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

DOCKET HP14-002

**IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN
ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE**

POST HEARING BRIEF OF JOHN WELLNITZ, INDIVIDUAL INTERVENER

DATED OCTOBER 27, 2015

I am giving input from the perspective of individual landowners, farmers, and contractors in regards to the proposed pipeline. My family farms in eastern Beadle County in Foster Township on land bought in the late 1990's by my father. The proposed route goes roughly diagonally through two quarter sections. There are several major areas of concern that so far have not been adequately addressed by Dakota Access. I will list them and give further explanation with each.

#1- LIABILITY

The easement portion regarding liability as it concerns the potential easement grantor, as prepared by Micah Rorie and presented to us by Dakota Access right of way employees or agents reads as follows- "18. Grantee hereby agrees to indemnify (Grantor) and hold harmless from and against any claim or liability or loss from personal injury, property damage, or environmental damage resulting from or arising out of the use of the easement by Grantee, its servants, agents or invitees, and the installation, use maintenance, repair, or removal of the pipelines by Grantee and such persons acting on its behalf, excepting, however such claims, liabilities, or damages as may be due to or caused by the acts of Grantor, or its servants, agents or invitees." This is unacceptable from a farmer or rancher point of view. To be subject to liability for accidental damage to pipeline or valve facilities is an undue burden to place on landowners, farmers, or contractors. For example, on our farm, as on many others, we use GPS guidance systems for steering tractors. These are large tractors, weighing up to over 50,000lb. They are often used at night, and in many cases by employees or custom farming contractors operating long hours in unfamiliar fields. The placement of above ground facilities is of major concern here both from a financial liability standpoint as well as personal injury. The other area of potential risk is in land improvement. We install tile on our farm along with ditch maintenance. Others also install tile on their farms. Tiling is relatively new in this

particular area with many farms around in the application process and planning on installing tile. I understand that Dakota Access has hired a consultant for tiling, and in speaking with Susan Bergman, Right of Way Manager for Contract Land Staff, the tiling consultant's recommendation of depth is inconsistent with my knowledge of the area. I contend that the depth of the pipe needs to be well out of the potential depth of the tile plow to mitigate the chances of potential damage or puncture. She says that the Dakota Access won't place the pipe at a depth of more than 60 inches across a field, and that this consultant deems that sufficient to meet the needs of future development. That is not necessarily true. The best accuracy, (and that is critical for drainage tile, especially in our flatter fields and smaller tube diameters used here) is achieved with a plow, not an open trench such as would be done with a backhoe. The required depth of drain tile usually is around 36 to 48 inches. I submit that the oil pipe being placed at 60 inches of cover is not enough depth to provide adequate separation from the tile plow, which is a blind operation, and the oil pipe. The tile plows are typically capable of cutting to a depth of 72 to 84 inches. Unless Dakota Access is willing to place their pipe well out of the potential reach of this operation, they need to assume full responsibility for all accidental damage and loss of product, as well as clean up and decontamination. I have spoken to Susan Bergman in regards to the protection from liability and received a negative response. If the PUC grants this permit, with the current conditions, and with it a greater chance of Dakota Access imposing their terms and conditions on landowners, rather than the other way around, you will be doing the people of South Dakota a disservice. One of the conditions of granting the permit needs to be to protect, hold harmless, and indemnify South Dakota's farmers, ranchers, and contractors against such liability. Obviously Dakota Access isn't going to be in favor of such a condition, but the Public Utilities Commission's responsibility is first and foremost to the people of South Dakota and our welfare, not to any out of state company.

#2- PIPELINE ROUTING AND VALVE PLACEMENT

Please see Exhibit A2, Topographic Map, pages 30-33 for this section.

Dakota Access has proposed the placement of a main line valve in one of our fields, stating that that particular location is necessary meet the spill protection plan as filed with the PUC. The location of the valve and it's enclosure is in a very unsuitable place. It would be directly across from the farmyard and house, in a cultivated field, (not a pasture) and right out in the middle of what is currently farmed. In speaking with Micah Rorie and Susan Bergman as to why this is considered a necessary location they have not given me anything more specific than that it's necessary for protecting the Middle Pearl Creek, and the railroad, which,as you can see on the map is crossed shortly farther on. I have made several requests to Chris Hubbs, and Susan Bergman (to pass on to Micah Rorie, which she stated she would do) to be shown the specific documents and railroad requirements that dictate this location as being necessary. I have to date received nothing from them. I have however been sent some of the requirements by PUC staff attorney, they are here-

Kearney, Darren

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Sep 21

to me

Hi John,

Staff's expert summarizes the required valve locations as follows in his direct testimony:

18 **Q: Are main line block valves planned to be installed at the proper locations?**

19

20 A: Part 195 requires that block valves be installed at each of the following locations:

21 1. On the suction end and discharge end of a pump station in a manner that
22 permits isolation of the pump station equipment in the event of an
23 emergency.

