the additional burden to prove its entitlement to the relief it requests. A plaintiff has the burden of proof in a civil case. *E.g., Mettler v. Williamson*, 424 N.W. 2d 670 (S.D. 1988). A prosecutor has the burden in a criminal case. *E.g., State v. Wilcox*, 204 N.W. 369, 48 S.D. 289 (1925) (“It is a cardinal rule in criminal prosecutions that the burden of proof rest with the prosecutor.”). On nearly every motion, the movant-- whether plaintiff, petitioner, defendant, respondent, or third party-- has the burden of proof on that motion.

E.g., Boylen v. Tyler, 641 N.W. 2d 134 (S.D. 2002); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W. 2d 259 (S.D. 1985). This is a cornerstone of adjudication in countries which provide due process. There is absolutely no basis here to relieve the Applicant of the burden of all petitioners—to prove that it is entitled to the relief it seeks from this adjudicatory body.

This obvious point is further established by the South Dakota statutes applicable to this body when this body is acting as an adjudicator. The burden is on the Petitioner or Applicant. SDCL 49-41B-22. This legal rule is even more clearly stated in ARSD 20:10:01:15.01. ARSD 20:10:01:15.01 is one of the Commission’s General Rule of Practice, and it applies in every contested case proceeding. The rule requires:

In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 (adopted under authority of SDCL §§49-1-11(2),(4), 49-34A-4, implementing SDCL §§49-1-11(2), (4); 49-34A-61) (emphasis added). This is the on-point rule, which the Commission is required to enforce.

ARSD 20:10:01:15.01 discusses both components of the burden of proof: the burden to produce evidence, and the ultimate burden to show that the weight of all evidence produced favors the petitioner. Under this rule, as is also generally the case, both components of the burden of proof lie with a petitioner. In its decision the Commission should clearly explain that Dakota Access has both burdens, and that Dakota Access’s failure to meet either burden provides an independent basis for denying Dakota Access’s petition.

The burden of production must lie with Dakota Access. In order to reach the correct decision on issues before it and to meet its obligations to the people of South Dakota and the

companies that come before the Commission, the Commission needs to be presented with the relevant facts. Nearly all of those facts are in the possession of the petitioning or applying companies, and therefore the burden to produce evidence must be on the companies. *E.g.*, *Davis v. State*, 2011 S.D. 51, 804 N.W.2d 618, 628 (S.D. 2011); *Eite v. Rapid City Area School Dist.* 51-4, 739 N.W.2d 264 (S.D. 2007); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001) (in a civil suit for alleged unlawful arrest, because the information is in the possession of the police officer, the officer has the burden to produce evidence showing why he had probable cause to arrest). Here, Dakota Access did not produce any evidence on several key issues. The Commission must require an applicant company to present evidence in support of all of its claims.

The burden of proof must also lie with Dakota Access. Even if the burden of production shifts in a case, the burden of proof always remains with the applicant. The South Dakota Supreme Court has repeatedly and consistently held that even in the rare situations where the burden of production shift as a case progresses, the burden of proof does not shift—it always remains with the petitioner or applicant.

For many years the term ‘burden of proof’ was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party's obligation to come forward with evidence to support its claim.

Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255, 129 L.Ed.2d 221, 228 (1994). “‘It is generally said that the burden of production may pass from party to party as the case progresses while the burden of persuasion rests throughout on the party asserting the affirmative of an issue.’ ” *Hayes v. Luckey*, 33 F.Supp.2d 987, 990 (N.D.Ala.1997) (citation omitted).

Davis v. State, 804 N.W.2d at 628 (quoting *Gordon v. St. Mary's Healthcare Ctr.*, 617 N.W.2d 151, 157-58 (S.D. 2000)). *See also Eite*, 739 N.W.2d 264.

The law imposing upon Dakota Access the burden of proof on the factual allegations in its Revised Application is so clear that the Commission acknowledged Dakota Access' burden in the Notice of Application; Order for and Notice of Public Input Hearings; Notice of Opportunity to Apply for Party Status ("Notice") issued December 16, 2014. The Commission stated:

For approval, the *Applicant must show* that the proposed pipeline Project will comply with all applicable laws and rules and 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, will not substantially impair the health, safety or welfare of the inhabitants, and 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.

Notice at 2 (emphasis added).

As discussed in sections I-VI, *infra*, Dakota Access unquestionably did not meet its burden of proof with respect to the questions before the Commission. This body therefore must deny Dakota Access's Revised Application.

ARGUMENT

I. THE REVISED APPLICATION WAS NOT FILED WITH THE CONTENT REQUIRED BY SDCL 49-41B-11 AND ARSD 20:10:22.

The first question before the Commission is whether the Revised Application was filed generally with the content required by SDCL 49-41B-11 and ARSD 20:10:22.

A. THE REVISED APPLICATION FAILED TO ESTIMATE THE NUMBER OF NON-LOCAL EMPLOYEES.

SDCL 49-41B-11(4) requires all applications to contain an estimated number of employees for both the construction phase and during the operation of the facility including "the number of employees who are to be utilized but who do not currently reside within the area to be affected by the facility." SDCL 49-41B-11(4).

