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

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| **IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE** | * * * * * * * | **STAFF'S POST-HEARING BRIEF**<br><br>**HP14-002** |

## I. Preliminary Statement

For purposes of this brief, the South Dakota Public Utilities Commission is referred to as "Commission"; Commission Staff is referred to as "Staff"; Dakota Access, LLC is referred to as "DAPL" or "Applicant". Reference to the transcript of the Evidentiary Hearing will be "ET", followed by the appropriate page number. Prefiled testimony that was accepted into the record will be referred to by the exhibit number. The Pipeline and Hazardous Safety Administration will be referred to as "PHMSA".

## II. Jurisdictional Statement

The Applicant has filed for a permit to construct a hydrocarbon pipeline. The Commission has jurisdiction over siting permits for transmission facilities pursuant to SDCL Chapter 49-41B. SDCL 49-41B-24 requires the Commission to make complete findings in rendering a decision on whether the permit should be granted, denied, or granted with conditions within twelve months of receipt of the initial application.

## III. Statement of the Case and Facts

On December 15, 2014, the Applicant filed a siting permit application pursuant to SDCL 49-41B-4 to construct the South Dakota portion of the proposed Dakota Access Pipeline ("the Project" or "the Pipeline"). The Pipeline would begin in North Dakota and terminate in Patoka,

Illinois, traversing 13 counties in South Dakota. The proposed 12- to 30-inch diameter pipeline will have an initial capacity of 450,000 barrels of oil per day with a total potential of up to 570,000 barrels per day. The proposed route will enter South Dakota in Campbell County at the North Dakota/South Dakota boarder and will extend in a southeasterly direction, exiting the state at the South Dakota/Iowa boarder in Lincoln County. The length of the Pipeline through South Dakota is approximately 271.6 miles. The Pipeline also includes one pump station in South Dakota, located in Spink County. As per state law, the Commission has one year from the date of application to render a decision on this application.

Pursuant to SDCL 49-41B-15 and 49-41B-16, the Commission held the following public input hearings:

1. on Wednesday, January 21, 2015, at 12:00 p.m., in Bowdle, South Dakota;
2. On Wednesday, January 21, 2015, at 6:00 p.m., in Redfield, South Dakota;
3. On Thursday, January 22, 2015, at 10:30 a.m., in Iroquois, South Dakota; and
4. On Thursday, January 22, 2015, at 5:30 p.m., in Sioux Falls, South Dakota.

Pursuant to ARSD 20:10:22:40, the Commission established a deadline of February 13, 2015, for submission of applications for party status. Forty-nine applications were received, all of which were granted.

## IV. Statement of the Issues

The issue to be decided in this matter is whether pursuant to SDCL 49-41B and ARSD 20:10:22, the permit requested by the Applicant should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Specifically, the Commission must determine whether

the Applicant met its burden of proof with respect to each element of SDCL 49-41B-22. If the Commission finds that the Applicant has met its burden and the permit is granted, the next issue the Commission must address is what, if any, conditions should be added to the permit.

## V. Burden of Proof

Pursuant to SDCL 49-41B-22 provides that the Applicant has the burden of proof to establish that:

> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The 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;
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

In addition, the administrative rules state that the Applicant "has the burden of going forward with presentation of evidence…" ARSD 20:10:01:15.01.

Therefore, the next question is what standard shall be applied to determine if the Applicant has met the burden of proof? The general standard of proof for administrative hearings is by preponderance, or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605. It is error to require a showing by clear and convincing evidence. *Dillinghan v. North Carolina Dept. of Human Resources,* 132 N.C. App. 704, 513 S.E.2d 823 (1999). "Preponderance of the evidence is defined as the greater weight of evidence." *Pieper v.*

*Pieper*, 2013 SD 98, ¶22, 841 NW2d 787 (citation omitted). Black's Law Dictionary defines preponderance of the evidence as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

*Black's Law Dictionary* (10th ed. 2014).

Each element must be established by reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable administrative law judge could conclude that the existence of facts supporting the claim are more probable than their nonexistence. *U.S. Steel Min. Co., Inc. v. Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor,* 187 F. 3d 384 (4th Cir. 1999).

If the Applicant meets its burden of proof, South Dakota code does not give the Commission any discretion regarding whether to grant a permit. The siting chapter provides no authority for the Commission to search outside of the four elements listed in SDCL 49-41B-22 for additional burdens of proof in deciding whether to grant or deny an application.

