BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

On September 29, 2015, Intervenors 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 Intervenors' 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 statues 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	20:10:22:02 Content of notification of intent 20:10:22:03 Prefiling conference 20:10:22:04 General format of application for permit 20:10:22:05 Application contents 20:10:22:06 Names of participants required 20:10:22:07 Name of owner and manager 20:10:22:08 Purpose of facility 20:10:22:10 Demand for facility 20:10:22:11 General site description 20:10:22:22 Time schedule 20:10:22:26 Nature of proposed energy conversion facility 20:10:22:28 Fuel type used 20:10:22:29 Proposed primary and secondary fuel sources and transportation 20:10:22:31 Solid or radioactive waste 20:10:22:32 Estimate of expected efficiency 20:10:22:36 Additional information in application
(2) The environmental impact of the proposed action including short-term and long-term effects	20:10:22:13 Environmental information 20:10:22:15 Hydrology 20:10:22:16 Effect on terrestrial ecosystems 20:10:22:17 Effect on aquatic ecosystems 20:10:22:18 Land use 20:10:22:19 Local land use controls 20:10:22:20 Water quality 20:10:22:21 Air quality
(3) Any adverse environmental effects that cannot be avoided if the proposal is implemented	20:10:22:14 Effect on physical environment
(4) Alternatives to the proposed action;	20:10:22:12 Alternative sites 20:10:22:30 Alternate energy resources
(5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented	20:10:22:37 Statement required describing gas or liquid transmission line standards of construction 20:10:22:38 Gas or liquid transmission line description
(6) Mitigation measures proposed to minimize the environmental impact	20:10:22:34 Transmission facility layout and construction
7) The growth-inducing aspects of the	20:10:22:09 Estimated cost of facility

proposed action	20:10:22:23 Community impact 20:10:22:24 Employment estimates 20:10:22:25 Future additions and modifications 20:10:22:27 Products to be produced
"procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969 as amended to January 1, 2011"	20:10:22:39 Testimony and exhibits 20:10:22:40 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 - lEN First Discovery Reply Dated 5/1/15
- Exhibit 25 - lEN 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: lEN 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.

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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:

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STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001

ORDER DENYING MOTION TO REQUIRE ENVIRONMENTAL IMPACT REPORT

(Issued October 5, 2015)

On January 20, 2015, Dakota Access, LLC (Dakota Access), filed with the Board a petition for a hazardous liquid pipeline permit, pursuant to Iowa Code ch. 479B. The matter has been docketed as Docket No. HLP-2014-0001.

Summary of Pleadings

1. Sierra Club Motion

On September 14, 2015, Sierra Club Iowa Chapter (Sierra Club) filed a "Motion to Require Environmental Impact Report" in Docket No. HLP-2014-0001. Sierra Club argues that at present, there is no governmental agency that will be conducting a comprehensive environmental review of this project because the reviews by the Corps of Engineers and the Iowa Department of Natural Resources are limited to specific areas within the jurisdiction of those agencies. Those reviews will not address Bird Conservation Areas, critical habitat areas, and other areas identified by Sierra Club as environmentally sensitive.

Sierra Club acknowledges that there is no statutory requirement for an environmental impact report for the entire proposed project in Iowa and that Dakota

Access is expected to describe, as part of its prefiled testimony, the environmental permits required and environmental studies conducted for this project. Sierra Club expresses a concern that if Dakota Access fails to provide adequate information regarding environmental issues, the Board may not have all the information it needs to make a fully-informed decision.

More specifically, Sierra Club argues that the limited environmental review being conducted by other agencies is not adequate for the Board's purposes. Sierra Club notes that Iowa Wildlife Action Plan has identified Bird Conservation Areas; critical habitat for protected species; Ducks Unlimited Living Lakes Initiative Emphasis Areas; Iowa Natural Heritage Foundation Priorities; Lake Restoration Program Priority Lakes Watersheds; habitat conservation priorities; Forest Stewardship Potential Areas; mapped prairies; and High Opportunity Areas for Cooperative Conservation Actions, many of which might be affected by the proposed pipeline. The permits and environmental studies being required by other agencies will not address these areas.

Iowa Code § 479B.1 requires the Board to consider the environmental damage associated with a proposed pipeline. Sierra Club asserts that an environmental impact report would address those impacts and urges the Board to require the preparation of an environmental impact report prior to considering the petition for permit in this case.

