

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)	
APPLICATION OF DAKOTA)	HP14-002
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO CONSTRUCT)	BRIEF IN OPPOSITION TO
THE DAKOTA ACCESS PIPELINE)	ENVIRONMENTAL IMPACT
PROJECT)	STATEMENT

On September 29, 2015, Intervenor Indigenous Environmental Network (IEN), Dakota Rural Action (DRA), Rosebud Sioux Tribe (RST) and Yankton Sioux Tribe (YST) (collectively, “Intervenors”) moved the Commission for an Order for the creation of an Environmental Impact Statement (EIS) under SDCL 49-41B-21 and SDCL 34A-9. The motion was denied; however Commissioner Hanson urged consideration of the concept as a condition of a permit. Applicant offers this brief in response to the ensuing discussion.

It is worth noting here that the Iowa Utilities Board denied the same request in a written opinion and order dated today, and attached hereto. The Sierra Club moved for a similar order in the Iowa permitting proceeding which was denied. The similarities between the two requests and the two proceedings are striking. The IUB found that the existing processes in Iowa were sufficient to address environmental issues in the past and there was no showing made that the processes would not be sufficient here.

Applicant resisted the Motion on two grounds. First, the existing permitting process contained in SDCL 49-41B is more extensive, more transparent and preferable to an EIS process. Second, the Intervenor’s desire for an EIS is not a genuine request to improve the process or provide more input but instead to delay and ultimately kill the Applicant’s project. For either reason, or both, the Commission should continue to deny the environmental impact statement process. Ultimately the Commission should continue to review and issue the permit as proposed pursuant to the Application for Facility Application Permit for the Dakota Access Pipeline under the current proceeding and review process which, when comparing the environmental impact statement process for the environmental analysis to the ongoing analysis, the content and analysis are virtually the same and culminate with like results.

Overall, the process of the Public Utilities Commission under South Dakota Rules, Chapter 20:10:22 (“*Energy Facility Siting Rules*”) pursuant to SDCL 49-41B for reviewing a permit application are a requirement, are substantially the same, and where they differ represent an even greater technical review and oversight of the proposed action, relative to the optional and alternative review process as defined under South Dakota Title 34A, Codified Law Chapter 34A-9 “*Environmental Impact of Governmental Actions*”.

The following discussion compares the two processes and options available to the Commission, and sets forth the conclusion that although not an exactly similar process, the content, public participation, technical evaluation and ultimate conclusions can be similarly derived from either process without one being significantly more advantageous to the end result over the other and in fact the process under ARSD 20:10:22, lends itself to more open dialogue, more specific review and technical criteria focusing the analysis to reach a conclusion on the application than SDCL 34A-9.

Therefore, at this time and into the future as part of a condition of the docket for the Dakota Access project, it would be a gross misuse of time, duplicative regulatory oversight and process, contrary to the public interest and use of government and/or private funds and resources, and certainly a duplicative and punitive process to require a state level Environmental Impact Statement or "EIS" on top of and in addition to the review that has occurred and continues to occur for the Dakota Access project.

Environmental Impact Statement (EIS) Process

For the purposes of this brief, the concepts and statements are made specifically in reference to the SDCL 34A-9 and not in relation to any Federal process or guidance under the National Environmental Policy Act ("*NEPA*"; *40 CFR Part 1500*) or the regulations and guidance under the Council on Environmental Quality ("*CEQ*") for Federal Environmental Impact Statements ("*EIS*"; *40 CFR part 1502*). For the Dakota Access project, there is no lead federal authority or agency with primacy to issue an overarching approval for the project and therefore the project does not trigger the requirements of 40 CFR 1500.

