

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
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ORDER REGARDING WINTER CONSTRUCTION

(Issued November 17, 2016)

INTRODUCTION

In the “Final Decision and Order” issued in this docket on March 10, 2016, the Utilities Board (Board) required that Dakota Access, LLC (Dakota Access), file a winter construction plan describing the procedures the company will use in the event construction takes place during winter weather. On August 4, 2016, Dakota Access filed a document entitled “Iowa Winter Construction Plan” (the Plan).

On August 19, 2016, the Northwest Iowa Landowners Association (NILA) filed comments on, and proposed revisions to, the Plan. On September 7, 2016, Dakota Access filed its response to NILA’s comments. On September 16, 2016, the Board staff witness filed a report concerning the Plan.

The Plan says that the purpose of the Plan is to outline procedures for construction in extreme low temperatures or in the event of considerable precipitation in the form of snow or ice. The Plan includes precautions on using frozen soil as trench backfill, on using frozen topsoil during land restoration activities, and on snow handling (including not mixing snow with the soil).

NILA offers several comments on the Plan and Dakota Access has responded to each. The Board will review the comments individually.

NOTICE OF THE PLAN

NILA says the Plan should have been filed with the original petition and notice of the Plan should have been provided to each and every affected landowner in Iowa because “the Winter Construction Plan affects all landowners....” Dakota Access says it was not required by statute, rule, or order to submit the Plan with its petition and the company substantially complied with the requirement to file the Plan in August. Further, the company should not be required to provide notice of the Plan to all affected landowners because construction is already complete on many parcels and will be completed on many more parcels before the Plan is triggered (if it ever is). Providing a copy of the Plan to all landowners would be of no benefit.

The Board finds that the proposal to require earlier filing of the Plan or notice of the Plan to all affected landowners is not supported by any legal authority. Moreover, it would result in notification of hundreds of landowners whose property will never be affected by winter construction activities associated with this project. While it is possible that winter construction will take place on some properties, it is not possible at this time to identify precisely which landowners might be affected in that manner. Moreover, notice of the filing of the Plan was provided to all those landowners who are included on the service list in the Board’s electronic filing system.

INTERACTION OF THE PLAN AND THE AIMP

NILA says that the Plan does not clearly state how it will interact with the existing Agricultural Impact Mitigation Plan (AIMP). NILA says there should be a specific statement in the Plan that it does not relieve Dakota Access of any of the requirements of the AIMP unless the Plan makes specific reference to a provision of the AIMP that is to be modified.

Dakota Access says there is no reason to amend the Plan to address any potential interaction with the AIMP. Compliance with the AIMP is required by Iowa Code § 479B.20 and 199 Iowa Admin. Code 9.7, and the Plan does not change that. Further, NILA does not identify what provisions of the Plan might be contrary to or conflict with the AIMP, so there is no basis for assuming that the Plan will interact with the AIMP in any particular manner.

The staff report filed on September 16, 2016, says the Plan does not indicate any intent to supersede or override any of the provisions of the AIMP. Instead, it adds procedures for winter conditions that were not included in the AIMP.

The Board finds that the proposal to clarify the interaction of the Plan with the AIMP is unnecessary because the Plan and the AIMP are both in effect and no potentially-conflicting provisions have been identified. As indicated in the staff report, the Plan adds procedures that were not included in the AIMP; it does not supersede or override the AIMP in any respect.

DEFINING WINTER CONDITIONS

NILA argues that the Plan fails to define an objective standard to identify winter conditions. Further, NILA says that the Plan is focused on how winter weather will affect construction activities when it should be focused on the impact to the land. NILA suggests the Plan should be “triggered when the soil is frozen to a depth of four inches at any point in the construction right of way.” (NILA Response at p. 2.) NILA also says that the presence of any snow should trigger the Plan provisions related to movement of snow. (*Id.*)

Dakota Access says that the Plan adequately defines “winter weather conditions” in Section 1.0 as “severe or harsh winter weather events with a real or perceived potential to impact the construction activities associated with the DAPL Project.” Dakota Access says NILA’s proposal is unnecessarily broad. NILA’s proposal would trigger the Plan where soil is frozen to a depth of four inches at any point in the right of way; Dakota Access says that just because one spot is frozen, that does not mean the Plan should be triggered in other locations where freezing conditions may not exist. As it is, the Plan requires winter procedures only in the locations where they are necessary and appropriate, that is, “when soils are frozen” (see Sections 3.2 and 3.3) and when snow is present (Section 3.1). It is the presence of those conditions at a specific work location that should trigger the Plan at those locations.

The staff report notes that while the Plan addresses frozen or snowy winter conditions, it is possible that there could instead “be a wet sloppy winter where

saturated soils do not dry and the ground surface remains soft.” (Staff report at p. 2.) Staff says that Section 3.7 of the Plan addresses this under the heading “Thawing Conditions” and provides that construction should avoid heavily saturated areas and should be suspended in unsuitable areas until appropriate conditions exist. Staff believes this principle should not be limited to thawing soil and instead should apply to all work in saturated soil, including unfrozen or never frozen soil.

The Board recognizes the concerns identified by NILA and the staff witness regarding the application of the Plan in conditions that may not involve solidly frozen soil or the presence of snow, such as the wet, sloppy conditions described by staff. The Board will require Dakota Access to file a revised Plan that specifically applies the provisions of Section 3.7 to saturated soils including unfrozen or never frozen soil, rather than being limited to thawing soil. To the extent there is any dispute regarding the existence of saturated soils or winter weather conditions in general, the county inspector will be able to raise the issue with Dakota Access using the process in Iowa Code § 479B.20 and the AIMP.

