

**FILED WITH
Executive Secretary**

May 12, 2016

IOWA UTILITIES BOARD

HLP-2014-0001

EXHIBIT 2



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April 26, 2016

VIA EMAIL (letter only) and OVERNIGHT DELIVERY (letter and attachments)

Col. John Henderson
Commander, U.S. Army Corps of Engineers
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Lowry A. Crook, Principal Deputy Assistant
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Re: Dakota Access Pipeline

Dear Col. Henderson and Deputy Assistant Secretary Crook:

We are writing on behalf of the Standing Rock Sioux Tribe, who have authorized us to represent them in potential litigation concerning the permitting process for the Dakota Access Pipeline (“DAPL”). As you know, the pipeline crosses through ancestral Tribal land and in close proximity to the Tribe’s reservation, most notably at the crossing of Lake Oahe just yards upstream of the reservation boundary. The Tribe has serious concerns about the risks presented by this project, including impacts on cultural resources and risks to the Missouri River, which is of the utmost cultural and economic significance to the Tribe.

In recent correspondence, you stated that you anticipated making a decision on the Lake Oahe crossing component of the pipeline by May 1, 2016. We do not have any current information on the Corps’ anticipated schedule for issuing verifications under Nationwide Permit 12 for the remainder of the pipeline, but believe that this is likely imminent too. **We are asking you to postpone a decision with respect to both in order to consider additional information from the Tribe and others, and to rectify numerous shortcomings in the process.**

As described further below, the Tribe believes that the permitting process to date is not consistent with governing legal requirements, and that a May 1 decision to authorize the project to proceed would be unlawful and will lead to litigation. While we have laid out many of these issues in previous correspondence, we reiterate and amplify the Tribe’s concerns here.

A. The Lake Oahe Crossing Must be Evaluated as an Individual Permit under the Clean Water Act

As your staff have acknowledged, the portion of the pipeline that crosses under Lake Oahe crossing requires a Rivers and Harbors Act § 10 permit. *See* 33 C.F.R. § 322.3(a) (“For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.”). The Corps evidently believes that the CWA authorization for the crossing can be processed under Nationwide Permit (“NWP”) 12. This belief is mistaken—the crossing cannot lawfully be issued under NWP 12, and an individual permit is required for this component of the project.

Specifically, in order to “qualify” for NWP authorization, proposals must meet a number of general conditions. 77 Fed. Reg. 10184, 10282 (Feb. 21, 2012). This project does not comply with these conditions and, accordingly, does not “qualify” for NWP. *See also* 33 C.F.R. § 330.6(a)(2) (“If the [Army Corps] decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.”). Specifically, General Condition 7 states that no activity may be authorized under an NWP that is in “proximity” to public water supplies. *Id.* at 10283. As the Tribe and others have repeatedly emphasized, the crossing is in close proximity to the Tribe’s source of drinking water for a significant portion of the reservation community. The potential impact on drinking water for the Standing Rock and many other Tribes and communities has also been emphasized by the Environmental Protection Agency and the U.S. Department of Interior. *See* March 11, 2016 letter from Philip Strobel, EPA, to Brent Cossette, Army Corps Omaha District (seeking additional analysis of “potential impacts to drinking water and the Standing Rock Sioux Tribe”); March 29, 2016 letter from Lawrence Roberts, Asst. Secretary—Indian Affairs, U.S. Department of the Interior (“a spill could impact the waters that the Tribe and individual tribal members residing in that area rely upon for drinking and other purposes”).

Relatedly, General Condition 17 states that no activity authorized by an NWP may “impair tribal rights” including “reserved water rights.” 77 Fed. Reg. at 10283. DAPL is routed just upstream of the Tribe’s reservation boundary, where any oil spill would have devastating effects within the reservation. As the U.S. Department of Interior emphasized in its correspondence, the Reservation necessarily includes the protection of adequate water quality. *See* Roberts letter, *supra* (“When establishing the Standing Rock Sioux Tribe’s (Tribe) permanent homeland, the U.S. reserved waters of sufficient quantity and quality to serve the purposes of the Reservation. The Department holds more than 800,000 acres of land in trust for the Tribe that could be impacted by a leak or spill.”). The Lake Oahe crossing does not “qualify” for a nationwide permit because of the risks to Tribal resources protected by treaty.