Dakota Access attempted to fulfill SDCL 49-41B-11(4) by stating: “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.” Revised Application at 40. The Commission heard testimony from Commission Staff witness Dr. Shelly that this means that anywhere from zero to 50 percent of the total construction work force would be locals. Since the Revised Application logically points out that the remaining portion of the workforce that is not local would consist of non-local personnel, that means that anywhere from zero to 50 percent of the workforce would consist of non-local personal, or as the statute calls them - employees who do not currently reside within the area to be affected by the facility. There were no studies or empirical evidence included in the Revised Application nor presented at the hearing that provide the Commission with any more detail. The Tribe asserts that such an estimate is 1) arbitrary and capricious because it is not based upon anything, and 2) too broad to fulfill the requirements of SDCL 49-41B-11(4). Therefore, the Commission must find that that Dakota Access failed to comply with the requirements of SDCL 49-41B-11(4).

B. THE REVISED APPLICATION FAILED TO ESTIMATE CONSUMER DEMAND NOR ESTIMATE THOSE CONSUMERS’ FUTURE ENERGY NEEDS.

SDCL 49-41B-11(9) requires all applications to contain the “estimated consumer demand and estimated future energy needs of those consumers to be directly served by the facility.” ARSD 20:10:22:10 requires applications to “provide a description of present and estimated consumer demand and estimated future energy needs of those customers to be directly served by the proposed facility”. Dakota Access addressed these requirements in paragraph 10.0 of its Revised Application. Dakota Access cited to the contracts it has with shippers and the shipping capacity that has been designated for both “committed” shippers and “walk-up” shippers and describes the “open season” process that Dakota Access undertook to obtain subscriptions from the committed

shippers. Revised Application at 4. Noticeably absent from this section and from the Revised Application as a whole is any information about how Dakota Access will meet the requirements of SDCL 49-41B-11(9) and ARSD 20:10:22:10. There was no description of present and estimated consumer demand nor the estimated future energy needs of customers provided by Dakota Access. In fact, the testimony presented at the hearing included a postulating theory about how the shipped product *might* eventually bring refined fuel back to South Dakota consumers however, Dakota Access could not definitively confirm its unsupported theory. Tr. 93, ln 12 – 94, ln. 10. The South Dakota Legislature required more than mere conjecture in order for an applicant to meet the requirements of SDCL 49-41B-11(9) and ARSD 20:10:22:10. Dakota Access’ Revised Application failed to fulfill the requirements of both SDCL 49-41B-11(9) as well as ARSD 20:10:22:10.

C. THE REVISED APPLICATION FAILED TO IDENTIFY ALL PERSONS PARTICIPATING IN THE PROPOSED FACILITY.

Dakota Access’ Revised Application failed to “contain the name, address, and telephone number of all persons participating in the proposed facility at the time of filing” as required by ARSD 20:10:22:06 (emphasis added). Participants in the proposed facility include Dakota Access, LLC, Energy Transfer Partners, and Phillips 66. Tr. 65 ln. 22 – 66 ln. 1, 66 ln. 17-18. Energy Transfer Partners and Phillips 66 were not listed as participants in the Revised Application. While Sunoco Logistics may participate in the proposed facility in the future, it does not at this time. Tr. 66 ln. 3-4, 16-19.

D. THE REVISED APPLICATION FAILED TO CONTAIN ALL WITNESSES/TESTIMONY, DATA, AND EXHIBITS.

Dakota Access failed to “file all data, exhibits, and related testimony which [it intended] to submit in support of its application” upon the filing of its application as required by ARSD 20:10:22:39.

E. DAKOTA ACCESS CANNOT PRODUCE A REASONABLY ACCURATE FORECAST OF THE IMPACT.

The community impact information in the Revised Application and provided by testimony is insufficiently addressed because it was based on information gathered entirely by non-Natives. Tr. 1044, ln 12 – 1046, ln 3; 1050, ln. 23 – 1059, ln. 18. Therefore, the Revised Application cannot produce a reasonably accurate forecast of the impact required by ARSD 20:10:22:23.

In sum, the Revised Application was not filed with the content required by SDCL 49-41B-11 and ARSD 20:10:22. Therefore, the Commission is required to deny or return the Revised Application. SDCL 49-41B-13.

II. THE REVISED APPLICATION AND ACCOMPANYING ECONOMIC IMPACT STUDY CONTAIN DELIBERATE MISSTATEMENTS OF A MATERIAL FACT.

The next question before the Commission is whether the Revised Application or any accompanying statements or studies required of the applicant contain any deliberate misstatements of a material fact. SDCL 49-41B-13.

A. THE REVISED APPLICATION OMITTED KEY INFORMATION NECESSARY TO UNDERSTAND THE ESTIMATED NUMBER OF EMPLOYEES.

All applications filed with the Commission are required to contain the “[e]stimated number of employees employed at the site of the facility during the construction phase and during the operation life of the facility. Estimates shall include the number of employees who are to be utilized but who do not currently reside within the area to be affected by the facility.” SDCL 49-41B-11(4). The applicable regulation provides:

The application shall contain the estimated number of jobs and a description of job classifications, together with the estimated annual employment expenditures of the applicants, the contractors, and the subcontractors during the construction phase of the proposed facility. In a separate tabulation, the application shall contain the same data with respect to the operating life of the proposed facility, to be made for the first ten years of commercial operation in one-year intervals. The application shall include plans of the applicant to utilization and training of the available labor force

in South Dakota by categories of special skills required. There shall also be an assessment of the adequacy of local manpower to meet temporary and permanent labor requirements during construction and operation of the proposed facility and the estimated percentage that will remain within the county and the township in which the facility is located after construction is complete.

ARSD 20:10:22:24.