## VI. Argument

Pipelines are regulated by both the federal and state government. The applicable statutes and rules address the siting of pipelines. Transmission facilities "may not be constructed or operated in this state without first obtaining a permit from the Public Utilities Commission." SDCL 49-41B-l. The Pipeline is a transmission facility as defined in SDCL 49-41B-2.1(2).

As discussed above, the Applicant has the burden of proof to establish that four specific elements are met. Those elements are provided in SDCL 49-41B-22. Staff will address each element individually.

**a. Analysis of SDCL 49-41B-22**

**1) Compliance with all applicable laws and rules.**

The Pipeline is subject to federal, state, and local laws and regulations that set forth numerous requirements for which the construction and operation of the facility must comply with. It is, therefore, impossible for Staff to predict with any degree of certainty whether the company will comply with all applicable laws and rules. However, the ability to comply is a good indicator of whether the company *will* comply. The Applicant's ability to comply with all applicable laws and rules is demonstrated through the Applicant's awareness of the laws and rules it is subject to and through the Applicant's compliance with applicable laws and rules to date. Moreover, it is illogical to expect the Applicant to demonstrate that it is in compliance with laws and rules that take effect in the future, when we have no way of knowing what those laws might be.

Permitting processes are established by regulatory agencies in order to ensure that projects comply with the applicable laws and regulations for which those agencies are responsible. Therefore, the Application itself is a tool used for demonstrating the Applicant's awareness of the applicable laws and rules it must comply with through listing the permits the Pipeline is required to obtain for construction and operation, as required by ARSD 20:10:22:05. (DAPL Exhibit 1, page 2).

Staff understands that the list of permits provided in the Application is not inclusive of all laws and rules with which the Applicant must comply. For example, state tax laws and pipeline design specifications do not require a permit, yet they must be complied with. Within the Application, the Applicant addressed their intent to comply with these two specific examples either through stating such, for pipeline design (DAPL Exhibit 1, page 52), or estimating such, for taxes (DAPL Exhibit 1, page 42).

For other laws and rules that the company does not specifically address, the Commission has the ability, per SDCL 49-41B-24, and has done so with past pipeline permits, to condition the issuance of the permit on the fact that the Pipeline shall comply with all applicable laws and rules. Therefore, it is Staff's position that the permit, if granted, should include a condition reflecting such. With this condition in place, it is in the Applicant's best interest to make sure the Pipeline complies with all laws and rules, as the Applicant could face substantial fines under SDCL 49-41B-34 if it fails to do so.

During the evidentiary hearing, a number of witnesses testified on the Applicant's compliance with applicable laws and rules to date. First, Staff witness Darren Kearney testified to the Application's compliance with ARSD 20:10:22 and SDCL 49-41B. Mr. Kearney states "at the time of the filing, the application was generally complete" and adds that "[…] Staff requested further information, or clarification, from Dakota Access, LLC which Staff believed were necessary in order to satisfy the requirements of SDCL 49-41B and ARSD 20:10:22." (Staff Exhibit 1, pages 4-5). It is Staff's position that the Application (DAPL Exhibit 1), and the Applicant's responses provided to Staff's data requests (Staff Exhibit 1, Exhibit A) include the information required by SDCL 49-41B and ARSD 20:10:22.

During cross examination of Mr. Kearney, intervenor Yankton Sioux Tribe (YST) asked a line of questioning that can be summarized by the following question, "Has the Applicant demonstrated how the proposed project will fulfill the energy requirements of the people of South Dakota" (ET 682:6-9). The clear intent of this questioning was to reach a conclusion that the Applicant did not address how the Pipeline will fulfill the energy requirements of the people of South Dakota. However, information regarding how the pipeline will specifically fulfill the energy requirements of the people of South Dakota is not required by South Dakota Law or PUC Rule and, further, would be of no value in the formulation of a decision by the Commission.

Article I, § 8, cl. 3 of the United States Constitution, commonly referred to as the commerce clause, gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The commerce clause is both a grant of congressional authority and a restriction on state's power to regulate. The commerce clause prohibits the Commission, or any state or state agency, from burdening interstate commerce by engaging in state and economic protectionism. See, *City of Philadelphia v. New Jersey*, 437 US 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). The United States Supreme Court has noted "the evils of economic isolation and protectionism." *Id*. at 623.