Generally, the use of the words "Environmental Impact Statement" or "EIS" often is in reference to the Federal statutes and guidelines. However, in the state of South Dakota, South Dakota references and uses the EIS reference very specifically and makes reference to only one portion of the Federal standard. Specifically, under SDCL 34A-9-7 "Contents of environmental impact statement" states "an *environmental impact statement* shall be prepared in accordance with the procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 as amended to January 1, 2011". When referring to the CEQ's guidance on this reference, the only mention or similar reference to the words "citizen participation" is located in (*NEPA rules*) 40 CFR 1503.1 Inviting comments, item 4, the NEPA rules and guidance under item 4 state "request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected."

Therefore, other than the standard to ensure public participation by affected or interested parties, the state and federal statutes do not compare, are not the same and are general references to similar words, but not in actions or expectations as to the content or exhaustiveness of the analysis and review.

Provided below are the sections and references to the contents and/or requirements of each state chapter and a general comparison of each.

SDCL 34A-9

First, SDCL 34A-9-7 “Contents of environmental impact statement” states “An environmental impact statement shall be prepared in accordance with the procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 as amended to January 1, 2011, and implementing regulations adopted pursuant to that act, 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.

Additionally, SDCL 34A-9-5, 6, 7, 8 and 9 all provide guidance for public comments, review and applicable actions that should be taken while developing and reviewing a state level EIS. Although similar in nature and purpose as a Federal EIS as articulated in 40 CFR Part 1500 and more specifically in Parts 1501, 1503 and 1505, Chapter 34 provides more general direction and leaves the discretion up to the “agency” in executing the requirements of the Chapters and subchapters. When comparing this to the applicable Chapters under ARSD 20:10:22 and the requirements under SDCL 49-41B, the agency and applicant have various duties to notify the public, affected landowners, other state agencies and applicable Federal agencies.

Although worded differently and disseminated across multiple Chapters under the South Dakota Codified law, the process under which the Public Utilities Commission has executed the notifications as well as the notices provided for by the applicant are for all practical purposes the same notices as required by the comparable Chapters under SDCL 34A-9.

When reviewing SDCL 34A-9-7 and the guidelines to comply with the statement “procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 as amended to January 1, 2011” and referencing the language under NEPA (*40 CFR 1503.1 Inviting comments*), item 4, the NEPA rules and guidance under item 4 state “request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.”

In comparison, under ARSD 20:10:22 and as part of the permit process for energy facility siting, the applicant is required to provide data in a much more prescriptive manner and in accordance with the rules as specified under ARSD 20:10:22, subchapters 01 through 40; the

table below provides a side-by-side comparison of the above general guidelines as provided for in SDCL 34A-9-7 as compared to the specific guidelines as part of ARSD 20:10:22.

SDCL Chapter 34A-9-7	ARSD 20:10:22
(1) A description of the proposed action and its environmental setting	<u>20:10:22:02</u> Content of notification of intent <u>20:10:22:03</u> Prefiling conference <u>20:10:22:04</u> General format of application for permit <u>20:10:22:05</u> Application contents <u>20:10:22:06</u> Names of participants required <u>20:10:22:07</u> Name of owner and manager <u>20:10:22:08</u> Purpose of facility <u>20:10:22:10</u> Demand for facility <u>20:10:22:11</u> General site description <u>20:10:22:22</u> Time schedule <u>20:10:22:26</u> Nature of proposed energy conversion facility <u>20:10:22:28</u> Fuel type used <u>20:10:22:29</u> Proposed primary and secondary fuel sources and transportation <u>20:10:22:31</u> Solid or radioactive waste <u>20:10:22:32</u> Estimate of expected efficiency <u>20:10:22:36</u> Additional information in application
(2) The environmental impact of the proposed action including short-term and long-term effects	<u>20:10:22:13</u> Environmental information <u>20:10:22:15</u> Hydrology <u>20:10:22:16</u> Effect on terrestrial ecosystems <u>20:10:22:17</u> Effect on aquatic ecosystems <u>20:10:22:18</u> Land use <u>20:10:22:19</u> Local land use controls <u>20:10:22:20</u> Water quality <u>20:10:22:21</u> Air quality
(3) Any adverse environmental effects that cannot be avoided if the proposal is implemented	<u>20:10:22:14</u> Effect on physical environment
(4) Alternatives to the proposed action;	<u>20:10:22:12</u> Alternative sites <u>20:10:22:30</u> Alternate energy resources
(5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented	<u>20:10:22:37</u> Statement required describing gas or liquid transmission line standards of construction <u>20:10:22:38</u> Gas or liquid transmission line description
(6) Mitigation measures proposed to minimize the environmental impact	<u>20:10:22:34</u> Transmission facility layout and construction
7) The growth-inducing aspects of the	<u>20:10:22:09</u> Estimated cost of facility

