

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:)
) Docket No. HLP-2014-0001
DAKOTA ACCESS LLC)

REPLY BRIEF OF SIERRA CLUB IOWA CHAPTER

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Sierra Club Iowa Chapter hereby submits the following Reply Brief.

I. WHETHER THE PETITION FOR A HAZARDOUS LIQUID PIPELINE PERMIT MEETS THE REQUIREMENTS OF IOWA CODE CHAPTER 479B

A. Public Convenience and Necessity

Dakota Access and the Intervenors supporting the pipeline appear to agree with Sierra Club that the concept of public convenience and necessity is ill-defined and allows the Board to weigh the costs and benefits of the pipeline project and determine if any alleged benefits outweigh the costs and justify granting a permit.

Dakota Access and the MAIN coalition both cite Thomson v. Iowa State Commerce Comm., 235 Iowa 469, 15 N.W.2d 603 (1944). In that case a railroad that had been in existence long before trucks were available to haul freight wanted to compete with the trucks by offering a coordinated rail and truck service. It is significant that the court, in holding that the certificate of public convenience and necessity should have been granted, emphasized that this was a dispute between the railroad and the trucking companies, and that as the court said of the railroad's proposed service, "The public wants such service."

Now compare the facts in Thomson with the facts regarding the Dakota Access pipeline. Dakota Access is not

a long-existing entity seeking to maintain its viability. More importantly, there has been no evidence that the public wants the pipeline. As noted in Sierra Club's initial Brief, there was no evidence that the public is not getting all the petroleum products it needs at a reasonable price. There was no evidence that members of the public are clamoring for the pipeline to be built. On the contrary, the public sentiment is clearly opposed to the pipeline. The only supporters are labor unions and the MAIN Coalition, which is an "Astroturf" organization of agriculture, business and labor interests that are supporting their own personal gain.

Dakota Access has cited several prior IUB decisions in an attempt to create the narrative that the IUB automatically approves permits for pipelines. In re Sioux City Brick and Tile Co., Docket P-834 (Dec. 1, 1995); In re United States Gypsum Co., Docket P-833 (Mar. 21, 1996); In re Ag Processing, Inc., Docket P-835 (Sept. 16, 1996); In re Quantum Pipeline Co., Docket HLP-97-0002 (May 1, 1998); In re Williams Pipeline Co., Docket P-667 (Aug. 1, 2000). However, there are stark factual distinctions between those cases and the Dakota Access case. All but one of those cases involved small natural gas pipelines. And all of the pipelines were only a few miles in length. They were all

designed to serve existing customers or businesses. Most importantly, there was no public opposition to any of those pipeline projects. The Board should not adopt Dakota Access' narrative.

Nor should the Board be intimidated by Dakota Access' argument that because the regulatory agencies in North Dakota, South Dakota and Illinois have granted a permit, this Board essentially has no choice but to also grant a permit. This Board has a duty to Iowans. The public opposition to the pipeline has been much greater in Iowa than in the other states. Iowans are rightfully concerned about the risks of the Dakota Access pipeline to our environment, cultural resources and farmland.

B. Global Issues

1. Climate Change

Dakota Access, of course, wants to ignore this issue and claim that it is irrelevant. However, by including climate change in the issues to be addressed in the parties' briefing, the Board has correctly recognized the importance of this issue.

Dakota Access and the MAIN Coalition both present the argument that the pipeline will not have any effect on climate change and assert that neither James Hansen nor Gene Takle have testified that it will. That is an

incorrect reading of both Dr. Hansen's and Dr. Takle's testimony. As set out in Sierra Club's initial Brief, at p. 12 and 13, both witnesses emphasized that permits for any activity that contributes to the extraction of fossil fuels should be denied.

If we want to solve the climate change problem, and Sierra Club believes we should, then we should not permit infrastructure projects that will extend the extraction of oil. It is the infrastructure and the need to pay for that infrastructure that promotes continued extraction of oil and contributes to climate change.

Dakota Access engages in an argument that somehow the pipeline will reduce carbon emissions by allegedly being a more efficient way to ship oil. That argument is almost Orwellian. Assuming *arguendo* that pipelines are more efficient, shipping by pipeline would contribute to more production of petroleum products. That would only exacerbate climate change. And if, as alleged by Dakota Access, shipping by pipeline would reduce the imports of oil from foreign countries, why did the oil companies successfully lobby for removal of the ban on oil exports?