Dakota Access' Revised Application states that approximately 724 construction personnel are anticipated to be associated with each construction spread and that “[p]roject construction will result in more than 7,100 additional job-years of employment with an approximate \$303 million increase in labor income.” Revised Application at 39. Commission Staff offered Ex. 1, Ex. A, *An Assessment of the Economic and Fiscal Impacts of the Dakota Access Pipeline in North Dakota, South Dakota, Iowa and Illinois* prepared for Dakota Access, LLC and prepared by the Strategic Economics Group, dated November 12, 2014, (“Economic Impact Study”) and the exhibit was admitted into evidence. The Economic Impact Study also estimates that 7,137 job-years will be produced in South Dakota. Staff Ex. 1, Ex. A at 109 of 301, Figure 1. Importantly, the Economic Impact Study provides the reader with the benefit of a definition of the term of art “job-year” and defines it to mean, “the equivalent amount of work done by one person for one year....[that]...will be distributed over the two-year construction stage or however long the construction stage requires.” Staff Ex. 1, Ex. A at 109 of 301, fn 2. Commission Staff witness, Dr. Shelly explained the importance of the definition: “[f]ootnote 2 means ...it’s assumed to be distributed over the two-year construction stage, or however long the construction stage requires.” Tr. 968, ln. 17-22. “It’s not saying there will be 7,000 jobs in any given year. It’s just saying that the people that are employed directly or indirectly by the project will contribute so many additional **hours of labor** above and beyond what would have occurred without the project.” Tr. 970, ln. 10-14. (emphasis added). However, this definition and detail provided by the Economic Impact Study was not

offered in the Revised Application nor did the Revised Application describe the 7,000 “jobs” as actually being “hours of labor” and not jobs. This omission of key information is commonly known as a half-truth - a statement which accurately discloses some facts but misleads the listener or reader by concealing other data necessary for a true understanding. Without such definition and details necessary for the Commission to obtain a true understanding of the jobs data, the Revised Application contains a deliberate misstatement of a material fact.

B. THE REVISED APPLICATION CONTAINS A DELIBERATE MISSTATEMENT OF THE NUMBER OF PERMANENT JOBS THE PROPOSED PROJECT WILL PRODUCE.

The Revised Application states that “[o]nce the pipeline has been built, the yearly operations and maintenance spending will add 12 permanent jobs with \$2 million in labor income.” Application at 40. The Revised Application is directly contradicted by the Economic Impact Study (A study prepared for Dakota Access, LLC) that provides “[o]nce the pipeline has been built, the yearly operations and maintenance spending will add 31 permanent jobs, [and] \$1.9 Million in labor income[.]” Commission Staff witness, Dr. Shelly detailed this inconsistency in his testimony. Staff Ex. 10 at 3. Dr. Shelly further explained, “it’s illogical to assume that 12 jobs will generate approximately the same annual income as 31 jobs.” Tr. 975, ln. 3-4. When asked by the Yankton Sioux Tribe which one is correct, Dr. Shelly identified the number of jobs listed in the Economic Impact Study as the number that’s correct. Tr. 975, ln. 8-11. This means logically, that that the Revised Application is incorrect and the Yankton Sioux Tribe argues that this is a deliberate misstatement of a material fact in the Revised Application. In support of this position, the Tribe points to the attempt by Dakota Access to explain and defend the inconsistency by suggesting that the Revised Application only lists direct jobs and the report lists direct, indirect, and induced jobs. Dr. Shelly squarely rejected this attempt. Dr. Shelly, in his opinion, responded, “[h]owever, they’re given in the context of a certain amount of labor income, which is the same amount of

labor income in both places, and that is an inconsistency since you can't have the same amount of labor income associated with two different levels of employment." Tr. 1000, ln 1-13. The Revised Application contains a deliberate misstatement of the number of permanent jobs the proposed project will produce.

In sum, the evidence proves that there are at least two instances of deliberate misstatements of a material fact in violation of SDCL 49-41B-13 in the Revised Application, and therefore the Commission is required to deny or return the Revised Application. SDCL 49-41B-13.

III. THE PROJECT CANNOT COMPLY WITH ALL APPLICABLE LAWS AND RULES.

The third question before the Commission is whether the project will comply with all applicable laws and rules. SDCL 49-41B-22.

A. THE PROPOSED PROJECT CANNOT COMPLY WITH THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITY ACT.

In promulgating the South Dakota Energy Conversion and Transmission Facility Act, the South Dakota legislature made specific findings regarding the necessity for the State to require a permit for energy conversion and transmission facilities. SDCL 49-41B-1. These findings are the basis for the Act itself. One of the findings the legislature made was that the State must "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.*" *Id.* (emphasis added). The State, through the Commission, must therefore restrict permits for such facilities to those that will meet the energy requirements of the people of South Dakota. Based on this requirement and the burden of proof for a permit application, a permit can only be granted for a facility that will help fulfill the energy needs of the people of the State. Nothing in Dakota Access' Revised Application, testimony, or exhibits addressed the energy needs of the people of the state. When questioned specifically about this requirement, Dakota Access witness Joey Mahmoud answered that he cannot state with certainty

whether the product proposed to be shipped through the pipeline would meet the energy requirements of the people of South Dakota. Tr. 93 ln 12- 94 ln. 10. Dakota Access therefore failed to prove that the proposed project complies with SDCL 49-41B-1.