proposed action	<u>20:10:22:23</u> Community impact <u>20:10:22:24</u> Employment estimates <u>20:10:22:25</u> Future additions and modifications <u>20:10:22:27</u> Products to be produced
“procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 as amended to January 1, 2011”	<u>20:10:22:39</u> Testimony and exhibits <u>20:10:22:40</u> Application for party status

Overall, when comparing the two chapters and the information, public review and process to evaluate the application, the data reviewed, published to the public and government agencies and process, although in general terms slightly differing terms, the contents of each, the data reviewed and the manner in which the public has an opportunity to participate and review the information are for all practical purposes the same.

The difference is formality for what is required under SDCL 49-41B/ARSD 20:10:22 versus SDCL 34A-9. Any consideration to require both forms of documents and process is simply duplicative and an additional burden on the state and applicant that is not required, overly broad and duplicative regulatory review that does not benefit the public and is punitive to the applicant under this process. If the intent of the Legislature was to require an EIS for every state action that did not contemplate a Federal action, then the Legislature would have required by statute the provisions under SDCL Title 34A and more specifically 34A-9, but rather left the decision to prepare an EIS as an optional avenue.

The Intervenors don’t seek an EIS for purposes of transparency or more input. They seek one to stop the Project.

Second, it’s clear from the consistent actions of the Intervenors that the Motion for an EIS was not related to a need to give more input or to learn more about the project but instead to burden the project and somehow stop it.

As a part of the contested case hearing process under SDCL 49-41B and SDCL 1-26A, the parties engaged in discovery over the course of the spring and summer of 2015. Applicant served numerous rounds of discovery on the Intervenors and other parties to the docket attempting to share information, learn concerns, narrow issues and find common ground. All parties intervening in the docket were served with at least one round of discovery, containing open ended questions designed to get concerns out in the open where they could be addressed. In the case of the Intervenors, the rounds were extensive and the answers were instructive as to this issue. None of the Intervenors who made the Motion were interested in discussing their issues. They offered answers describing their positions and viewpoints as “irrelevant” and “outside the scope of discovery.” They offered very little in the way of questions and answers regarding specific facts and instead relied upon a position being such that “we do not believe applicant can sustain its burden of proof.” Over and over again, the attempts at consultation were met with

stonewalling by these very Intervenors, as can be seen in the responses to discovery filed in the docket. Portions have been excerpted and reproduced below:

- Exhibit 17 - DRA First Discovery Reply Dated 5/1/15
- Exhibit 18 - DRA Second Discovery Reply Dated 6/22/15
- Exhibit 19 - RST First Discovery Reply Dated 4/29/15
- Exhibit 20 - RST Supplemental Discovery Reply Dated 6/15/15
- Exhibit 21 - RST Second Discovery Reply Dated 6/15/15
- Exhibit 22 - RST Third discovery Reply Dated 9/1/15
- Exhibit 23 - RST Fourth Discovery Reply Dated 9/1/15
- Exhibit 24 - IEN First Discovery Reply Dated 5/1/15
- Exhibit 25 - IEN Second Discovery Reply Dated 6/22/15
- Exhibit 26 - YST First Discovery Reply Dated 5/22/15
- Exhibit 27 - YST Second Discovery Reply Dated 6/22/15
- Exhibit 28 - YST Third Discovery Reply Dated 8/21/15
- Exhibit 29 - YST Fourth Discovery Reply Dated 9/9/15

From Exhibit 18 in the docket, DRA Responses to Applicants Interrogatories:

INTERROGATORY NO.6: If the answer to No.3 above is "no," generally state what it is about the proposed Dakota Access pipeline that the Dakota Rural Action finds objectionable.