2. World Petroleum Market

Dakota Access has not responded to this issue, but the MAIN Coalition claims that the pipeline is needed to reduce

importing oil from foreign countries. First, there was absolutely no evidence that the pipeline would reduce foreign imports. Second, as noted above, the United States has been exporting oil and refined products and now has no ban on exporting crude oil at all. Dakota Access cannot assure us that the oil shipped in the pipeline will not be exported to foreign countries.

C. National Issues

1. Energy Independence

Dakota Access, in accordance with the testimony of its witness, Guy Caruso, discounts the relevance of energy independence. But energy independence has been the goal of this country since the energy crises of the 1970's. It is confusing why Mr. Caruso would downplay energy independence until you examine who is funding his organization: ConocoPhillips, ExxonMobil, Pioneer (an oil company), TransCanada, and the government of Alberta (Sierra Club Hrg. Ex. 27, p. IV). It is the oil companies that want the choices Mr. Caruso talks about - the choices to sell the oil wherever the companies can get the best price.

2. Energy Security

Dakota Access has not, and cannot, assure that the oil shipped in the pipeline will not be exported to foreign countries. If we deplete U.S. oil fields to export the oil

or its refined product, we will not be energy secure. The Dakota Access pipeline will not change that. In fact, if the pipeline makes it easier for oil companies to export the product, the pipeline will lessen our energy security.

It is hypocritical to worry about energy security and energy independence when the ban on oil exports was recently lifted at the same time the oil companies are also importing oil from foreign countries, many with unstable governments.

3. Rail Transportation Versus Pipelines

a. Safety Issues

The parties on both sides have presented statements and figures regarding the relative safety of rail versus pipelines. The bottom line is that there is no clear answer to the question, and that both means of transportation have had serious breaches of safety. Dakota Access has certainly not carried its burden to prove that pipelines are necessarily safer than rail.

The MAIN Coalition asserts that railroads do not have safety requirements comparable to pipelines. That is not true. New stronger regulations were adopted in 2015 (Sierra Club Ex. 27, p. 28). Furthermore, safety regulations for pipelines have been an issue of concern (Sierra Club Ex. 27, p. 25).

b. Impact on Grain Shipments

This issue has been completely laid to rest. There is no question that whatever constraints there were on grain shipments in 2013-14, they were due to unique circumstances that have not been repeated since. Even Elaine Kub, Dakota Access' witness, admitted that the "market has relaxed significantly since the worst congestion occurred." (Hrg. Tr. p. 316-317).

c. Reducing Oil Shipments by Rail

As noted in Sierra Club's initial Brief at p. 25-26, Joey Mahmoud and Michael Ralston testified that the pipeline will not necessarily reduce rail shipments of oil. And although Dakota Access argues that Sierra Club witness David Swenson said the pipeline would increase rail capacity for other products, Mr. Swenson explained that trains might still be carrying other types of cargo (Dakota Access Cross Ex. 5, p. 3). He was clearly speaking off the cuff in a radio interview and had not studied the issue.

The issue has never been that the pipeline would shut down rail traffic. The issue, which was first raised by Dakota Access, was that oil shipments by rail would be reduced as a result of the pipeline. But, as noted above, Mr. Mahmoud and Mr. Ralston have said that oil shipments by rail will not necessarily be reduced. One of the reasons

for that is that rail is more flexible and can send the oil where it needs to go at a particular time. A fixed pipeline cannot.

4. Sale of Crude Oil to Foreign Markets

The MAIN Coalition argues that the purpose of the Dakota Access pipeline is not to deliver oil or its refined product to foreign markets, but to make it available for domestic consumption. This argument ignores the fact that Dakota Access cannot assure that the oil will remain in this country. That is especially true now that the ban on foreign export of crude oil has been lifted.

Dakota Access, of course, argues that this issue is irrelevant. Any issue that does not fit into its marketing strategy to sell the pipeline is asserted to be irrelevant. That marketing strategy was the basis of Damon Rahbar-Daniels' testimony on which Dakota Access relies. But the bottom line is that he could not give any assurance that the oil or its refined product would not be sold on the foreign market.

