

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
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**ORDER DENYING REQUEST FOR EMERGENCY STAY, DENYING OTHER
MOTIONS, AND CONTINUING TEMPORARY REMEDY**

(Issued August 26, 2016)

PROCEDURAL HISTORY

On March 10, 2016, the Utilities Board (Board) issued its “Final Decision and Order” (March 10 Order) in this docket, granting a permit for a hazardous liquid pipeline to Dakota Access, LLC (Dakota Access), pursuant to Iowa Code chapter 479B. A number of parties to this proceeding have filed petitions for judicial review of that order (and associated orders), including the case of *Richard R. Lamb, et al., v. Iowa Utils. Bd., et al.*, Polk County District Court No. CVCV051997. On August 9, 2016, 15 petitioners in that case filed with the Court a motion for a stay of enforcement of the Board’s March 10 Order with respect to their properties. On August 22, 2016, the Court issued a ruling denying the motion for stay; however, the ruling expressly preserved the right of the petitioners to file a motion for stay with the Board pursuant to Iowa Code § 17A.19(5).

Also on August 22, 2016, the petitioners in the Court proceeding, who will also be identified as the Petitioners here, filed with the Board an emergency motion for a

stay of enforcement of the Board's March 10 Order while they pursue judicial review of that order.

On August 23, 2016, the Board issued an "Order Requiring Information, Scheduling Oral Argument, and Issuing Temporary Remedy." The Board directed Dakota Access not to conduct any construction or pipeline-related activities on the Petitioners' properties, required that both the Petitioners and Dakota Access provide the Board with certain information, and scheduled an oral argument on the motion for stay for August 25, 2016.

Also on August 23, 2016, Dakota Access filed an emergency motion to dissolve the temporary remedy, which Dakota Access characterized as a stay.

Later the same day, the Petitioners filed an emergency motion for an intermediate stay, seeking an order preventing Dakota Access from constructing its pipeline over their properties while the Board considers the motion for stay filed August 22, 2016.

On August 24, 2016, Dakota Access and the MAIN Coalition filed separate resistances to the August 22, 2016, motion for stay. Later on the same day, Dakota Access filed its response to the Board's request for information.

On August 25, 2016, the Petitioners filed a statement of counsel and, later in the day, affidavits from a number of landowners, all in response to the Board's request for information. The same day, Dakota Access filed a motion to dismiss the

motion for stay, arguing that the Petitioners had missed the deadline for filing the requested information and that the motion for stay should therefore be dismissed.

Also on August 25, 2016, the Board heard oral argument from counsel for the Petitioners and counsel for Dakota Access.

JURISDICTION

As noted above, multiple petitions for judicial review of the Board's March 10 Order have been filed. The general rule is that the filing of a petition for judicial review divests the agency of jurisdiction of the matter unless and until the District Court remands the case to the agency. *McCormick v. N. Star Foods, Inc.*, 532 N.W.2d 196, 199 (Iowa 1995). However, there are exceptions to this general rule. Here, the exception is statutory; Iowa Code § 17A.19(5) gives the agency jurisdiction to consider a request for stay after a petition for judicial review has been filed.

APPLICABLE LEGAL STANDARDS

Iowa Code § 17A.19(5)(a) provides that the filing of a petition for judicial review does not automatically stay the execution or enforcement of agency action such as the March 10 Order. Unless precluded by law, the Board "may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review." Iowa Code § 17A.19(5)(a).

As the Polk County District Court discussed in its “Ruling on Petitioners’ Motion for Stay,”¹ the statute sets forth a process for applying for a stay and the applicants must first apply for a stay from the Board. Iowa Code § 17A.19(5)(a). If the Board denies the application for a stay, the Petitioners may ask the District Court to grant relief. Iowa Code § 17A.19(5)(b). If the Petitioners do so, Iowa Code § 17A.19(5)(c) says the District Court may grant relief only after considering and balancing the following four factors:

- a. The extent to which the applicant for a stay is likely to prevail when the Court finally disposes of the matter;
- b. The extent to which the applicant will suffer irreparable injury if relief is not granted;
- c. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings; and
- d. The extent to which the public interest relied on by the agency is sufficient to justify the agency’s action in the circumstances.