ANSWER NO. 6: Not applicable. However, the board opposes the Dakota Access pipeline because it is environmentally risky and poses potential health and welfare hazards for the people of South Dakota.

INTERROGATORY NO.7: If the answer to No.3 above is "yes," generally state the organization's objections to the construction of crude oil transportation pipelines in the State of South Dakota.

ANSWER NO. 7: Not applicable.

From Exhibit 22, Rosebud Sioux Tribe's Responses to Applicants Interrogatories, Third set:

INTERROGATORY NO. 2: Does the Tribe or any witness or potential witness have knowledge of cultural resources along the proposed route which are unknown to the State Historical Preservation Office or other authorities? If so, state locations or likely location.

ANSWER AND OBJECTION: The Tribe objects to the sought information on the grounds that there is insufficient foundational knowledge provided by Dakota Access to establish the extent of the State Historical Preservation Officer's knowledge of cultural resources located along the proposed route so as to answer the question as presented. Without this information it is impossible to answer the question. Additionally, the Tribe does not know what Dakota Access means by "other authorities" as that term is not defined by the question. It is equally impossible to respond to this question without the term "other authorities" being defined by Dakota Access and also providing the base level of subject matter knowledge for any possible "other authorities."

INTERROGATORY NO.4: Does the Tribe hold land which have been adjudicated at any point along the proposed pipeline route? If so, identify the result of such adjudication and describe the location of the land along the proposed route affected by the adjudication.

ANSWER AND OBJECTION: The Tribe objects to the sought information on the grounds that Dakota Access has not defined what it means by the term "adjudication" in the context of the question? Without such a definition it is not possible to answer the question.

INTERROGATORY NO.5: If the proposed pipeline is constructed as described in the application and attached exhibits, do you contend it will violate current state or federal rules or regulations? If so, provide those rules or regulations and a factual basis for you contentions.

ANSWER AND OBJECTION: The Tribe objects to the question on the grounds that the question asserts a misinterpretation and misapplication of the statutory burden of proof placed on Dakota Access. In order for the PUC to issue the permit, Dakota Access is required to meet the statutory burden under SDCL 49-41 B. The Intervenors do not have to establish that the applicant will violate current state or federal rules or regulations if the project is constructed.

INTERROGATORY NO.6: Do you believe or contend the proposed facility, if constructed as described in the application and attached exhibits, will pose a threat of serious injury to the environment within or on the Rosebud Sioux Reservation? If so, please describe how you believe the environment within or on the Rosebud Sioux Reservation will be seriously injured.

OBJECTION: The Tribe objects to the question on the grounds that the question asserts a misinterpretation and misapplication of the statutory burden of proof placed on Dakota Access and requires hypotheticals, calls for speculation and requires assumptions that cannot be made.

INTERROGATORY NO 8: In the event of a pipeline leak or spill along the current proposed route, how would or might the Rosebud Sioux Tribe Reservation be directly impacted?

ANSWER AND OBJECTION: The Rosebud Sioux Tribe objects to the Interrogatory on the grounds that the Interrogatory call for an answer that is based on hypothetical's and calls for a speculative answer. Without waiving the objection, and not limited to the foregoing, a pipeline spill or leak may contaminate the waters in which the tribe has rights to under the Winter's Doctrine as it relates to reserved water rights and such a leak or break may also damage the land and natural environment along the proposed route. As a sovereign government recognized as such under federal, international and local law, the Rosebud Sioux Tribe has an interest in seeing that all laws relevant to the proceeding are examined, applied and enforced. A leak or spill in this regard directly impacts the Rosebud Sioux Tribe, its Reservation and its interests wherever located.