The Tribe acknowledges that some Courts have held that the Corps is not required to “conduct a searching examination of every general condition for every verification request...” *Mobile Baykeeper v. U.S. Army Corps of Engineers*, 2014 WL 5307850 (S.D. Ala. 2014). Here, the Tribe is not asking for a “searching examination of every general condition.” Rather, there is abundant credible evidence before the Corps, including comments from a recognized sovereign Tribal government and from agencies with appropriate technical expertise, that the Lake Oahe crossing is not suited for an NWP due to its risks and impacts. Issuance of the verification without addressing this input is unlawful.

An NWP verification for the Lake Oahe crossing is inapplicable for another reason. Under the Corps’ regulations, a single project can only proceed under both an NWP and an individual permit where the “portions qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project.” 33 C.F.R. § 330.6(d). Section 408 authorizations are individual “permits” within the meaning of this regulation. *See id.*, § 320.2(e); §320.4 (general policies applicable to “all” Army permits). Plainly, no component of the pipeline has “independent utility” or the “ability to function” without the other components of the pipeline. The Corps appears to be proceeding with unlawful segmentation of the pipeline in violation of this regulation.

Accordingly, issuance of an NWP 12 verification for the Lake Oahe crossing is inconsistent with these and other General Conditions and would be a violation of federal law. An individual permit is required.

B. The Corps Has Not Complied with the National Historic Preservation Act

The Tribe's previous correspondence has outlined in detail the cultural and historic significance of the area to be affected by the pipeline on its ancestral lands, and the dismaying failure of the Corps to engage in meaningful consultation with the Tribe during the development of the proposal. The Corps' modest steps to rectify these past failures have come too late in the process to meaningfully shape the choice of alternatives, or to prevent the destruction of sites with great cultural and historical significance to the Tribe.

From the earliest stages of this project, the Tribe has sought to convey to you the historic and cultural significance of the area where the pipeline would be routed and the HDD construction would take place. It has also communicated its dismay at the complete lack of Tribal involvement as the route was selected, soil borings conducted, and the draft environmental assessment developed. These concerns were echoed by staff at the Advisory Council on Historic Preservation, who wrote in July of 2015 that they had never been properly notified of the undertaking, and again in February of this year, when they wrote that they had not been provided sufficient evidence that the Corps met § 106 requirements.

These fundamental concerns have never been rectified. While Corps staff came out to visit the site, these actions took place only *after* fundamental decisions had been made about the pipeline's routing without consulting the Tribe. Moreover, the Tribe has never been able to participate in the surveys that have been done on the HDD drilling site and pipeline access route. The sites near the HDD drilling area that the Tribe has expressed concern about—sites that Corps' archeologists have visited but not surveyed—have not been properly assessed for their eligibility in the National Register.¹ The area that will be affected by the Corps' decision contains numerous sites that either do or could warrant inclusion in the National Register of Historic Places, but that have not been properly evaluated yet. Once construction begins, the sites could be irrevocably damaged or lost.

Moreover, we continue to disagree about the scope of the Corps' § 106 review, which is unlawfully narrow. Under 36 C.F.R. § 800.16(d), the area of potential effects of a project includes all areas that "may directly *or indirectly* cause alterations in the character or use of historic properties." The ACHP observed that given the "unlikelihood that the pipeline could be constructed but for the issuance" of 209 NWP verifications, it should expand the scope of its review.² The Corps' regulations suggest the same. Under App. C to 33 C.F.R. § 325, the "permit area" to be evaluated includes the nonjurisdictional

¹ The visit from the Corps archeologists was not an actual Class III survey but rather a "walk through" to help them in getting a preliminary sense of the site. In late March, long after the publication of the draft EA and selection of alternatives, the Tribe was given an opportunity to participate in limited surveys. Consistent with its cultural practice, and in light of serious unaddressed problems with the surveys, the THPO declined to participate in the limited surveys but expressed its willingness to participate in surveys of appropriate scope.