For this reason, a prior statutory requirement that a proposed facility "be consistent with the public convenience and necessity in any area or areas which will receive electrical service, either direct or indirect, from the facility, regardless of the state or states in which such area or areas are located," was struck down by the South Dakota Supreme Court. *In re Nebraska Power District*, 354 NW2d 713 (SD 1984). The Court held that "requiring a transmission facility… crossing the state and delivering twenty-five percent or less of its design capacity to this state, to satisfy an additional condition of public necessity and convenience, regardless of the state where

the area is located, violates the commerce clause of the United States Constitution and therefore is unconstitutional." *Id.* at 718. Thus, to rule that a facility cannot cross the state unless an applicant can guarantee it will provide energy to this state is in direct violation of the commerce clause of the United States Constitution.

Transitioning now to the Applicant's compliance with PHMSA regulations, Staff witness Robert McFadden, P.E., testified that "[i]t appears that thus far, the Dakota Access Pipeline is following all PHMSA procedural requirements." (Staff Exhibit 9, page 6). As identified in Mr. McFadden's testimony, the Applicant is required to develop a number of plans due to PHMSA regulations, with one of the plans (the Oil Spill Response Plan) requiring specific approval by PHMSA. (Staff Exhibit 9, page 4) He further states, "the PHMSA inspection process reviews the documents for adequacy during compliance audits" and that "[t]hey [(PHMSA)] note deficiencies and require the operator to address such deficiencies." (*Id.*) Through his testimony, Mr. McFadden identified that PHMSA ensures that their pipeline safety regulations are followed by pipeline operators via inspections and compliance audits. (*Id.*) The Applicant's witness, Todd Stamm also corroborated Mr. McFadden's statements on PHMSA compliance inspections. Mr. Stamm stated that "we go through a large number of [PHMSA] inspections, whether they be specific to individual line segments or specific to policies, procedures, plans that kind of over arc, you know, the various lines we have." (ET 577:4-8). Given that PHMSA has a process in place for conducting compliance audits, inspections, and the resolution of non-compliances discovered, the Pipeline will be designed and operated in accordance with PHMSA regulations.

With regards to the compliance with state and federal cultural and historical resource laws, Staff witness Paige Olson provided testimony on requirements related to this subject. In her prefiled testimony, Ms. Olson stated that "[t]o the best of [her] knowledge DAPL has

complied with SDCL 1-19A-11.1 for the centerline portions of the project." (Staff Exhibit 6, page 8). Ms. Olson did, however, provide a number of recommendations the State Historic Preservation Office (SHPO) had for the Applicant in order to ensure protection of South Dakota cultural and historic resources. (Staff Exhibit 6, pages 10-14). During the evidentiary hearing, Ms. Olson testified that the Applicant had satisfactorily addressed her recommendations. (ET 753:8-13). One outstanding recommendation that Ms. Olson had, as communicated during re-direct examination, is that it would be beneficial if the Applicant could have an archeologist monitor the work during construction. (ET 873:24-25).

During cross-examination of Ms. Olson, testimony was solicited attempting to show that the Applicant did not conduct the proper government to government consultation with tribes in accordance with section 106 of the National Historic Preservation Act (NHPA). (ET 807-808). Ms. Olson explains, "portions of the Project will be reviewed under Section 106 of the National Historic Preservation Act and portions will be reviewed under SDCL 1-19A-11.1." (Staff Exhibit 6, page 8). The portions the Project that fall under section 106 of the NHPA are for portions of the route that cross U.S. Fish and Wildlife easements, require a permit from the Army Corps of Engineers, or have some other form of federal connection. (ET 748-749, 2167-2168). Moreover, Dakota Access's witness Monica Howard, testified that for portions of the project that are on private property with no federal connection do not require Section 106 consultation. (ET 2160-2168). Dakota Rural Action (DRA) and Indigenous Environmental Network's (IEN) witness Waste Win Young testified that that a cultural resource survey that lacks identification of traditional cultural properties by tribal experts does not comply with Section 106 regulations. (ET 1532-1533). Ms. Young further testified that the Army Corps of Engineers is the government entity responsible for consulting with the tribes for lands with a federal action. (ET

1541). Finally, Ms. Olson stated "Section 106 of the National Historic Preservation Act outlines who the consulting parties are and specifically speaks to the participation of American Indian Tribes […] SDCL 1-19A-11.1 does not provide for this type of interaction." (Staff Exhibit 6, page 8).

