STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

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

POST-HEARING BRIEF OF SIERRA CLUB IOWA CHAPTER

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INTRODUCTION

On January 20, 2015, Dakota Access LLC filed a petition for a permit to construct a hazardous liquid pipeline through Iowa, pursuant to Chapter 479B of the Iowa Code. The proposed pipeline would carry crude oil from the Bakken Region of North Dakota to a terminal in Patoka, Illinois, and then on to refineries in Nederland, Texas, according to public announcements made by Dakota Access in 2014 (Sierra Club Hrg. Ex. 24, 25).

Section 479B.1 of the Iowa Code states:

> It is the purpose of the general assembly in enacting this law to grant the utilities board the 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 or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary. (emphasis added).

Section 479B.9 then says, in part, "a permit shall not be granted to a pipeline company unless the board determines that the proposed pipeline will promote public convenience and necessity." (emphasis added).

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

A. Public Convenience and Necessity

As noted above, the Board cannot grant a permit to Dakota Access unless Dakota Access carries its burden to show that

the proposed pipeline would promote public convenience and necessity. The concept of public convenience and necessity, especially in the context of this case, is not well-defined.

The only Iowa case that Sierra Club could find that gives any hint of what public convenience and necessity means is S.E. Iowa Coop. Elec. Assn. v. IUB, 633 N.W.2d 814 (Iowa 2001). In that case the City of Mt. Pleasant decided to discontinue buying power through the coop and to instead buy power directly from an investor-owned utility. The Iowa Supreme Court held that in determining public convenience and necessity for the transmission of electricity the issues were whether the new arrangement for power to Mt. Pleasant was necessary to serve a public use and whether it resulted in cost savings to the public served.

Although there are obvious factual distinctions between the S.E. Iowa Coop. case and the case before the Board here, it is clear that public convenience and necessity involves directly serving the general public. As will be discussed in more detail in the following sections of this Brief, the Dakota Access pipeline will not directly serve the general public, instead serving Dakota Access and the oil companies that want to transport the oil.

The proposed project must also obviously be necessary to be a necessity. According to Webster’s Desk Dictionary

"necessary" means "positively needed: indispensable." Clearly, the proposed pipeline does not meet this definition because there are already other pipelines and rail shipping oil from the Bakken region.

Because the usage of the term "public convenience and necessity" in Chapter 479B is unclear, it is instructive to examine where the term came from. A certificate of public convenience and necessity came into existence in the nineteenth century to ensure that public service companies provided reliable service to the public at fair prices. W. K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Columbia L. Rev. 426 (1979). The primary focus was on preventing competition that would dilute the services offered to the public.

That article describes five rationales that have been used to justify the purpose of a certificate of public convenience and necessity:

1. Prevention of "wasteful duplication" of physical facilities;
2. Prevention of "ruinous competition" among public service enterprises;

3. Preservation of service to marginal customers, so a new company entering the field would not skim off the most profitable customers;
4. Protection of investments and a favorable investment climate in public service industries;
5. Protection of the community against social costs (externalities), e.g., environmental damage or misuse of eminent domain.

Id. at 428.

Over time the term has been maintained but has probably lost any real meaning as it has been applied in contexts divergent from its original application.

Indeed, in a Texas case involving a mobile home transport business, the Texas Court of Appeals said:

> The expression "convenience and necessity" is simply a conclusory symbol. It declares the Commission's final decision on whether the public benefit derived from the proposed motor-carrier service justifies granting the authority requested by the applicant.
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> Notwithstanding the employment of the two words "convenience" and "necessity," the symbol essentially represents the unitary idea referred to above – a decision on whether the resulting public benefit justifies granting the authority.

Professional Mobile Home Transport v. Railroad Comm. of Texas, 733 S.W.2d 892 (Tx. App. 1987).

The Jones article cited above also makes the point that in a broader application of public convenience and necessity, social losses involving externalities, such as environmental damage and eminent domain, should be considered. W. K. Jones, supra, at 501, 511.

A Louisiana case, Louisiana Tank Truck Carriers v. La. PSC, 549 So.2d 850 (La. 1989), made the point that an applicant for a certificate of public convenience and necessity must do more than merely show that the proposed operation is in accordance with public convenience and necessity, but must show clearly that the operation will materially promote public convenience and necessity. In this light, it is significant that Iowa Code § 479B.9 uses the term "promote" when referencing public convenience and necessity. The Iowa Legislature used that term to express its intent that a hazardous liquid pipeline should not be permitted as a matter of course.

All of this is not to say that an interstate hazardous liquid pipeline could never be permitted in Iowa. But it is clear that an interstate pipeline company carries a heavy burden to show public convenience and necessity for the pipeline.

Nor is it sufficient for the pipeline company to assert that there is some benefit to entities outside of Iowa or in

other parts of the world. A comparison between Chapters 478 and 479B of the Iowa Code is instructive.

In Chapter 478, with respect to electric transmission lines, when referring to the public interest, § 478.3(3) states that the term "public" is not limited to consumers in Iowa. However, no such provision exists in Chapter 479B, when referring to public convenience and necessity. The Iowa Supreme Court has repeatedly said that when the legislature shows in one statute that it knows how to express its intent in that statute, but does not express similar intent in a similar statute, it means to express a different intent. See, e.g., Sanon v. City of Pella, 865 N.W.2d 506 (Iowa 2015); Star Equip. Ltd. v. State, 843 N.W.2d 446 (Iowa 2014). The conclusion, therefore, is that the legislature intended for the Board to consider benefits to consumers outside of Iowa in transmission line cases, but not in hazardous liquid pipeline cases. In other words, if the legislature had wanted alleged benefits of a hazardous liquid pipeline to entities outside of Iowa to be considered, it would have said so, just as it did with respect to transmission lines.

In sum, then, a clear definition of public convenience and necessity is elusive. It is apparent, however, that the term encompasses all of the possible costs and benefits surrounding a project and the balance between the two.

The issues set forth by the Board in its Outline of Issues for Briefing adequately and accurately describe the scope of public convenience and necessity in this case. Those issues will be addressed in detail in the following sections of this Brief.

In summary, Dakota Access has not shown that their project will promote public convenience. At most, it provides convenience for Dakota Access and their shippers.

In his direct testimony (Dakota Access Ex. DRD Direct, p. 6-7), Damon Rahbar-Daniels testified:

> I want to emphasize that the single most important fact supporting the need for the Project is that we know the decision of the market: as a result of the open seasons that have been conducted, shippers have committed to long-term transportation and deficiency contracts for committed transportation service on the Dakota Access Pipeline. Basically, a transportation and deficiency contract is one under which the shipper agrees to pay the carrier for the availability of transportation service, even during periods when that transportation service is not actually utilized by the shipper. Thus, these shippers have made substantial financial commitments on a long-term basis, to receive transportation service on Dakota Access' system at the current system capacity of approximately 450,000 bpd.

That statement clearly does not describe public convenience and necessity. When Dakota Access and the shippers entered into their contractual commitments before the parties had any idea whether all permits would be granted, they took the risk and should not now be able to use that risk as the basis for an allegation of public convenience and necessity.

Further, it becomes even more obvious that this is not a public convenience when you consider that the petition, testimony, and evidence were merely marketing pitches for the project. This includes Joey Mahmoud's mantra of how many landowners had signed easements, inferring that landowners who signed easements supported the project, and speaking of those who did not sign easements as not negotiating in good faith. It also includes several witnesses who would not answer the questions, but instead continued the sales pitch, including Mr. Daniels and Mr. Frey. The direct testimony was page after page of marketing hype. It became obvious when Mr. Frey was on the stand and could not respond to cross examination of his direct testimony, it was as if he had copied someone else's homework as his direct testimony.

Even Dakota Access witness Guy Caruso indicated that the purpose of the pipeline was to provide alternate shipping options for the owners of the oil (Hrg. Tr. P. 201). That also fails the criteria for public convenience and necessity.

It is clear that Dakota Access's customers are those shippers who own the oil. This pipeline will provide another option for them to move their oil to refineries. The pipeline is for their use, but not the general public. In fact testimony indicated that there is no guarantee that the oil moving through this pipeline will be used by Iowans (Hrg. Tr.

P. 127, 2197-2198). Likewise there was testimony that the customers may not see any price reductions for refined oil products should this pipeline be built (Hrg. Tr. P. 2421). Furthermore none of the witnesses indicated that they were having problems getting access to the oil products that they purchased and used.

For these reasons, this project does not meet public convenience and necessity.

B. Global Issues

1. Climate Change

Climate change is the defining issue of our time. It is not an exaggeration to say that the fate of life on our planet depends on our efforts to stop burning fossil fuels as quickly as possible. The testimony of Dr. James Hansen and Dr. Gene Tackle in this case make that point in unassailable factual detail.

Dr. Hansen's testimony (Exhibit Sierra Club-JH-1, p. 4-5) states:

> It is now clear, as the relevant scientific community has established for some time, that high CO_2 emissions from fossil fuel burning have already disrupted Earth's climate system and that, unless we fundamentally alter business as usual, the build up of atmospheric CO_2 will impose profound and mounting risks of ecological, economic and social collapse.

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> [I]ncreased exploitation of fossil fuel reserves, including from the Bakken formation, cuts sharply in the wrong direction. It will flood the market and reduce the impetus for development of and reliance upon non-carbon sources of energy.