² We further question whether sufficient verification requests have been submitted at all. The pipeline crosses far more than 209 waterways and wetlands in its nearly 1200 miles. PCNs are required wherever the proposed project "may have the potential to cause effects to any" eligible historic properties. 77 Fed Reg. at 10284. DAPL's cultural resource surveys have taken place without input from the Tribe. In the Tribe's experience, historically and culturally significant properties are found routinely in the Plains region, which were heavily travelled prior to colonization. We expect to see far more PCNs for a project of this magnitude.

components of private projects where three conditions are met: a) the activity would not occur “but for the authorization of the work” under Corps jurisdiction; b) the activity is “integrally related” to the work being authorized under the Corps jurisdiction; and c) the activity must be “directly associated” with the work to be authorized. *See also id.* at § 2(a) (“The district engineer will take into account the effects, if any, of proposed undertakings *both within and beyond* the waters of the U.S.”) (emphasis added).

DAPL plainly meets all three of these criteria. The nearly 1200-mile pipeline could not be built without Corps authorization to cross major systems like the Missouri River mainstem: there is simply no feasible design or route that could avoid Corps-regulated waters. The remainder of the pipeline is unquestionably “integrally related” and “directly associated” to the components of the pipeline under Corps jurisdiction, as one part simply cannot exist without the other.³ The Corps’ insistence that the § 106 review is limited to the jurisdictional areas only is inconsistent with its own regulations.

In sum, the Corps has mishandled virtually every one of the steps required by § 106.⁴ First, it erroneously defined the area for potential effects by circumscribing § 106 review to only the Corps’ jurisdictional areas, as described above, rather than all areas directly and indirectly affected by its decision. Second, it failed to timely initiate consultation with the Tribe, in violation of the regulations which call for initiation of consultation at the earliest time. 36 C.F.R. § 800.2(c). As a result, critical decisions about the site and routing for the project had already been made prior to any consultation with the Tribe. Third, it has failed to properly identify historic properties, even within its limited scope of review. As the Tribe has repeatedly observed, there are a number of eligible and potentially eligible sites at the Missouri River HDD site on which the Tribe has not been properly consulted and its participation has been incomplete. Of course, sites outside the Corps’ unlawfully truncated scope of review have not been properly assessed at all. The Corps cannot lawfully approve the HDD crossing and NWP 12 verifications because it has not taken the steps required by the § 106 consultation process.

C. The Draft EA Fails to Assess the Risks of Oil Spills and Leaks, as Required by NEPA

Even if the Corps could lawfully authorize the Lake Oahe crossing under the CWA under an NWP verification—and, for the reasons discussed above, it cannot—issuance of a § 408 permit and real estate easement to cross federal lands (which is not subject to NWP authorization) is a major federal action triggering NEPA. That is why the Corps has issued a draft environmental assessment (“EA”) for the Lake Oahe crossing. Regardless of the nature of the permit, that EA must still meet the requirements of NEPA, and in this regard its efforts to date fall notably short. Specifically, despite repeated concerns about the risk of oil spills and leaks being raised by the Tribe, other federal agencies, and the public, the existing documentation contains virtually no analysis of these risks or their consequences. This failure violates NEPA if not rectified in the final NEPA documentation and decision.

³ For this reason, the Corps’ illustration of a linear crossing of jurisdictional waters provided in Appendix C is inapposite here. Whatever the truth of the statement that linear projects “almost always can be undertaken without Corps authorizations,” it is plainly not true of *this* pipeline. A pipeline that crosses 1200 miles in four states cannot be built without significant involvement of the Corps.

⁴ The Tribe has received a copy of the Corps’ letter, dated April 22, 2016, documenting its finding that “no historic properties” are affected. The letter will be the subject of objection and additional documentation from the THPO in the near future. For purposes of this letter, please note that the § 106 process is not complete until the 30-day period of objection on this finding has passed, 36 C.F.R. § 800.4(d)(1), and no permit may be issued until the § 106 process is complete. *Id.*, § 800.1(c).