SEPARATE RECORDKEEPING FOR WINTER CONSTRUCTION

NILA says that the Plan should include a section requiring Dakota Access to prepare a separate written report for, and requiring county inspectors to maintain a separate log of, all construction activities completed under the Plan, to be provided to the affected landowner at the end of all activities under the Plan.

Dakota Access says that the role of the county inspector is defined by statute and rule and NILA's proposal to create new record-keeping requirements for the county inspector and for Dakota Access is unwarranted. There is no reason to believe that the county inspectors will not fulfill their duty to inspect construction activities for compliance with the AIMP and the Plan; creating a new layer of reports and logs would be a waste of resources.

The Board will require Dakota Access to maintain a list identifying each parcel where construction activities take place pursuant to the Plan and the nature of those activities on each parcel. Moreover, if there are any parcels where winter construction activities take place or where construction is halted due to winter weather, the statewide construction report filed each week by Dakota Access should have another column added to show the number of parcels where winter construction activities have taken place, by county. This information will allow the Board to monitor the extent of any winter construction activities and the list of all winter construction parcels will be useful if there are any post-construction issues to be resolved.

ADDITIONAL EASEMENTS FOR NEARBY SNOW STORAGE

NILA asserts that the Plan should be revised to prohibit Dakota Access from piling snow at the edge of the construction right of way until Dakota Access has obtained an additional temporary workspace ten feet in width to act as a buffer area. NILA says that in the absence of such a buffer zone, the snow piled at the edge of the existing right of way workspace will affect the adjacent land.

Dakota Access responds that piling snow within the right of way is a routine act and no basis has been shown for imposing special requirements on the activity or for requiring the purchase of additional temporary workspace.

The Board staff report says it is unclear how snow storage on the right of way would have adverse effects on land outside of the easement.

The Board finds that with respect to snow management, as staff says, “it is unclear how snow storage on the right-of-way would have adverse effects outside of the easement.” (Staff report at 3.) No basis has been shown for requiring the company to acquire additional easement rights on adjoining land for storage within the existing easement area.

USE OF FROZEN SOIL AS BACKFILL

Next, NILA says that the Plan should be revised to prohibit use of any frozen soil as backfill under any circumstances. NILA does not explain the basis for this recommendation.

Dakota Access responds that such a prohibition could have more adverse consequences than the occasional use of frozen soil. If there is insufficient unfrozen soil at a location to backfill the trench, a prohibition on use of frozen soil would force Dakota Access to leave the trench open during the winter months, which may pose a greater risk of harm to the soil than the use of some frozen soil for backfill. Further, if the use of frozen soil causes issues, Dakota Access says those issues can be addressed and remedied in the spring.

The staff report says that Section 3.2 of the Plan includes a provision requiring the suspension of final clean-up activities and topsoil replacement if the subsoil is frozen and cannot be uniformly redistributed across the right of way because backfilling the trench with frozen subsoil would not allow the subsoil to settle and consolidate until it thaws, potentially leading to low and soft spots in the field. Further, Section 3.4 calls for backfilling with unfrozen material to the extent practical, and if frozen soil must be used then the topsoil is not to be replaced until any settled or low areas can be repaired in the spring. Staff concludes these provisions address the primary concerns associated with frozen soil, including recognition that it may be better to delay some actions until spring.

The Board finds that the Plan should not prohibit use of frozen soil as backfill in all circumstances, so long as all other criteria are satisfied. In some situations, it appears using frozen soil and addressing any issues in the spring may be the best available option. And, as the staff report says, “the Plan recognizes that trench backfill with unfrozen soil is preferable, but makes provision for additional remedial action if frozen soil is used.” (Staff report at 4.)

POST-CONSTRUCTION MONITORING

Finally, NILA says that the Plan should be revised to require post-construction monitoring involving Dakota Access, the county inspector, and the affected landowner. Dakota Access says NILA’s proposal ignores the role of the county inspector in monitoring construction activities while they are occurring. Moreover,

there is no basis provided, and no standards to apply, for any such monitoring.

Dakota Access says that if a landowner believes there has been harm to the land, the landowner can bring a complaint.

As noted above, the Board will require Dakota Access to maintain a list of all properties where winter construction activities take place. This will allow identification of all potentially-affected areas if there are any issues that Dakota Access is unable to resolve to the satisfaction of the affected landowner.

DEFERRAL OF CORRECTIVE ACTIONS

The staff report filed on September 16, 2016, raises one additional point. Staff notes that Section 3.6 of the Plan provides that some, but not all, post-construction corrective activities may be deferred until spring in certain conditions. Staff believes this principle should be applied to all aspects of winter land restoration. Staff recommends that the provision in Section 3.6 allowing deferral to spring of corrective actions under certain conditions should be extended to all winter construction activities.

Dakota Access has not filed any response to the staff report. The Board will accept staff's proposed modification in this respect.

CONCLUSION

The Board will approve the proposed Plan subject to the modifications described above. Section 3.7 should be modified such that construction will be suspended for all heavily saturated areas, rather than being limited to thawing soil.

The Plan should be modified to reflect a requirement that Dakota Access maintain a list identifying all parcels on which winter construction activities took place (including suspension of construction activities) and if winter construction takes place in any county, the weekly statewide construction reports filed by Dakota Access shall identify the number of affected parcels in each county. Finally, Section 3.6, relating to the possible deferral of corrective actions until spring under specified conditions, should be modified so that it applies to all aspects of winter land restoration.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Iowa Winter Construction Plan" filed by Dakota Access, LLC, on August 4, 2016, is approved, subject to the modifications described in this order. Within 14 days of the date of this order, Dakota Access, LLC, shall file a modified winter construction plan reflecting those modifications.

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 17th day of November 2016.