

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

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

**ORDER ACCEPTING COMPLIANCE FILINGS
AND ISSUING PERMIT**

(Issued April 8, 2016)

INTRODUCTION

On March 10, 2016, the Board issued its “Final Decision and Order” (Order) in this docket, granting a hazardous liquid pipeline permit to Dakota Access, LLC (Dakota Access), pursuant to Iowa Code chapter 479B, which grants the Board 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... to approve the location and route of hazardous liquid pipelines, and to grant eminent domain where necessary.” Iowa Code § 479B.1.

Iowa Code § 479B.9 provides in relevant part, that “the board may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper.” In the Order, the Board imposed a number of terms and conditions, finding that “if the terms and conditions adopted above were not in place, the evidence in this record would be insufficient to establish that the proposed pipeline will promote the public convenience and necessity.” (Order at 108.) The Order also provides that the permit will be issued only when

Dakota Access has filed for the Board's review and acceptance a number of compliance filings, including but not limited to, the following:

1. A revised Agricultural Impact Mitigation Plan (AIMP);
2. Proof of general liability insurance in the amount of at least \$25 million;
3. Unconditional and irrevocable parent company guarantees of Dakota Access for remediation of damages from a leak or spill;
4. A timeline showing the construction notices that will be given and describing the information to be included with the notices;
5. Modified condemnation easements; and
6. A statement accepting the terms and conditions of the Board's order.

(Order at 153-54.)

On March 16, 2016, Dakota Access filed its "Pre-Permit Compliance Filings and Request for Expedited Treatment." On March 19, 2016, the Board issued an "Order Denying Motion to Expedite and Establishing Schedule," setting a schedule for the parties to file comments on the compliance filings and for Dakota Access to reply to those comments.

On March 24, 2016, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, filed comments on the compliance filings. On the same date, Keith Puntenney, a party to this proceeding, filed a motion for an extension of time to file comments, which was granted at an open meeting on March 25, 2016.

On March 25, 2016, Board staff witness Don Stursma filed a staff report dated March 24, 2016, addressing the pre-permit compliance filings. On the same date, Sierra Club Iowa Chapter (Sierra Club) filed comments regarding the pre-permit

compliance filings. On March 28, 2016, the Northwest Iowa Landowners Association (NILA) filed comments, and on March 29, 2016, Keith Puntenney filed comments.

Also on March 29, 2016, Dakota Access filed a reply in support of its compliance filings.

On April 4, 2016, in an open meeting conducted pursuant to Iowa Code ch. 21, the Board's General Counsel presented a review of the compliance filings, the comments filed, and the report of the Board staff witness.

In this order, the Board will review the compliance filings and the comments filed by the parties. As described in the Board's Order, all of the compliance filings are required in order to support and sustain the Board's finding that the proposed pipeline will promote the public convenience and necessity, as required by Iowa Code § 479B.9; until there is substantial compliance with each of those requirements, a permit will not be issued.

Further, the company has made certain commitments that must be completed before construction can commence. In particular, Dakota Access has committed that

Dakota Access will file with the Board permits, approvals or other similar documents from the U.S. Army Corps of Engineers and Iowa Department of Natural Resources prior to commencing construction.

(Reply Brief at 53.) The company has also committed to file final versions of the Stormwater Pollution Prevention Plan (SWPPP) and Unanticipated Discovery Plan (UDP) prior to commencing construction. (*Id.* at 52-53.) Dakota Access filed its Sovereign Lands Construction Permit from the Department of Natural Resources on March 29, 2016, but has not yet filed any permit, approval, or other authorization from the U.S. Army Corps of Engineers or the final SWPPP or UDP. Consistent with the

company's own commitments, construction may not commence until these documents are filed with the Board (although no review or approval will be required).

The Board notes that the determination of exactly what activities amount to "construction" is an open question in this docket, see "Order Regarding Applications, Motions, and Requests and Taking Official Notice" issued on March 31, 2016. The Board intends to address that question at the earliest opportunity. Until that time, Dakota Access may continue to take the steps of "environmental staking and clearing trees (with hand-held tools)" (see "Dakota Access' Response to Board's March 31, 2016 Order Regarding Construction Activities" at 2), but only on parcels where all of the following conditions are true: (a) Dakota Access has a voluntary easement; (b) Dakota Access has received permission from the landowner to engage in these activities; and (c) Dakota Access has given the county inspector for that county and the landowner reasonable advance notice of the timing and location of the activities. The Board relies upon the county inspector to verify with the landowner that the landowner has consented to the described activities and to inspect those activities as appropriate.

If the county inspector observes any environmental concerns or conditions that make it inappropriate for Dakota Access to engage in staking or clearing trees at any particular location or at any particular time, the county inspector should inform Dakota Access. If the company and inspector cannot agree on a revised approach that addresses the environmental concerns or conditions, the Board will hear and resolve any complaints within three business days.

Finally, the Board will require Dakota Access to file with the Board a list of the county inspector or inspectors for each county, with contact information, within seven days of the date of this order. This will allow landowners an opportunity to contact the relevant county inspector on their own initiative, if they so choose.

I. Modified AIMP

In the Order, the Board required Dakota Access to make several modifications to its Agricultural Impact Mitigation Plan (AIMP). Additionally, in its open meeting on March 29, 2016, the Board requested further information from Board staff regarding whether the AIMP applies to all land or solely to agricultural land. The Northwest Iowa Landowners Association (NILA) has also argued that the Order includes requirements that Dakota Access did not implement in the modified AIMP filed with the Board. Each of the objections or issues raised by the parties will be discussed in turn.

A. Effect of AIMP on Non-Agricultural Land

Dakota Access filed an AIMP to minimize impacts to and restore agricultural lands during and after construction pursuant to Chapter 9 of the Board's rules. The Board is granted authority to promulgate the rules found in Chapter 9 by Iowa Code §§ 479.29 and 479B.20. Both sections state the Board "shall adopt rules establishing standards for the restoration of agricultural lands" during and after pipeline construction.

Although Dakota Access states in the plan's introduction that it will provide copies of the AIMP to "all landowners of property that will be disturbed by the construction," Section 2 of the AIMP states that the mitigation measures in the plan

apply only to agricultural land. Section 2 further clarifies that such measures do not apply to “urban land, road and railroad right-of-way, interstate natural gas pipelines, mined and disturbed land not used for agriculture.” Section 6 of the AIMP contains the mitigation measures to meet the requirements of the Board’s Order and Chapter 9 of the Board’s rules. It therefore appears the AIMP’s original purpose was to establish the standards for protection and restoration of agricultural land during and after pipeline construction

However, the Board’s Order required Dakota Access to include terms and conditions in the AIMP that apply to all landowners affected by the pipeline, such as the notice requirements. Therefore, the terms that can reasonably be seen as affecting only agricultural land as defined in the AIMP and 199 IAC 9.1(3), such as the provisions regarding the planting of cover crops, are required to be implemented only for agricultural land. Terms that can be reasonably read to apply to all landowners, such as the notice requirements, sequence of events, and right to designate a point of contact, should apply to all landowners of property that will be disturbed by the project, not just agricultural land. As noted above, under the AIMP’s own terms, the AIMP will be provided to all affected landowners. This effectively acknowledges that all landowners are afforded rights and benefits within the AIMP that may be reasonably applicable to any given property.

The Board finds that the Order requires that certain conditions, such as the notice requirements, must apply to all landowners regardless of any language in the AIMP limiting its application to agricultural land.

The Order requires Dakota Access to include terms and conditions in the AIMP that apply to all landowners affected by the pipeline, such as the notice requirements. The proper delineation of the scope of these requirements will be clarified by requiring Dakota Access to add the following language to the AIMP at the end of Section 2: Plan Limitations:

Notwithstanding the above provisions, the AIMP also contains provisions that apply to all affected landowners, not just to those owning affected agricultural land. Those provisions that have been explicitly ordered by the Iowa Utilities Board to apply to all affected landowners and those provisions that can sensibly be applied to all affected landowners, including but not limited to the landowner notice provisions contained herein, shall apply to all properties affected by the construction, operation, or maintenance of the pipeline.

So that the agency record will be complete, Dakota Access shall file a final and redlined version of the AIMP reflecting this change in accordance with the ordering clauses below.

B. Author of the Plan

1. Background

The Order requires Dakota Access to state that the AIMP has been adopted by the Board. (Order at 76).

2. Dakota Access

Dakota Access has changed the cover sheet of the AIMP and included a sentence in the introduction section reflecting this change.

3. Staff Witness Report

The Staff Witness Report dated March 24, 2016, states the change substantially complied with the Board's Order.

4. Analysis

This section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

C. County Inspector Role & Enforcement Provisions

1. Background

The Order requires Dakota Access to modify its AIMP by incorporating the requirement proposed by NILA clarifying the role of county inspectors and the enforcement provisions. (Order at 76-78).

2. Dakota Access

Dakota Access has filed a modified AIMP that includes two new paragraphs in the introduction section addressing this issue.