5. Depletion of Bakken/Three Forks Oil Reserves

Dakota Access dismisses Sierra Club Hearing Exhibit 26, claiming that it shows only a slight dip in production. The dip in production is, in fact, not slight. And as of September, 2015, the most recent data, the trend was still

increasingly downward. Moreover, the information in Exhibit 26 is confirmed by Sierra Club Hearing Exhibit 22. In addition, Sierra Club Hearing Exhibit 17 shows the dramatic reduction in the number of oil rigs in the Bakken area.

The MAIN Coalition takes issue with Sierra Club witness Taylor Brorby's testimony about the rapid depletion of Bakken wells. The data confirm Mr. Brorby's testimony. See, J. David Hughes, Bakken Reality Check, Fall 2015, p. 8, found at www.postcarbon.org/wp-content/uploads/2015/10/Hughes-Bakken-Reality-Check-Fall-2015.pdf.

6. National Alternatives to Crude Oil Pipelines

This is apparently another issue that doesn't fit with Dakota Access' sales pitch, so it is claimed to be irrelevant. This issue is not irrelevant, however. If there are viable alternatives to building this pipeline and still providing for the country's energy needs, there is no public convenience and necessity for this project.

Contrary to Dakota Access' argument, wind and solar energy are an alternative to oil, with the advent electric vehicles. Building a pipeline that will enable the delayed transition to a carbon-free future is at odds with the trend to electric vehicles.

7. Permits and Authorizations

Dakota Access wants the Board to ignore the permits and authorizations from other agencies. The Board has made it clear, however, that it wants to consider these permits. It makes sense that the Board would grant a permit for construction of the pipeline and taking property by eminent domain only after being assured that the environmental issues have been resolved.

Furthermore, the Board has a responsibility to protect the environment in the vast majority of the pipeline route that is not subject to any permits or authorizations.

D. State Issues

1. Economic Issues (Jobs, Taxes, Purchases, Etc.)

Dakota Access claims that David Swenson testified that he is not an expert witness. This is based on his radio interview transcribed as Dakota Access Cross Ex. 5. Mr. Swenson made it clear in that interview that what he meant was that he was not testifying on the side of any party (Dakota Access Cross Ex. 5, p. 1). The record shows that Mr. Swenson is clearly an expert. His curriculum vitae (Ex. Sierra Club-DS-2) is impressive in terms of economic impact studies. And Gannon witness Mark Imerman testified that no one involved in this case has conducted more IMPLAN studies than Mr. Swenson (Hrg. Tr. p. 2814).

Next, Dakota Access has completely misrepresented Mr. Swenson's testimony regarding the misuse of the concept of job years. Dakota Access refers to Mr. Swenson's testimony (Exhibit Sierra Club-DS-1, p. 13) to argue that job years are often used in the private sector, and therefore, a proper measure in this case. Mr. Swenson makes clear, however, that that is not the proper way to figure the impact of jobs. Even though it may be customary in private economic impact studies to misuse the job years concept in order to inflate the number of jobs as Dakota Access is doing here, that is not how a professional economist or governmental agency uses the concept (Exhibit Sierra Club-DS-1, p. 13-14).

Dakota Access also attempts to use Mr. Swenson's economic impact study for the Red Rock hydroelectric project (Dakota Access Cross Ex. 6) to show that Mr. Swenson used job years in that study, and argue that, therefore, Mr. Lipsman was correct in using job years. This is a distortion of Mr. Swenson's testimony, because he never said job years is not a proper measure when used properly. His criticism was that Mr. Lipsman used it improperly. The fact is that the Red Rock study is a classic example of the proper way to use job years. Table 2 of that study demonstrates the process of transforming a

total cost of project and job requirements summary into categories that can be modeled. Mr. Swenson then took those data and properly annualized them such that the proper spending by category was put into each respective year of activity. That proper allocation of the job years data is shown in Table 4 of the study. Mr. Lipsman's study, on the other hand, did not present the annualized equivalent number of jobs that would occur during each year of the project. And remember, Mr. Lipsman used a two-year construction period, rather than the actual 8-9 month construction period.