B. THE PROPOSED PROJECT WOULD VIOLATE ABORIGINAL RIGHTS OF THE YANKTON SIOUX TRIBE.

In addition, construction of the proposed project would violate the aboriginal rights of the Yankton Sioux Tribe. Approximately two-thirds of the length of the proposed project would traverse through aboriginal title territory of the Yankton Sioux Tribe. Ex. YST 7 at 5-6; Ex. YST 9; Tr. 1032 ln. 13-15; *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 215 and App. A (1970); *Yankton Sioux Tribe v. United States*, 24. Ind. Cl. Comm. 208, 236 (1970). Aboriginal title “carr[ies] with [it] a right to *use* the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983) (emphasis in original). Such rights are called “aboriginal rights” and are “rights arising from occupancy and use of land by the Indians from time immemorial.” *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Aboriginal rights are recognized by the courts and are legally enforceable. “The federal government grants and protects aboriginal rights ‘against intrusion by third parties.’” *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 205 (W.D. Wisc. 1996), citing *Tee-Hit-Ton Indians*, 348 U.S. 272, 279 (1952). The gathering of traditionally used plants on the Yankton Sioux Tribe’s aboriginal territory is a practice engaged in by and vital to the culture, health, and spirituality of the Yankton Sioux Tribe. Tr. at 1033 ln. 20-21, 1034 ln. 2-10, 1060 ln. 22 – 1061 ln. 16. Construction and operation of the proposed project would infringe upon the Yankton Sioux Tribe’s aboriginal right to gather plants on its aboriginal territory through the impacts of the project on plants in Yankton’s aboriginal territory, both during construction and in

the event of a spill. Ex. YST 7 at 6; Tr. 1034 ln. 14-17. The proposed project would therefore result in a violation of law.

C. THE PROPOSED PROJECT CONTAINS ADDITIONAL VIOLATIONS OF LAW.

Additionally, Dakota Access failed to comply with SDCL 49-41B-11 and ARSD 20:10:22 as described in paragraph I, *supra*.

Also, Dakota Access failed to provide an environmental impact statement under SDCL 34A-9-4 as discussed in paragraph IV(A), *infra*.

In conclusion, Dakota Access has not proven that the project will comply with all applicable laws and rules. SDCL 49-41B-22. Therefore, the Commission is required to deny or return the Revised Application. SDCL 49-41B-13.

IV. THE PROJECT WILL POSE A THREAT OF SERIOUS INJURY TO THE ENVIRONMENT AND TO THE SOCIAL AND ECONOMIC CONDITION OF INHABITANTS OR EXPECTED INHABITANTS IN THE SITING AREA.

The next question before the Commission is whether the project will pose a threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area. SDCL 49-41B-22.

A. AS IT HAS PREVIOUSLY ACKNOWLEDGED, THE PUC MUST “ADDRESS ENVIRONMENTAL CONCERNS,” WHILE APPROPRIATELY ACCOUNTING FOR THE FACT THAT DAKOTA ACCESS HAS NOT PRESENTED ANY EIS.

On September 23, 2015, the Yankton Sioux Tribe and other parties submitted a Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement. By order issued October 22, 2015, the PUC denied that motion for a stay.¹ But the PUC’s prior decision

¹ The Tribe respectfully notes that its discussion of the PUC’s order denying the Tribe’s motion for stay is not intended to waive the Tribe’s objection to that order.

merely postponed until the present time two significant issues related to the environmental impact from the proposed pipeline.

1. BECAUSE DAKOTA ACCESS CHOSE NOT TO SUBMIT THE INFORMATION WHICH WOULD BE CONTAINED IN AN ENVIRONMENTAL IMPACT STATEMENT, DAKOTA ACCESS FAILED TO MEET ITS BURDEN OF PROOF REGARDING ENVIRONMENTAL IMPACTS.

The first of these two issues is simple: whether Dakota Access has met its burden of proof related to environmental impact. The PUC cannot grant a permit to Dakota Access unless Dakota access proves that its proposed pipeline:

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

SDCL §49-41B-22. As the Tribe and others discussed in their joint motion for a stay, an EIS is designed to provide facts essential to prove these core issues.

The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed project is likely to have on the environment, to list ways in which any adverse effects of the action might be minimized, and to suggest alternatives.

SDCL §34A-9-4.

When the Tribe and others discovered through discovery in this matter that Dakota Access was making the foolish decision of seeking a permit without either a federal or a state EIS, the Tribe and other parties filed a joint motion to stay, suggesting that the better mode of proceeding would be for the PUC to stay the process so that Dakota Access could obtain what the Tribe believed to be required information related to essential elements in this case. A wise party in Dakota Access' position would have reviewed that motion for a stay and realized that the Tribe

was correct—that Dakota Access should not try to proceed without an EIS. But in a reactionary and improperly aggressive response brief, Dakota Access made the extremely short-sighted argument that it wanted to take its chances of attempting to prove its case without an EIS. Although the Tribe continues to believe the PUC should not have let Dakota Access proceed in this manner,² the PUC permitted Dakota Access to proceed without an EIS. But in so doing, the PUC could not, and did not, relieve Dakota Access of its ultimate burden of proof.³

The PUC concluded its order denying the motion for stay by acknowledging that it ultimately had to adequately “address environmental concerns.” Oct. 22, 2015 Order at 2. The PUC must now adequately address the environmental concerns based upon the record that Dakota Access presented—a record which does not include an EIS. On the record before it, without an EIS, Dakota Access did not prove its case. We simply do not know whether or not Dakota Access will comply with environmental laws or whether its project will pose a threat to the environment or to the health, safety or welfare of some South Dakotans. For this reason, its petition must be denied under both SDCL §49-41B-22(2) and SDCL §49-41B-22(3).