3. Staff Witness Report

The staff witness states the changes made to the AIMP comply with the Board's Order on this point. Though the language added is not identical to that proposed by NILA, it is substantially similar.

4. Analysis

While the language is not identical to NILA's proposed language, NILA did not raise an objection to this modification. This section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

D. Notice Requirements

1. Background

The Order requires Dakota Access to modify its AIMP to provide for landowner notice two weeks prior to beginning construction on the landowner's property as well as a second notice 48 hours before construction begins. (Order at 80). The Board also required a modification of the AIMP to allow landowners to designate their own point of contact. (Order at 80.)

2. Dakota Access

Dakota Access has modified its AIMP by including in its Point of Contact section language substantially similar to that proposed by NILA, as modified by the Board's Order. In response to the concerns raised in the Staff Witness Report discussed below, Dakota Access believes the language is unambiguous given the Order and that any change required by the Board at this time would not be substantive and should not delay the issuance of the permit.

3. Staff Witness Report

The staff witness states that the modified AIMP includes provisions for the two-week notice, the 48-hour notice, and the ability for a landowner to designate his or her own point of contact. The report recommends a clarification to the AIMP language regarding the two-week notice to state that it will be given two weeks prior to construction on each landowner's property, not simply two weeks before overall construction begins.

4. NILA

In its response, NILA suggests explicitly requiring Dakota Access to provide notice to the counties directly as well as providing an updated AIMP and a red-lined version showing changes from previous versions that may have been provided to the counties.

5. Analysis

The language Dakota Access added to the AIMP in connection with the two-week notice requirement is potentially subject to multiple interpretations. It could be read to say that all landowners in a county will be notified two weeks before construction starts at any location or it could be read to say that each landowner will receive notice two weeks before construction starts on that landowner's property. The Board's Order was clear that the notice needs to be sent to each landowner two weeks before construction is to begin on the landowner's land, not just in general. However, the language Dakota Access used in the modified AIMP is nearly identical to that originally proposed by NILA. The Order instructed Dakota Access to provide the notice two weeks before construction begins on the landowner's land, and then incorporate the notice requirements in its AIMP. The Order did not explicitly require Dakota Access to use any specific language to do so.

It appears Dakota Access has incorporated the notice requirements required by the Order. However, in order to eliminate any possible ambiguity, Dakota Access shall amend the second full paragraph on page 3 of the modified AIMP to add the following underlined phrase: "In addition to any other notice required by law, DAPL shall, at least two weeks prior to commencement of construction on the landowner's

property, provide....” As noted above, so that the agency record will be complete, Dakota Access shall file a final and redlined version of the AIMP reflecting this change in accordance with the ordering clauses below.

Subject to the inclusion of this ministerial change, this section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

E. Topsoil Separation

1. Background

The Order requires Dakota Access to strip and separate all topsoil, even where the depth of the topsoil is greater than 36 inches. (Order at 82).

2. Dakota Access

Dakota Access modified section 6.2 of its AIMP to include the following statement: “If the actual depth of topsoil exceeds 36 inches and there is adequate room in the permitted workspace, Dakota Access will, upon landowner request, remove the actual depth of the topsoil.” A similar provision was added for topsoil stripped from the adjacent subsoil storage areas. Dakota Access also states that it used NILA’s own proposed language when it modified the AIMP.

3. Staff Witness Report

The staff witness concludes that the language proposed by Dakota Access is acceptable because it is consistent with the record as a whole. The report notes that the language included in the modified AIMP was adopted from a proposal made by NILA.

The staff witness also says that the trench excavation area is unlikely to require additional storage space since the volume of earth being removed would be similar regardless of the proportion of topsoil to subsoil. However, additional stripping from the spoil storage area could generate substantial additional volume, perhaps exceeding the capacity of the reserved storage area. The staff witness says that giving the landowner the right to request the additional stripping would be appropriate since it would allow the landowner to use his or her own best judgment to determine whether the topsoil quality would be less affected by leaving it in place rather than excavating it.

4. NILA

NILA argues that requiring a landowner to request complete separation places a burden upon the landowner, especially since the Board did not require Dakota Access to provide or allow measurements of the actual topsoil depth. NILA argues the default should be for Dakota Access to strip all topsoil unless the landowner requests otherwise.

5. Analysis

The Order's requirement was that all topsoil, regardless of depth, be separated. (Order at 82). By adding the conditions of adequate space and a landowner request, Dakota Access has imposed conditions that were not required by the Order. However, the language Dakota Access used was adopted from NILA's original proposal and the staff witness believes they are acceptable. The Board finds the conditions are reasonable and consistent with the record as a whole.

Accordingly, this section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

F. Limitation of Coordination of Aboveground Structures

1. Background

The Order requires Dakota Access to modify section 6.4 of the AIMP to state that coordination of aboveground structures should be limited only to “minor” structures and should not include major structures such as valves. (Order at 82-83).

2. Dakota Access

Dakota Access modified section 6.4 of the AIMP by incorporating the language from NILA’s proposal. (NILA Brief at Exhibit A).

3. Staff Witness Report

The staff witness noted that Dakota Access adopted the language proposed by NILA. The staff witness also noted that federal pipeline safety standards could limit the coordination of some items.

4. Analysis

This section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

G. Weed Management Plan

1. Background

The Order requires Dakota Access to take reasonable steps to implement extra weed control measures if a need for those measures is identified by a county inspector. Dakota Access was required to modify its AIMP to reflect that requirement. (Order at 94).

2. Dakota Access

Dakota Access modified its AIMP by adding section 6.15 with language nearly identical to that which is found in the Order.

3. Analysis

This section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

H. Commitment to Install Pipeline at a Minimum Depth of 48 Inches

1. Background

The order requires Dakota Access to modify its AIMP to reflect the company's commitment to installing the pipeline at a minimum depth of 48 inches where reasonably possible. (Order at 107).

2. Dakota Access

Dakota Access included a paragraph in the introduction to the AIMP stating that the pipeline will be placed underground "with no less than 48 inches of cover to the top of the pipe" except where a subsurface obstruction would prevent that depth or where a landowner requests less cover and such a request is deemed prudent and lawful.

3. Analysis

This section of the modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order.

I. Inspection Rights

1. NILA

NILA argues that the Order requires Dakota Access to modify its AIMP to provide landowner inspection rights related to trenching, tile repair, dewatering, or backfilling. NILA argues that the section of the Order discussing the notice requirements also required these inspection rights. (Order at 80).

2. Analysis

Page 80 of the Order states:

As indicated above, the Board will require Dakota Access to give notice to the landowner two weeks before construction is to begin on the landowner's property and a second notice 48 hours before construction is to begin. After the two week notice is given, Dakota Access, its contractor, the inspector, and the landowner will then each be responsible for being ready to observe and discuss any issues regarding trenching, tile repair, dewatering, and backfilling, if necessary.

This language does not include any additional requirements, but merely describes the purpose of and reason for the two-week notice. Likewise, the sections of the Order discussing why the 48-hour notice is required to comply with Iowa Code § 479B.20(6) are merely descriptive and do not create additional obligations or requirements.

The modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order and does not need to include NILA's proposed changes.

J. Qualified Technician & Soil Conservation Practices

1. NILA

NILA argues that on page 81 of the Order, the Board requires Dakota Access to remove any requirement or reference to a “qualified technician,” especially when discussing future drain tiles or soil conservation practices. NILA also argues that Dakota Access needs to include future soil conservation practices with the two-week notice requirement related to drain tile diagrams.

2. Staff Witness Report

The staff witness notes that the Board did not adopt a definition for “qualified technician” but did require Dakota Access to modify its two-week notice to include a request for drain tile diagrams.

3. Dakota Access

Dakota Access states that the Order does not require removal of the term “qualified technician.” Instead, the Order only requires the request for drain tile diagrams.

4. Analysis

The Order does not require the removal of “qualified technician” from the AIMP. Instead, it simply declines to “adopt the proposal from NILA to define the term ‘qualified technician.’” (Order at 81). Likewise, the Order does not require a request for future soil conservation policies. The Order only requires “Dakota Access to file a modified AIMP incorporating the requirement that the company request any drain tile diagrams as a part of the two-week notice.” (Order at 81).

The modified AIMP provided by Dakota Access is in substantial compliance with Ordering Clause No. 3(a) of the Order and does not need to include NILA's proposed changes.

II. Insurance Requirements

The Board discussed the insurance requirements in Section IV.d of the Order at pages 58 to 63 as a part of a broader discussion of oil spill remediation. Ordering Clause No. 3(b) of the Order requires Dakota Access to file "a general liability insurance policy in the amount of at least \$25,000,000, to be filed and reviewed each time it is renewed, but at a minimum annually, for the life of the pipeline."