The most significant problem with Dakota Access' argument is that it does not account for the costs and risks of the project to be weighed against any benefits. In determining public convenience and necessity, the Board should not be willing to sacrifice long-term costs and risks for short-term benefits.

The MAIN Coalition relies on the testimony of its own non-expert witnesses (what James Pray referred to as Dakota Access' well-wishers) with statements that have no basis, other than Dakota Access' promotional material. The Board need not consider any of this.

2. Environmental Issues

Dakota Access ignores the point that was made repeatedly during the hearing in this case, that the jurisdiction of the Corps of Engineers and the Iowa DNR is severely limited with respect to the entire route of the pipeline. That leaves most of the pipeline route unprotected. Dakota Access has made it clear that it will not do anything beyond what is specifically required to obtain permits from the Corps of Engineers and the Iowa DNR.

Dakota Access relies on Dakota Access Hearing Ex. MH-13. This document, along with Dakota Access Hearing Ex. MH-9, was submitted two days after the hearing concluded so Monica Howard could not be cross examined about it. Cross examination would have revealed the following facts:

MH-9

Although Dakota Access claims that the Corps of Engineers and the Fish and Wildlife Service have said the pipeline will have no effect on protected species, the Corps has not issued a biological assessment and the FWS has not issued a biological opinion. There can be no determination of no effect until those documents are completed. 16 U.S.C. §§ 1536 (b) and (c). Likewise, a determination that the pipeline may affect the bat species

and the Topeka shiner also requires a biological assessment and a biological opinion.

Dakota Access claims it has done extensive field surveys, but it has not produced those surveys for the Board to review and consider. It is also claimed that no maternity trees for the bats were identified, but there is no indication as to how it was determined which trees would be maternity trees. We don't know what studies were done to make that determination or how long a valid study would need to be or under what circumstances it should be conducted.

It is also significant that on January 14, 2016, the Fish and Wildlife Service finalized a rule providing for measures to protect the northern long-eared bat. 81 Fed. Reg. 1900 et seq. An incidental take of the species is prohibited in areas of the country impacted by white-nose syndrome. As shown by the map hereto attached, every county in Iowa, except Lyon County, is an area impacted by white-nose syndrome. In addition, Van Buren County, one of the counties through which the Dakota Access pipeline would pass, has known long-eared bat hibernacula.

The rule prohibits incidental take that would alter the hibernaculum's entrance or environment, or takes place within .25 mile of a hibernaculum. It also prohibits an

incidental take due to the destruction of a roost tree or other trees within a 150 foot radius from the roost tree from June 1 through July 31. This would apply to all areas along the pipeline route, not just the areas of Corps of Engineers jurisdiction.

Dakota Access claims it has made routing decisions in order to avoid or minimize impacts to protected species, but there is no evidence of what changes were made. It is also probable that if any changes were made, they were restricted to the few small areas under the jurisdiction of the Corps of Engineers. Furthermore, one of the sovereign lands under the jurisdiction of the Iowa DNR is the Nelson Tract in the Big Sioux Wildlife Management Area. No effort was made to go around that area.

Dakota Access claims it has reduced the impact to protected species by reducing the workspace corridor to 85 feet in forested areas. There is no indication how much that reduces the impact on the protected species.

Dakota Access claims that the roosting season for the Indiana bat is May 15 to October 1, but FWS protocol is that the roosting season begins on March 31, and that trees cannot be cut down after March 31 and until October 15. U.S. Fish and Wildlife Service, Guidance on Developing and Implementing an Indiana Bat Conservation Plan. There is no

mention of the roosting period for the northern long-eared bat.

Dakota Access also claims that it will cut down trees during the roosting season, in spite of FWS protocol to the contrary, and that to attempt to cover its actions, it will observe a tree within 24 hours of cutting it down. If a bat is not observed, the tree will be cut. This has a significant implication for the northern long-eared bat since that species roosts in small colonies, using a primary tree and several secondary trees for roosting. A 24-hour observation clearly is not long enough to observe all of the primary and secondary trees used by a colony of northern long-eared bats.