2. IN THE ALTERNATIVE TO THE ARGUMENT IN SUBSECTION 1, THE PUC MUST IMPOSE PRE-CONDITIONS ON THE PERMIT WHICH WILL REQUIRE DAKOTA ACCESS TO OBTAIN AN EIS AND COMPLY WITH ALL RECOMMENDATIONS OR OTHER PRE-CONDITIONS RELATED TO PROTECTION OF THE ENVIRONMENT AND HEALTH AND WELFARE.

² There were two primary reasons staying the case would have been the better mode of proceeding. First, to fulfill its core duties to the people of South Dakota, the PUC needed the facts which would be contained in an EIS. Second, as is shown in the body of this brief, Dakota Access could not succeed without an EIS, and therefore proceeding without one merely wasted the time and resources of the PUC and the parties.

³ Dakota Access responded to the motion for stay by asserting that attorneys for its opponents should have informed it earlier in the case that it would not be able to win if it did not present an EIS. Even if that argument was correct at the time (which it was not) it is immaterial now. The current issue is not when other parties informed Dakota Access that it was making a mistake by trying to prove its case without an EIS. The current issue is whether Dakota Access actually proved its case.

In the PUC order denying the motion and the parties' briefs on the motion for a stay, the parties and PUC each acknowledged that the PUC has discretionary authority to require Dakota Access to obtain an EIS. *E.g.*, October 22 order at 2 (citing SDCL §34A-9-4). Contrary to what Dakota Access implied to the PUC in Dakota Access' response to the motion for stay,⁴ to comply with its discretionary duty to decide whether to require an EIS, the PUC is required to make what it believes is the best, wisest decision based upon all of the facts presented. *E.g. Peck v. S.D. Penitentiary Employees*, 332 N.W. 2d 714, 716-17 (S.D. 1983). Generally an agency is given discretionary authority when the agency's decision will be fact-specific and/or will rely upon the decision-maker's special knowledge and expertise. *Id.* If the PUC concludes that the best decision is to require an EIS, then the PUC must order an EIS.

In the present matter, if Dakota Access' request for a permit is not denied, the best decision by the PUC would be to condition the permit on Dakota Access: 1) obtaining an EIS before beginning any construction; and 2) taking all mitigation measures identified in the EIS (including any suggested alternative which would mitigate or minimize environmental impact)

Section 21 of the Energy Conversion and Transmission Facilities Act, SDCL §49-41B-21, incorporates the South Dakota Environmental Policy Act, SDCL chapter 34A-9, into the PUC's decision-making. The Environmental Policy Act authorizes every state agency to prepare an environmental impact statement when "any major action they propose or approve... may have a significant effect on the environment." SDCL §34A-9-4. The act defines the term "action" as

⁴ Dakota Access has confused the standard and duty which the PUC is to apply with the duty and standard which an appellate body would apply. For every decision it makes, an adjudicatory body's duty is to enter what it believes is the correct decision based upon the facts and the law. "Discretionary authority," "mandatory duty," "de novo review" and other similar standards provide operative language for any appellate body, not for fact-finding adjudicatory body. In fact, where an adjudicator has discretionary authority, its obligation to render what it concludes is the correct decision is more important than when it decides legal issues. In the former, appellate bodies put nearly complete trust in the adjudicator to enter the right decision; while in the latter, appellate bodies will readily correct errors in the adjudicatory decision.

including “a lease, permit, license, certificate.” SDCL §34A-9-2. Thus, if the issuance of an energy facilities permit may significantly affect the environment, the South Dakota legislature contemplated that the PUC would prepare an EIS before approving the permit.

In their prior motion for a stay, the movants relied upon the Minnesota Court of Appeals recent decision in *In the Matter of the Application of the North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota*, A15-0016 (Minn. App. 2015) (hereinafter *In re Sandpiper*). Although the PUC held that *In re: Sandpiper* was not dispositive on the issue presented in the motion for a stay, there is no denying that *In re Sandpiper* is highly persuasive precedent that the best and wisest decision in the present matter would be to condition a permit on Dakota Access obtaining an EIS and taking all mitigation actions described therein.

In *In re Sandpiper*, the court reversed a Minnesota PUC order granting a certificate of need for the Enbridge Sandpiper Pipeline project, and required preparation of an EIS because the project constituted a “‘major government action’ that creates the ‘potential for significant environmental effects.’” under the Minnesota Environmental Policy Act. *In re Sandpiper*, slip op. at 8 (quoting Minn. Stat. §116D.04 sub 2a (2014)). *In re Sandpiper* shows that for a major pipeline project, such as DAPL, the wisest decision is to utilizing the EIS process. *Id.*

Under section 11 of the South Dakota Environmental Policy Act, preparation of an EIS by the PUC would not be necessary if a federal agency prepared one under the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* SDCL §34A-9-11 states that “To avoid duplication of effort and to promote consistent administration of federal and state environmental policies, the environmental impacts statement required under this chapter need not be prepared with respect to actions for which a (federal) detailed statement is required”). As explained by

Paige Olson in her pre-filed testimony, “the overall project has been segmented, so there is no overarching lead federal agency for the project.” *Pre-filed Testimony of Paige Olson, on file herein*, pp. 7-8. Consequently, there is no federal EIS, and preparation of a state EIS is the optimal manner for the PUC to exercise its discretion under the principles enunciated by the Minnesota Court of Appeals in *In re Sandpiper*.