On March 16, 2016, Dakota Access filed three insurance policies: A general liability policy (the "underlying policy") and two excess/umbrella policies triggered by losses covered by the underlying policy but that exceed the coverage limit of that policy.¹ The aggregate of the three policies is \$26,000,000, slightly more than the Board required. The underlying policy contains a pollution exclusion, but those terms are replaced by an endorsement that begins at page 51 of the policy. That endorsement provides that the pollution exclusion in the underlying policy does not apply; instead, it provides that "pollution" is covered by the policy if it falls into any of three broad categories designed to address spills, leaks, or other similar incidents associated with the pipeline.

¹ Dakota Access filed the insurance policies with a request for confidential treatment of the entire policies. On March 30, 2016, the Board issued an order notifying Dakota Access that the Board was granting that request with respect to the policy premiums and other identifying information but otherwise denying the request. Pursuant to 199 IAC 1.9(8)(b)(3), the Board will continue to treat the insurance documents as confidential records for 14 days from the date of the order to afford Dakota Access an opportunity to seek injunctive relief. Accordingly, this discussion will not address any of the specific language of the insurance policies and will be based upon information already included in the public portion of the record.

OCA and the Board staff witness do not address the insurance policies in their filed comments. Sierra Club and NILA comment on the subject.

A. Named Insureds

1. Sierra Club

Sierra Club says that the underlying policy lists Dakota Access as the insured; as a result, the property owners and others who are damaged by an oil spill will be compensated only if Dakota Access is found to be legally responsible. Sierra Club says that Dakota Access witness Mahmoud said that “the landowners would specifically be named insureds.” (Sierra Club comments at 2.)

2. Dakota Access Reply

Dakota Access says that the policies expressly cover third-party bodily injury and property damage from leaks and spills defined in an expansive variety of ways from vandalism to earthquakes to accidental discharges regardless of cause. (Reply at 9.)

3. Analysis

The Board finds that the insurance must pay claims to the landowners and any other third parties injured by a spill or leak. The Board finds the insurance is in substantial compliance with this requirement of Ordering Clause 3(b) the Order.

B. Term of Policy

1. Sierra Club

Sierra Club says that the policy includes an expiration date with no assurance that the policy will be extended. Sierra Club says that once the permit is issued, the Board would have no further authority to ensure the required amount of insurance remained in effect.

2. Dakota Access Reply

Dakota Access responds that this has already been addressed in the Order, as the Board anticipated that the insurance would be issued on an annual basis and required that the policy be “renewed for the life of the pipeline” with annual filings, at a minimum, to demonstrate each renewal. (Order at 153.)

3. Analysis

The Board contemplated the insurance would be issued on an annual basis and made provisions for that situation, requiring that the coverage be renewed for the life of the pipeline and that proof of continued coverage be filed with the Board on a regular basis. (Order at 153.) To the extent Sierra Club is concerned about the Board’s ability to enforce this requirement, the Board notes that Iowa Code § 479B.21 allows the Board to assess civil penalties for any violation of chapter 479B or any rule or order issued pursuant to that chapter. Further, § 479B.19 authorizes the Board to commence an equitable action in district court to compel compliance with the Board’s order. These statutes provide adequate mechanisms for enforcement of this requirement.

The Board finds that the insurance is in substantial compliance with this requirement of Ordering Clause No. 3(b) of the Order.

C. Exclusions

1. Sierra Club

Sierra Club says that Mr. Mahmoud testified that the only exclusion in the policy would be that Dakota Access's own property would not be covered, but the policy in fact includes a number of other exclusions. Sierra Club contends the Board was misled. (Sierra Club comments at 3.)

2. Dakota Access Reply

Dakota Access responds that all insurance policies have definitions, limitations, and exclusions, but the policies provided by Dakota Access expressly cover third-party bodily injury and property damage from leaks and spills, regardless of cause. (Reply at 9.)

3. Analysis

The Board finds that the policies cover the risks and losses that they were supposed to cover. Moreover, a fair reading of Mahmoud's testimony on this point reveals that he was not certain that the only exclusion would involve Dakota Access's own property. Mahmoud's actual testimony was as follows:

A. Yeah, I just told you what the exclusion was. It is not intended to cover the damage to a facility owned by Dakota Access.

Q. Is that the only exclusion?

A. That's it, that I'm aware of, I should say, because we haven't bought the policy yet. So as far as I know, that's the intent. (Tr. 3405-06.)

The Board finds that the insurance is in substantial compliance with this requirement of Ordering Clause No. 3(b) of the Order.

D. Identity of Insurance Company

1. Sierra Club

Sierra Club quotes certain language from the policy relating to the fact that the Texas Department of Insurance does not audit an insurer offering surplus lines of coverage, says the language is unclear, and concludes that the insurance company issuing the policy may not be entirely reliable. (Sierra Club at 4-5.) Sierra Club says the Board should investigate the company.

2. Dakota Access Reply

Dakota Access responds that Sierra Club admits that "it is not entirely clear what the import of this language is" and Dakota Access concludes the objection is speculative and ultimately unfounded. (Reply at 9.)

3. Analysis

The bare statement that the Texas Department of Insurance does not audit this particular type of insurance offering is insufficient to establish that the company issuing the policy is unreliable. It is a description of the activities of the Texas Department of Insurance and does not necessarily say anything about the financial condition of the insurer.

The Board finds that the insurance is in substantial compliance with this requirement of Ordering Clause No. 3(b) of the Order.

E. Conditions to Make a Claim

1. Sierra Club

Sierra Club says that the insurance does not apply to certain incidents unless certain timing criteria are met involving discovery and reporting of a leak. (Sierra Club at 5-6.) Sierra Club says that the most common way for pipeline leaks to be discovered is by members of the general public, so a leak could be ongoing for some time before it was discovered and reported, resulting in no coverage. (Sierra Club at 6-7.)

2. Dakota Access Reply

Dakota Access responds that the timely reporting requirement only applies to certain types of incidents and any type of remediation will fit within one of the types of coverage. (Reply at 7-8.) Dakota Access also points out that the timing criteria are not unreasonable and are highly unlikely to cause a gap in coverage. (*Id.*) Finally, Dakota Access contests Sierra Club's claim that the most common way for pipeline leaks to be discovered is by the general public, noting that the evidence in the record established that only 22 percent of pipeline leaks are discovered by the general public. (Iowa Farmland Owners Association Exh. 14; Tr. 485-87, 683-85, and 760-61.)

3. Analysis

The Board finds that Sierra Club has focused on the reporting requirements for only one type of incident that would invoke coverage, ignoring the other mechanisms

for invoking coverage. Further, the reporting requirements are not unreasonable because they allow a reasonable amount of time to discover and report incidents, even after the policy in question has expired.

The Board finds that the insurance is in substantial compliance with this requirement of Ordering Clause No. 3(b) of the Order.

F. Number of Policies

1. NILA

NILA objects that Dakota Access has offered a general liability insurance policy in an amount of less than \$25 million per occurrence with umbrella policies to cover the rest. NILA says that using multiple policies to provide insurance coverage forces the Board to reconcile variations in coverage between those policies. NILA concludes that a standalone policy should be required. (NILA Confidential Comments at 1.)

2. Dakota Access Reply

Dakota Access says that the overall coverage exceeds the \$25,000,000 required by the Board's effort. The umbrella policies are triggered by the same events that would trigger coverage under the underlying policy; they apply when the underlying policy's coverage has been exhausted. Dakota Access says that NILA has failed to show how the use of multiple policies is problematic. (Reply at 9-10.)

3. Analysis

It is reasonable for Dakota Access to structure the insurance in tiers and doing so has not caused any variations in coverage between or among the policies. The

events that trigger coverage under the general liability policy will also trigger coverage under the excess/umbrella policies.

The Board finds that the insurance is in substantial compliance with this requirement of Ordering Clause No. 3(b) the Order.

G. Specific Coverage

1. NILA

NILA says that Dakota Access should be required to purchase coverage for certain specified events that were not originally included in the insurance coverage and if such coverage is unavailable, the company should deposit \$25,000,000 in an escrow account to self-insure against such events. (NILA Confidential Comments at 1.)

2. Dakota Access Reply

Dakota Access argues that in the event of a spill caused by the excluded events, the parental guarantees would still apply and provide funds for remediation. However, the company also addressed the issue by filing a revised Confirmation of Coverage page that shows the events identified by NILA are now covered as well.

3. Analysis

This issue is moot because Dakota Access has added the necessary coverage.

III. Parent Company Guarantees

1. Dakota Access Compliance Filings

On March 16, 2016, Dakota Access filed revised parent company guarantees as compliance with the Ordering Clause No. 3(c) of the Order.² Dakota Access's filing includes Member Guaranty Agreements executed by officers of Phillips 66 Company and Energy Transfer Partners, L.P., which are identified as Guarantors, as well as a letter agreement evidencing the guaranty signed by officers of Dakota Access, LLC, Dakota Access Holdings, LLC, and Phillips 66 DAPL Holdings, LLC. Dakota Access states that the guarantees provide unconditional and irrevocable backstops for any spill remediation costs for which Dakota Access is liable.