The rest of Dr. Hansen's testimony substantiates his authoritative warning with detailed scientific facts. Then Dr. Hansen concludes (Exhibit Sierra Club-JH-1, p. 30):

> It is correct that industry, other business, and consumers all need time to retool and reinvest in emission-free options to fossil fuels. But government agencies can assist markedly right now by denying permits for additional exploitation that would serve only to cut short the time available for that necessary transition.

The testimony of Dr. Gene Tackle, another eminent climate scientist, brings the climate change issue home to Iowa. Dr. Tackle notes (Exhibit Sierra Club-GT-1, p. 3-4):

> The observational record across Iowa shows trends in a number of climate metrics for the past 20-40 years that are different from the earlier part of the climate record. Most important is the change in precipitation because this change has direct effects on other variables such as temperature, humidity, and cloudiness. It also has indirect effects on dew-formation, soil erosion rates, agricultural planting conditions, insect and disease pests, water quality, and human health. These changes have reached magnitudes such that they are having financial consequences for agriculture and human health in Iowa.

Considering that it will take years before the climatological impacts even of current atmospheric carbon concentrations are fully manifest, Dr. Tackle's testimony

implies even greater urgency to transition away from fossil fuels.

Dr. Tackle then describes in detail the scientific evidence of the impact of climate change on Iowa. He concludes by describing the effect of decreasing our use of fossil fuels (Exhibit Sierra Club-GT-1, p. 13):

> Climate science has demonstrated very clearly that the severity of impacts of climate change is directly correlated to the amount of carbon emissions due to the use of fossil fuels. For example, in Exhibit Sierra Club-GT-16 (adapted from the US National Climate Assessment, 2014) if fossil fuel emissions of carbon dioxide continue to grow at their currently accelerating rates the average number of days exceeding 100°F in Iowa will increase from the current level of 1.4 days per year to between 30-60 days per year by end of the current century. Lower emission scenarios, as shown in Exhibit Sierra Club-GT-16, will reduce the occurrence of these extreme days by a factor of 3. These emissions reductions will correspondingly reduce the highly disruptive changes to not only agriculture but the entire social structure of Iowa (Exhibit Sierra Club-GT-18, Key messages 5 and 6).

Dr. Tackle concludes his testimony in the same vein as Dr. Hansen (Exhibit Sierra Club-GT-1, p. 14-15):

> Since the overwhelming scientific evidence links changes in climate at both global and regional scales with atmospheric carbon dioxide, policy-makers and decision-makers should implement decisions and policies that reduce use of fossil fuels, which is the primary reason for these increasing carbon dioxide emissions.

The importance of the climate change issue was also acknowledged by witnesses for Dakota Access and the MAIN Coalition.

Guy Caruso, testifying for Dakota Access, relied on a report from the Center for Strategic and International Studies in his testimony. Delivering the Goods: Making the Most of America's Evolving Oil Infrastructure (Sierra Club Hearing Ex. 27). That report states at p. VII:

> [M]ost believe substantial action must be taken in the near term to prevent the most harmful impacts of climate change. . . . It would be ideal if the United States undertook a strategic review to consider the costs and benefits of a climate policy and assessed how unconventional oil production fits into the larger picture, ...

And John MacDonald and Michael Treinen, both retired military officers testifying for the MAIN Coalition, agreed that climate change is an issue of national security. This is also confirmed by the report of a panel of retired military officers, and statements of the Joint Chiefs of Staff (Sierra Club Hearing Ex. 32; Hrg. Tr. p. 1826).

Dr. Tackle's testimony about the effects of climate change on Iowa agriculture have been echoed by others (Puntenney Hrg. Ex. 8, 28, 29; Sierra Club Hrg. Ex. 31).

Climate change also affects Iowa manufacturing (Sierra Club Hrg. Ex. 31).

Having established that climate change is a direct threat to the people of Iowa and is an issue that must be addressed now, the question for the Board is whether the Dakota Access pipeline will contribute to climate change and

impede the urgently required transition away from fossil fuels.

As Dr. Hansen and Dr. Tackle both emphasize, the first step in addressing climate change is for decision makers, such as this Board, to adopt policies and decisions that help to keep fossil fuels in the ground and nudge us toward a carbon-free future. Of course, denying a permit to Dakota Access will not by itself stop climate change, but it would be a step in that direction. Nevertheless, it would be a grave error to dismiss the contribution the Dakota Access pipeline would have on exacerbating climate change. At this moment in the world's energy history, all decisions to create additional extraction and transportation infrastructure necessarily have incremental impact on the world's climate. Yet, taken together, these decisions may well determine whether our planet is inhabitable for future generations.

As commenters at the public hearing said and as U.S. Presidents have said, this country is addicted to oil. And it just makes sense that you don't treat an addict by making it easier for him to get a fix. This is especially true of the Dakota Access pipeline when there is no necessity for the pipeline, as will be shown in subsequent sections of this Brief.

Dakota Access, by its own admission, in Exhibit F of the application filed with the Board, states that the pipeline's "purpose is to move an economical, abundant, reliable, and domestic supply of crude oil from the Bakken and Three Forks production region in North Dakota to a crude oil market hub located in Patoka, Illinois." Notwithstanding the hype in the foregoing statement, Dakota Access is clearly stating that the pipeline would contribute to more oil being transported from the Bakken region. That is more oil to feed this country's addiction.

And this does not mean that the Dakota Access pipeline would simply replace trains in transporting the same amount of oil. Joey Mahmoud testified that there would not necessarily be a net reduction in oil trains because of the pipeline (Hrg. Tr. p. 2201).

And in terms of addressing climate change, it is not an either/or proposition between trains and pipelines. We need to stop oil from being transported by any mode of transportation. The only way to effectively combat climate change is to keep the oil in the ground, which includes not building the infrastructure to transport the oil.

Furthermore the Board should note that neither Dr. Takle nor Dr. Hansen were questioned by any of the parties or the

board. Therefore, the content of their direct testimony stands unchallenged.

2. World Petroleum Market

The first point to establish is that the world petroleum market has no relevance to the public convenience and necessity for the Dakota Access pipeline. The proper market focus is the supply and demand for petroleum products in this country. There is no indication from the evidence in this case that Iowans, or people in the United States generally, are experiencing a shortage in petroleum products. But even when considering the world petroleum market this pipeline is not justified.

Guy Caruso testified that the United States is exporting petroleum products to the world market (Hrg. Tr. p. 201). But we are also importing oil from other countries. If this country can export petroleum products, while we are also importing oil, the only conclusion that can be reached is that the final destination for the oil or its refined products is solely a function of where the oil companies can sell the oil at the best price. This has nothing to do with public convenience and necessity. It has everything to do with what is in the economic interests of the oil companies.

Puntenney Hearing Exhibit 6-2 also states that world oil price declines are expected to cut non-OPEC supply in 2016 by

nearly 0.5 million barrels/day. This is the largest decline in over two decades. OPEC oil supply also fell by 220,000 thousand barrels/day in August of 2015. So the world market reflects the decreasing demand for petroleum products.

2. Other Issues

Sierra Club is not aware of any other global issues that have been presented in this case.

B. National Issues

1. Energy Independence

Sierra Club believes energy independence refers to the United States being able to provide all of its energy needs from domestic sources. In this case, energy independence is a red herring in determining public convenience and necessity.

If the United States were truly interested in energy independence, then absolutely no oil or refined oil products would leave the United States. Testimony indicated that oil and refined produces are being sent out of the United States. Next, if energy independence were the policy of the United States, the United States would have strict control on conserving oil. There are no restrictions beyond some fuel efficiency standards for cars. Third, the pipeline would be part of an integrated system that would move oil and refined products within the United States for customers in this

country only. Mr. Mahmoud and Mr. Daniels both indicated that they do not know where the product will be ultimately sold nor do they care (Hrg. Tr. p. 127, 2197-98).

There was no evidence presented that the United States is not able to supply all of the oil this country needs if we were effectively conserving our oil usage. In fact, as noted above, we are actually exporting oil and oil products. The oil is obviously getting to consumers in this country. There are no lines at gasoline stations. The price of gasoline is falling. Iowa has a healthy renewable fuels industry that decreases our dependence on oil.

Furthermore, renewable energy sources, such as wind and solar, along with alternatively powered vehicles and other substitutes for the use of oil, are increasing, and thus steadily reducing our nation’s dependence on oil. Puntenney Hearing Exhibit 17 states that wind now generates a third of U.S. renewable electricity, and the industry is growing faster than any other clean power source in the country. The United States has pledged to double its investment in renewable power by 2020. Puntenney Hearing Exhibit 18 states that solar and wind energy are now cost competitive with fossil fuels. The Dakota Access pipeline would not fit into this transition to clean and renewable energy, and if anything, would impede it.

In addition, Dakota Access' own witness, Guy Caruso, downplayed the idea of energy independence. He said the issue, as far as he was concerned, was energy security (Dakota Access Ex. GC Reply, p. 2). As near as can be determined from his confusing testimony, energy security means that consumers would have choices about where to obtain oil, including foreign countries. This is confusing for two reasons. First, consumers don't choose where their oil comes from; oil companies do. That leads to the second point of confusion. The Dakota Access pipeline would not lead to more choices for consumers. Consumers are getting the oil now. The pipeline would only benefit oil companies.

The Dakota Access pipeline has no connection to energy independence. And it certainly does not promote public convenience and necessity in that regard.

Energy independence and energy security are lofty feel-good terms, but have no basis in proving that this pipeline provides public convenience and necessity. As Attorney James Pray indicated during the hearing, Dakota Access is obscuring the issues by wrapping itself in the American flag in hopes that by doing so, it will meet the public convenience and necessity criteria. Dakota Access has not met the public convenience and necessity criteria.