Section 106 consultation is required on lands that have a federal action, but consultation is not required for private property unless federal connection exists. (ET 748-749). Therefore, it is the responsibility of the Army Corps of Engineers, not the Applicant, to consult with the tribes on the portions of the Project that require such consultation and not the Applicant. The Applicant submitted a Nationwide Permit 12 application to the Army Corps of Engineers in December of 2014 and Pre-Construction Notifications in April 2015 (DAPL Exhibit 33, page 1), triggering the Army Corps of Engineers to complete Section 106 consultations for lands that have a federal connection. It is Staff's understanding that Applicant has fulfilled their obligation to date by filing for the nationwide permit.

Brian Walsh testified in his capacity as an Environmental Scientist III with the Ground Water Quality Program for the Department of Environment and Natural Resources (DENR). (Staff Exhibit 2). Mr. Walsh described the regulatory requirements of the DENR. While he did not directly provide an opinion as to whether DAPL has complied with DENR regulations, Mr. Walsh did not express any doubt as to the Applicant's ability to do so.

When the preponderance of the evidence standard is applied to this issue, Staff argues that the Applicant's awareness of the laws and rules and the steps it has taken to date to comply demonstrates its eventual ability to comply with all applicable laws and rules.

### 2) Risk of serious injury to the environment or social and economic condition of inhabitants in the siting area

The South Dakota Supreme Court addressed this issue its *Big Stone II* decision. *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶29, 744 NW2d 594, 603. In that case, the Court held that the competing interests of economic development and protection of the environment must be balanced. *Id*. at ¶35. The Court stated that "[n]othing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat." *Id*.

SDCL 49-41B-22 does not provide a definition of "siting area" for transmission facilities. The lack of a clear definition is logical, because the siting area of a transmission facility would naturally vary depending on numerous factors including the type of project, size of the project, and population of the area. Logic dictates that the "siting area" for purposes of this issue is any area that would see a direct social or environmental affect from the construction or operation of the pipeline in South Dakota. Therefore, the risks that Staff will analyze under this issue are as applied to this understanding of the siting area.

**Impact on the Environment due to Construction**

The Energy Facility Siting Rules, as found in ARSD Chapter 20:10:22, require the Applicant to provide specific information on how the Project will impact the environment. Specifically, the Applicant was required to address the effects the project will have on the physical environment, terrestrial ecosystems, and aquatic ecosystems. Staff understands that the construction of pipeline could have an impact on the environment; however, the burden that the Applicant is required to meet is to prove that the project will not pose an unacceptable threat of

serious injury to the environment. Staff finds that the Applicant met this burden, as discussed in the following paragraphs.

Impacts to the physical environment as a result of the Project include vegetation loss, soil compaction, damage to drain tiles, and erosion. In response to these foreseen impacts, the Applicant has created mitigation plans in order to minimize the impacts. For example, the applicant has filed an Agricultural Impact Mitigation Plan (DAPL Exhibit D) that addresses soil compaction, drain tile damage, erosion, and restoration mitigation measures. The Applicant also filed a draft Stormwater Pollution Prevention Plan (DAPL Exhibit D) that identifies best management practices to be used for erosion control and soil stabilization. Staff finds that through the implementation of such mitigation plans the impacts to the physical environment can be reasonably minimized and, further, that the construction of the Project does not pose an unacceptable threat of serious injury to the physical environment.

With regard to the terrestrial ecosystem, major topics of concern include the Project's impacts to agricultural use of land (hayland and rowcrop), impacts to native grass lands, facilitating noxious weed growth, impacts to wildlife, and impacts to terrestrial threatened and endangered species. The Applicant identifies that impacts to agricultural use of land will be temporary during construction and that agricultural production can resume the next growing season. (DAPL Exhibit 1, page 22). The Project is expected to cross 41 acres of native grassland, and the Applicant states that they will restore all grasslands as near to pre-construction conditions as practicable. (*Id*.) In order to do such, the Applicant identifies that they will use topsoil segregation, soil conditioning, de-compaction, seed mixes developed based on data from pre-disturbance field surveys and input from the local NRCS, and monitoring. *(Id.*) In order to

mitigate the spread of noxious weeds, the Applicant states they will implement BMPs and weed control practices during construction. (*Id*.)