2. OCA and Sierra Club Comments

On March 25, 2016, comments were filed by OCA and Sierra Club regarding the guarantees and their compliance with the Board's Order. OCA asserts that based on its review of the parent guarantees, the documents are responsive to the Board's Order. Sierra Club, however, argues that the guarantees are inadequate.

Sierra Club claims that the documents only guarantee obligations of Dakota Access Holdings and Phillips 66 Holdings to Dakota Access under an agreement between Dakota Access, Dakota Access Holdings, and Phillips 66 Holdings. Sierra Club also claims that the guarantees only cover the costs of a spill if Dakota Access has legal liability for the spill, which is not an "unconditional guaranty" as required by

² Dakota Access filed the parent corporation guarantees with a request for confidential treatment of the entire documents. On March 30, 2016, the Board issued an order notifying Dakota Access that the Board was denying the request. Pursuant to 199 IAC 1.9(8)(b)(3), the Board will continue to treat the parent company guarantees as confidential records for 14 days from the date of the order to afford Dakota Access an opportunity to seek injunctive relief. Accordingly, this discussion will not address any of the specific language of the guarantees and will be based upon information already included in the public portion of the record.

the Board's Order. In addition, Sierra Club states that the guarantees are only as good as the financial condition of the parent companies and Sierra Club identifies concerns regarding the financial condition of Energy Transfer Partners, a parent company of Dakota Access Holdings, LLC.

3. NILA Comments

On March 28, 2016, NILA filed comments in response to the guarantees. Specifically, NILA takes issue with Section 11 of the Member Guaranty Agreements which provides that the guarantees may be amended or modified by the parties. NILA suggests that a new written instrument could be executed by the Guarantors and Dakota Access revoking the guarantees.

4. Dakota Access Reply

On March 29, 2016, Dakota Access filed a reply to the objections raised by Sierra Club and NILA on this issue. Dakota Access states the documents illustrate that its parent companies have unconditionally guaranteed to fund the obligations of Dakota Access; the parent companies are intended to be a backstop rather than the first source of funds in the event of an incident. In response to Sierra Club's assertion that the guarantees are not unconditional because they require Dakota Access to be obligated to pay for remediation before the guarantees come into effect, Dakota Access says the argument is illogical because the parent companies should not be required to provide money that Dakota Access is not obligated to pay.

Dakota Access also argues that Sierra Club's attempt to call into question the financial strength of Energy Transfer Partners and Phillips 66 is an effort to relitigate issues the Board has already reviewed and decided. Dakota Access argues that

there is no evidence to suggest that the assets of Energy Transfer Partners and Phillips 66 are insufficient. Dakota Access states that the parental guarantees reflect the precise language in the Board's Order, have the approval of the OCA, and are unconditional and irrevocable guarantees of the obligations incurred by Dakota Access for remediation of spills in Iowa.

5. Analysis

Ordering Clause No. 3(c) of the Order requires Dakota Access to provide an unconditional and irrevocable guarantee from the parent companies of Dakota Access for the remediation of damages from a leak or spill. (Order at 154).

Dakota Access filed two guaranty documents executed by officers of the appropriate parent companies. In addition, Dakota Access filed an executed letter agreement signed by corporate officers of other related entities which further identifies the obligations of Dakota Access' parent companies to guarantee any remediation of damages from a leak or spill. It is established under Iowa law that corporate officers are presumed to be authorized to execute contracts on behalf of their companies.³

In response to Sierra Club's argument that the financial condition of these guarantors is not good, Dakota Access says that ample evidence was introduced at the hearing regarding the financial health of those companies. To the extent updated information may be appropriate, Dakota Access notes that as of March 24, 2016, the market capitalization of Energy Transfer Partners was approximately \$20 billion and

³ See *Wisconsin Lumber Co. v. Greene & Western Tel. Co., et al.*, 127 Iowa 350, 101 N.W. 742, 744 (1904), citing *Blackshire v. Homestead Co.*, 39 Iowa 624 (1874). See also *Black Diamond Coal Co. vs. Anderson Coal Co., Inc.*, 194 Iowa 238, 189 N.W. 774, 775 (1922).

that of Phillips 66 was approximately \$46 billion, for a combined total of \$66 billion. Dakota Access says there is no evidence in the record to indicate these assets are in any way insufficient (Reply at 4) and the Board agrees.

NILA's suggestion that a new document could be executed by the guarantors and Dakota Access to revoke the guaranty appears to be without merit. The language of the guarantees specifically states that the obligation is irrevocable and unconditional. The fact that the documents include a common amendment clause does not render the documents revocable. Rather, Dakota Access has sufficiently demonstrated its intent to comply with the Board's parental guaranty requirement by filing copies of the guaranty agreements as well as an executed letter agreement that reiterates the guaranty obligations are irrevocable and cannot be modified without the written consent of the Board.

The language of the guarantees is specific and reflects the intent of the Board's order, namely that they are unconditional and irrevocable guarantees of any obligations incurred by Dakota Access for remediation of spills in Iowa. The Board finds the parental guarantees filed by Dakota Access are in substantial compliance with this requirement of Ordering Clause No. 3(c) of the Order.

IV. Timeline of Notifications

1. Dakota Access Compliance Filings

Dakota Access filed a timeline identifying three pre-construction notices as previously described in the Revised AIMP section of this order. They include a two-week notice to each landowner of the pending construction that includes contact information for the Dakota Access representative for the area, contact information for

the county inspector, and a request that the landowner provide Dakota Access and the county inspector with any available drain tile diagrams for the landowner's property. A copy of the two-week notice will also be provided to the county inspector at the time the first notice is sent to a landowner in that county.

The second notice will be provided to each landowner 48 hours before construction starts on that landowner's property.

The third notice will be provided, in writing, to county inspectors at least 24 hours before trenching, permanent tile repair, or backfilling is undertaken at any specific location.

2. OCA, NILA, and Sierra Club

OCA, NILA, and Sierra Club had no comments specific to the timeline.

3. Staff Witness Report

The Staff Witness Report recommended one clarification to the timeline. The revised AIMP requires that the county inspector be given at least 24 hours' notice before trenching, permanent tile repair, or backfilling is undertaken at any given location and that the county inspector must also be "continually informed of the work schedule and any schedule changes...." While the 24-hour notice is specifically included in the timeline, the continuous notice requirement is only generally mentioned. (Timeline at 2, Revised AIMP at 4, definition of "Proper Notice to the County Inspector.")

4. Analysis

The Board finds that the timeline should be revised to specifically state the continuous notice requirement, which is already recognized in the AIMP. The Board

will require Dakota Access to resubmit the timeline with the following language added at the end of the first paragraph on page 2 of the timeline:

DAPL or its contractor will keep the person responsible for the inspection continually informed of the work schedule and any schedule changes, and will provide at least 24 hours' written notice before trenching, permanent tile repair, or backfilling is undertaken at a specific location. Iowa Code § 479B.20(4) requires the county inspector to be present for the indicated activities but includes no notice requirement; the county inspector notice provision of the AIMP will advise the inspector of where their presence will be needed DAPL may request that the county inspector designate a person to receive such notices. (Rev. AIMP at 5.)

Because this is a specific, ministerial change using specified language, it is not necessary for the Board to review and approve the revised condemnation easements, but Dakota Access will be required to file the documents with the Board within seven days of the date of this order to provide a clear record.

With this change, the Board finds that the timeline of notifications will be in substantial compliance with the requirements of Ordering Clause No. 3(d) of the Order.

V. Condemnation Easements

The Board discussed the condemnation easements in Section VI of the Order (Terms and Conditions Applicable to Overall Route) at pages 83 to 91. The Board identified several disputed issues relating to the easements, reviewed suggested changes to the easements proposed by NILA, and required Dakota Access to make several changes to its easements.

A. Aboveground Appurtenances (Valves)

1. Background

Starting on page 84 of the Order, under the heading “(1) Aboveground Appurtenances,” the Board discussed the company’s intent to secure the right to place valves on the condemnation parcels at any time in the future without having to acquire additional easement rights for that purpose. The testimony established that the company actually requires only 66 locations for aboveground appurtenances, each of which will be the subject of a separate, specific valve easement, and the company explained that the Exhibit H filings for currently-identified valve sites include specific valve site provisions. However, the company also sought condemnation authority for other valve sites which had not yet been identified “in the event that changed human or environmental conditions warrant additional or changed valve sites.” (Order at 85, quoting Dakota Access Reply Brief at 30.) Dakota Access argued that securing condemnation authority for valves in advance would spare landowners having to go through another condemnation proceeding. Dakota Access explained it would provide additional compensation to affected landowners in the event it needs to install additional valves.

NILA argued that because the burden of a potential future valve is substantial and the company has not shown a need for the future valves, language in the easement which includes the right to install future valves without further compensation should be removed.

The Board required Dakota Access to modify the condemnation easement to remove the language that would allow the company the right to place valves on a

landowner's property at some future time. The Board explained that the Exhibit H descriptions show the location of valves the company is required to install to comply with federal safety regulations and emphasized that if the company wants to install any valves in the future, it will have to negotiate a voluntary easement with the landowner or seek additional eminent domain authority and submit an amended Exhibit H. (Order at 86.)