24 2. On each line entering or leaving a breakout storage tank area in a manner
25 that permits isolation of the tank from other facilities.

26 3. On a mainline at locations along the pipeline system that will minimize
27 damage or pollution from accidental hazardous liquid discharge, as
28 appropriate for the terrain in open country, or for populated areas.

29 4. On each lateral takeoff from a trunk line.

30 5. On each side of a water crossing that is more than 100 feet wide from
31 high-water mark to high-water mark unless the Administrator finds in a
32 particular case that the valves are not justified.

33 6. On each side of a reservoir holding water for human consumption.

34 Dakota Access Pipeline maps provided with the original permit submission
35 indicates that valves are planned for the locations as prescribed above. There
36 are a total of 31 main line block valves which are in addition to valves at the
37 single pump station and at the launcher/receiver locations. Main line block
38 valves appear to be properly spaced. Additional information is needed on the
39 width of several of the streams to confirm that additional main line block valves
40 are not required at these locations. I reserve the right to amend my testimony if
41 subsequent information is obtained that indicates that additional valves are
42 required.

Dakota Access's expert states the following with regard to valve locations

62 Main Line Valves (MLV's): Dakota Access plans to install 40 MLVs along the route in South
63 Dakota. Approximate locations for these valves are shown in the route mapping presented in
64 Exhibits A2, A3, and A4. The MLVs will be constructed within the 50-foot permanently
65 maintained ROW, and be approximately 75-feet-long and 50-feet-wide. These valve sites will
66 be located within an easement obtained from landowners. The spacing intervals between the
67 MLVs along the ROW are based upon the location of the high consequence areas (HCAs), DOT
68 requirements and permit requirements. All valves will have remote actuators so that in the
69 unlikely event of an emergency, these valves can be quickly activated from the Pipeline Control
70 Center to isolate sections of the pipeline to minimize environmental impacts. The valves will
71 also be designed to allow for local operation.

The regulation both witnesses are referring to is [49 CFR 195.260](#).

Another section of the regulation that may be at play with the valve locations around pearl creek is found at [49 CFR 195.452](#) (see subpart i). Basically if Pearl Creek is a high consequence area (HCA), then DAPL may be planning to install the valves around pearl creek to protect that waterbody. However, Dakota Access indicated that there are no HCA's in South Dakota so I am thinking they would justify the valve location based on the portion of 49 CFR 195.260 that states:

“[a valve must be installed at the following location...] on each mainline at locations along the pipeline system that will minimize damage or pollution from accidental hazardous liquid discharge, as appropriate for the terrain in open country, for offshore areas, or for populated areas.”

Also, the PUC's pipeline safety staff informed me that there is not a specific distance requirement for valve spacing. Therefore, I spoke incorrectly on the phone with regards to a distance requirement.

Feel free to contact me with any further questions.