With respect to wildlife concerns, the Applicant states that construction will be short-term and any impacts to wildlife will be temporary. (DAPL Exhibit 1, 24). One specific concern is the impact construction will have on ground nesting birds. However, the Applicant states that construction would be underway prior to nesting season and anticipates nesting birds would avoid the Project area. (*Id*.) Terrestrial threatened and endangered species that could be impacted by the Project may include eagles, western prairie fringed orchid, piping plover, sprague's pipit, and whooping crane. For these species, the Applicant has identified that there is no potential to affect the species due to either no suitable habitat in the area, no suitable nesting habitat in the area, no observances of species occurrence during field surveys, or the species is highly mobile and would likely avoid the construction area. (DAPL Exhibit 4, pages 44-51). Further, DAPL witness Monica Howard testified that "Dakota Access has been working with the USFWS since June of 2014, impact assessments on all federally protected species is being coordinated in accordance with the Endangered Species Act." (DAPL Exhibit 38, page 4). When asked if this type of coordination satisfies the SD Game Fish and Parks, Staff witness Tom Kirschenmann stated that it would. (ET 932).

Staff understands that there may be impacts to terrestrial ecosystems as a result of construction of the Pipeline. Upon review of the record, however, Staff finds that any impacts to terrestrial ecosystems as a result of Project construction would be temporary and that no parties presented evidence showing that any such impacts would pose a threat of serious injury to the terrestrial ecosystems. The Applicant identified that "no effect" determinations have been made for terrestrial threatened and endangered species and that the Applicant is coordinating with the

USFWS. Finally, the Applicant identified measures it would implement to minimize impacts to terrestrial ecosystems. Coordination with the USFWS and the implementation of mitigation measures as identified by the Applicant, and any USFWS recommendations, prevents the Project from posing a serious threat to the terrestrial ecosystem.

The Project is a linear pipeline and will thus need to cross waterbodies in order to get from pipeline origination to termination. As such, the Project has the potential to impact aquatic ecosystems. The Applicant identified that any impacts to waterbodies will be limited to the construction phase and impacts may include: adverse impacts to wetlands (e.g. increased sedimentation and turbidity, introduction of water pollutants, or entrainment of fish). (DAPL Exhibit 1, pages 26 and 28).

In order to minimize the adverse impacts to wetlands, the Applicant identified that the Project was designed to avoid the permanent fill in of wetlands and routed to avoid wetlands. (DAPL Exhibit 1, pages 28-29). For example, the Applicant identified they will Horizontal Directional Drill (HDD) three waterbodies categorized as low quality. (DAPL Exhibit 33, page 19). Where impacts to wetlands are unavoidable, the Applicant identified they will expedite the time spent through wetland crossings and implement Best Management Practices (BMPs) in order to ensure the wetlands are restored post-construction in accordance with applicable regulations and permits. (DAPL Exhibit 1, pages 26-29).

In terms of aquatic species, the Applicant identified that the Project has the potential to affect two particular species of concern, the pallid sturgeon and the Topeka shiner. In order to alleviate risks to the pallid sturgeon, the Missouri River and the Big Sioux River will be crossed using Horizontal Directional Drilling and the Applicant concludes that no impacts to this species

will occur as a result. (DAPL Exhibit 4, pages 44-51). The Applicant further identifies that the Big Sioux River may be used as a water source for HDD installation activities or hydrostatic testing purposes, which could impact the pallid sturgeon. (*Id*.) In order to mitigate this impact, the Applicant identified they would implement conditions on permitted intake structures at the Big Sioux River as described in the USFWS Recovery Plan for the Pallid Sturgeon. (*Id*.)

Regarding the Topeka shiner, nine waterbodies the Project crosses in South Dakota contain known occurrences of the species that include: James River, Shue Creek, Pearl Creek, Rock Creek, West Fork Vermillion River, East Fork Vermillion River, and Big Sioux River. (*Id*.) Impacts to Topeka shiners in the James River, Big Sioux River, East Fork Vermillion River, and Pearl Creek will be mitigated as a result of the Applicant using an HDD crossing method for those waterbodies. (DAPL Exhibit 33, page 20), (DAPL Exhibit 4, pages 44-51), and (ET 403). The West Fork Vermillion River will be crossed at its headwaters where there is no suitable habitat for the species. (DAPL Exhibit 4, pages 44-51). For the remaining four waterbodies, the applicant identified that they will develop suitable construction and/or mitigation measures through consultation with resource agencies prior to initiating construction. (DAPL Exhibit 1, pages 30-31). Further, the Applicant's witness Monica Howard testified that "all open cut crossing will take place in accordance with the *Programmatic Biological Opinion for the Issuance of Selected Nationwide Permits Impacting the Topeka Shiner in South Dakota* (October 2014) and result in no likely adverse effects." (DAPL Exhibit 33, page 23).