2. Dakota Access Compliance Filings

On March 16, 2016, Dakota Access filed two revised easements, one identified by the filing title "Standard Easement Rights Revised" (Revised Standard Easement), and the second identified by the filing title "Valve Easement Rights Revised" (Revised Valve Easement).⁴ The language of the Standard Easement has been modified to remove the reference to valves:

The easement rights being sought are:

i. Non-exclusive easements for the purposes of accessing, establishing, laying, constructing, reconstructing, installing, realigning, modifying, replacing, improving, operating, maintaining, inspecting, patrolling, protecting, repairing, relocating (to the extent permitted by Iowa Code chapter 479B and Iowa Utilities Board rules thereunder), and removing at will, in whole or in part, one pipeline not to exceed 30" in diameter, for the transportation of oil, hydrocarbon liquids, and the products thereof, together with below-ground appurtenances (and also for pipeline markers, ~~valves~~, and cathodic protection test leads which Dakota Access, LLC ("Dakota Access") is specifically allowed to install upon the surface of the Pipeline Easement in areas that minimize the obstruction of the landowner's use of the Property) as may be necessary or desirable for the operation of the pipeline, over, across, under and upon the Property;

⁴ The Board notes that while the electronic files containing these documents were identified in this manner, the documents themselves bore no distinguishing headings or titles, making it unnecessarily difficult for the reader to review this part of the compliance filing.

(The changes marked throughout this section using ~~strike through~~ or underline have been made by the Board to assist the reader in tracking the changes.)

3. Staff Witness Report

The Staff Witness Report notes that the only difference between the two revised easement documents submitted by the company on March 16 is that one has an additional paragraph on valves. One includes the right to install a valve (the Revised Valve Easement) and necessary appurtenances and the other (the Revised Standard Easement) does not. According to the report, neither agreement contains a generic right to install a valve at some future date. The report states it “is presumed that the version containing the right to install a valve would only be used for parcels where the Board has granted the right of eminent domain, and the Petition Exhibit H specifically includes a valve site.” (Staff Witness Report at 6.) The report recommends that if the Board accepts the revised Valve Easement, the order should state this expectation.

4. NILA Comments

On March 28, 2016, NILA filed comments responding to Dakota Access’ compliance filings. According to NILA, the Board’s ruling states that to install additional valves in the future, the company will have to negotiate a voluntary easement with the landowner or, if an agreement cannot be reached, seek additional eminent domain authority and file an amended Exhibit H.

NILA states that the company erred by initially using a generic “Easement Rights” document that conflated sites that will require valves with sites where valves

are not required. NILA observes that the Board was correct in finding that the company did not show this broad taking of a valve easement was necessary.

With respect to the revised easements, NILA contends the company ignored the Board's ruling by filing a document which pertains to valve sites to be taken by condemnation. According to NILA, the company's revised document actually expands condemnation rights for valve sites. On this point, NILA refers to the following provision in the revised Valve Easement:

v. the right to construct, maintain and change slopes of cuts and fills within the Pipeline Easement, and the Valve Easement, if any, to ensure proper lateral and subjacent support for and drainage for the pipeline and valve, as applicable, and appurtenant facilities related to this pipeline project;

NILA contends this provision was not included in the earlier document and landowners have not seen this language. (However, the Board notes that a similar provision was included in the Valve Easement language for parcels that have been identified as including valve sites, such as IA-JE-070.000.) NILA urges the Board to reject the revised Valve Easement.

5. Dakota Access Reply

On March 29, 2016, Dakota Access replied to the Staff Witness Report and NILA's comments regarding the revised easements. According to Dakota Access, it is not necessary for the Board to follow the report's recommendation to clarify when the version of the easement containing the right to install a valve will be used. Dakota Access states that the Board's Order binds the company to use the Valve Easement only where a specific valve site was identified as part of the Exhibit H process.

Dakota Access states that the Staff Witness Report acknowledges the easement forms no longer include a general right to place valves in the future. That language was removed and the revised valve language will be used only for condemnation of valve locations identified in the Exhibit H filings. The company suggests that if the Board believes it is necessary to reinforce this point, it can do so when approving the compliance filings, but no further action should be required on this point before issuing the permit.

According to Dakota Access, NILA's comments about valves make no sense. (Dakota Access March 29, 2016, Reply at 12, n. 8.) Dakota Access argues NILA mistakenly suggests that no valve language was to be included in any easement, even where a valve was identified on an Exhibit H.

The company rejects NILA's assertion that condemnation rights for valve sites have been expanded. Instead, the company insists it complied with the Board's ruling by removing a generic right to install valves at a later date; any remaining valve-specific language about valves applies where a valve has been identified on an Exhibit H.

6. Analysis

Dakota Access explained that the Exhibit H filings for parcels that include a currently identified valve site have easement provisions specific to valve sites. The company also testified and acknowledged in its briefs that originally it was seeking condemnation authority over and across other properties that may require installation of a valve at some future time. The company attempted to include this future authority by including a reference to valves in the Standard Easement. As originally

included in the Exhibit Hs for sites where a valve had not been identified, the statement of easement rights provided the company with

i. [n]on-exclusive easements for the purposes of . . . establishing. . .constructing, . . .**installing**. . .in whole or in part, one pipeline. . . (**and also for** pipeline markers, **valves**, and cathodic protection test leads **which Dakota Access. . . is specifically allowed to install upon the surface of the Pipeline Easement.** . .) as may be necessary or desirable for the operation of the pipeline, over, across, under and upon the Property.

(Emphasis added.)

The Board required Dakota Access to modify the condemnation easement by removing the language that would allow the company the right under the easement to place valve on a landowner's property at some future time. (Order at 85; Ordering Clause No. 3(e).) In response, Dakota Access filed two revised easements: a Revised Valve Easement and a Revised Standard Easement.

The reference to valves does not appear in the Revised Standard Easement. Dakota Access also makes two statements in its "Reply in Support of Pre-Permit Compliance Filings" filed on March 29, 2016, that demonstrate that the company's understanding of its easement rights with respect to valves is consistent with the Board's expectation that if the company seeks to install valves in the future, it will need to negotiate a voluntary easement with the affected landowner or, if negotiations are not successful, seek additional eminent domain authority and amend Exhibit H. First, the company states that "the language of the Final Order binds Dakota Access to use the form of easement including valve rights only where a specific valve site was identified as part of the Exhibit H process." (Reply at 12.) Second, the company states that the valve easement language "can and will only be

used for condemnation of valve locations identified in the Exhibit H filings.” (*Id.*)

Based on those two declarations and the revision to the Standard Easement, the Board finds that Dakota Access has complied with the Board’s requirement to modify the easement by removing the language that would have allowed the company the right under the easement rights granted in this proceeding to place valves on a landowner’s property at some future time. The Board finds that the modified easement is in substantial compliance with the requirements of Ordering Clause No. 3(e) of the Order.

B. Access to Easement Strips

1. Background

Starting on page 86 of the Order, under the heading “(2) Access to the Easement Strips,” the Board explained that the company originally sought the right to access its easements by crossing any part of each entire property in any way and at any time that is convenient. The Board acknowledged the objection of landowners who asserted instead that the company should be able to access the Pipeline Easement and Temporary Construction Easement areas only through those easements or by specifically-defined access easements. The Board referred to the testimony of Dakota Access witness Johnson that unless a specific access easement is requested, or unless otherwise agreed by the landowner, the company would access the easement area via the easement itself.

The Board required Dakota Access to revise the condemnation easement to remove the language that appeared to allow access over the entire parcel at the discretion of Dakota Access.

The targeted language was included in Section No. v. of the original Standard Easement, which gave the company

the right of unimpeded entry and access in, to, through, on, over, under, and across the Access Easement, if any, **and such other portions of the Property** as may be reasonably necessary to exercise the rights granted to Dakota Access at all times convenient.

(Emphasis added. The Board notes that the original Valve Easement contains similar language in Section No. vi.)

2. Dakota Access Compliance Filings

The revised easements filed by Dakota Access on March 16, 2016, show the following modifications to the language about access to the easements and a new provision added to each version of the easement:

Revised Standard Easement

v. the right of unimpeded entry and access in, to, through, on, over, under, and across the Access Easement, (and in the event of an emergency if any, and over such other portions of the Property as may be reasonably necessary) to exercise the rights granted to Dakota Access at all times convenient.

vi. The right of unimpeded entry and access in, to, through, on, over, under, and across the Pipeline Easement (and Temporary Construction Easement while in effect) for all purposes necessary and at all times convenient and necessary to exercise the rights granted to Dakota Access;

Revised Valve Easement

vi. the right of unimpeded entry and access in, to, through, on, over, under, and across the Access Easement (and in the event of an emergency if any, and over such other portions of the Property as may be reasonably necessary) to exercise the rights granted to Dakota Access at all times convenient, ~~including the right to construct and maintain access ways within the Access Agreement ;~~

vii. the right of unimpeded entry and access in, to, through, on, over, under, and across the Pipeline Easement and Valve Easement (and Temporary Construction Easement while in effect) for all purposes necessary and at all

times convenient and necessary to exercise the rights granted to Dakota Access;

3. Staff Witness Report

The Staff Witness Report acknowledges the changes to both versions of the easement and concludes that the revised paragraph and new provision appear to limit access under ordinary conditions to the permanent or temporary easement or any separate access easement; under emergency conditions, the provisions allow other access as needed.