Instead of analyzing the risk of spills or leaks, the EA simply confirms that the pipeline will comply with all applicable regulations. See Draft EA at 71 (“the Project would be designed to meet or exceed the applicable federal regulations as detailed in Sec 3.10-Reliability and Safety. Therefore, the potential cumulative impacts on water resources and aquatic resources resulting from spills would be minor...”). But an agency can’t avoid consideration of impacts simply by declaring that a project will meet other requirements of law—if they could, only projects that violated other legal requirements would need to be analyzed. That is plainly not the law. See *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d. 1109, 1123 (D.C. 1971); *S. Fork Band Council of W. Shoshone v. United States DOI*, 588 F.3d 718, 726 (9th Cir. 2009); *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004).

Although the draft EA contains a number of attachments that should have assessed spill risk, none actually do so. For example, the document labeled “Spill Containment, Countermeasures, and Containment Plan” only addresses procedures to address spills of hazardous materials during *construction* of the pipeline—not the critical risk of oil leaks and spills during the *operation* of the project. See App. A to Draft EA. Similarly, the “Geotechnical Report” appended as Appendix D to the EA addresses the potential risks of accidents during the process of installing the pipeline—it contains zero analysis of whether the operation of the pipeline under the bed of the Missouri River, over decades, would be safe. Without any such detailed analysis, it is impossible for the Corps to conclude that the DAPL crossing will have insignificant impacts.⁵

Other similarly sized pipelines have done the kind of analysis of the risk of leaks and spills (and the consequences of such events) that is entirely absent here. For example, in evaluating the Keystone XL pipeline (which was shorter in length than DAPL but had a somewhat higher maximum capacity), the State Department prepared an analysis of both risk and environmental consequences of pipeline spills as part of the NEPA process. See Ex. A. That assessment concluded that 2.2 pipeline spills could be expected every ten years of operations. *Id.* at 3-2. The study further concluded that most pipeline spills would result in significant exceedances of benzene standards in drinking water supplies—even in major river systems like the Missouri River. *Id.* at 4-9.⁶ Another pipeline that will start in the North Dakota oil fields is undergoing an EIS process in Wisconsin. That document also looks closely at both the risks and consequences of spills and leaks. See Ex. B.

While the Keystone XL EIS analysis showed considerable risk of leaks and spills, it has been heavily criticized as incomplete and inaccurate. In one expert analysis, the author used PHMSA reporting to conclude that the actual likelihood of spills over the 875-mile Keystone pipeline would be over 18 spills over 10 years, with 1.2 “large” (i.e., over 1000 barrels) spills expected. Ex C. The analysis also

⁵ To the extent that the Corps anticipates that these documents will be developed in the future, that also is not sufficient to comply with NEPA. See *S. Fork Band Council of W. Shoshone* at 726; *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734-35 (9th Cir. 2001).

⁶ The benzene drinking water standard is .005 parts per million (“ppm”). According to the analysis, even a “small” spill in a “high flow stream” (which would include the Missouri, also crossed by Keystone XL) would result in benzene concentrations above this limit, whereas a large spill would have very high benzene concentrations. *Id.* The analysis also discussed Keystone’s pipeline safety program and its procedures to reduce risks. None of this analysis is available for DAPL, however.

noted the long-recognized problem of underreporting of pipeline spills, concluding that the real risks were likely to be significantly higher than what one would conclude from the reported data. *Id.* at 5.

In deciding that the Keystone XL pipeline was not in the “national interest,” the Secretary of State cited PHMSA data that reported 1,692 pipeline incidents in ten years between 2002 and 2012. Ex. D at 13. The decision also identified the large number of groundwater wells and potential outcomes if groundwater were contaminated by spill leaks. *Id.* at 14. The decision highlights the importance of a full NEPA analysis—understanding the risks and consequences is critical to an informed decision on the Corps permits for DAPL.