2. Energy Security

As mentioned above, Guy Caruso, tried to tie the Dakota Access pipeline to energy security. As further discussed above, energy security as apparently defined by Mr. Caruso, essentially means a benefit for the oil companies, not the public.

There are no federal mandates that require pipelines to be built for energy security. Likewise, there are no state mandates. If there were truly a need to provide for energy security, there would be a comprehensive program involving conservation and energy efficiency, programs to reduce vehicle miles driven, and extensive incentives to build and purchase electric and hybrid cars.

Furthermore, there would be an absolute ban on oil exports of all kinds. Instead, Congress just passed, and the President signed, a bill ending the ban on oil exports.

Although several retired military officers testified to say that the Dakota Access pipeline will contribute to energy security, the fact is that climate change poses the greatest risk to national security. That implies a transition to clean and renewable fuels and reducing the use of oil.

Similar to the observation made above as to energy independence, this is another example of Dakota Access wrapping itself in the American flag, attempting to fool the Board into believing that this pipeline is a public

convenience and necessity. There is no long-term security in relying on non-renewable fossil fuels.

3. Rail Transportation Versus Pipelines

There are three aspects to the rail versus pipeline issue. One is whether pipelines are safer than rail for shipping oil. Another is whether the Dakota Access pipeline would free up rail for grain shipments. The third aspect is whether the pipeline would reduce shipments of oil by rail.

a. Safety Issues

The evidence regarding the relative safety of pipelines and rail is inconclusive at best. It appears that they are both equally unsafe. The report upon which Mr. Caruso relied, Delivering the Goods (Sierra Club Hrg. Ex. 27), states in footnote 1:

> There is an ongoing debate about the relative safety merits of shipping crude by rail versus pipeline. Over the past two decades, both modes have demonstrated improved safety records even as greater volumes of hazardous materials are carried. Both modes deliver more than 99 percent of their crude product safely. Comparisons between the two modes are difficult because of different reporting requirements. All sides agree, however, that safety is paramount.

That report goes on to say, at p. 25:

> Recent significant crude oil pipeline incidents (most prominently in Arkansas in March 2013 and an October 2013 spill in North Dakota) demonstrate the continued need for vigilance by industry and regulators. . . . The National Transportation Safety Board (NTSB), an investigative body with no regulatory authority, listed

> enhancing pipeline safety on its annual top ten "most wanted" list in both 2013 and 2014. . . .

In the economic assessment submitted by Strategic Economics Group (Dakota Access Ex. MAL-1, at p. 49), it is stated that during 2013 more than 800,000 gallons of oil was spilled from railroad cars. In that same year 119,290 barrels, or slightly over 5,000,000 gallons, of hazardous liquids were spilled from pipelines. While this may not be a completely apples-to-apples comparison, it certainly shows that there is no substantial evidence that pipelines are safer than rail for transporting oil.

b. Impact on Grain Shipments

The argument that if shipments of oil by rail were reduced, more rail capacity would be available to ship grain, was clearly rebutted by the evidence in this case.

Gannon witness Bruce Babcock presented written testimony (Ex. Gannon-Babcock Direct Testimony) explaining that the testimony of Dakota Access witness Elaine Kub was based on irrelevant data and did not account for unique circumstances in 2013-2014, including a dramatic increase in the production of grain in 2013, a record cold winter in 2013-2014 which required shorter trains, and a short-term increase in North Dakota oil production during the winter of 2013-2014 (Exhibit Gannon-Babcock Direct Testimony, p. 9). It is interesting to

note that when Dr. Babcock appeared at the hearing for cross examination, he received absolutely no cross examination.

Ms. Kub, however, was vigorously cross examined by parties opposing the pipeline. During that cross examination Ms. Kub admitted that the study upon which she based her opinion did not include Iowa (Hrg. Tr. p. 303-304), and she did not create a model for demonstrating the effect of oil transport by rail on grain prices in Iowa (Hrg. Tr. p. 310). She then stated that the problems in rail service were caused by increased demand to ship coal, grain, and oil (Hrg. Tr. p. 315). But the percentage of rail shipments attributed to coal was 43%, to agriculture and food products was 12%, and to oil and industrial products was 7% (Hrg. Tr. p. 316). Therefore, oil shipments had only a minimal impact, if any, on the shipment of grain.

Further, Ms. Kub acknowledged what she said in her written reply testimony (Dakota Access Ex. EK Reply, p. 4), that the "market has relaxed significantly since the worst congestion occurred" (Hrg. Tr. p. 316-317). That is exactly the point of Dr. Babcock's testimony, that a set of unique circumstances in 2013-2014 contributed in some states to difficulty in shipping grain by rail.

Ms. Kub also admitted that Iowa's transition to wind energy and natural gas will reduce shipments of coal by rail

and that will free up additional rail capacity (Hrg. Tr. p. 343).

Another unique circumstance impacting rail capacity in 2013-2014 was that BNSF Railroad shut down tracks for construction work in upgrading the tracks (Hrg. Tr. p. 371-372).

The evidence showed that any alleged shortage of rail capacity for transporting grain was a singular event and there was no shortage of rail assets for shipping grain in 2015 (Puntenney Hrg. Ex. 15, 16).

So, the argument about the impact of oil shipments on shipping grain is based on inaccurate and irrelevant evidence and is simply a red herring that Dakota Access is using to create a false claim of public convenience and necessity.

c. Reducing Oil Shipments by Rail

One of Dakota Access' repeated arguments is that the pipeline will reduce shipments of oil by rail, which it claims is a more dangerous and expensive way to transport oil. However, Dakota Access presented no evidence to substantiate the argument that the pipeline will reduce shipments of oil by rail. On the other hand, Joey Mahmoud testified that there would not necessarily be a net reduction in oil trains because of the pipeline project (Hrg. Tr. p. 2201). Also, MAIN Coalition witness Michael Ralston testified that rail

shipments of oil may not be reduced even if the pipeline is built (Hrg. Tr. p. 3075). So Dakota Access' argument that oil trains would be reduced is pure speculation at best and misrepresentation at worst.

4. Sale of Crude Oil to Foreign Markets

Dakota Access has admitted that there is no assurance that the oil carried by its pipeline will not be exported to foreign markets. At the time of the hearing there was a ban on exporting crude oil (but not the refined product) to other countries. As noted previously, that ban no longer exists. It is obvious that removing the ban on export benefits only the oil companies, as explained above in discussing Guy Caruso's testimony.

If oil companies are draining the Bakken oil fields and shipping the oil or its refined products overseas, then that, in the long term, threatens our energy independence and energy security. Because once the United States supply of oil is depleted, United States oil companies will be forced to exclusively rely on foreign sources.

The Dakota Access pipeline could be a factor in draining the oil resources from the United States and delivering it to other countries, some of which may be unstable or unfriendly to our country.

5. Depletion of Bakken/Three Forks Oil Reserves

The evidence showed that the Bakken region is experiencing a dramatic decrease in production. Sierra Club Hearing Exhibits 22 and 26 show that Bakken oil production is in sharp decline over the last several months. Sierra Club Hearing Exhibit 17 shows that the number of active drilling rigs in the Bakken region dropped during the year ending November 8, 2015, from 193 rigs to 64. That is a breathtaking figure and surely indicates a long-term trend.

Perhaps even more dramatic is the number of oil companies abandoning the Bakken region. Occidental Petroleum is leaving North Dakota altogether (Sierra Club Hrg. Ex. 15). Two other Bakken oil companies, Samson Resources and American Eagle Energy, have declared bankruptcy (Sierra Club Hrg. Ex. 16). In addition, Koch Pipeline Company has abandoned plans to build a 250,000 barrels/day pipeline from the Bakken region to Illinois (Puntenney Hrg. Ex. 1). In November of 2012, lacking shipper interest, OKEOK Partners cancelled plans for a 200,000 barrels/day pipeline from the Bakken area to Cushing, Oklahoma (Puntenney Hrg. Ex. 1). Another Bakken-to-Cushing pipeline project, by Enterprise Products Partners, was cancelled in late 2014 (Puntenney Hrg. Ex. 2).

The recoverable supply of oil in the Bakken area will be totally depleted in the near future, while the Dakota Access pipeline will remain in the ground forever. The oil companies,

Dakota Access, and the refineries will benefit for a short period of time. The landowners where the pipeline would be located will deal with the pipeline forever. The landowners will not be able to build structures over the easements, the fertility of the soil will be reduced, and users of the rivers and streams crossed by the pipeline will see a scar where the easement was forever.

This is not a scenario that demonstrates public convenience and necessity.

6. National Alternatives to Crude Oil Pipelines

As was discussed above in Section C(1) of this Brief, alternative energy is rapidly replacing fossil fuels. The transition to alternative energy is the best alternative to crude oil pipelines. The counterargument is that the transition to renewable energy cannot be made immediately so we allegedly need the pipeline to supply energy until the transition to renewable energy can be completed. But that argument simply enables our continued addiction to oil that was discussed above. The urgently needed transition to renewable energy must occur as quickly as possible, and the pipeline would only be an excuse to delay that transition.

In fact, the transition to electric vehicles would not need to be delayed. Vehicles running on batteries have been available for several years. Hybrid vehicles running on

gasoline and batteries have been available even longer. Even gasoline-powered vehicles are being designed to travel more miles per gallon.

7. Permits and Authorizations

The only permit or authorization that Dakota Access claims it needs on a national level is a Section 404 permit from the Corps of Engineers, as listed in Dakota Access Exhibit MH-4. Because this is a pipeline project, the 404 permit will be Nationwide Permit 12.