4. NILA Comments

According to NILA, the Board ruled that, except in case of emergency, the company can only access an eminent domain parcel over the permanent easement or the temporary easement, unless there is a separate agreement with the landowner.

With respect to the Revised Standard Easement, NILA objects to the use of the word “under” in Section No. vi. NILA contends that, for purposes of access, the company does not need to go under, but only needs to go “over and across.” NILA also objects to the lack of a definition of “Access Easement” and suggests the lack of precision could be used to broaden the scope of the condemnation easement. NILA proposes the following alternative language:

vi. The right of entry and access over and across the Pipeline Easement. In addition, while the Temporary Construction Easement is in effect, the right of entry and access over and across the Temporary Construction Easement. In addition, in the event of emergency, the right of entry and access over other portions of Grantor’s Property as are necessarily presented by such emergent conditions.

5. Dakota Access Reply

According to Dakota Access, NILA misunderstands access easements and misstates the Board's decision on that topic. Dakota Access contends the Board did not rule that the company can only access a parcel over the permanent or temporary easement, unless there is a separate agreement with a landowner.

Dakota Access states that the Board ruled that except in case of emergency, the company does not have a general right to access a parcel at any location, but where a specific Access Easement was requested and identified on Exhibit H, that is a valid means of access. Dakota Access asserts that the Board did not rule that Access Easements could not be obtained through the condemnation process where they had been specifically identified and justified.

6. Analysis

NILA's comments in response to the revised easements appear to suggest that the Board did not contemplate specifically-defined access easements. The Board does not agree. The Board contemplated that the company could access any easement area via the easement itself, by way of a specifically-defined access easement identified on an Exhibit H filing, or by separate agreement with the landowner.

The Board discussed these options on page 86 of the Order, referring to assertions and testimony from landowners and the company's witness that recognized specifically-defined access easements as a means for the company to access the easements. The Board did not intend to preclude specifically-defined

access easements as an option. What the Board intended to preclude was an unlimited right of access to easements across any other part of the property.

With respect to NILA's argument that the company does not need to "go under" for purposes of access, that language was included in the original easement and the Board did not require it to be changed.

In response to the Board's Order, Dakota Access filed revised easements that no longer contain the provisions that would have given the company a generic right of access over the entire parcel. The revised language complies with the Order by stating that except in case of emergency, the right of unimpeded entry and access is limited to the Pipeline Easement, any Temporary Construction Easement, (or Valve Easement or Access Easement, as applicable). The Board finds that the revised easements are in substantial compliance with the requirements of Ordering Clause No. 3(e) of the Order.

C. Fences, Gates, Keys

1. Background

Starting on page 88 of the Order, the Board discussed language in the Dakota Access condemnation easement requiring that if a landowner erects a fence across the Access Easement (if any) or Pipeline Easement, the owner must install a gate and supply the company with a key. The language also provided that Dakota Access must be permitted to install its own lock if it so chooses. NILA proposed alternative language providing that if a fence is in existence prior to the Pipeline Easement, Dakota Access must pay to install the gate; if the fence is installed after the Pipeline Easement is in place, the owner must pay for the gate.

The Board ruled that the landowner and Dakota Access should both have access to the pipeline easement area and the ability to open any gate installed across a permanent easement. The Board adopted NILA's proposed revision. (Order at 89.)

2. Dakota Access Compliance Filings

The revised easements filed by Dakota Access on March 16, 2016, show the following modifications to the language (in both the standard and valve easements) about fences, gates and keys:

vii. vi. If there is an existing fence across the Access Easement, if any, or Pipeline Easement, Dakota Access shall have the right, at its expense, to install a gate. If the gate is locked, Dakota Access must supply the owner or party in possession with a key. If the owner or party in possession erects any fences across the Access Easement, if any, or Pipeline Easement, the owner must install a gate, and if any gate across any Access Easement is locked, Grantor the owner must supply Dakota Access with a key. The owner shall allow Dakota Access to install its own lock if Dakota Access so chooses, provided that the method of locking the gates allows both parties to use its/his/her own key or lock to open the gate without further assistance of the other;

3. Staff Witness Report

The Staff Witness Report notes that the revised easements filed by Dakota Access do not contain the exact words of the NILA proposal regarding fences, gates, and keys. The report says that NILA's proposal and the language included in the revised easements are reasonably consistent in intent, with one difference. NILA's proposed language would have required that a gate be installed where there is an existing fence across an easement; the language submitted by Dakota Access would reserve the right to install a gate.

The report suggests that the language of the Order adopting the revision proposed by NILA appears to require that the NILA language be adopted verbatim. The report recommends that if the Board intended the company to use NILA's language verbatim, the Board should direct the company to use the specific language or explain why the alternative language is acceptable.

4. Dakota Access Reply

With respect to the revised language regarding fences, gates, and keys, Dakota Access suggests that the Staff Witness is overly concerned about use of the literal language proposed by NILA. Dakota Access states it is not clear in the Order whether the Board intended that certain suggestions from NILA be adopted verbatim or implemented in concept. Dakota Access states that even if the Board asks for further changes to this section of the revised easements, those changes would not be substantive and should not delay issuing the permit.

5. NILA's Comments

The only issue NILA raises on this topic is to object to the reference to "Access Easement" in the revised section on fences, gates, and keys.

6. Analysis

The Board agrees with the Staff Witness Report that the company's modified easement complies with the spirit and intent of the Order, even though the revised easement provisions do not use NILA's exact proposed language. NILA does not object to this provision in its March 28, 2016, filing.

The Board finds that the revised easement provisions on fences, gates, and keys are in substantial compliance with the requirements of Ordering Clause No. 3(e) of the Order.

D. Review and Approval of Future Plans

1. Background

Starting on page 89 of the Order, the Board discussed the company's proposal that it should have the right to review and approve a landowner's plans to do any of the following within the easement area(s) or in any location that could adversely affect the easement area(s): (1) Construct or install any temporary or permanent site improvements other than streets and roads; (2) Drill or operate a well; (3) Remove soil or change the grade or slope; (4) Impound surface water; or (5) Plant trees or landscaping.

NILA proposed that any plan approval rights should be limited to the 50-foot pipeline easement area and it should be clarified that Dakota Access shall not unreasonably withhold its approval. NILA also suggested that similar clarifications should be applied to Dakota Access's right to review any landowner plans to construct certain roads or to construct or alter water, sewer, or other utility lines.

The Board addressed this issue by requiring a revision to the condemnation easement limiting the company's access to the 50-foot permanent easement. The restrictions included by Dakota Access in the condemnation easement as described above are therefore only applicable to the 50-foot permanent easement. The Board also concluded this right of approval should be bilateral. Dakota Access should give the landowner the right to review and approve any future plans of Dakota Access to

make surface changes within the easement, which approval shall not be unreasonably withheld.

2. Dakota Access Compliance Filings

The revised easements filed by Dakota Access on March 16, 2016, show the following modifications to the language (in both the standard and valve easements) about approval of future plans:

~~vii-viii.~~ viii. The right to approve owner's plans to do any of the following within the ~~Easements or in any location that could reasonably be deemed to adversely affect the Easements~~ Pipeline Easement: (1) construct or permit the construction or installation of any temporary or permanent building or site improvements, other than streets and roads; (2) drill or operate any well; (3) remove soil or change the grade or slope; (4) impound surface water; or (5) plant trees or landscaping. Such approval shall not be unreasonably withheld;

ix. After the pipeline is constructed, owner shall have the right to approve Dakota Access' plans to make permanent surface changes to the Pipeline Easement area. Such approval shall not be unreasonably withheld;

~~viii.~~ x. The right to review and approve owner's plans to: (1) construct any and all streets and roadways, at any angle of not less than forty five (45) degrees to the pipeline, across the Pipeline Easement which do not damage, destroy or alter the operation of the pipeline and its appurtenant facilities and (2) construct and/or install water, sewer, gas, electric, cable TV, telephone or other utility lines across the Pipeline Easement at any angle of not less than forty five (45) degrees to the pipeline, provided that all of Dakota Access's required and applicable spacings, including depth separation limits and other protective requirements are met by owner. Such approval shall not be unreasonably withheld;

3. Staff Witness Report

The Staff Witness Report notes that the Order required the easements to be modified to include a landowner right to review future plans by the company to make surface changes. The Staff Witness concludes the revised easement provision is consistent with the Board's requirement.

4. Dakota Access Reply

Dakota Access does not address this issue in its Reply.

5. NILA Comments

NILA does not offer any comments on this issue.