The South Dakota Environmental Policy Act incorporates the federal regulations for environmental impact statements. SDCL §34A-9-7. The applicable regulations disfavor the segmentation of projects in the manner described by Ms. Olson in her pre-filed testimony. 40 CFR §1502.4(a). Consequently, the Dakota Access Revised Application presents the very type of situation in which the preparation of an EIS by the PUC is appropriate. *E.g. LeFlemme v. Federal Energy Regulatory Comm’n*, 852 F.2d 389 (9th Cir. 1988) (ordering suspension of hydroelectric project permit proceeding until environmental impacts evaluated).

The Sandpiper Pipeline Project would have a capacity of 375,000 barrels per day, and cross northern Minnesota for 300 miles, and the Minnesota court ruled that it was a “major action,” triggering the need for an EIS under the state Environmental Policy Act. *In re Sandpiper*, slip op. at 3, 8. Dakota Access proposes to cross South Dakota for 272 miles, with a capacity of 570,000 barrels per day, significantly more than Sandpiper. Dakota Access, *Revised South Dakota Public Utilities Commission Application for the Dakota Access Pipeline, on file herein*, p. 1. Thus, DAPL potentially poses a far greater environmental risk to South Dakota than the Sandpiper Pipeline Project may pose to Minnesota. As in *In re Sandpiper*, the PUC should have the benefit of an EIS, so that it will know how the proposed pipeline would impact the environment and the people living near the pipeline and so that it can condition the permit on appropriate mitigation of such impacts.

Otherwise, for example, the 279 water body crossings by DAPL in South Dakota will be permitted by the Army Corps of Engineers under a single combined section 404/10 permit, with no alternatives analysis or further environmental review. *See Dakota Access Application for U.S. Army Corps of Engineers Section 404/10 Permit.* The Environmental Policy Act is designed precisely to address this situation, in which there is no federal review process for an oil and gas project which potentially significantly impacts the South Dakota environment.

In further support for an EIS, Commission Staff witness Dr. Shelly assessed the socioeconomic impact analysis provided by Dakota Access for the proposed project and noted a concern with the analysis, in particular, that the analysis that was performed did not contain as much detail as he would expect in an Environmental Impact Study. Tr. 957, ln. 20-22; Tr. 958, ln. 1-4; Tr. 959, ln. 5-7; Tr. 983, ln. 23-25 – 984, ln. 1-4. In addition to the lack of detail, Dr. Shelly noted major deficiencies in topics addressed in the analysis provided by Dakota Access. In particular, Dr. Shelly noted the absence of “public input to the [socioeconomic impact] analysis”. Tr. 981, ln. 17-19. In addition, Dakota Access’ socioeconomic impact analysis failed to include a process for written comments on the draft of the analysis as is required of an economic impact statement. Tr. 981, ln. 19-21. Importantly, Dr. Shelly stated that his experience with other linear projects that go in a straight line across the county such as a pipeline or an electricity transmission line, that he is familiar with, did require an EIS. Tr. 987, ln. 4-10.

The PUC is required to decide whether it is best to require an EIS, and the lesson of *In re Sandpiper* is that the best decision is to require Dakota Access to prepare an EIS. Given the scope of the potential environmental impacts of an oil and gas pipeline of the size and magnitude of DAPL, the determination of whether the revised application meets the statutory criteria is properly determined by through preparation of an EIS. In the absence of an environmental impact

statement, it is impossible for the Commission to conduct the requisite review of the threats of serious injury to the environment that is required under SDCL 49-41B-22 and therefore the Revised Application must be denied, or in the alternative, require the preparation of an EIS prior to issuance of a permit.

B. THE PROPOSED PROJECT INCLUDES THREATS OF SERIOUS INJURY TO THE SOCIAL AND ECONOMIC CONDITIONS.

The applicant has the burden of proof to establish that “[t]he 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[.]” SDCL 49-41B-22. The applicable legal rule provides:

The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

(1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;

(2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;

(3) A forecast of the impact on agricultural production and uses;

(4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;

(5) A forecast of the impact on transportation facilities;

(6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and

(7) An indication of means of ameliorating negative social impact of the facility development.

ARSD 20:10:22:23.

Commission Staff witness, Dr. Shelly identified a missing component of the socioeconomic impact analysis as being the absence of an evaluation of availability of housing and impacts on the character of the local community that are typically analyzed but were not here.

Tr. 984, ln. 10-15. Additional considerations that are typically evaluated in a socioeconomic impact analysis but were “only mentioned briefly” in Dakota Access’ socioeconomic impact analysis include impacts on healthcare and lodging availability. Tr. 985, ln. 9-14. Importantly, Dr. Shelly recommended that the Commission “ask for more detailed analysis of the impact on issues such as housing” because:

With this project you will have – during the construction phase you will have a relatively large number of construction workers in a small area at a given point in time. They’re not going to be there for very long, but once they’re there, they obviously need accommodation. And what I have done in preparing these, and my colleagues have done, is we have looked in detail at whether there’s enough accommodation available for those workers. And the reason we’ve done that is because you don’t want to – one reason is you don’t want to displace the people who are looking for accommodation there. But also it has impacts on tourism. Because if the workers make use of the bed or hotel space, then that displaces tourists, and depending on the nature of the area, that could be a problem.

Tr. 990, ln. 6 – 991, ln. 4. In fact, Dr. Shelly stated that “the **biggest** impact they’re going to have in terms of socioeconomic –or could have potentially is on the **housing situation** and **displacing tourists.**” Tr. 991, ln. 13-18. (emphasis added). Such a socioeconomic analysis as to impacts on housing and tourism were not conducted here to Commission Staff witness’ satisfaction and despite being required by ARSD 20:10:22:23(1). Therefore it is impossible for the Commission to evaluate this potential threat in compliance with SDCL 49-41B-22 without the necessary and required information from Dakota Access.