2. No Bakken Here Joinder

On September 23, 2015, No Bakken Here filed a "Joinder in Motion to Require Environmental Report" and later that day filed an amended joinder (with a

corrected attachment to the pleading). No Bakken Here directs the attention of the Board to a decision from the Minnesota Court of Appeals[1] saying that under Minnesota law, the decision to grant a certificate for a large oil pipeline is a "major governmental action that has the potential to cause significant environmental effects," and so an environmental impact statement is required before that certificate may be granted or denied. No Bakken Here asserts the court's decision explains "why a thorough and independent environmental report is important in this case and why the Board should grant the Sierra Club's motion." (Joinder at p. 2.)

3. Dakota Access Resistance to Sierra Club Motion

Also on September 23, 2015, Dakota Access, LLC (Dakota Access), filed a "Resistance to Sierra Club Motion to Require Environmental Impact Report." Dakota Access says it is strongly committed to protecting the environment and a pipeline is the safest, most environmentally-sound way to transport petroleum products from domestic sources. Dakota Access describes the work it has done to identify and avoid environmentally-sensitive areas and the manner in which the design and operation of the pipeline will protect the environment, all as described in the prefiled testimony of witnesses Howard, Frey, and Stamm.

Dakota Access says that numerous governmental agencies will have a role in the environmental review of this project, citing the U.S. Army Corps of Engineers, the Iowa Department of Natural Resources, the Iowa State Historic Preservation Office and the State Archeologist, and the U.S. Fish and Wildlife Service. Dakota

[1] *In the Matter of the Application of North Dakota Pipeline Co. LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota*, Minn. Ct. App. No. A15-0016 (issued September 14, 2015).

Access argues there is no reason to believe that review by each agency working within its own area of expertise will not be just as effective as a single agency reviewing all environmental issues.

Dakota Access argues the Sierra Club motion is without legal support. While § 479B.1 authorizes the Board to consider environmental factors in this proceeding, the Board has normally done that through prefiled testimony and a hearing, rather than a special, independent report. Dakota Access says that if Sierra Club wants an overall review of the environmental impact of the project, it should commission one and then have its own witness sponsor it at hearing.

Dakota Access argues that the statute and rules applicable to HLP dockets were promulgated long before this docket, and to change the requirements in the middle of the process would raise due process concerns. In fact, Dakota Access says, if the Board were to impose new requirements not covered by any rule, it would commit error of law.[2] Finally, Dakota Access says that if Sierra Club truly believed a third-party environmental report were necessary, it should have raised the issue much earlier in this proceeding. Because Sierra Club waited until 60 days prior to the hearing, Dakota Access suggests the motion is "a mere tactic of opposition." (Resistance at p. 4.)

4. MAIN Resistance to Sierra Club Motion

On September 24, 2015, the MAIN Coalition (MAIN) filed a resistance to the Sierra Club motion. MAIN argues that § 479B.1 limits the Board's consideration of environmental issues to the protection of landowners and tenants; it does not give

[2] Citing *Office of Consumer Advocate v. Iowa Utilities Bd.*, 744 N.W.2d 640, 643-46 (Iowa 2008).

express authority to require a comprehensive environmental study. MAIN points out that 199 IAC rule 13.14(1), which states that "environmental agencies may have a jurisdictional interest it the routing of the pipeline...," is an acknowledgement that other agencies may express their environmental concerns, if any, in this docket. MAIN asserts the any such issues should be raised in prefiled testimony and considered at the hearing. Finally, MAIN argues that the recent decision of the Minnesota Court of Appeals, cited by No Bakken Here, is based on a Minnesota statute that does not apply in Iowa and Iowa has no comparable statute. Accordingly, MAIN concludes, the Board should give no credence to the arguments of No Bakken Here.

5. Sierra Club Reply to MAIN Resistance

On September 25, 2015, Sierra Club filed a reply to MAIN's resistance. Sierra Club says that while there may not be a statute or rule explicitly requiring a comprehensive environmental review in this proceeding, there is no statute or rule that limits the Board's discretion to require such a review, either. Sierra Club argues that the Board has that authority and should exercise it, especially when the jurisdiction of other agencies with environmental authority is limited.

Sierra Club argues that No Bakken Here clearly understood and stated that the Minnesota court decision is factually and legally distinguishable; No Bakken Here directed the Board to the decision for its explanation of why an environmental impact report should be required before a permit is issued.

6. Sierra Club Reply to Dakota Access Resistance

On September 28, 2015, Sierra Club filed a reply to the Dakota Access resistance. In response to the argument that Sierra Club has delayed filing its motion for an environmental impact report, Sierra Club says that Dakota Access did not file its prepared direct testimony describing its environmental review until September 8, 2015, and "prior to that time, Sierra Club did not know specifically what sort of environmental review Dakota Access was conducting." (Reply at p. 1.) Sierra Club says that all of its motions have been filed in good faith, not for purposes of delay.