History demonstrates again and again that the risk of spills from pipelines is real. Despite the well-recognized problem of underreporting, PHMSA statistics are sobering. During the 20 years from 1996 to 2015, a “significant” crude oil pipeline spill occurred 1188 times, or an average of 57 oil spills per year. Ex. E. The average amount of oil spilled from pipelines in these events was 47,576 barrels, and the cost of the spills averaged \$131 million per year. Notably, the PHMSA data only cover “significant” incidents, defined as spills involving either a fatality or injury requiring in-patient hospitalization; \$50,000 or more in total costs (measured in 1984 dollars); highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; or liquid releases resulting in an unintentional fire or explosion. The data of course do not account for smaller spills. In 2013, the *Guardian* newspaper compiled state agency data to report that 300 smaller spills had occurred in North Dakota in the previous two years, almost none of which had been reported to the public. See Ex. I.

Similarly, an evaluation prepared for a National Energy Board proceeding in Canada revealed that the TransMountain pipeline had experienced 81 spills between 1961 and 2013, or an average annual rate of 1.54 spills per year. Ex. F. Although the amount of oil spilled appears small as a percentage of the total pipeline volume, the overall volume of oil spilled was enormous: over 4.5 million liters (nearly 1.2 million gallons). *Id.* at 21. The study revealed that spills can occur due to numerous unpredictable actors, including human error, natural events like landslides, and equipment malfunction. Another expert evaluation explicitly criticized the “Supervisory Control and Data Acquisition” (“SCADA”) and “Inline Evaluation” pipeline safety systems proposed for an expansion of that pipeline. Ex. G. The same systems are proposed to be used on DAPL.

The DAPL promises a “state of the art” system that can detect leaks “down to 1 percent or better of the pipeline flow rate within a time span of approximately 1 hour or less.” But that is neither “state of the art,” nor does it avoid potentially significant impacts. A leak of, say, 0.2% of the pipeline flow—likely undetectable by this system—would mean over 1,140 barrels (or 47,880 gallons) of crude *per day* being spilled without detection. The proposed remote sensor system is not in any respect “state of the art” but rather the same approach that has repeatedly failed in other pipelines, including catastrophic pipeline oil spills like the ones in the Kalamazoo and Yellowstone Rivers. One study discussed the true state-of-the-art technology for leak detection, including external sensor systems, which are not proposed for any section of the pipeline. See Ex. H, at App. 4. External sensors are more costly than conventional controls like the ones proposed for DAPL.

In fact, a 2012 Inside ClimateNews evaluation of PHMSA data showed that only 5% of pipeline spills between 2002 and 2012 were detected via remote sensors. Ex. J. Instead, the general public reported nearly a quarter of them after seeing oil on the ground or water, and pipeline staff reported the rest. *Id.* The study offered ample reason to be skeptical of DAPL’s claim to be able to detect pipeline ruptures within “1 to 3 minutes.” EA at 66. For example, even though the proponent of the Enbridge

pipeline claimed that it could detect ruptures within 8 minutes, the actual rupture at the Kalamazoo River took 17 hours to detect. Inside ClimateNews, *supra*. See also Ex. G, *supra*, at 9 (“In fact, Accufacts, after investigating many pipeline ruptures spanning almost 40 years, cannot identify any pipeline rupture where the rupture was properly identified by control room operators within 10 minutes.”). The National Transportation Safety Board analysis for the massive Kalamazoo pipeline spill, the cleanup of which has cost over \$800 billion and remains incomplete, cited “pervasive organizational failures” and “weak federal regulation” for the spill. Ex. K.

Just within the last month, a major leak at the relatively new Keystone pipeline in South Dakota highlighted these risks. The pipeline was commissioned in 2010 with “a number of advanced leak detection technologies.” Ex. L. Even so, 35 leaks occurred during its *first year* of operations. The recent leak, of an estimated 16,800 gallons of crude oil, was not uncovered by the pipeline’s leak detection system but was reported by the landowner. *Id.*

The Tribe is in the process of retaining experts to review the EA and other materials to better assess the safety of the HDD process and site for the pipeline, and provide that input to the Corps. We believe that this information is essential to an informed decision under federal law. We ask that you hold open the record until such information is available, which should be sometime in early to mid-May.