Darren

Darren Kearney

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From this information the placement of the mainline valve near and just south of mile post (MP) 370.5 is not necessary, and if it is necessary, then the routing of the pipe itself is faulty. Again, Dakota Access has failed to provide the actual findings and requirements, including the railroad easement, that necessitate the placement of a valve in this exact location. When I have suggested more appropriate locations, such as across the road where it would be more in the corner of a field or going back north, (note PUC staff's statement that there is not a specific distance requirement for valve spacing) the response I have gotten is that there are not any other suitable locations. As Dakota Access has failed to provide more adequate information, I have nothing to base that claim on besides their word. Susan Bergman informed me that proximity to power lines was not a determining factor in deciding valve location, which Micah Rorie later corrected and stated that yes it indeed is a factor, and that proximity to power, especially three phase, is part of what makes a site better for a valve location. What my conversations have basically yielded, and due to lack of cooperation on Dakota Access's part in providing more information, is that this valve site near MP370.5 affords them compliance with some spill protection requirements in the most convenient location for them, not the best location for all parties involved. This site is along a county road and has three phase power running down it. The site is unacceptable to the landowner. It would be a major hindrance to farming and is also directly visible from the house, ruining the aesthetic appeal of the location and view from the house. It would also pose a major risk of being run into by a tractor. We have made a practice, as part of the land development, to remove obstacles from our fields, not add more in. We move or bury rock piles and old fences, and have started a process with NRCS to consolidate wetlands into corners of fields and reserve areas that are out of the way. Also, it is one of the only sites nearby to the farm that is suitable as a future building site for a house or farm expansion. The area through which the pipeline is proposed and right where the valve site is proposed is a high, flat piece of ground, with water bearing rocky strata underneath it. (I know, I have dug into it burying a rock pile in the immediate area- when I dug into the water bearing strata it filled the hole with 4 feet of water) It is well drained and perfect for a house, something that is rare in this area near the main farm. So the placement of the pipeline, and especially of the valve site, along with hindering the current farming practice and water management development, would ruin the area for future development of its highest and best use. Bear in mind that this location took most of a lifetime to acquire, and the landowners, my parents, are not willing to have that destroyed to serve the purposes of a petroleum pipeline company. In reviewing the valve locations on the Exhibit A2 map, they are not consistent with the purpose of complete watershed protection as the Dakota Access agents claim. For example, the pipeline is proposed to cross the West Pearl Creek, a good sized creek flowing through permeable water bearing strata (I know, we have an large irrigation well within 50 feet of that creek) at MP368. The next valve up-pipe of that crossing is near MP363.5, nearly 3.5 miles up-pipe on the pipeline route. The next valve down-pipe from the Middle Pearl crossing on the pipeline route is this one near MP370.5, or 2..5 miles down-pipe. I have proposed to Micah Rorie that they use the corner of a pasture near MP369.5 for the valve site if one is required in close proximity to Middle Pearl Creek. There would only be about .5 mile of additional potential pipeline drainage into the Middle Pearl Creek basin were a rupture to occur there because the high point of elevation is at MP370. If the Middle Pearl Creek basin and railroad tracks require the kind of protection that would necessitate a valve then the pipeline should be sleeved through that area instead. This brings up the choice of pipeline route. Dakota Access has chosen a site for crossing Middle Pearl Creek that is very poor. It is in a wide, winding portion of the creek and is directly upstream from the wooden railroad trestle. If the pipeline were routed about a mile west, it would cross the railroad on high ground, then cross the Middle Pearl Creek in an area where the banks are narrower and better defined. If a valve site were still required, it could be along a road and in the corner of a field, and much better satisfy all parties affected by this pipe. It appears to be poor planning on the part of Dakota Access with the intent of making the most direct, least expensive route. If the pipe were routed to the west it could still re-join the current proposed route at MP372. In following the pipeline south east there are more inconsistencies in the valve placement. For example, from the valve at MP372, the pipe crosses the South Fork Pearl Creek, a major watershed, near MP375 and comes very near a large wetland area between MP377 and 377.5 with no valve until near MP378. I believe that in terms of the part these valves are supposed to play in protecting these watersheds, and if one is necessary near MP370.5, then these other locations are inadequate. The valve near MP378 is over a mile from the next RR track at Hwy14 so that the necessity of close proximity to a railroad is also an invalid argument for this site near MP370.5. I know the area. It appears that the route and plan developed by Dakota Access is largely self serving (possibly conforming to requirements by the railroad, an entity with more clout than an individual landowner) and does not take into account the inconvenience and risk to landowners and farmers with the poor discretion in this valve placement. And this is all in just a short section of the pipeline route, I wonder how many other poor routing decisions have been made along its length. Speaking with others in the area, there is a similar sentiment. As far as this farm goes, that valve location is a deal breaker in negotiating the pipeline easement. If the Public Utilities Commission grants this permit to Dakota Access, without the terms and conditions that landowners' interests must be fully satisfied, you will be doing a disfavor to the very people you are expected to serve. To burden landowners and farmers with valve structures out in their fields that they did not consent to, and must carry the liability, risk, and destroyed aesthetic value of their property because of, is an act against the people of South Dakota.

#3- EMINENT DOMAIN AND PROPERTY RIGHTS

In speaking with Susan Bergman I have asked whether Dakota Access would pursue the use of eminent domain to acquire easements if an agreement was not able to be reached between Dakota Access and the landowner. She said that they don't want to use that but also stated that most landowners settle before the case actually goes to court, implying that the pressure financially and psychologically are too much for most people to continue to fight with. So in essence Susan implied that it is a