From Exhibit 24, IEN Answers to Applicant's Interrogatories, First Set:

INTERROGATORY NO.8: Please state with specificity the objections, if any, which Indigenous Environmental Network has to the Dakota Access project. For each such objection:

- a. Outline a complete factual basis, any relevant law, rule or regulation applicable thereto and an expected or desired outcome if any.
- b. For each such objection, state the decision maker responsible for deciding said objection.

ANSWER NO. 8: IEN is still researching the Dakota Access pipeline and the objections that we may be raising based on applicable law, rule or regulation.

From Exhibit 27, YST's Answers to Applicant's Interrogatories, Second Set:

INTERROGATORY NO.8: Does the Yankton Sioux Tribe have a formal position regarding the construction of crude oil pipelines on its Reservation land? If so, what is it and how was that position developed.

OBJECTION: Yankton objects to this interrogatory on the grounds that it is irrelevant to the proceeding and not likely to lead to the discovery of admissible evidence.

INTERROGATORY NO.9: Does the Yankton Sioux Tribe have a formal position regarding the construction of crude oil pipelines in the State of South Dakota? If so, what is it and how was that position developed.

OBJECTION: Yankton objects to this interrogatory on the grounds that it is irrelevant to the proceeding and not likely to lead to the discovery of admissible evidence.

The exhibits are replete with similar answers to questions designed to engender meaningful dialogue. The Intervenors were asked. And by and large, they chose to decline to engage.

The timing of the motion also displays their motivations. This motion was untimely and designed to spark emotion and create prejudice to the applicant. Despite the clear language of the statute requiring a decision within a one year time frame, this motion was delayed to the very morning of the hearing's commencement and dealt with by surprise. Again the timing points to the conclusion that the Intervenors don't seek an EIS for any purpose other than delay and obstruction.

Whereupon, the Commission should resist any attempt to institute a proceeding under SDCL 34A-9.

Dated this 5 day of October, 2015.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
BRETT KOENECKE

KARA SEMMLER
Attorneys for Plaintiff
503 South Pierre Street
PO Box 160
Pierre, SD 57501-0160
(605) 224-8803

CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson hereby certifies that on or before the 5 day of October, 2015, he electronically served through the PUC filing system or mailed by US First Class Mail, a copy of the Objection to Joint Motion to Amend the Procedural Schedule to the following:

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
patty.vangerpen@state.sd.us

Ms. Kristen Edwards
South Dakota Public Utilities Commission
Kristen.edwards@state.sd.us

Mr. Brian Rounds
South Dakota Public Utilities Commission
brian.rounds@state.sd.us

Mr. Darren Kearney
South Dakota Public Utilities Commission
darren.kearney@state.sd.us