There was also expensive evidence presented demonstrating the threat of serious injury to the social and economic condition of inhabitants and expected inhabitants in the siting area involving the threat of sexual violence and spills. See, e.g., paragraph V, *infra*.

In sum, the proposed project will pose a threat of serious injury to the environment and to the social and economic condition of inhabitants or expected inhabitants in the siting area in violation of SDCL 49-41B-22. Moreover, Dakota Access has failed to meet its burdens of proof

and production as to each of the requirements of ARSD 20:10:22:23. Therefore, the Commission is required to deny or return the Revised Application. SDCL 49-41B-13.

V. THE PROPOSED PROJECT WILL SUBSTANTIALLY IMPAIR THE HEALTH, SAFETY, AND WELFARE OF THE INHABITANTS.

The next question before the Commission is whether the proposed project will substantially impair the health, safety, or welfare of the inhabitants. SDCL 49-41B-22.

The proposed project would bring with it threats of an increase in sexual violence. Construction of the proposed project would require an influx of approximately 1,500 to 3,000 out-of-state workers into the State of South Dakota for temporary jobs. Tr. 302 ln. 1-15, 19-24. The temporary influx of workers and the conditions of their employment are likely to lead to increased crime, including in particular sexual violence, in local communities. Tr. 1040 ln. 15-17; Ex. YST 7 at 3, 4. The Yankton Sioux Tribe's Fort Randall Casino is in such proximity to the proposed project that workers are likely to frequent the Casino during their non-working time, placing young women in that community at risk. Ex. YST 7 at 3. Logically, young women in the nearby, highly populated areas of and near Sioux Falls would be placed at risk as well. If the project were constructed, there would be insufficient law enforcement in affected communities to safely address the threats and safety concerns posed by the presence of the 1,500 to 3,000 temporary, out-of-state workers. Ex. YST 7 at 4, Ex. YST 6 at 3. Should an act of violence occur between a worker and a Tribal member on an Indian reservation, jurisdictional issues and lack of law enforcement coordination would make it difficult to hold the worker responsible. Ex. YST 7 at 4.

There are also extensive risks associated with the inevitable spill. As a new company (Tr. 67 ln. 5), Dakota Access has no experience operating pipelines. Dakota Access failed to show that the proposed pipeline will not spill or leak. Dakota Access has no experience cleaning up spills. Tr. 67 ln. 2-5. Sunoco Logistics, which has experience cleaning up spills, is not currently a

participant in the proposed project. Tr. 66 ln. 3-4; Revised Application at 4 (listing only DAPL-ETCO Operations Management, LLC as the operator). The proposed project would cross the Missouri River twice (Tr. 217 ln. 15-18), placing all downstream users of the water in South Dakota at risk in the event of a spill at one of those locations. A spill in the Missouri River would have severe negative social impacts on the Yankton Sioux Tribe due to the spiritual and medicinal uses of the water in that river. A spill within the Yankton Sioux Tribe's aboriginal territory, and particularly in or near the James River, which would also be crossed by the proposed pipeline, would have severe negative social impacts on the impacts of the Yankton Sioux Tribe due to the spiritual and medicinal uses of the plants gathered there.

No environmental impact statement (EIS) has been conducted with respect to the proposed project. *See, generally, Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement* and paragraph IV(A), *supra*. Without an EIS, insufficient evidence exists to know the comprehensive impact of a spill on the environment. The lack of an EIS also makes it impossible to evaluate the comprehensive and cumulative impacts of construction on the environment.

In conclusion, the proposed project will substantially impair the health, safety, and welfare of the inhabitants. SDCL 49-41B-22. Therefore, the Commission is required to deny or return the Revised Application. SDCL 49-41B-13.

VI. DUE CONSIDERATION HAS NOT BEEN GIVEN TO THE VIEWS OF GOVERNING BODIES OF AFFECTED LOCAL UNITS OF GOVERNMENT.

The sixth question before the Commission is whether the Project will 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. SDCL 49-41B-22. Due to the potential harms to the Yankton Sioux Tribe and Rosebud Sioux Tribe described throughout this brief, these

two tribes would clearly be affected if the proposed pipeline is constructed. Because both tribes are in close enough proximity to the project that they would be affected by it, they are considered local. Furthermore, as federally recognized Indian tribes, both of these tribes are plainly units of government. Tribes have the ability to compact with states in a number of areas including, but not limited to, gaming, uniform commercial code filings, taxation, and social services. 27 U.S.C. §§ 2701, et seq.; Cheyenne River Sioux Tribe Compact (November 16, 2001); SDCL Chapter 10-12A. They are able to do so because they are units of government. Tribes make and are ruled by their own laws. The United States recognizes its relationship with tribes as “government-to-government.” *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (referencing the “government-to-government” relationships between the United States and Indian tribes). The State of South Dakota created a cabinet-level Department of Tribal Relations that recognizes the State’s government-to-government relationship with tribes in South Dakota. South Dakota Department of Tribal Relations: Department Mission, Values, and Goals for 2011-2013, <http://www.sdtribalrelations.com/dgoals.aspx> (last visited Nov. 6, 2015). There can be no doubt that the governments of Indian tribes are units of government. As such, they are entitled under SDCL 49-41B-22 to have their views receive due consideration by a permit applicant such as Dakota Access. However, throughout its permit process, Dakota Access failed to coordinate with the governing bodies of any tribes or any tribal agencies in South Dakota. Tr. 67 ln. 23 – 68 ln. 2; Ex. YST 6 at 2-4; YST 7 at 6. Because Dakota Access failed to give due consideration to the views of the governing bodies of the Yankton Sioux Tribe and the Rosebud Sioux Tribe, Dakota Access failed to fulfill its statutory obligations under SDCL 49-41B-22.