A Section 404 permit is needed for activities regarding the dredging or filling of a water of the U.S. (WOTUS). The evidence at the hearing in this case was clear that the jurisdiction of the Corps of Engineers encompasses only a very small portion of the entire length of the pipeline in Iowa (Hrg. Tr. p. 1582). The rest of the pipeline route is unprotected for environmental impact by the 404 permit process.

The 404 permit process includes an archaeological and environmental review for only those areas under Corps of Engineers jurisdiction, which would be rivers, streams and wetlands.

Exhibit MH-4 also mentions consultation with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act (16 U.S.C. § 1536). However, that consultation is

between the Fish and Wildlife Service and the Corps of Engineers and is limited to the aforementioned jurisdiction of the Corps over WOTUS (Hrg. Tr. p. 1583). Therefore, the Fish and Wildlife Service will not be giving attention to protected species that are present in the pipeline path at locations other than those within the Corps' jurisdiction. That means that the northern long-eared bat and the Indiana bat that Hughey Tweedy testified are living on his property (Hrg. Tr. p. 1408) will not be given any attention by federal authorities as part of the 404 permit process.

It is significant that Dakota Access has not presented to the Board any documentation from the Corps of Engineers or the Fish and Wildlife Service showing what environmental studies or reviews have been done. All that Dakota Access has presented is the unsubstantiated testimony of Monica Howard, including Exhibit MH-9, which was filed on December 9, 2015, 2 days after the hearing was concluded. With that exhibit, Ms. Howard was allowed to testify without being cross examined by other parties or questioned by the Board. As such, the exhibit should have no bearing on the Board's decision.

OCA witness Jeff Thommes listed in his written testimony (OCA Exhibit Thommes Direct, p. 5-8) several federally protected species that may be within the pipeline route: three species of mussels, Topeka shiner, eastern prairie fringed

orchid, western prairie fringed orchid, Indiana bat, northern long-eared bat, bald eagle, golden eagle, and various migratory birds. Dakota Access has presented no evidence that the project will not cause serious harm to these species. Mr. Thommes also noted that:

> [N]o documentation of agency consultations or survey reports were available for review and that the Application did not include a complete accounting of anticipated impacts on sensitive species as is typically seen in a state routing permit application.
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> [T]here was no discussion of specific activities within these habitats, nor was there any analysis of potential impacts on these habitats or listed species.

OCA Exhibit Thommes Direct, p. 3-4.

The species Mr. Thommes listed will be surveyed only in the wetlands, streams and rivers under Corps of Engineers jurisdiction. Dakota Access has been adamant that it will not do any more than is legally required to obtain a permit from the Corps of Engineers. Therefore, none of the other areas crossed by the pipeline will be surveyed for the federally protected species listed by Mr. Thommes.

Dakota Access Exhibit MH-4 also fails to mention the consultation required under Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f). Section 106 requires federal agencies undertaking some action, e.g., granting a permit, to consult with the Advisory Council on

Historic Preservation, state historic preservation offices, and Native American tribes to ensure that historic and archaeological resources are not impacted by the federal action. The Section 106 process would be part of the Corps of Engineers Section 404 process. Dakota Access has not presented the Board with any evidence, other than once again the unsubstantiated testimony and exhibits submitted by Monica Howard, that Section 106 has been followed.

Sierra Club strongly believes that the Board should not grant a permit in this case since Dakota Access has not carried its burden to show that it has complied with federal permit requirements. Additionally, the Board must require an environmental impact statement or an equivalent to evaluate the impacts to environmental and cultural resources for those areas not covered by Corps of Engineers jurisdiction. No agency is currently requiring Dakota Access to survey the entire pipeline route for federally protected species. As explained in more detail below, this is a regulatory gap that the Board must fill.

8. Other Issues

a. Impact on the People and Land of North Dakota

The Dakota Access pipeline will facilitate the continued devastation of the people, the land, and the social fabric of North Dakota. Taylor Brorby's written testimony (Exhibit

Sierra Club-TB-1) describes in detail the impacts of the Bakken oil boom on North Dakota.

For example, the flaring of natural gas from the oil wells carpets the region and exposes people to chemical toxins (Exhibit Sierra Club-TB-1, p. 4). There was an oil spill on a landowner's farm near Tioga, North Dakota, and two years after the spill the 865,200 gallons of spilled oil is still not completely cleaned up (Exhibit Sierra Club-TB-1, p. 5). North Dakota residents have moved from the area rather than live with the impacts of oil drilling (Exhibit Sierra Club-TB-1, p. 6).

The written testimony of Rhiannon Chance Hanson also describes the impacts of the Bakken oil boom on Native American communities in North Dakota.

Dakota Access will probably argue that the impact of the Bakken oil boom on the people and the land of North Dakota is irrelevant to this case. But the impact on North Dakota is one of the externalities that must be considered in determining public convenience and necessity.

D. State Issues

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

The overwhelming evidence in this case is that any economic benefit to Iowa from the Dakota Access pipeline is very short-lived and extremely modest. Dakota Access tried,

through the testimony of Michael Lipsman, to paint an inflated picture of jobs and economic development for Iowa as a result of this project. However, Gannon witness Mark Imerman and Sierra Club witness David Swenson effectively rebutted Mr. Lipsman's argument.

Mr. Imerman's written testimony (Exhibit Gannon-Imerman Direct Testimony) convincingly argues that the economic benefits projected by Mr. Lipsman and his firm are inaccurate and misleading, not because the IMPLAN model used by Mr. Lipsman is faulty, but because the data entered into the model by Mr. Lipsman were seriously flawed. It is important to understand, first of all, that the IMPLAN tool is a model. It is only as useful and accurate as the data entered into it. That is the basis of Mr. Imerman's critique of Mr. Lipsman's analysis. Mr. Imerman demonstrated that the data or scenarios used in Mr. Lipsman's study were faulty in four respects: (1) payment for easements and damages was improperly included as part of the stimulus; (2) expenditures and materials that cannot be obtained in Iowa were improperly included; (3) it was improperly assumed that all employment and contracting activities will originate with expenditures in Iowa; and (4) the fact that there is insufficient idle construction capacity in Iowa for the pipeline project was ignored (Exhibit Gannon-Imerman Direct Testimony, p. 4).

David Swenson had similar criticisms of Mr. Lipsman's analysis (Exhibit Sierra Club-DS-1). Mr. Swenson's first criticism is that the jobs were calculated using the concept of job years, a concept that overstated the number of jobs that would actually be created by the pipeline project (Exhibit Sierra Club-DS-1, p. 12-19). Mr. Swenson's second criticism is that Mr. Lipsman's analysis reported the jobs as full time equivalents, rather than as an annualized value. This inaccuracy also resulted in overstating the number of jobs that would be created by the pipeline project (Exhibit Sierra Club-DS-1, p. 19-21). Mr. Swenson's third criticism was that Mr. Lipsman's analysis ignores the fact that most of the materials for constructing the pipeline will be manufactured outside of Iowa (Exhibit Sierra Club-DS-1, p. 21-24). Mr. Swenson's fourth criticism is that the highly specialized jobs required to build a crude oil pipeline would not be filled by workers from Iowa, so the benefits to Iowa workers were overstated (Exhibit Sierra Club-DS-1, p. 24-26).

Mr. Lipsman's analysis is also misleading because it assumes there will be 3,564 construction jobs on the pipeline in Iowa (Dakota Access Ex. MAL Direct, p. 13) and that the work will last for two years (Dakota Access Ex. MAL-1, p. 2, n. 2). But in fact, Dakota Access estimated that there may not be more than 2,000 construction jobs in Iowa (Sierra Club

Hrg. Ex. 24) and that the construction period will last 8-9 months at most.

Another major problem with Mr. Lipsman's analysis is that it accounts only for the alleged benefits of the proposed pipeline and completely ignores the costs to Iowa of the project. These costs would include the environmental impact from loss of trees in the pipeline right-of-way, impact on habitat of protected species of wildlife, the impact of frac sand mining as described by Sierra Club witness Bob Watson, contributing to climate change, and the damage from a pipeline spill. In addition, there will be certain occupations and businesses that are adversely impacted by the pipeline. These are the externalities that were referenced above in the Columbia Law Review article in the discussion of public convenience and necessity. So in determining public convenience and necessity, the Board must weigh the modest short-term economic benefits against the costs.

2. Environmental Issues

The overarching problem with the environmental issues related to the Dakota Access project is that Dakota Access has not undertaken thorough and complete environmental studies for the entire pipeline route. The Iowa Legislature has eloquently described the importance of protecting Iowa's fragile environment, in § 455A.15 of the Iowa Code:

The general assembly finds that:

1. The citizens of Iowa have built and sustained their society on Iowa's air, soils, waters, and rich diversity of life. The well-being and future of Iowa depend on these natural resources.

2. Many human activities have endangered Iowa's natural resources. The state of Iowa has lost ninety-nine and nine-tenths percent of its prairies, ninety-eight percent of its wetlands, eighty percent of its woodlands, fifty percent of its topsoils, and more than one hundred species of wildlife since settlement in the early 1800's. There has been a significant deterioration in the quality of Iowa's surface waters and groundwaters.

3. The long-term effects of Iowa's natural resource losses are not completely known or understood, but detrimental effects are already apparent. Prevention of further loss is therefore imperative.

4. The air, waters, soils, and biota of Iowa are interdependent and form a complex ecosystem. Iowans have the right to inherit this ecosystem in a sustainable condition, without severe or irreparable damage caused by human activities.