Upon review of the record specific to aquatic ecosystem impacts, Staff has determined that the Project does not pose a threat of serious injury to aquatic ecosystems. The Applicant identified that they avoided waterbody crossing to the extent feasible, used HDD waterbody crossing impacts to avoid impacts where certain waterbodies are crossed, and stated they will

implement best management practices to protect aquatic ecosystems during construction. In four waterbodies, the Project has the potential to impact the Topeka shiner during construction; however, the applicant stated the crossings will take place in accordance with the Programmatic Biological Opinion. There was no evidence in the record that shows the expected impacts to aquatic ecosystems pose a serious threat to the environment.

**Impact on the Environment Due to Pipeline Operation**

During the course of the evidentiary hearing, a number of parties voiced concern regarding the impacts the Pipeline will have on the environment while it is in operation. The major concern brought forth by the intervenors is the potential for the Pipeline to rupture and cause environmental damage as a result. A number of previous pipeline spills were mentioned during the hearing, pre-filed testimony, and public comments. Staff understands that there is the potential for all pipelines to spill; however, SDCL49-41B-22 requires that the Commission enter a decision based on whether or not the Project poses an unacceptable threat of serious injury to the environment. Staff provides the following discussion for Commission consideration.

The first question before the Commission in terms of potential of spills from the Pipeline is, does the Pipeline itself create an *unacceptable* threat of serious injury to the environment should it spill? Staff position is that for interstate pipelines the determination of public acceptance for the potential of a spill is done at the federal level, through the PHMSA rule making process. The basis for this position is that PHMSA was given the authority to create rules in order to ensure pipelines are designed, constructed, and operated in manner to protect public safety. While drafting such rules, PHMSA ultimately weighs the benefits of additional requirements for pipeline safety against the costs of implementing those requirements. This

process then establishes a level of pipeline safety standards that ensure pipelines do not pose an unacceptable threat to the public. The Applicant identified that the Project is being designed to PHMSA standards and that the final design will meet or exceed all applicable standards (DAPL Exhibit 1, page 52). Therefore, Staff finds that the Pipeline itself will not pose an unacceptable threat of serious injury to the environment since it will be designed and operated under PHMSA regulations.

A second question before the Commission is: Will the route itself pose an unacceptable threat of serious injury to the environment in the event of a spill? Upon review of PHMSA defined high consequence areas (HCAs) and unusually sensitive areas (USAs), Staff found that the applicant avoided all such areas with its proposed route. Further, the Applicant also stated the route doesn't cross in HCAs in South Dakota. (ET 186-187). By avoiding HCAs and USAs, the Applicant demonstrated that they attempted to minimize the threat of serious injury to the environment, to the extent practicable, should the Pipeline spill. Based on this, the Pipeline route does not pose an unacceptable threat of serious injury to the environment should the Pipeline spill.

Finally, in the event the Pipeline does spill, the question before the Commission is: Will such a spill pose an unacceptable threat of serious injury to the environment? In order to mitigate the severity of a spill, the Applicant is required by PHMSA and the DENR to have a spill response plan. (DAPL Exhibit 1, page 2). The purpose of the spill response plan is to ensure the Pipeline operator has resources and processes in place in order to respond quickly to a spill. This, in turn, helps minimize the severity of a spill's impact on the environment. Moreover, Staff witness Kim McIntosh identified that spills can be remediated and that "the SDDENR has established cleanup criteria and standards in which each release is evaluated

against to protect human health and the environment." (Staff Exhibit 3, page 4). Based on the above, Staff finds that in the unfortunate event of a spill there are federal and state protections in place in order to minimize the threat of serious injury to the environment and remediate spills to acceptable levels of contamination.

