
**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

**JOINT MOTION TO STAY
PROCEEDINGS FOR
PREPARATION OF AN
ENVIRONMENTAL IMPACT
STATEMENT**

HP14-002

COMES NOW the Yankton Sioux Tribe, the Rosebud Sioux Tribe, Indigenous Environmental Network and Dakota Rural Action, by and through undersigned counsel, and move for an order to stay the proceedings in the above-referenced docket for a reasonable time, to allow for the preparation of an environmental impact statement (EIS) on the Dakota Access Pipeline revised application. It is requested that the order prescribe an appropriate fee upon Dakota Access for the cost of preparation of the EIS, pursuant to SDCL §34A-9-4. The moving parties have learned in discovery that no federal agency will prepare an EIS, thereby triggering the authority in SDCL §34A-9-2(3) for an EIS by the Commission.

This motion is based upon SDCL §49-41B-21, SDCL chapter 34A-9, the papers and pleadings on file herein, and the Memorandum of Points and Authorities, below.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

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 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.

The Minnesota Court of Appeals recently addressed this very issue. The court reversed a Minnesota PUC order granting a certificate of need for the Enbridge Sandpaper 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 the Matter of the Application of the North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpaper Pipeline Project in Minnesota*, A15-0016 (Minn. App. 2015) slip op. at 8 quoting Minn. Stat. §116D.04 sub 2a (2014). The *Sandpaper Pipeline Project* case stands for the proposition that the environmental impacts of a major pipeline project, such as DAPL, must be evaluated utilizing the EIS process. *Id.* Otherwise, the court will reverse and remand any permit issued by the PUC for an oil and gas pipeline, for lack of compliance with the state Environmental Policy Act. *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 the *Sandpaper Pipeline Project* case.

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 DAPL revised application presents the very type of situation in which the preparation of an EIS by the PUC is

appropriate. See 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 the Matter of the Application of the North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota*, slip op. at 3, 8. DAPL proposes to cross South Dakota for 272 miles, with a capacity of 570,000 barrels per day, significantly more than Sandpiper. DAPL, *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. The Tribes and all South Dakota residents are entitled to the more rigorous environmental review ordered in the *Sandpiper Pipeline Project* case.

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. SDCL §34A-9-4 (“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”).

In this docket, the applicant must demonstrate that the Dakota Access 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.

The preparation of an EIS is generally discretionary under the South Dakota Environmental Policy Act. *In re Water Management Board*, 351 N.W.2d 119, 124 (S.D. 1984). Nevertheless, the lesson of the *Sandpaper Pipeline Project* case is that the optimal exercise of discretion by the PUC is to prepare an EIS prior to the approval of a permit for a significant oil and gas pipeline project. 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.

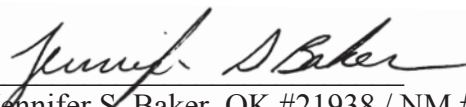
The Environmental Impact Statement:

...shall be prepared in accordance with the procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 . . . and shall include, at a minimum a detailed statement setting forth the following: (1) A description of the proposed action and its environmental setting; (2) The environmental impact of the proposed action including short-term and long-term effects; (3) Any adverse environmental effects that cannot be avoided if the proposal is implemented; (4) Alternatives to the proposed action; (5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented; (6) Mitigation measures proposed to minimize the environmental impact; and (7) The growth-inducing aspects of the proposed action.

SDCL §34A-9-7.

An environmental review conducted under this statute will best enable the Commission to determine whether the DAPL revised application complies with the statutory criteria for a permit under SDCL §49-41B-22. The Commission should enter an order to stay this permit application docket, impose a reasonable fee on DAPL for the cost of preparing an EIS, and directing the staff to implement the EIS process forthwith.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.



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I certify that on this 29th day of September, 2015 the foregoing **JOINT MOTION TO STAY PROCEEDINGS FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT** was filed on the Public Utilities Commission of the State of South Dakota e-filing website. Also on this day, a true and accurate copy was sent via email to the following (or US Mail first class postage prepaid where indicated):

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