6. Analysis

The revised easements filed by Dakota Access make the right of approval bilateral. Also, Dakota Access has made the appropriate revision to the easements to limit the review and approval of future plans to the Pipeline Easement. The Board finds that the modified easements are in substantial compliance with the requirements of Ordering Clause No. 3(e) of the Order.

E. Removal of Trees and Shrubbery

1. Background

Starting on page 90 of the Order, the Board explains that Dakota Access sought the right to trim or remove trees and shrubbery that, in the sole judgment of Dakota Access, may be necessary to prevent possible interference with any of its easement rights, even if those trees or shrubbery are located outside the easement area. The Board discussed NILA's objection that this right should be limited to the 50-foot permanent easement area.

The Board generally agreed, noting that one reason for a 50-foot-wide easement is to make it so that vegetation from outside the easement area will not affect the pipeline in its actual location. The Board also decided that the easement should contain language recognizing the obligation of Dakota Access to leave the

easement area in satisfactory condition after trimming or removing trees or shrubbery.

2. Dakota Access Compliance Filings

The revised easements filed by Dakota Access on March 16, 2016, show the following modifications to the language (in both the Standard and Valve Easements) about removal of trees and shrubbery:

~~ix.~~ xi. The right to trim or cut down or eliminate trees or shrubbery within the ~~Easements or adjacent to the Easements to the extent~~Pipeline Easement in the sole judgment of Dakota Access as may be necessary to prevent possible interference with its easement rights, including the operation of the pipeline and to remove possible hazards thereto, and the right to remove or prevent the construction of any and all buildings, structures, reservoirs or other obstructions on the Easements which, in the sole judgment of Dakota Access, may endanger or interfere with the efficiency, safety, or convenient operation of the pipeline and appurtenant facilities or use of the Easements; Dakota Access shall leave the surface of the Pipeline Easement area in satisfactory condition after trimming or removing trees or shrubbery

3. Staff Witness Report

The Staff Witness concludes that the revised easement provisions are consistent with the Board's Order.

4. NILA Comments

NILA states that the Board's ruling clearly required that the condemnation easement rights concerning the removal of trees and shrubbery be limited to the 50-foot pipeline easement area. NILA observes that Section xi of the Revised Standard Easement uses the term "Easements" in two locations. NILA notes that the original version of the condemnation easement defined "Easements" as an area greater than the 50-foot pipeline easement. NILA urges the Board to require the company to limit Section xi of the condemnation easement to apply only to the "Pipeline Easement."

5. Dakota Access Reply

Dakota Access does not agree with NILA's suggestion that the Board should require the company to limit section xi of the revised condemnation easements concerning removal of trees and shrubbery to apply only to the Pipeline Easement area. Dakota Access contends NILA argues that the company has the right to clear trees and shrubs in the 50-foot permanent easement, but not in the temporary construction easement. Dakota Access argues this position is contrary to NILA's stated interests in safety and actually serves to impede construction. Dakota Access asks the Board to reject NILA's argument and clarify that the company has the right to clear trees and shrubbery in both the permanent easement and the temporary construction easement.

6. Analysis

The language of the Board's Order could be read to limit Dakota Access' right to clear trees and shrubbery to the 50-foot permanent easement area alone. This is because the focus of the analysis was on a somewhat different issue: Whether Dakota Access should be permitted to clear trees and shrubbery *outside* of the easement area if, in the opinion of Dakota Access, the trees or shrubbery could have an adverse effect inside the easement area. However, the intent of the Order was not to limit Dakota Access to tree clearing in the 50-foot Pipeline Easement area alone; the Temporary Construction Easements, for example, would not be of much use if the company were prohibited from clearing them for construction purposes. The Board's intent was to require Dakota Access to eliminate language that would have given the company the right to clear vegetation outside of the approved

easement areas, not to limit all vegetation management to the 50-foot Permanent Easement area. To the extent there is any ambiguity in the Order on this point, the Board clarifies that the company may condemn the right to clear trees and shrubbery in all areas subject to an easement, whether it is a Permanent Easement, Temporary Construction Easement, Valve Easement, or Access Easement.

With that understanding, the Board finds that the revised condemnation easements filed by Dakota Access are not consistent with the intent of the Order on this issue. To align the condemnation easements with the Board's intent, Dakota Access shall replace the provision on removal of trees and shrubbery that appears in the revised condemnation easements with a provision that reads as follows:

The right to trim or cut down or eliminate trees or shrubbery within the Easements in the sole judgment of Dakota Access as may be necessary to prevent possible interference with its easement rights, including the operation of the pipeline and to remove possible hazards thereto, and the right to remove or prevent the construction of any and all buildings, structures, reservoirs or other obstructions on the Easements which, in the sole judgment of Dakota Access, may endanger or interfere with the efficiency, safety, or convenient operation of the pipeline and appurtenant facilities or use of the Easements; Dakota Access shall leave the surface of the Easement area in satisfactory condition after trimming or removing trees or shrubbery.

Because this is a specific, ministerial change using specified language, it is not necessary for the Board to review and approve the revised condemnation easements, but Dakota Access should file the documents with the Board within seven days of the date of this order to provide a clear record. With this change, the Board finds that the revised easement provisions on vegetation management will be in substantial compliance with the requirements of Ordering Clause No. 3(e) of the Order.

VI. Statement Accepting Terms and Conditions

1. Background

The Order requires Dakota Access to file a “statement accepting the terms and conditions the Board has determined to be just and proper for this permit, as described in this order.” (Order at 154).

2. Dakota Access

On March 16, 2016, Dakota Access filed a “Letter Accepting Conditions.” The letter states that Dakota Access accepts the permit subject to the conditions in the Order with two clarifications that the company believes to be necessary and reasonable. First, Dakota Access states that it may ask the Board to clarify the conditions or grant relief from one or more conditions as necessary. Second, Dakota Access states it should not be disadvantaged in any appeals or challenges to the pipeline permit initiated by other parties. Dakota Access therefore proposes to reserve the right to make all available arguments, even if such arguments could call into question one or more of the conditions and terms.

3. Staff Witness Report

The staff witness reviewed the compliance filings. The staff witness notes the two “clarifications” sought by Dakota Access and finds the statement to otherwise satisfy the requirements of the Board’s Order if those clarifications are acceptable to the Board.

4. NILA

NILA filed comments on the filings on March 28, 2016. NILA objects to Dakota Access’s clarifications. First, it states that if Dakota Access has any questions about

the terms or conditions in the Order, it should ask them now, not at some indeterminate point in the future. Second, NILA argues that the second clarification would allow Dakota Access to receive the permit now, then argue in court that the conditions and terms should be stripped away from the permit. NILA proposes that the Board state that the permit is revoked if the conditions are stripped away or modified by a future court ruling.

5. Analysis

The first condition or clarification sought by Dakota Access, that the Board may clarify or grant relief from one or more conditions, is reasonable. The terms and conditions are being imposed by the Board, and if an ambiguity or unanticipated condition arises later on that would require clarification or a modification of a term or condition in the order, Dakota Access will need to ask the Board for guidance or a modification of the term or condition.

The second condition, that Dakota Access should be permitted to make arguments on appeal even if they call into question one or more of the conditions or terms, is also acceptable with the understanding that the Board's Order made clear that all of the terms and conditions were necessary to find that the proposed pipeline promotes the public convenience and necessity. Dakota Access may need to make such arguments as part of the judicial review process. In the event a court eliminates or modifies a term or condition, however, the Board will ask the Court to remand the case to the Board to consider whether the pipeline still promotes the public convenience and necessity given such changes. Given that understanding, the

statement filed by Dakota Access is in substantial compliance with Ordering Clause No. 3(f) of the Order.

VII. Exhibit H Compliance Filing

On April 5, 2016, Dakota Access filed Revised Exhibit H documents reflecting modifications ordered by the Board on the parcels identified in Ordering Clause No. 11 of the Order. Those changes can be described as follows.

1. Johnson Parcel

On Parcel H-BO-08 (IA-BO-028), belonging to LaVerne Johnson, the Board did not revise the route of the pipeline but instead required that Dakota Access bore the line under a concrete drainage fixture already installed on the property. Doing so will require additional temporary workspace for additional equipment and for soil storage. Dakota Access said that Johnson did not allow timely survey access, but the company was able to prepare and file revised documents describing the additional area required without an additional survey.

On April 7, 2016, Johnson filed a "Notice of Cooperation" asserting that Johnson had allowed timely survey access but because it appears the survey was not actually needed, the matter is closed.

2. Lenhart Parcel

On Parcel No. H-BU-08 (IA-BU-073), belonging to the Lenharts, the Board ordered Dakota Access to revise its Exhibit H documents in one of two ways to accommodate the likelihood of new construction on the property: Either move the pipeline 960 feet to the north (allowing for the new construction and for the use of dirt from the northern portion of the property) or move the pipeline 500 feet to the north

and compensate the Lenharts for the excess cost of hauling dirt from another location. The revised Exhibit H documents filed by Dakota Access reflect the second option.