**Impact on the Social and Economic Condition of Inhabitants**

Staff witness Dr. Michael Shelly testified that the Project "will not pose a threat of serious injury to the social and economic condition of the inhabitants or expected in habitants in the siting area." (Staff Exhibit 10, page 4). He further testified that there will "be positive economic benefits to the local communities resulting from Project expenditures in local areas, the employment of local workers, and the payment of sales and use tax, gross receipts tax, and tourism tax." (Staff Exhibit 10, page 4).

In order to apply the preponderance of the evidence standard, one must weigh the positive economic impacts against the negative impacts. There was much speculation as to negative impacts that could occur from the inability of municipalities to expand within the easement area. However, because there was no testimony or evidence as to any harm that would actually come of this, there is nothing on this subject to weigh the positive impacts against. Notably, the City of Sioux Falls participated, but did not raise that issue. Also Lincoln County and Minnehaha County intervened but chose not to participate. The cities of Tea and Harrisburg did not intervene.

Several individual landowners did testify to the potential for negative economic impacts on their land and businesses. For example, Kevin Schoffleman testified that the Pipeline could affect plans that he may have in the future to develop a quarter section of his land for housing.

(ET 1078). In addition, Thomas Stofferahn described his concern that the Project will impact the research plots for his business, Nortec Seeds, Inc. (ET 1138-1140). He stated that "there is no way [he] can put … research plots and test plots with [the] pipeline going diagonally cross [his] ground." (ET 1138:10-14).

Other landowners testified to similar concerns. By not summarizing each landowner's testimony, Staff in no way intends to minimize their testimony, but simply focused on a few examples to avoid redundancy in this brief. Staff understands several other landowners have concerns, as well, and we have listened to and considered those concerns.

Several mitigating considerations must be considered and applied to the concerns voiced at the hearing. If the Company is required to compensate the landowner for any crop loss and loss of insurance coverage resulting from the construction and operation of the Pipeline, lower crop yields will not result in an economic loss. Furthermore, if there is a concern about an inability to sell a parcel of property for development in the future, the fact that compensation is being made for the easement, which would naturally offset against any loss in value for the future in the context of selling land now versus selling land later. The difference being, the land remains with the seller and retains value to the seller when the Pipeline buys an easement. No expert testimony was presented to establish that pipeline easements will adversely impact property values, or that easements have been shown in the past to adversely impacted property values.

**3) Health, safety, and welfare of inhabitants**

The Yankton Sioux Tribe presented testimony that an influx of pipeline workers could create an influx of crime in communities along the route. However, no evidence was provided

that this would be the case, despite the fact that the original Keystone pipeline was constructed in the area as recently as 2010. In drawing our own conclusion, Staff again points to our arguments in VI.a.2 above. Essentially, the PHMSA rulemaking process ensures the health, safety, and welfare of inhabitants by creating rules to ensure pipelines are designed, constructed, and operated in a manner to protect public safety. Because the Project is being designed to PHMSA standards, Staff finds the Project will not substantially impair the health, safety, or welfare of inhabitants.

**4) Interference with orderly development of the region**

Throughout the eight-day hearing, one of the issues that garnered much attention was the proximity of the Project to the Sioux Falls area, specifically, whether the Project would interfere with the orderly development of the area. Staff has given careful consideration to this concern. Many individuals commented that the route could go further west and south of these growth areas. Staff reviewed the route, but questions whether the route could not be moved further west due to environmental constraints. In addition, the Applicant presented testimony, through Mr. Joey Mahmoud, that Sioux Falls residential areas have already grown around pre-existing hydrocarbon pipelines in Lincoln County. (ET 1937).

Many questions remain as to the proximity of the Project to the cities of Tea and Harrisburg. However, neither municipality intervened in this proceeding or offered testimony.

Mr. Mahmoud testified that the Company took into consideration comments offered by the public at the public input hearings to develop a reroute. (ET 182:1-11). Mr. Mahmoud also testified that the company met with the cities of Sioux Falls, Tea, and Harrisburg, although he did acknowledge that those cities stopped short of actually giving

their support for the Project. (ET 182:15-22).

Jack Edwards also testified on the location of the pipeline near those developing areas. (ET 483-487). Mr. Edwards, who testified that he has worked in the pipeline industry for over 35 years (Exhibit DAPL 32), stated in his experience, pipelines are compatible with urban settings and that, in fact, a pipeline currently runs through the parking lot of the Empire Mall in Sioux Falls. (ET 386-387).