Dakota Access infers that the Topeka shiner will not be impacted because the streams being crossed are not critical habitat and are alleged not to be a spawning area. That flies in the face of the final rule of the Fish and Wildlife Service that was published in the Federal Register listing the Topeka shiner critical habitat. 69 Fed. Reg. 44736 et seq., July 27, 2004. Even though a stream segment is not listed as critical habitat, it can still be useful habitat for the Topeka shiner. In fact, oxbows and other off-channel habitats adjacent to mainstream channels provide habitat conditions suitable for the species to

complete its necessary life cycle requirements, including spawning. The main channel provides corridors for traveling to other suitable habitat. The main corridors themselves may not be suitable habitat beyond providing the transportation corridors for the fish. Therefore one can't just assume that a channelized area is not used by the Topeka shiner. That is why trenching those streams is a problem.

Regarding the trenching across rivers and streams, Dakota Access has not explained how fine sediment particles will be avoided, how the area of impact will be restored to pre-construction conditions, nor how temporary culverts will not impede stream flow. Furthermore, the time period for completing the trenching is vague. According to Exhibit MH-9, construction is "typically" 72 hours or less, and the goal is 24-48 hours. A more definite time frame is necessary to determine the impact on the Topeka shiner. This is critical information that has not been given to the Board.

Dakota Access claims it will use best management practices (BMPs), but those practices have not been identified. Moreover, there is no indication as to how Dakota Access' assurances will be enforced. Although Dakota Access claims it uses BMPs, the evidence has shown

throughout that BMPs have been ignored when that is to Dakota Access' benefit. For example, Dakota Access refused to comply with recommendations from OCA witnesses as to BMPs, refused to acknowledge Douglas Harr's reference to the Wildlife Action Plan as a BMP, and refused to follow John Doershuk's recommendations about BMPs with respect to cultural resources.

MH-13

Dakota Access claims that it exceeded minimum Corps of Engineers wetland delineation standards. But in testimony set forth in Sierra Club's initial brief, Ms. Howard made it clear that Dakota Access would do no more than the minimum required by the Corps. And if Dakota Access has done all of the surveys and other work it claims, it has not provided any of the surveys or other proof.

In general, Ex. MH-13 does not provide any information that would inform the Board that Dakota Access has undertaken adequate steps to protect the environment.

3. Safety Issues

Dakota Access argues at this late date that the Board does not have jurisdiction over safety issues, alleging that federal law preempts the Board's authority. However, Dakota Access has never submitted any pre-hearing filings, has never requested a declaratory order from the Board, nor

sought a declaratory judgment from a court challenging the Board's jurisdiction on the basis of federal preemption. On the contrary, Dakota Access has presented evidence to the Board through written testimony and witnesses at the hearing regarding safety issues, apparently acquiescing in the Board's authority.

In any event, the preemption argument fails. Dakota Access has cited three Eighth Circuit cases. None of those cases support its argument.

ANR Pipeline Co. v. Iowa State Commerce Comm'n., 828 F.2d 465 (8th Cir. 1987), is irrelevant because it involved a natural gas pipeline. It is clear that natural gas pipelines are under the jurisdiction of FERC. Likewise, Northern Natural Gas Co. v. IUB, 377 F.3d 817 (8th Cir. 2004), involved a natural gas pipeline. Preemption was clear.

The third case cited by Dakota Access, Kinley Corp. v. IUB, 999 F.2d 354 (8th Cir. 1993), did involve a hazardous liquid pipeline. Although the Eighth Circuit held that the former Chapter 179 of the Iowa Code was preempted by federal law as to hazardous liquid pipelines, Dakota Access admits that the current Chapter 479B was adopted in response to the Kinley decision. See, Dakota Access brief,

p. 41, n. 103. So Chapter 479B gives the Board its unpreempted authority.

Section 479B.1 states that the Board has "authority to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline" (emphasis added). This clearly includes environmental and safety issues. And, as has already been discussed, the Board must determine that the pipeline will promote public convenience and necessity, a broad term that would certainly include safety issues.

4. Oil Spill Remediation

As with the previous issue, Dakota Access is arguing that the Board has no authority. Dakota Access calculates that it can convince the Board that the Board is simply a rubber stamp.