With so much of Iowa's environment already destroyed, a massive construction project through many of the state's rivers, streams, forests and prairies could have significant impacts. The permanent right of way for the pipeline will be permanently cleared of trees, which may affect some species including birds. Some of the woodlands will be fragmented, affecting the bird species residing in the wooded area since some bird species are sensitive to open areas created in woods (Ex. Sierra Club-DH-1, p. 4; Hrg. Tr. 2578-2579). Even the temporary construction easement will be cleared and will take

years to return to its original habitat. Open trenching of rivers and streams presents some vulnerability to native species, since the floor of the river or stream will be dug up and replaced. The cobbling on the bottom of a stream provides fish habitat. No one will know what those impacts are unless the areas are adequately surveyed. So far, the areas under the specific jurisdiction of the Corps of Engineers and the Iowa DNR are the only areas subject to any kind of environmental survey.

Environmental issues have already been discussed above with respect to the permit required from the Corps of Engineers and the interagency consultation connected with that permitting process. Dakota Access Exhibit MH-4 also lists some state-level environmental permits and consultations that are required.

The primary state permit is for sovereign lands. It is clear from Exhibit MH-4 that a floodplain permit and consultation on state protected species is limited to the Iowa DNR's jurisdiction over sovereign lands. The only sovereign lands that are involved are the Big Sioux River in Lyon County, the Big Sioux Wildlife Management Area in Lyon County, the Des Moines River in Boone County, and the Mississippi River in Lee County. Just as with the Corps of Engineers, the DNR's jurisdiction covers only a very small

portion of the pipeline route. And again, just as with the federal permit, Dakota Access has presented no surveys or studies supporting its claim that there is no environmental impact.

Although the federal Endangered Species Act prohibits the taking of any federally protected species anywhere, along with impairing its habitat, the evidence is clear here that the only areas for which federally protected species will be considered are the areas within the Corps of Engineers jurisdiction.

The State of Iowa also has a state endangered species act that prohibits the taking of any state-protected species anywhere, along with impairing its habitat. Likewise, the only areas for which state-protected species will be considered are the four sovereign lands within the Iowa Department of Natural Resources jurisdiction.

The reason an environmental impact statement or its equivalent should be required is that no one knows what species live in any specific location in Iowa. Obviously, fields planted in cash crops are not likely to host protected species. But protected species and species of greatest conservation need can reside in prairies, grasslands, forested areas, areas along rivers and streams, and even in ditches, especially for state-protected species. As Sierra

Club witness, Douglas Harr, said in his written direct testimony (Ex. Sierra Club-DH-1, p. 4):

> The problem is that our knowledge of where the threatened and endangered species are located is seriously incomplete. Without a thorough survey of the pipeline route, which would be part of an environmental impact assessment, the IUB cannot make an informed decision on whether to grant a construction permit for the pipeline.

Mr. Harr further explained in his testimony at the hearing (Hrg. Tr. p. 2574:

> Well, I think one of the things that absolutely should be required is a complete environmental review, especially of the areas of concern on state and sovereign lands and also any other large portions of habitat that may exist on private lands that it may cross.

With respect to the questions about the spotted skunk that Mr. Wagner asked Mr. Harr, the spotted skunk is state-endangered (Hrg. Tr. p. 2569). Mr. Harr observed the spotted skunk several years ago in northwest Iowa in the area proposed for the pipeline. Although Mr. Harr has not heard of any sightings since, that in no way indicates that the spotted skunk has been extirpated from the area (Hrg. Tr. p. 2570). Because we don’t know its status, that is precisely the reason why biologists do field surveys, looking for denning sites and trying to spot the animal.

OCA witness Jeff Thommes, in his written testimony (OCA Ex. Thommes Direct, p. 4-5), testified:

> I would note that no documentation of agency consultations or survey reports were available for

> review and that the Application did not include a complete accounting of anticipated impacts on sensitive species as is typically seen in a state routing permit application.
>
> **********
>
> Wildlife Management Areas, wetlands, waterbodies, riparian areas, and forested areas were listed as being crossed by the project, however, there was no discussion of specific activities within these habitats, nor was there any analysis of potential impacts on these habitats or listed species.
>
> **********
>
> Typically a desktop review would be conducted for federal and state-listed species that have potential to be present in the project area. Those desktop reviews would include reviewing publicly available data, such as the U.S. Fish and Wildlife Service Information for Planning and Conservation tool and available state species and habitat data. Using recent aerial imagery, survey data (if available), National Wetlands Inventory data, and National Hydrology Dataset data, a review for potential habitat would be conducted for the listed species identified through the U.S. Fish and Wildlife Service and the state agency. Once a determination is made for the potential of a species or habitat to occur within the project area, an impacts analysis would be conducted and agency consultations completed as required. Surveys would be conducted, if warranted, and minimization and/or mitigation measures would be developed to avoid or minimize impacts on sensitive habitats and listed species as possible.

Dakota Access has presented no evidence to show that it has undertaken the procedures and documentation described by Mr. Thommes.

Mr. Thommes has identified 49 state-protected animal species and 54 state-protected plant species that could be impacted by the pipeline project (OCA Ex. Thommes Direct, p.

8-13). Sierra Club witness Douglas Harr discusses in his written testimony (Exhibit Sierra Club-DH-1) several public lands and other areas that could be impacted by the pipeline. This testimony and the lack of documentation by Dakota Access vividly demonstrates why Sierra Club believes that the Board should require an environmental impact assessment. This would be an environmental impact statement as contemplated by the National Environmental Policy Act or an equivalent assessment.

Regulations promulgated by the Council on Environmental Quality establish what must be in an environmental impact statement (EIS). There must first be a statement of purpose and need. 40 C.F.R. § 1502.13. The statement of purpose and need dictates the range of reasonable alternatives to the proposed project. Furthermore:

> [A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality. . . . Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). Nor can the EIS be based on self-serving statements, especially ones with no supporting data, from the

prime beneficiary of the project. Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997).

Next, the EIS must contain a description of the alternatives to the proposed project. 40 C.F.R. § 1502.14. The EIS must "rigorously explore and objectively evaluate all reasonable alternatives," including a no action alternative. Id. A review of alternatives is important so that the least environmentally damaging alternative can be selected.

After determining the possible alternatives, the EIS then must examine the environmental impacts of each alternative. 40 C.F.R. § 1502.16. This is so the least environmentally damaging alternative can be selected.

Mr. Harr described how an EIS would contain an examination of environmental impacts:

> As far as wildlife is concerned, I think a survey of especially all rivers and streams it's crossing, all public lands, any areas of significant habitat, forests on private land, grasslands on private land, all need to be thoroughly looked by professionals to determine what is there and not just review desktop papers.

(Hrg. Tr. p. 2575).

Jeff Thommes also said Dakota Access should "analyze potential impacts on sensitive species and habitats and develop measures to avoid, minimize, or mitigate for impacts on listed species." (OCA Ex. Thommes Direct, p. 14) That is what an EIS or its equivalent would do.

A professional survey is also more than a drive-by or a short visit. Plants emerge at different times throughout the growing season; likewise with butterflies. Even times of the day affect what species are readily visible.

Mr. Harr's testimony addressed the state's Wildlife Action Plan. The Wildlife Action Plan lists species of greatest conservation need, along with protected species. Environmental surveys involve looking at the plants and animals on-site to determine if they are found on the list of species in decline in Iowa. The Wildlife Action Plan is a guidebook. Best management practices would involve using the guidebook and surveying the species before designating the location for the pipeline easement and certainly before construction (Hrg. Tr. p. 2572-2573). Mr. Harr's exhibits 17 to 25, which are part of the Draft Wildlife Action Plan (Exhibits Sierra Club-DH-17-25), show the areas of greatest conservation priority. Dakota Access has not even looked at those areas with respect to the pipeline route and its overall effect on the most environmentally important areas of the state.

In this case, without an EIS or an equivalent, the Board has no way to make an informed decision on whether to permit the Dakota Access pipeline. That is especially true in this case, since the applicable permitting processes leave a large

regulatory gap in protecting the environment. This is the sort of regulatory gap that Sierra Club witness Bob Watson described in his written testimony (Exhibit Sierra Club-BW-1, p. 3-7). Regulatory gaps occur because of a patchwork of regulations, agencies with narrow jurisdictions, no meaningful way for citizens to have input, allowing industries to regulate themselves, local officials lacking expertise, budgetary constraints, and externalities not being considered.

In its order denying Sierra Club's motion for an environmental assessment or impact statement, the Board said:

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

In fact, "Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project." Thus, on the basis of its own clearly defined criterion, the Board must deny the permit.

3. Safety Issues

Crude oil pipelines in recent years have experienced discharges of oil that have had disastrous consequences. In his direct testimony No Bakken Here witness Jonas Magram

referred to several pipeline spills (Exhibit No Bakken Here-JM-1, p. 3-5). In 2010, an Enbridge pipeline in Michigan spilled 850,000 gallons of oil into the Kalamazoo River. In Montana, in early 2015, the Bridger Pipeline spilled 40,000-50,000 gallons of oil into the Yellowstone River. That same pipeline had spilled 63,000 gallons of oil into the same river in

2011. In May of 2015, the Plains All American pipeline spilled over 100,000 gallons of crude oil that affected 100 miles of California beaches. In 2013, ExxonMobil's Pegasus pipeline ruptured in Mayflower, Arkansas. By the time the pipeline was shut down nearly two hours later, over 250,000 gallons of crude oil had spilled.