Sierra Club says that the resistance filed by Dakota Access makes it clear that the company will do no more to protect the environment than that which is absolutely required, so a thorough environmental review is required, particularly where each of the other environmental agencies cited by Dakota Access has only limited jurisdiction.

Sierra Club says Dakota Access is disingenuous when it argues on the one hand that Sierra Club has waited too long to request an environmental report and then argues on the other hand that Sierra Club and the Board should wait until all the evidence is in. Sierra Club requests that the Board grant its motion to require an environmental impact report.

7. Dakota Access Reply to No Bakken Here Joinder

On September 29, 2015, Dakota Access filed a reply to No Bakken Here's joinder in the original Sierra Club motion. Dakota Access says that reliance on the Minnesota Court's decision is misplaced because Iowa does not have an

environmental protection act similar to Minnesota's. Because the law analyzed by the Minnesota Court does not exist in Iowa, the Minnesota decision "offers nothing to inform the Board's decision in this matter and the Board should give no consideration to the facts or reasoning contained therein." (Reply at p. 3.)

Analysis

All parties agree that there is no explicit statutory or rules requirement for an independent environmental impact report. Further, all parties agree that the Board has the authority, and even the obligation, to consider environmental issues in this docket. MAIN asserts that authority is limited to the environmental damages that might be caused for landowners and tenants on affected property, but that argument does not directly impact the question of whether an environmental report should be required, which is where the parties disagree.

Sierra Club says that § 479B.1 requires the Board to consider the environmental damage the proposed pipeline might do and asserts that "the Board cannot adequately do so without an accurate independent environmental report." (Motion at p. 3.) However, Sierra Club never explains why a report is the only, or even the most, suitable means for evaluating environmental considerations. The Board has granted many permits in the past without requiring an environmental impact report, so the burden is on Sierra Club to show that the Board's normal procedures are not adequate in this case. Sierra Club has not met that burden; it has not identified any environmental issue that cannot be addressed using the

standard procedures, that is, prefiled testimony, hearing with cross-examination, and briefing.

No Bakken Here relies upon a recent decision from the Minnesota Court of Appeals to try to establish the need for an independent environmental impact report. In that case, the Minnesota Public Utilities Commission was considering an application for a certificate of need and a routing permit for a proposed oil pipeline. All parties agreed that the Minnesota Environmental Policies Act required an environmental impact statement (EIS) before a permit could be issued, but the commission bifurcated the proceeding and proposed to consider the certificate of need issues separately from the permit issues. The commission intended to require the EIS as part of the second phase of the proceedings, concluding that a "high-level" environmental review would be adequate for the first phase. The Court reversed, finding that the EIS must be completed before a final decision may be made on the certificate of need.

No Bakken Here argues that the Minnesota decision explains why a through and independent environmental report is important in this case, but the Board disagrees. The Court found that the relevant Minnesota statutes require that the EIS be completed before a "final governmental decision" may be made. The Court further found that the decision to grant or deny the certificate of need was unambiguously a "final governmental decision" and therefore the environmental review is required as part of the first phase of the bifurcated proceedings. The Court noted that this result is consistent with other language in the Minnesota statutes, language that emphasizes the desirability of conducting the required

environmental review early in the decision-making process, but the Court's decision begins with the notion that in Minnesota an EIS is required, by statute, at some point in the proceedings.

The decision does not support the argument that an environmental report is required as a matter of policy. The decision is based entirely on Minnesota law that requires an EIS before certain governmental actions may be taken. No party has identified any similar Iowa law. The Board understands that No Bakken Here and Sierra Club consider the reasoning of the Minnesota decision to be persuasive, but even that reasoning is based on the language of the Minnesota statutes, which have no Iowa equivalent.

Dakota Access argues that the existing process for evaluating environmental issues (prefiled testimony, cross examination at hearing, and briefing) is sufficient to allow the Board to fulfill its statutory duties and Dakota Access asserts it has provided sufficient information in its prefiled testimony to serve that purpose. Moreover, Dakota Access claims that imposing a requirement for an environmental report at this stage would be a violation of Dakota Access's right to due process of law.

The Board will not address in this order the sufficiency of the testimony Dakota Access has filed, as that is something for the Board to decide after the hearing. Nor will the Board address the alleged due process issues; if after hearing the Board decides that Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project, then the Board can deny the petition for permit and explain the basis for that decision. The

fact remains that the existing agency process has been sufficient to address environmental issues in the past and so far, no one has shown that it will not be sufficient here.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion to Require Environmental Impact Report" filed by Sierra Club Iowa Chapter on September 14, 2015, is denied.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

/s/ Nick Wagner

Dated at Des Moines, Iowa, this 5th day of October 2015.