VII. THE COMMISSION IS REQUIRED TO DENY DAKOTA ACCESS' REQUEST FOR A PERMIT.

As shown in sections I through VI, *supra*, Dakota Access has failed to meet its burden of production with respect to several of the questions before the Commission and it has failed to meet its burden of proof with respect to all of the questions addressed in sections I through VI. Dakota Access must meet both its burden of proof and its burden of production with respect to all six of these questions. Because it has failed to do so, Dakota Access' Revised Application must be denied.

VIII. IF A PERMIT IS GRANTED, IT SHOULD BE SUBJECT TO TERMS AND CONDITIONS.

In accordance with the laws of the State of South Dakota, the Commission must deny the Revised Application for a permit for the proposed project. However, should the Commission find, contrary to law, that the permit should be granted, it should do so subject to the following terms and conditions.

A. COMPLETE CULTURAL SURVEYS

If a permit is issued, the permit should be contain a condition that 100% of the land that would be disturbed during construction, including all ancillary lands and lands not within the right of way corridor itself, must be surveyed prior to breaking ground for the project. Dakota Access provided testimony that only about 98% of the corridor has been surveyed (Tr. 468 ln. 9) and that ancillary lands have not been completely surveyed. Without a complete survey, potential cultural sites that would be disturbed cannot be taken into account and protected during the construction process. It is crucial that all land to be affected during construction be surveyed prior to construction to protect the rights and interests of Yankton and of all South Dakotans. Any permit granted for the project should contain a condition to this effect.

B. TRIBAL CONSULTATION

If a permit is issued, the permit should contain a condition requiring tribal consultation and treating tribes as local units of government for purposes of SDCL 49-41B-22. As previously stated, *supra*, Dakota Access failed to consult with Indian tribes on a number of issues vital to the social, cultural, and safety interests of those tribes. As a condition to any permit, Dakota Access should be required to meaningfully consult with the tribes about the project in order to be able to give due consideration to their views, and it must in fact give due consideration to tribal views. This is a requirement under the authority for issuance of permits, 49-41B-22, and it is has not yet been met by Dakota Access. Section VI, *supra*. In addition, while it is not a requirement under South Dakota law, Dakota Access should be required to consult with tribes beyond the scope of SDCL 49-41B-22 in a manner similar to the consultation requirement imposed on a lead federal agency under the National Environmental Policy Act, 42 U.S.C. §§ 4321. Such consultation should cover environmental, cultural, spiritual, historical, health, and law enforcement concerns of the tribes. Neither federal law nor state law explicitly requires this, but it is within the Commission's permitting authority to include this as a condition of any permit and it is the only way to ensure tribal interests are taken into account in the project. SDCL 49-41B-24.

C. ENVIRONMENTAL IMPACT STATEMENT

If a permit is issued, the permit should be conditioned on the completion of an environmental impact statement and a finding of no significant impact. As discussed in section IV(A)(1), *supra*, no environmental impact statement has been completed for the proposed project. As a result, the Commission currently lacks sufficient information to make a fully informed decision on Dakota Access' Revised Application. The Commission has authority to prepare or require the preparation of an environmental impact statement. SDCL 49-41B-21. Therefore, as a

precondition of the permit, the Commission should require the preparation of an environmental impact statement prior to the permit becoming effective, and requiring satisfactory findings from the environmental impact statement prior to the permit becoming effective.

D. PROTECTION OF ABORIGINAL RIGHTS

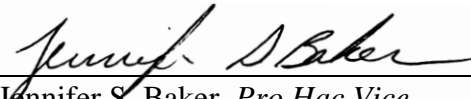
If a permit is issued, it should prohibit Dakota Access from interfering with Yankton's aboriginal rights. This restriction should include, but not be limited to, the rights of Tribal members to gather plants in Yankton's aboriginal territory, including along the pipeline route.

CONCLUSION

For the afore-stated reasons, the Commission must deny Dakota Access' Revised Application for a permit for the proposed project. As posed by the Commission in its Order for and Notice of Evidentiary Hearing, there are six initial questions before the Commission in this proceeding for which Dakota Access bears the burdens of proof and production and which determine whether or not Dakota Access has met the statutory requirements for issuance of a permit. The Commission's findings with respect to these first six questions will determine its decisions on the seventh question (whether a permit should be granted), the eighth question (what terms, conditions, or modifications should be imposed if a permit is granted), and the ninth and tenth questions (what amount of coverage under the indemnity bond is reasonable and what form, terms, and conditions should be imposed thereon). Dakota Access must prove compliance with each of the statutory requirements addressed by questions one through six. Failure by Dakota Access to meet its burden of proof or production with respect to any one of these questions mandates denial of the Revised Application. Because Dakota Access has failed to meet its burdens with respect to all six of these questions, the permit must, by law, be denied and the Commission need not address the remaining questions as they are moot. However, in the event that the

Commission does grant a permit for the proposed project, the terms and conditions described in section VIII, *supra*, are necessary for the protection of the health and welfare of South Dakotans and should be imposed as part of the permit.

Dated this 6th day of November, 2015.



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