Dakota Access' safety expert, Stacey Gerard, claims that PHMSA is capable of assuring the safety of the Dakota Access pipeline. But PHMSA has only been in existence since 2004. All of the pipeline spills described in the preceding paragraph occurred after that date. Ms. Gerard claims that PHMSA has recently received increased appropriations to hire additional inspectors. But it was not clear from her testimony how many, if any, of those additional inspectors would be assigned to Iowa. Nor is it clear how the additional inspectors would prevent the kinds of spills described above.

Iowa does not have a hazardous liquid pipeline inspection program to fill in the regulatory gap (Hrg. Tr. p. 821).

It was also apparent from Ms. Gerard's testimony that she was relying on statements from Dakota Access as to what it says it will do to allegedly assure safety of the pipeline. In summary, Ms. Gerard's testimony is based on faith, rather than fact.

Dakota Access witness, Todd Stamm, explained that there will allegedly be periodic inspections of the pipeline after it is constructed. This will consist of remote monitoring (Hrg. Tr. p. 660), periodic flyovers (Hrg. Tr. p. 740), and inspections inside the pipe once every five years (Hrg. Tr. p. 642). The evidence showed, however, that many times a pipeline spill is first detected by local residents, not through any inspection program undertaken by the pipeline company (IFLOA Ex. 14).

Once a spill is detected, Mr. Stamm testified that the first responders are only to secure the perimeter. The closest Dakota Access employee will be summoned to respond.

Dakota Access plans to have only 12 permanent employees in Iowa. Ten of those employees would be stationed at the pumping station in Cambridge, and another in northwest Iowa and one in southeast Iowa (Hrg. Tr. p. 660). It would take

them awhile to get to the location of a spill, up to an hour according to Mr. Stamm (Hrg Tr. p. 713).

Mr. Stamm said that the actual cleanup crews would be as much as 12 hours away. Local first responders would be used only to establish a perimeter around the spill; they would not take any action to contain or abate the spill. In the twelve hours for Dakota Access cleanup crews to begin on-site activities, the spilled oil can lodge in the pores of soil, move into ditches and waterways, and spread across the land.

In this regard, it is important to remember that in the Mayflower, Arkansas spill described above, in less than two hours before a cleanup crew arrived, the pipeline rupture had discharged over 250,000 gallons of crude oil.

Unfortunately, the Iowa Utilities Board does not have any authority over the safety of the Dakota Access pipeline once a construction permit is granted. Allowing such a risk certainly does not promote public convenience and necessity. Based on the evidence presented by Dakota Access, the Board should not take a chance by granting a permit.

4. Oil Spill Remediation

There is no question that oil pipeline spills cost millions of dollars to remediate. In fact, the cost for remediation of the Enbridge spill in Michigan is now over one billion dollars. The $250,000 bond required by Iowa Code §

479B.13 is woefully inadequate. Joey Mahmoud's written testimony (Dakota Access Ex. JM Reply, p. 7-8) mentions guarantees from the parent companies and insurance policies he claims are available to cover cleanup costs.

The other possible source of cleanup funds is the Oil Spill Liability Trust Fund. The details of the trust fund are set out in 33 U.S.C. § 2702. Section 2702(a) specifically says that payments from the fund apply only to situations where "oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines . . . ." Navigable waters are waters of the United States. 33 U.S.C. § 2701(21). Therefore, the fund would not be available to landowners where the spill damages agricultural land or other land that is not a navigable water.

Furthermore, a landowner or other person suffering damages as a result of an oil spill, in order to use the fund, must undertake a rigorous procedure to make a claim against the fund. Pursuant to 33 C.F.R. § 105, the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the fund to support the claim. The regulation further sets forth 13 additional requirements that must be in the claim.

But before a claim is made to the fund, the claimant has a preliminary hurdle to jump. The claimant must first present the claim to the responsible party, which would be Dakota Access or Sunoco Logistics. 33 C.F.R. § 136.103. And to make matters worse for the claimant, the responsible party can escape liability if it can show that the spill was caused by a third party and the responsible party was not negligent. It is almost assured that a responsible party would make every effort to invoke that defense. So the picture this paints is a procedure where the landowner who has a claim is tied up in litigation for years.

In other words, Mr. Mahmoud's claim that the Oil Spill Liability Trust Fund is available to indemnify landowners for damage from an oil spill is an illusion.

5. Cultural Issues

Archaeological and historic resources will likely be impacted by the Dakota Access pipeline project. John Doershuk, Iowa State Archaeologist, has testified in detail why Dakota Access has not properly investigated and documented these resources (Exhibit Sierra Club-JD-1). In his direct testimony Dr. Doershuk flagged deficiencies in the archaeological work performed by Dakota Access' consultants. Dakota Access has not coordinated with Dr. Doershuk's office, and Dr. Doershuk's testimony also notes that Dakota Access

has not provided requested information to the State Historic Preservation Office.

In his supplemental testimony (Sierra Club Hrg. Ex. 33), Dr. Doershuk described continuing deficiencies with the archaeological work.

He clarified that Dakota Access has contacted his office, but that there has been no consultation with his office. There have been no "direct, extended and substantive conversations with [the State Archaeologist's Office] about expected resources that might be encountered, appropriate field sampling strategies and required documentation." (Sierra Club Hrg. Ex. 33). Dakota Access has claimed that it has consulted with the State Archaeologist's Office. That claim was disingenuous and misrepresented Dr. Doershuk's direct testimony. The direct testimony (Exhibit Sierra Club-JD-1, p. 2) stated that the State Archaeologist's Office had not been consulted by Dakota Access. Ms. Howard's reply testimony (Dakota Access Ex. MH Reply, p. 24) twisted the question Dr. Doershuk was asked into the question of whether his office was simply contacted. Based on Ms. Howard's reply testimony (Dakota Access Ex. MH Reply, p. 24), the only "consultation" was to obtain some site information from Dr. Doershuk's office.

Dr. Doershuk explained in his testimony at the hearing that typically, for a project of this size, the consulting archaeologist for the project developer would contact the State Archaeologist and begin the consultation process (Hrg. Tr. p. 2895). Dr. Doershuk made it clear that this is customary and best practice (Hrg. Tr. p. 2896). It is ironic that Dakota Access repeatedly claims it is following best practices in everything, but refuses to follow best practices with respect to consultation with the State Archaeologist's Office. It is not customary or feasible for the State Archaeologist to track down every project and project developer to engage in consultation.

In an attempt to evade the lack of consultation with the State Archaeologist, Dakota Access' cross examination of Dr. Doershuk at the hearing was to impugn his motives for raising the issue. The cross examination made no attempt to challenge the substance of his testimony (Hrg. Tr. p. 2873-2909). That cross examination also made clear that Dakota Access has no intention of consulting with the State Archaeologist's Office unless forced to do so by the Board. Without that consultation, the permit should be denied.

Dr. Doershuk also explained why the Unanticipated Discoveries Plan (Dakota Access Ex. MH-3) is not adequate. This Plan is a final plan, not a draft. An Unanticipated

Discoveries Plan is significant because it is often the case that during construction, cultural resources will be discovered that were not found in pre-construction surveys. The lack of an adequate plan in this case is especially troubling because the surveys that have been done are inadequate and cover only those small areas under the jurisdiction of the Corps of Engineers.

Dr. Doershuk's third point was that since his direct testimony was submitted, the Dakota Access consultants have submitted 29 reports that are limited to the areas under the limited jurisdiction of the Corps of Engineers. These reports are inadequate, a conclusion with which the State Historic Preservation Office concurs.

Finally, Dr. Doershuk related that Dakota Access has refused to provide the State Historic Preservation Office with any alleged archaeological reports beyond those required by the Corps of Engineers. Even those reports are deficient. These reports will be considered by the Corps only in the areas under its jurisdiction. The record is clear that most of the pipeline route is not under Corps jurisdiction. The deficiencies in the archaeological submittals to the Corps demonstrates the lack of effort expended in performing proper and adequate studies along the portion of the pipeline route not under Corps jurisdiction. If Dakota Access claims it has

conducted more extensive surveys, it has not submitted any reports or the surveys to the Board. The only way proper and comprehensive archaeological studies will be performed is for the Board to exercise its authority and require them to be done.

It is significant that when Dakota Access objected to the offer of Dr. Doershuk's supplemental testimony, the Board admitted the exhibit but allowed Dakota Access the opportunity to have Monica Howard offer rebuttal testimony (Hrg. Tr. p. 2648, 2873). However, there was no rebuttal testimony from Ms. Howard. It is obvious that Dakota Access was not challenging the accuracy of Dr. Doershuk's statements. It just wanted to prevent the Board from considering his testimony.

Dakota Access had several last clear chances to properly consider the archaeological issues. The first was John Doershuk's letter to the Board on May 22, 2015 (Exhibit Sierra Club-JD-2). That letter should have alerted Dakota Access that more archaeological work needed to be done and should have resulted in Dakota Access immediately beginning to consult with the State Archaeologist's Office.

Next, Dakota Access had warning that environmental impacts, including impacts to cultural resources, were not properly addressed when Sierra Club filed its Motion for an

Environmental Report. At that point, Dakota Access could have had its consultants conduct more thorough archaeological work. Even when the Board ruled on that motion, saying that if the environmental impacts were not adequately evaluated, the permit would be denied, Dakota Access made no attempt to conduct further archaeological studies.