In sum, the Corps cannot determine that the DAPL presents no significant environmental risks by simply relying on existing federal regulation and the operator’s assurances that risks are low. The report highlights the need for significant oversight and analysis before authorizing new pipeline projects that threaten critical treaty-protected resources and drinking water. Such analysis is missing here, rendering the EA invalid.

One final note regarding the Corps’ evaluation under NEPA is warranted. The Corps’ policies require the Corps to look broadly at the public interest affected by the permit request, including the benefits and costs of the project. See 33 C.F.R. § 320.4 (general policies for evaluating permit applications); 320.2 (§ 408 authorization are “permits”). We understand that the Corps’ position is that its authorities are sufficiently limited over the pipeline that it has no obligation to review the environmental impacts and risks of the pipeline as a whole, but only the segments that cross jurisdictional waters. While we do not agree, we also note that the Corps has little compunction about touting the *benefits* of the pipeline as a whole. For example, in its February 25, 2016 letter to Chairman Archambault, the Corps discussed the \$3.78 billion investment from pipeline construction and the economic, employment, and tax benefits it would allegedly bring. Whatever the truth of these statements, the law doesn’t allow the Corps to have it both ways. If its jurisdiction is limited to the tiny segments of the pipeline crossing jurisdictional waters, then it should limit its review of the benefits of the project to those segments. If it wishes to tout the benefits of the pipeline as a whole, then the law requires a fair comparison of the costs

and risks of that pipeline as a whole. The Corps' apples-to-oranges comparison of risks to benefits, if embodied in the final decision document, would violate NEPA.⁷

D. The Corps is Segmenting "Connected Actions" in Violation of NEPA

It is well settled that federal agencies cannot segment different components of a single project into multiple components for individual review. But that is precisely what is happening here with respect to the federal crossings in North Dakota, the grasslands easements in North and South Dakota, and the § 408 levee crossing in Illinois. Three different components of a single pipeline project are being processed separately under three different EAs. We incorporate by reference the Sierra Club's March 21, 2016 comment letter on this issue. At a minimum, these three connected actions must be evaluated in a single NEPA document, including a comprehensive analysis of cumulative and indirect effects.

E. Conclusion

We are aware that the proponent of DAPL is staging equipment to begin construction in the next few weeks, on the assumption that all permits will be granted in the near future and work can commence immediately thereafter. But the proponent's preferred timeline is not the determining factor here, and you have previously affirmed to us that it will not drive the Corps' process. New information on pipeline leaks—like the significant leak at the Keystone pipeline in South Dakota just a few weeks ago—continue to reveal the shortcomings of our pipeline safety and permitting system. The continued collapse of the Bakken oil industry, and construction of other pipelines in the area, raise questions about the claimed urgent need for the project. And a proper oil spill risk analysis or § 106 consultation could potentially change the location of DAPL or construction and mitigation requirements, either of which, in turn, could affect the decision to proceed with the project at all. We ask you to hold off on issuing any permits or verifications for the project until the above-discussed shortcomings have been fully addressed.

Please do not hesitate to call one of us at (206) 343-7340 to discuss this matter further.

Sincerely,

A black rectangular redaction box covering the signature of the sender.

Jan E. Hasselman
Stephanie Tsosie

Enclosures

⁷ Equally mystifying is the Corps' assertion that DAPL "will not have a significant impact on the nation's reliance on fossil fuels because the project will not increase crude oil production." There is zero support in the letter, or anywhere in the record, for this surprising claim. Without a careful analysis of the market economics, the impact on crude production is unknowable. In the Keystone XL EIS, for example, the State Department provided a detailed look at the question and found that in some price scenarios, construction of the pipeline would increase the production of fossil fuels. Secretary Kerry weighed this potential heavily in deciding that the project was not in the public interest. *Ex. D, supra*. In our view, investment of nearly \$4 billion in infrastructure for the transportation of fossil fuels all but guarantees their continued production of fossil fuels, and their transportation through Tribal lands, for decades.

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April 26, 2016
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