Mr. Tom Siguaw
Dakota Access, LLC
tom.siguaw@energytransfer.com

Mr. Keegan Pieper
Dakota Access, LLC
keegan.pieper@energytransfer.com

Mr. Stephen Veatch
Dakota Access, LLC
Stephen.veatch@energytransfer.com

Mr. Joey Mahmoud
Dakota Access, LLC

Joey.mahmoud@energytransfer.com

Mr. Jack Edwards
Dakota Access, LLC
Jack.edwards@energytransfer.com

Ms. Jennifer Guthmiller
McPherson County Auditor
mcpersonaud@valleytel.net

Mr. Keith Schurr
Edmunds County Auditor
Keith.schurr@state.sd.us

Ms. Kelly Toennies
Faulk County Auditor
Kelly.toennies@state.sd.us

Ms. Theresa Hodges
Spink County Auditor
spinkcoauditor@nrctv.com

Ms. Jill Hanson
Beadle County Auditor
auditor@beadlesd.org

Ms. Jennifer Albrecht
Kingsbury County Auditor
Jennifer.albrecht@state.sd.us

Ms. Susan Connor
Miner County Auditor
minerauditor@minercountysd.org

Ms. Roberta Janke
Lake County Auditor
lakeauditor@lakecountysd.com

Ms. GERALYN Sherman
McCook County Auditor
Geraldyn.sherman@state.sd.us

Mr. Bob Litz
Minnehaha County Auditor

blitz@minnehahacounty.org

Ms. Sheila Hagemann
Turner County Auditor
turcoaud@iw.net

Ms. Marlene Sweeter
Lincoln County Auditor
auditor@lincolncountysd.org

Ms. Lisa Schaeffbauer
Campbell County Auditor
campbellcommission@yahoo.com

Ms. Karla Engle
South Dakota Department of Transportation
karla.engle@state.sd.us

Mr. Chris S. Giles
Lake County States Attorney
Chris.Giles@lakecountysd.com

Mr. Steve Harper
WEB Water Development Association, Inc.
sharper@webwater.org

Mr. Randy Kuehn
rlkfarms@gmail.com

Mr. Michael F. Nadolski - Representing Lincoln County Board of Commissioners
mnadolski@lincolncountysd.org

Mr. Bret Merkle - Representing Pente Farms, LLC; KKKP Property, LLLP; Pederson Ag, LLC;
Calvin Schreiver; DLK&M, LLC; Jean Osthus; and Daniel & Marcia Hoiland
bret@merklelaw.com

Ms. Cindy Heiberger
Minnehaha County
cjepson@minnehahacounty.org

Mr. Kersten Kappmeyer
Minnehaha County
kkappmeyer@minnehahacounty.org

Mr. Glenn J. Boomsma - Representing: Peggy A. Hoogestraat, Kevin J. Schoffelman, Linda Goulet, Corlis Wiebers, Mavis Parry, Shirley Oltmanns, Janice E. Petterson, Marilyn Murray, Delores Andreessen Assid, Joy Hohn, and Orrin E. Geide
glenn@breitlawpc.com

Mr. Larry A. Nelson - Representing: City of Hartford
Frieberg, Nelson and Ask, L.L.P.
lnelson@frieberglaw.com

Ms. Linda Glaeser
Rocky Acres Land Investment, LLC
lglaeser@seattlecca.org
lmglaeser@wwdb.org

Mr. Dale E. Sorenson
Dale E. Sorenson Life Estate
a77man@msn.com

Ms. Kimberly Craven - Representing Dakota Rural Action and Indigenous Environmental Network (IEN)
kimecraven@gmail.com

Ms. Debra K., Mr. Duane H. & Mr. Dennis S. Sorenson
stubbyfarmer@yahoo.com

Mr. Douglas Sorenson
plowboy@svtv.com

Mr. William Haugen
Haugen Investments LP
wh401889@hotmail.com

Mr. Phillip Fett
vonfett529@gmail.com

Mr. Bradley F. Williams
bwilliams@bestlaw.com

Mr. Craig L. & Ms. Dotta-Jo A. Walker
court_walker@hotmail.com

Ms. Diane Best
City of Sioux Falls
dbest@siouxfalls.org

Mr. Charles J. Johnson
c-bjohnson@svtv.com

Mr. Paul A Nelsen
paul@paulnelsenconstruction.com

Mr. Paul F. Seamans
jackknife@goldenwest.net

Mr. John Wellnitz
johnwellnitz@gmail.com

Mr. John Stratmeyer
46534 272nd St.
Tea, SD 57064

Mr. Lorin L. Brass
46652 278th St.
Lennox, SD 57039
brass@iw.net

Mr. Matthew L. Rappold - Representing: RST-Sicangu Oyate Land Office
and RST- Sicangu Lakota Treaty Office
Rappold Law Office
Matt.rappold01@gmail.com

Ms. Thomasina Real Bird - Representing - Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
trealbird@ndnlaw.com

Ms. Margo D. Northrup - Representing: South Dakota Association of Rural Water Systems, Inc.
Riter, Rogers, Wattier & Northrup LLP
m.northrup@riterlaw.com



BRETT KOENECKE