Then, when Dr. Doershuk submitted his written direct testimony, Dakota Access had further and more specific reason to know that more archaeological work needed to be done. Dakota Access refused. Even after Dr. Doershuk submitted his supplemental testimony, Dakota Access' response was not to acknowledge his points, but to attack him personally in its cross examination of him.

Dakota Access has not shown good faith in refusing to consult with the State Archaeologist's Office. Dakota Access made it clear in its cross examination of Dr. Doershuk that it does not intend to consult with his office because there is no legal requirement to do so. This is an absolute insult to any Iowan and to any Native American who cares about cultural resources. This is another example of the regulatory gap that exists in the federal and state permitting processes. This is a gap the IUB must fill.

In fact, the statute creating the duties of the State Archaeologist, Iowa Code § 263B.2, states that the State

Archaeologist shall coordinate with other state agencies for the discovery, location and excavation of archaeological sites and remains. The IUB would be one of those state agencies. In the August 21, 2015, IUB staff report by Don Stursma, it is noted that Dr. Doershuk had submitted his May 22, 2015, letter to the Board. The staff report concludes that through evidence and briefing the Board should determine if sufficient archaeological studies have been conducted. Sierra Club respectfully suggests that, pursuant to Iowa Code § 263B.2, the Board should coordinate with the State Archaeologist as a part of this permitting process to ensure the sufficiency of the archaeological review.

This is also an example of why the Board needs to require an EIS or its equivalent. An EIS would include an analysis of the impacts of the pipeline project on cultural resources.

6. Permits and Authorizations

The primary state permit which Dakota Access must obtain is a permit to cross sovereign lands. The sovereign lands impacted by the pipeline are the Big Sioux River, the Big Sioux Wildlife Management Area, the Des Moines River, and the Mississippi River. These crossings, like the Corps of Engineers jurisdictional areas, are a very small part of the entire pipeline route. There was no evidence presented in connection with Ms. Howard's testimony as to what studies and

surveys have been conducted with respect to the sovereign lands.

It is clear, however, that no surveys will be conducted outside the sovereign land areas.

This is further reason why the Board should require an environmental impact statement or its equivalent and why there is a regulatory gap that the IUB must fill.

7. Other Issues

Sierra Club witness Bob Watson presented written testimony describing the impact of frac sand mining in northeast Iowa (Exhibit Sierra Club-BW-1). The oil in the Bakken region is known as tight oil. It is found between layers of shale. It is extracted by a process called hydraulic fracturing, or fracking. The process uses sand as part of the lubricant in the drilling apparatus. The process requires a special kind of silica sand that is found in northeast Iowa.

Frac sand mining leaves an area of devastation in its wake (Exhibits Sierra Club-BW-2, 3, 4). Dakota Access claims that its pipeline will make it easier and less expensive to extract the oil from the Bakken Region. Facilitating the extraction of the oil will increase the pressure to continue sand mining in northeast Iowa.

The devastation from frac sand mining is another example of an externality that the IUB must consider in determining

whether the Dakota Access pipeline promotes public convenience and necessity.

II. ISSUES, IF THE PERMIT IS GRANTED

A. Route Issues

Sierra Club has no comments on the route issues.

B. Eminent Domain Issues

1. Eminent Domain – Legal Analysis of Board's Authority

Eminent domain is one of the most drastic powers that a government entity can inflict on its citizens. The Iowa Supreme Court has said:

> The sovereign power to take private property from citizens without their consent is limited by our State and Federal Constitution and legislative enactments. Property owners are entitled to strict compliance with legal requirements when a government entity wields the power of eminent domain. These legal requirements help protect against abuse of the eminent domain power. We strictly construe statutes delegating the power of eminent domain and not the absence of a clear legislative authorization for a joint public-private entity to condemn private property.

Clarke County Reservoir Commission v. Abbott, 862 N.W.2d 166, 168 (Iowa 2015).

Iowa Code § 479B.16 authorizes the Board to grant the power of eminent domain if a permit is granted pursuant to Iowa Code § 479B.9. Pursuant to Iowa Code § 6B.2B, a party wanting to exercise eminent domain must negotiate with the landowner in good faith before requesting eminent domain.

That requirement would logically apply to Dakota Access in this case.

a. Eminent Domain is Available Only to a Utility

In 2006 the Iowa Legislature passed a law that tightened the requirements for a private entity to be granted the power of eminent domain. One aspect of the law amended Iowa Code § 6A.21. That section now provides that agricultural land cannot be condemned by eminent domain for private development purposes. Section 6A.21 further provides, however, that this restriction on eminent domain does not apply to utilities under the jurisdiction of the IUB or to any other utility granted the power of eminent domain.

There is no doubt that Dakota Access is not a public utility as defined by Iowa Code § 476.1. Dakota Access is not a business furnishing gas, electricity, communications services, or water to the public for compensation. Nor is Dakota Access a utility of any kind under the jurisdiction of the IUB. The Board's authority extends only to granting or denying a construction permit for the pipeline and granting or denying eminent domain. The Federal Energy Regulatory Commission (FERC) has jurisdiction over Dakota Access with respect to its terms of service. PHMSA has jurisdiction over the safety aspects of the pipeline.

An analogous situation was considered by the Iowa Supreme Court in Hawkeye Land Co. v. IUB, 847 N.W.2d 199 (Iowa 2014). In that case the court held that an electric transmission line company did not have the power of eminent domain because it was not a public utility. Moreover, the court found that the company was not under the jurisdiction of the IUB:

> [I]ndependent transmission companies are federally – not state – regulated. IUB acknowledges that its decision in 2007 to allow the sale of IPL's transmission assets to ITC Midwest deprived IUB of jurisdiction over those assets.

Id. at 218. Likewise, a crude oil pipeline that simply transports a product, just like a transmission line that merely transports electricity, is not under the jurisdiction of the IUB.

Therefore, the only way Dakota Access would be exempt from the prohibition against eminent domain for private development purposes is if it is a utility otherwise granted eminent domain authority under Iowa law. Although Iowa Code § 479B.16 authorizes eminent domain for hazardous liquid pipelines, § 6A.21 requires that the pipeline be a utility in order to come within the exemption establish by that section. Dakota Access is not a utility.

There do not appear to be any Iowa cases that define a utility that is not a public utility. There is a recent Iowa

Supreme Court case, however, that may be helpful in analyzing this issue. SZ Enterprises, LLC v. IUB, 850 N.W.2d 441 (Iowa 2014). In that case the court relied on 8 factors to determine if a third-party provider of solar electricity was a public utility. This analysis goes beyond the definitions in § 476.1 and places more emphasis on the concept of a utility.

The 8 factors are:

(1) What the corporation actually does.

(2) A dedication to public use.

(3) Articles of incorporation, authorization, and purposes.

(4) Dealing with the service of a commodity in which the public has been generally held to have an interest.

(5) Monopolizing or intending to monopolize the territory with a public service commodity.

(6) Acceptance of substantially all requests for service.

(7) Service under contracts and reserving the right to discriminate is not always controlling.

(8) Actual or potential competition with other corporations whose business is clothed with public interest.

SZ Enterprises, 850 N.W.2d at 458. In analyzing these factors the court said that the weighing of the factors is not a mathematical exercise but a question of practical judgment. Id. at 468.

An analysis of the above factors in light of the evidence applied to Dakota Access in this case yields the following:

(1) What Dakota Access actually does is transport oil for oil companies for delivery to refineries. It is a common carrier, just like a railroad, a trucking company, or a barge company. No one would contend that those entities are utilities. Dakota Access witnesses made it clear that the shippers are the pipeline's customers and that it is serving the shippers. The pipeline provides no direct service to the public. Despite Joey Mahmoud's vain attempt to argue that because some of the oil in the pipeline may be turned into a product that may eventually be used by members of the public, the pipeline serves the public directly, any rational assessment of the situation would conclude that the pipeline does not provide a direct service to the public. In fact, it could be argued that many businesses provide a benefit to the public, perhaps

even more directly than the Dakota Access pipeline, but they are not considered to be utilities.

(2) A dedication to public use may be a factor that applies only to public utilities. But it seems that a utility must provide some service to the public. As noted above a railroad, trucking company, or barge company are not considered utilities.

(3) The articles of incorporation or organization for Dakota Access are not in the record. It is inconceivable, however, that the articles would provide any information that would counter the fact that Dakota Access is simply a common carrier in the business of transporting crude oil for the benefit of shippers and refiners.

(4) Shipping oil by pipeline is not a service in which the public is generally interested. Consumers of petroleum products do not care how oil gets to refineries and eventually to the gasoline pumps.

(5) At least ostensibly, Dakota Access does not intend, and indeed could not, monopolize an area. It seems clear that the transportation of oil is open to any company.

(6) Dakota Access does not accept all requests for service. As shown by the evidence, Dakota Access

took bids from shippers and selected the shippers that it wanted to contract with.

(7) There is nothing in the record to indicate that Dakota Access cannot discriminate as to who it contracts with. As noted previously, Dakota Access chose who it wanted to contract with as a result of the open season bids.

(8) Again, as noted above, there is nothing that precludes other pipeline companies from competing with Dakota Access. In fact, the evidence was clear that there already are other pipelines transporting oil from the Bakken area.

Although the eight factors in SZ Enterprises are not directly applicable since Dakota Access is not a public utility, they are persuasive in showing that Dakota Access is not a utility of any kind.

Simply stated, Dakota Access is not a utility; it is a business like any other. Therefore, it does not come within the exemption in Iowa Code § 6A.21, and it cannot be granted the right of eminent domain.

b. Good Faith Effort to Negotiate Easements

According to Iowa Code 6B.2B, an entity requesting eminent domain must make a good faith effort to negotiate a purchase agreement with a landowner before requesting eminent

domain. In this case, Dakota Access has not negotiated in good faith with landowners.