The most significant evidence in the record as to a city's ability to develop in spite of a pipeline is found in Exhibit 51, which is the map of a portion of Sioux Falls submitted by the Applicant. From this map, one can ascertain that there are existing pipelines within the Sioux Falls area, including underneath residential neighborhoods and what appears to be a track and football field on the right hand side of the Exhibit.

While, regrettably, there was very little evidence in the record as to the potential for the project to interfere with the orderly development of the region, there was even less evidence in the record that it would interfere with the development of the region. As stated in Section V of this brief, "[p]reponderance of the evidence is defined as the greater weight of evidence." *Pieper*, 2013 SD 98, ¶22. Because there was no evidence to weigh against that presented by the Applicant, it appears they have satisfied their burden with respect to this issue.

If the Commission does find that the Project unduly interferes with the development of the region, Staff notes that the Commission lacks the authority to route a facility. SDCL 49-41B-36. However, if the permit is denied based upon the location of the pipeline, the Applicant has the opportunity to reapply and have the new application decided upon the narrow issue of whether changes made in the reapplication adequately address concerns about development in the region. SDCL 49-41B-22.1 provides in relevant part:

> Upon the first such reapplication, the applicant shall have the burden of proof to establish only those criteria upon which the original permit was denied, provided that nothing in the reapplication materially changes the information presented in the original application regarding those criteria upon which the original permit was not denied.

Therefore, if the Commission does find that the Applicant failed to prove by a preponderance of the evidence that the Project would not unduly interfere with the development of the region; Staff recommends the Commission nonetheless rule upon each issue so that the issues may be narrowed and an exhaustive, repetitive future hearing may be avoided.

**VII. The need for an Environmental Impact Statement**

Throughout the hearing, much discussion was had regarding the lack of an environmental impact statement (EIS). Staff discussed its position on this issue when the issue was raised during the evidentiary hearing. Staff maintains that position.

The Court has held that

> SDCL chapter 34A-9 provides the statutory mechanism for addressing the environmental impact of governmental actions. SDCL 34A-9-4 provides in part: "All agencies *may* prepare, or have prepared by contract, an environmental impact statement on any major action they propose or approve which may have a significant effect on the environment." (Emphasis added.) Under this section, an EIS is optional, not mandatory. [T]he matter is one which lies in the discretion of the agency…

*Matter of SDDS, Inc. In re Application of SDDS, Inc. for a Solid Waste Permit*, 472 NW2d 502, 507 (SD 1991). (internal citations omitted).

As Staff mentioned at the evidentiary hearing, the Commission is restricted to one year in which to reach a final decision on the Application. SDCL 49-41B-24. Even if the Commission had granted the request for an EIS when it was made on the first day of the evidentiary hearing, it

is incredibly unlikely that an EIS could have been completed by the one year deadline, which is December 15, 2015.

This permit is vetted by not one, but four separate state commissions and/or utility boards.[1] One can expect a thorough vetting of the issues by each of these agencies.

If there is specific information that the Commission is interested in, which would have been covered by the EIS, Staff recommends requiring the Applicant to provide that information, rather than go through the entire EIS process, much of which could be redundant to the application. For example, if the Commission wants additional information on the effect of construction on the hotel industry, as was mentioned at the hearing (ET 990-991), it could draft a condition which requires a study be conducted and measures be taken to avoid overburdening the hotel and tourist industry. Such a plan might be as simple as avoiding lodging in certain locations at certain times. The Applicant could submit the plan for Commission review. This is consistent with the Court's recent holding pertaining to future review of a plan by the Commission, in which the Court upheld a condition which required the applicant to develop a mitigation plan subsequent to the granting of a siting permit, but retained the authority to review the plan. *Pesall v. MDU, et al*., 2015 SD 81.

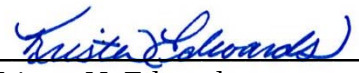
## VIII. Conclusion

Each issue must be weighed using the preponderance of evidence standard. Is it more likely than not that Dakota Access has satisfied each requirement of SDCL 49-41B-22? Staff reserves its position on this issue in order to examine and consider the arguments of each party.

[1] The Applicant has applied for permits in North Dakota, South Dakota, Iowa, and Illinois.

Pursuant to SDCL 49-41B-24, the Commission may deny, approve or approve the application with conditions. Staff reserves the right to recommend conditions and to file jointly with any other party or on its own behalf, a motion for adoption of conditions.

Respectfully submitted this 6th day of November, 2015.



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