tool they would be willing to use. What that means is basically the idea that there is any negotiating available is a deception, a kind of pretense, and an illusion as long as this possibility of this use of coercion and ultimately force is within their legal reach. Really what is perceived as negotiation, and what the landowner is expected to believe as working with the company on equal terms, is all within what the company deems acceptable. What the landowner ends up hearing from the pipeline company is "We pretend to want to negotiate but really we will get the easement on our terms one way or another." There is something fundamentally wrong with a multi-billion dollar company going against an individual who in many cases has limited resources to use in litigation. To expect the outcome to be fair and just is unrealistic. South Dakota has been applauded for the integrity of our eminent domain laws, especially after the passing of House Bill 1080 in 2006. However, if the Commission chooses to grant this permit to Dakota Access without the specific condition of complete protection of property rights, and the landowners determination of exactly what happens on their property, and knowing that Dakota Access would use, or threaten or imply the use of, the eminent domain process to acquire easements, then it will be an act of aggression toward the people of South Dakota by the Commission. An act done on behalf of an out of state company transporting an out of state product that neither originates nor is refined in South Dakota. The pipeline is not for public use. It is not a road on which farmers will haul their grain. Nor is it a provider of clean water, or even a provider of internet or phone services. I'm aware that the commission's job is to do what is determined best for the people of South Dakota in general, after full review of all parties' input, and not just for the wishes of few, but something as fundamental to South Dakotan's as property rights needs to be taken very seriously. Know this, that if the Commission grants this permit without specific terms and conditions of supreme protection of landowners' property, and with that protection from liability, which is essentially protection of the landowners themselves, their livelihood, history, future plans, and identity, you will be considered not as a friend and ally to the people but an accomplice to bullying and abuse of power. This permit must not be granted until complete protection of landowners is guaranteed.

#4- CLOSING

The reason I did not bring these statements and questions to Dakota Access or to the Commission during the discovery process or at the hearings, is that I was at that time trying to communicate with the company and its agents directly. We were not made aware of the valves at all until I believe mid July. Most of the month of August I tried to communicate with Micah Rorie, at one point we had a meeting scheduled but he cancelled that due to other things. I had been expecting to be able to talk extensively with Micah Rorie about the specifics of this proposed valve location, and considered it unnecessary to take other routes, expecting the company representatives to be acting in good faith toward me. The last I spoke with Micah was with the understanding that they were still giving serious consideration to alternate valve locations. It wasn't until October 15, 2015, when I called Susan Bergman to get a clear answer of what the current intention of the company was regarding this valve location, that I got my most recent information. She stated that to her knowledge the intention was still to place it at the original location. I have still not received any additional information from Micah Rorie or from any other Dakota Access agents explaining the railroad permitting, waterway crossing requirements, or other pertinent information regarding the necessity of the placement of this valve near MP370.5. Had I known clearly what the company intended and that they would be uncooperative in providing that to me personally, I could have probably obtained the information during the discovery process. However, at that time I expected them to work with me on this. Micah Rorie and Susan Bergman have always been courteous and respectful, though I believe I have only spoken to Micah twice on the phone, and never in person, but that still doesn't answer my questions adequately. Also, the hearings in Pierre were held during a very busy time for us here with preparation for harvesting. Also bear in mind that these negotiation and legal issues with a company of this kind are out of the normal business proceedings for most of us as farmers and ranchers and to be held to the same expectations as a professional lawyer is unreasonable. To hire a lawyer to spend time dealing with is out of state, unwelcome and unasked for company, is yet another financial burden placed upon individuals in South Dakota. My statements can be consolidated into one basic argument. These other components such as valve and pipe placement on landowners' property would be covered under this provision. In closing I submit that the permit should not be granted until all landowners along the proposed route are satisfied with all aspects of the project and its impact on them, and guaranteed to be held harmless and without any liability whatsoever for accidental damages to the pipe or associated structures such as valves, and the route itself, depth of cover, and locations of above ground facilities are all subject to this supreme requirement. If that means re-routing, double wall pipes, deeper placement, or whatever, that is just part of the project. Saving money in construction costs or easement acquisition for Dakota Access and in turn placing extra burden on people along the pipeline route is not serving the people of South Dakota well. I trust that the Commission will take these statements and arguments seriously, as I know they represent more than just what we are dealing with on our farm, and are also what others are dealing with, as a picture of how this pipeline is disrupting the lives and livelihoods of individuals along its proposed route and costing us not only the diminished value of property and impeded operations or development in the future, but also time and money now. It has also caused a lot of stress and agitation for many people, as you are well aware, and if it is permitted to be installed without complete landowner protection and approval there will be many people embittered at the commission for your part in allowing it. I believe that there is a way for these pipelines to be built, and satisfy all parties involved or affected. The projects might cost the company more, and place more ongoing burden and responsibility on them and the payback to investors might take somewhat longer, but that is part of responsible development. Thank you very much for hearing me. Sincerely, John Wellnitz.