The alleged \$25 million insurance policies Dakota Access claims it will obtain do not give much assurance. The policies have not been obtained. We do not know what specific coverage or exclusions will be in the policies. And if they are like most insurance policies, the insurance company will make every effort to avoid paying claims. The Board needs more assurance than that.

The OCA has also expressed skepticism of the financial ability of Dakota Access to assure the Board that there are sufficient financial commitments to cover damages from an oil spill (OCA brief, p. 16-18).

Dakota Access makes a passing mention of the Oil Spill Liability Trust Fund allegedly being available to cover any damages. Significantly, however, there is no mention of the fact that the Trust Fund only covers spills impacting navigable waters. Nor is there any citation to the cases Dakota Access boasted it could produce that would show that the Trust Fund does not just apply to navigable waters. The fact is that most of the land along the pipeline route would not be covered because it is not a navigable water.

5. Cultural Issues

Dakota Access barely mentions this issue. It is obvious that Dakota Access' position is that it will do no more than the absolute minimum to obtain the federal and state permits from the Corps of Engineers and the Iowa DNR. And Dakota Access admits this covers only 91 miles of the approximately 347 miles of pipeline in Iowa (Dakota Access brief, p. 32).

It is also significant that Dakota Access has made no attempt to respond to the concerns expressed by Dr. John Doershuk, the Iowa State Archaeologist. Dakota Access

Exhibit MH-13 certainly does not address those concerns. It reaffirms that Dakota Access is essentially restricting its actions to the Corps of Engineers jurisdiction.

II. ISSUES, IF THE PERMIT IS GRANTED

A. Route Issues

Sierra Club has no response on route issues.

B. Eminent Domain Issues

Sierra Club adopts and incorporates the statements and arguments on this issue in the initial briefs submitted by Richard Lamb, Jesse Hickenbottom, et al. and the Iowa Farmland Owners Association, et al.

It is also necessary to clarify the definitions of "public use, public purpose, and public improvement" in Iowa Code §§ 6A.21 and 6A.22. In § 6A.21, public use, public purpose and public improvement do not include commercial or industrial enterprise development. This applies to the condemnation of agricultural land.

Section 6A.22 restricts condemnation of any land other than agricultural land. That section includes a common carrier as a public use or public purpose, but that section does not apply to agricultural land. So, with respect to agricultural land, a common carrier, as a commercial enterprise, is not a public use or public purpose.

Therefore, Dakota Access cannot be granted eminent domain authority over agricultural land.

CONCLUSION

Throughout its argument, Dakota Access has attempted to create the narrative that Chapter 479B essentially requires the Board to grant a permit for any hazardous liquid pipeline. If that were true, the Board would simply be a rubber stamp. It should be clear by now, however, that a pipeline company has the burden to prove that the pipeline will promote public convenience and necessity.

Instead, what Dakota Access has presented to the Board is the business case for Dakota Access to make money for itself and its shareholders. It has also presented the case that the pipeline is for the convenience of the oil companies and the shippers. But that is certainly not public convenience and necessity. Even if the demand for petroleum products were not decreasing, there is no evidence that the demand is not being met currently. And there is no evidence that the pipeline would decrease the cost of petroleum products to consumers.

The Dakota Access pipeline is a last ditch effort to drain every last drop of oil from the Bakken area as cheaply and as quickly as possible. And Dakota Access does not care at all about anything standing in its way.

All of the permits and authorizations in the world cannot put back together the damage to the rivers, soil, and forests that the pipeline will cause. That includes permanent damage from cleared easements, trenching of rivers and streams, and loss of fish, turtles, butterflies, birds, other wildlife, and native plants. There is an alphabet soup of regulatory agencies (ACE, DNR, FWS, PHMSA, FERC) that have authority over some small aspect of the Dakota Access project. But the only agency that can fill in the regulatory gaps is the IUB. The Sierra Club is confident that the Board is willing to step up and fill those regulatory gaps.

The Dakota Access pipeline is one of the largest and most controversial projects ever to come before the Board. Iowans from all walks of life and political persuasions, with no motive of financial or personal gain, have objected to this pipeline. The Board must act in the public interest and deny a permit for this pipeline.

/s/ *Wallace L. Taylor*

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