NILA witness Francis Goebel filed written testimony describing the conduct of the Dakota Access land agents (NILA Ex. 9, p. 3-4), by which the agents pressured him and threatened him with eminent domain. Likewise, NILA witnesses Tom Konz and Steven Hickenbottom were threatened with eminent domain (NILA Ex. 8, p. 4; NILA Ex. 6, p. 2). Mr. Konz also described how another landowner was harassed and pressured to sign an easement (NILA Ex. 8, p. 5).

The tactics described by these witnesses shows a complete lack of good faith on the part of Dakota Access. Therefore, Dakota Access has not negotiated in good faith to obtain voluntary easements, as required by Iowa Code § 6B.2B, so it should not be granted the right of eminent domain.

The testimony of Charles Frey is also significant in this regard. In Mr. Frey's direct written testimony (Dakota Access Ex. CAF Direct, p. 12-13), he states:

> However, to ensure that the pipeline is built in an efficient manner, and to meet the Project objectives and commercial obligations to go into service in the fourth quarter of 2016, Dakota Access may have to employ eminent domain authority to acquire land from unwilling or hold-out landowners.
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> **********
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> As described further in the direct testimony of Mr. Damon Rahbar-Daniels, Dakota Access has secured long-term

> transportation service agreements from multiple shippers under which the full committed volume of the pipeline system has been subscribed at the capacity of approximately 450,000 barrels per day. To move this crude oil and to meet the commercial in-service date and delivery expectations, Dakota Access must proceed at a fast pace on the Project. So, although Dakota Access does not wish to rely upon eminent domain, it is very important to have eminent domain authority in the event that a hold-out landowner will not negotiate in good faith and thereby would delay the overall Project and its in-service date. . . . If a landowner refused to negotiate in good faith, and Dakota Access did not have eminent domain authority, Dakota Access would have to change the pipeline route. This would increase the construction time, increase costs, increase impacts on the environment, and potentially impact more landowners that would the optimum route.

When you analyze this testimony, it is an arrogant statement that Dakota Access has a right to eminent domain to satisfy it own commercial benefit, to meet its construction schedule, and that any landowner who would not sign an easement was not negotiating in good faith, as if a landowner has some sort of absolute obligation to sign an easement. Eminent domain law is to benefit the public, not a private company, and to protect landowners. Mr. Frey's testimony demonstrates Dakota Access' contempt for the purpose of eminent domain and the rights of landowners, and the company's lack of good faith with respect to eminent domain.

Because Dakota Access has not negotiated with landowners in good faith before requesting eminent domain, the Board should not grant eminent domain authority to the company.

CONCLUSION

The Board must determine whether Dakota Access has carried its burden to prove that its pipeline will promote public convenience and necessity. Public convenience and necessity is a largely undefined term. However, it broadly means that the alleged benefits of a project outweigh the costs and risks.

In undertaking its duty, the Board must confront the marketing and public relations messaging that has permeated the public information, filings, and evidence presented to the Board. Dakota Access keeps trumpeting the alleged benefits of the project.

So, the Board must first evaluate the alleged benefits of the Dakota Access pipeline project. A review of those alleged benefits reveals the following:

- Economic benefits to Iowa would be modest and short-term. Even Michael Lipsman, Dakota Access' economic expert, admitted that the bulk of the economic benefit would be just during the construction of the pipeline. Although Dr. Lipsman used a two-year construction period, the evidence is clear that the planned construction period would only be 8-9 months at the most. The long-term economic benefits would be based on 12 permanent employees and are hardly worth considering in the Board's determination.

Aside from the short-term aspects of any alleged economic benefits, the amount of the impact would be much less than Dr. Lipsman estimates. His analysis was based to a great extent on numbers and estimates provided to him by Dakota Access. Furthermore, Intervenor witnesses Mark Imerman and David Swenson explained why Dr. Lipsman's analysis was flawed. But the most significant problem with his analysis is that it did not take account of the costs and risks that would be incurred as a result of the pipeline project. Even though Dr. Lipsman did not consider those costs and risks, the Board must do so.

- Contrary to Dakota Access' contention, the pipeline is not needed to provide energy independence and energy security for the United States. It is further asserted that the pipeline is needed to satisfy an allegedly unmet demand for oil, and that Iowans will benefit from the pipeline transporting oil from North Dakota to refineries on the Gulf Coast.

There was no evidence that there is an unmet demand for oil in this country. This is just an example of Dakota Access using marketing strategy to sell its product. The evidence was that oil production in the Bakken area is declining, oil companies are leaving the area or taking bankruptcy, demand for petroleum products in this country is declining, there

are already other pipelines carrying oil from the Bakken area, and railroads will continue to transport oil from that area.

All of this raises the question of why shippers signed contracts with Dakota Access to commit to shipping oil on its pipeline. What it means is that the shippers felt for some reason that the Dakota Access pipeline was a better deal for them than other pipelines or shipping by rail. Fine, but that does not mean that a benefit to the shippers is a benefit to the public. In fact, when one pulls back the curtain, the evidence demonstrates that this Dakota Access pipeline is all about convenience and necessity to the shippers and to Dakota Access, not public convenience and necessity. As Damon Rahbar-Daniels said in his direct written testimony:

> I want to emphasize that the single most important fact supporting the need for the Project is that we know the decision of the market: as a result of the open seasons that have been conducted, shippers have committed to long-term transportation and deficiency contracts for committed transportation service on the Dakota Access Pipeline. Basically, a transportation and deficiency contract is one under which the shipper agrees to pay the carrier for the availability of transportation service, even during periods when that transportation service is not actually utilized by the shipper. Thus, these shippers have made substantial financial commitments on a long-term basis, to receive transportation service on Dakota Access' system at the current system capacity of approximately 450,000 bpd.

It should also be noted that in response to interrogatories in the South Dakota Public Utility Commission proceeding, Dakota Access said that whether the oil

transported would stay in the United States, to what extent oil would be transported on this pipeline that could not be transported on other pipelines, whether the pipeline would increase demand for Bakken oil, the capacity of existing pipelines, and the projected demand for crude oil in the United States, were irrelevant to the proceeding (Sierra Club Hrg. Ex. 3, Responses 35-40). If those issues are irrelevant, the Board should not consider them.

On the other hand, there are significant costs and risks the Board must consider:

- The pipeline will inflict damage to Iowa's environment and cultural resources. Sierra Club witness Douglas Harr and OCA witness Jeff Thommes described the environmental resources that are at risk from the pipeline project. Iowa State Archaeologist, John Doershuk, has emphasized that cultural resources have not been adequately surveyed and documented. Dakota Access has not provided to the Board any documentation of any surveys or studies identifying or evaluating the environmental and cultural resources along the pipeline path. Moreover, Dakota Access has made it clear that it does not intend to do any more than is minimally required to satisfy the very limited jurisdictional requirements of the Corps of Engineers and the Iowa DNR. That means that most of the

environmental and cultural resources along the pipeline route will be unprotected, unless the Board denies a permit.

Dakota Access is arrogantly assuming that the Board will not require it to do any more than is required to obtain the federal and state permits. However, the Board has acknowledged that it has the responsibility to protect the environmental and cultural resources along the pipeline route.

- There is also the risk of an oil spill that the Board must consider. The evidence established that pipeline spills are not uncommon and that they cause tremendous damage to land and water. The cleanup costs are staggering. The only financial assurance legally required is a $250,000 bond pursuant to Iowa Code § 479B.13. Dakota Access claims it will have insurance policies to cover damages. But if these insurance policies are like most insurance policies, the insurance companies will try to find a way not to pay claims.

Nor does the Oil Spill Liability Trust Fund provide any solace. It is limited to oil spills into navigable waters and contains exemptions from coverage. It does not cover damage to any other land in Iowa. Moreover, it would tie up a claimant in procedural red tape for a very long time.

Dakota Access' oil spill response plan is also inadequate. There will only be 12 employees in Iowa. It may

take an employee up to an hour to get to the scene of the spill. Local responders will only be allowed to establish a perimeter to keep people away, but will not take any action to address the spill. In the time it takes to get the Dakota Access employees on the scene, the spill will have inflicted wide-scale damage to the land and soil or water resources of the State.

- The most troubling aspect of these costs and risks is that if the Board grants a permit for construction of the pipeline, there is no regulation or enforcement to ensure that Dakota Access avoids or mitigates damage to the environment or takes proper action to avoid or properly respond to oil spills. The only assurance is for the Board to deny a permit.
- An issue that Dakota Access would like to ignore is climate change. The fact is that any activity, such as building this pipeline, that contributes in any way to the use of fossil fuels contributes to climate change. The future of life on earth depends on stopping climate change. Building the Dakota Access pipeline is too big a risk to take.

Quite frankly, throughout this whole process, Dakota Access has acted like it is simply entitled to a permit, with the assurance that the Board will grant it. Dakota Access has undertaken only the minimal actions it thinks are necessary to obtain a permit, apparently believing marketing and public

relations messaging will be enough. Dakota Access entered into contracts with shippers before there was any assurance that it would get a permit from the Board, or any other permit or authorization needed for the pipeline. Dakota Access cannot now use those contracts as a necessity requiring the Board to grant a permit. Nor does the Board have an obligation to accommodate Dakota Access' construction schedule.

Sierra Club respectfully requests that the Board deny a permit in this case.

/s/ [redacted]
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