Also on April 5, 2016, the Lenharts filed a “Response to Board Order and Notice of Cooperation” saying that they have had the opportunity to review the revised survey and concur that the survey satisfies the requirements of the Board’s Order with respect to their property.

On April 8, 2016, the Lenharts filed a revised response providing an update regarding the ongoing negotiations. In the April 8 filing, the Lenharts also noted that Dakota Access, in its April 5 filing, said that if the company is unable to negotiate voluntary easement revisions on adjacent parcels, it will request the right to use the original route. The Lenharts object to that proposal, arguing that Dakota Access has failed to prove the original route is necessary and failed to provide adequate information regarding possible alternative routes.

It appears the parties are continuing to negotiate and the Board will allow those negotiations to continue with the understanding that any party to these negotiations may approach the Board at any time for resolution of the matter.

3. Smith Parcels

On Parcel Nos. H-CH-12 (IA-CH-081), H-CH-015 (IA-CH-080), and H-CH-016 (IA-CH-082), belonging to the Smiths, the Board ordered Dakota Access to revise its Exhibit H documents to reflect a revised route addressed at the hearing in this matter that eliminated the need to cross another parcel, identified as H-CH-24 (IA-CH-083) and reduced the impact of the pipeline on H-CH-015 (IA-CH-080). In its April 5,

2016, filing, Dakota Access says that to date the Smiths have not granted survey permission or agreed to a revised route. Dakota Access says that on the revised Exhibit H documents it has complied with the Board's Order by avoiding H-CH-24 altogether and by reducing the impact on H-CH-15 as much as it can be without compromising safety.

On April 8, 2016, the Smiths filed a "Response to Board Order and Notice of Cooperation (Smith)" saying that the new route avoiding Parcel No. H-CH-024 is acceptable and Dakota Access may enter on the property to survey and inspect. With respect to the route modifications on Parcels H-CH-015 and H-CH-012, however, William Smith, owner of H-CH-015, indicates that the route may be returned to the original route if the Marie Smith Revocable Trust (owner of H-CH-012) requires.

The Board finds that the route revisions that were made to avoid Parcel No. H-CH-024 are acceptable to the parties. It appears the route revisions affecting H-CH-012 and H-CH-015 are still subject to negotiation. The Board will allow those negotiations to continue, subject to the understanding that any party may, at any time, present the matter to the Board for a resolution.

4. Double D Land & Investments, LLC, Parcel

On Parcel No. H-SI-18 (IA-SI-073), belonging to Double D Land & Investments, LLC, the Board granted the right of eminent domain to condemn an easement along the proposed route but did not grant that right with respect to a proposed valve location. Dakota Access's revised Exhibit H documents reflect the removal of the valve from this parcel.

5. Feldstein Parcel

On Parcel No. H-JA-02, belonging to Feldstein, the Board granted Dakota Access the right of eminent domain but required that the easements explicitly incorporate the vegetation management policies that allow perennial plants and shrubs up to 15 feet tall with trunks up to 3 inches in diameter at chest height. Dakota Access has filed a revised statement of easement rights for this parcel reflecting those policies.

6. Tweedy Parcel

On Parcel No. H-LE-28 (IA-LE-171), belonging to Tweedy, Dakota Access proposed to horizontally directionally drill under the entire length of the parcel, but the company still sought the right to cut a 30-foot path through the property over the pipeline route to enable, among other things, visual observation of the route. The Board denied that request, finding that removal of trees that provide roosting areas for several species of bats was not required; visual inspection on foot can take place without clearing a 30-foot path. Dakota Access has filed a revised statement of easement rights for this parcel removing the reference to clearing trees as required by the Board's Order but retaining language that would allow trimming of vegetation to ensure a passable path for visual inspection.

7. Dakota Access Reservation of Rights

In those cases where the pipeline route has been relocated, Dakota Access says that it is still negotiating revised voluntary easements on the adjacent parcels in some cases. Dakota Access submits that the filing of the revised Exhibit H documents satisfies the requirements of the Order, but the company indicates that if

it cannot secure necessary route modifications on adjacent properties it may have to return to the Board for additional relief as may be appropriate.

8. Analysis

The Board has reviewed the revised Exhibit H documents. While some of the revisions were not specifically contemplated or required by the Order, overall the revised documents are in substantial compliance with the requirements of the Order, with one exception. The Order did not state that Dakota Access could retain the right to trim vegetation on the Tweedy property. The Order denied Dakota Access the right to clear a path across this parcel. The Board anticipates that Dakota Access's inspectors can walk through an Iowa forest without having to clear out the existing vegetation. The statement of easement rights for parcel H-LE-28 must be re-filed with all vegetation trimming rights removed (except in the case of an emergency). Dakota Access shall file a second revised statement of easement rights in compliance with this requirement within seven days of the date of this order.

Dakota Access says that the Smiths have not granted survey permission or agreed to the revised route, the company has been able to file revised Exhibit H documents that satisfy the requirements of the Order by eliminating the crossing of Parcel No. H-CH-24 and reasonably minimizing the impact of the pipeline on Parcel No. H-CH-15. These revisions are facially consistent with the requirements of the Order.

The same can be said of each of these revised Exhibit H documents. However, the Board recognizes that with the exception of Johnson and the Lenharts, the affected landowners have not had the opportunity to state their views regarding

the revised documents. The Board will grant those landowners seven days from the date of this order to file comments on the revised Exhibit H documents and the Board will address any such comments in a future order.

Finally, the Board recognizes that implementing these route changes will, in some cases, require similar changes on adjoining properties. It is reasonable for Dakota Access to return to the Board for appropriate relief if the company is unable to negotiate adequate route revisions on the adjoining properties, at which time the Board can consider the specific facts and circumstances and order such relief as may be appropriate.

Subject to those understandings, the filing of a second revised statement of easement rights for Parcel No. H-LE-28, and the possible comments of the other landowners, the Board finds that the revised Exhibit H documents filed by Dakota Access on April 5, 2016, are in substantial compliance with the requirements of the Order.

VIII. Conclusion

The Board finds that Dakota Access has substantially complied with the requirements of the Board's "Final Decision and Order" issued in this docket on March 10, 2016, and that a hazardous liquid pipeline permit pursuant to Iowa Code chapter 479B should be issued to Dakota Access, LLC. The permit, identified as Permit No. N0042, will be issued concurrently with this order.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Pursuant to Iowa Code chapter 479B, the petition for a hazardous liquid pipeline filed by Dakota Access, LLC, will be issued concurrently with this order.
2. Pursuant to Iowa Code § 479B.13, Dakota Access, LLC, is vested with the right of eminent domain to the extent necessary and as prescribed and approved by the Board, as shown on the revised Exhibit H documents filed in the record of this case.
3. Within seven days of the date of this order, Dakota Access shall file for the record:
 - a. A final revised AIMP incorporating the ministerial changes described in this order;
 - b. A final description of the notice timeline incorporating the ministerial change described in this order;
 - c. A final set of condemnation easement descriptions incorporating the ministerial change described in this order;
 - d. A revised statement of easement rights for parcel H-LE-28 with all vegetation trimming rights removed (except in the case of an emergency); and
 - e. A list of the county inspector or inspectors for each county, including contact information (at a minimum, name, address, email address, and telephone number).

4. Those landowners who own property directly affected by the revised Exhibit H documents filed on April 5, 2016, may file comments on those documents within seven days of the date of this order if they have not filed comments already.

5. Dakota Access shall not commence construction of the pipeline (as described in the Introduction to this order) until it fulfills its commitments to file the permits, approvals, or other similar documentation from the U.S. Army Corps of Engineers and to file the final Stormwater Pollution Prevention Plan and Unanticipated Discoveries Plan.

6. For purposes of the preceding Ordering Clause No. 5, and pending the Board's final ruling in this docket on the question of what activities constitute "construction," Dakota Access may continue to engage in environmental staking and clearing trees and shrubbery with hand-held tools, but only on parcels where all of the following conditions are true:

- a. Dakota Access has a voluntary easement;
- b. Dakota Access has received permission from the landowner to engage in the described activities; and
- c. Dakota Access has given the county inspector and the landowner reasonable advance notice of the timing and location of the activities.

7. When Dakota Access makes any further compliance filings in this docket, including but not limited to future permits or authorizations and renewed insurance policies as required by Ordering Clause No. 3 of the "Final Decision and Order" issued March 10, 2016, the filings shall be submitted in the Board's electronic filing system (or future filing system) with a copy directly to the Board's General

Counsel. The public may comment on the filings within 15 days of the date of filing. Within 30 days of the date of filing, General Counsel shall submit a report to the Board analyzing the filing and any comments received.

8. Within 180 days after completion of the construction of the new pipeline, Dakota Access must file maps that accurately show the location of the pipeline as constructed. The map will be part of the record in this case and will represent the final route as authorized by the permit.

9. The Board retains subject matter jurisdiction of this docket for purposes of receiving and acting upon such additional filings as may be appropriate.

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 8th day of April 2016.