Although § 17A.19(5)(a) does not say the Board is to consider and balance these four factors when deciding whether to grant an application for a stay, Board rules at 199 IAC 7.28(2) state that in determining whether to grant a stay, the Board shall

¹ *Richard Lamb, et al, v. Iowa Utilities Board, et al.*, Polk County Case No. CVCV 051997, issued August 22, 2016. The Court ruled the petitioners were not entitled to a stay because they did not comply with the requirements of Iowa Code § 17A.19(5) by first requesting a stay from the Board. The motion for stay filed with the Court was denied without prejudice to allow the petitioners the opportunity to file a motion with the Board.

consider the four factors listed in Iowa Code § 17A.19(5)(c). Further, in its ruling the District Court stated that if the Petitioners file a motion for stay with the Board, the Board will need to consider the four factors in light of the record before the Board.

The first factor is the extent to which the applicant for stay is likely to prevail on the merits of the appeal. The factor does not specify how likely it must be; instead, “the degree of likelihood of success required to be shown to obtain a stay will necessarily vary with the assessment of the other three factors.” *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008), citations omitted. A stay can be granted where the likelihood of ultimate success is not high but the other factors favor the applicant. *Id.*

The second factor considers the extent to which the applicant will suffer “irreparable injury” if a stay is not entered. “[T]he irreparable-injury factor was meant to impose a strong showing on the applicant.” *Id.*

Even if the Board determines the injury is “irreparable,” the Board must then determine the extent of the injury; a minor injury will not support a stay, even if it cannot be repaired. *Id.*

The third factor requires the Board to balance the “irreparable injury” to the applicant if a stay is denied against the “substantial harm” to the other parties if a stay is granted. The different standards reflect a legislative determination that a lower standard applies to the other parties; their substantial harm may offset a showing of irreparable injury. Iowa Code § 17A.19(5).

The fourth factor requires consideration of the public's interest in the matter. "This factor helps distinguish stays involving agency action from stays or injunctions involving purely private parties." *Grinnell College*, 751 N.W.2d at 403, citation omitted. The interests of private litigants in an agency action may need to yield to the greater public interest. *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W.2d 511, 513 (Iowa 1985).

BOARD DISCUSSION

A. The Emergency Motion for Stay

The four-factor balancing test can be applied to the information and arguments provided by the parties as follows.

1. *Likelihood of success on the merits.*

Without describing all of the arguments presented on this issue, it is sufficient to say that the Board believes the March 10 Order is a well-reasoned decision that correctly applies Iowa law to the evidence in the record and the Petitioners have little likelihood of success on the merits of their appeal. As the *Grinnell* Court indicated, a stay can be granted where the likelihood of ultimate success is not high if the remainder of Petitioners' case for issuance of a stay is compelling, so this determination is not fatal to Petitioners' motion. 751 N.W.2d at 402. Still, this factor weighs against granting the motion for stay.

2. *Extent of any irreparable harm to the Petitioners.*

Petitioners argue they will suffer two irreparable harms if there is no stay. First, they say they will lose their right to effective judicial review of the March 10 Order. Second, they say they will lose a unique interest in their real property.

Petitioners argue they will lose their constitutional right to challenge the March 10 Order on judicial review if a stay is denied. They argue that the challenge will be rendered ineffective if there is no stay because once the pipeline is constructed across their properties, it is likely that the only remedy available to the Petitioners (if they prevail on appeal) would be monetary damages. Those damages are already guaranteed under Iowa Code chapters 6B and 479B, so denial of a stay (and construction of the pipeline) would mean that Petitioners would receive no additional relief with a successful appeal. Petitioners say that the result of denying the stay would be to make the appeal process an academic exercise.

Petitioners also argue that they will suffer irreparable harm in the absence of a stay because their unique interest in this land is threatened. Petitioners cite authorities indicating that in at least some circumstances, an interest in land has unique value that cannot be compensated by monetary damages. See, e.g., *O'Hagan v. U.S.* 86 F.3d 776, 783 (8th Cir. 1996).

With respect to the Petitioners' right to be heard, Dakota Access argues that the Petitioners have already had the opportunity to be heard by the Board, have pursued other potential remedies that were ineffective, and have chosen not to

pursue other opportunities that were available to them. Many of them were formal intervenors in the Board proceedings, where they presented evidence at the hearing and filed post-hearing briefs. Dakota Access says they could have presented their stay request to the Board at any time after issuance of the March 10 Order, but instead they tried to collaterally attack that order in separate judicial proceedings in a manner prohibited under chapter 17A. Dakota Access argues that if there is any question about the adequacy of judicial review as a remedy for Petitioners, it is a result of their own choices and actions.

Dakota Access argues that Petitioners' claim of a property interest that is unique in a manner that renders monetary damages inadequate is also without merit. Dakota Access cites, among other cases, *Nichols v. City Of Evansdale*, 687 N.W.2d 562, 567 (Iowa 2004) for the proposition that monetary damages can be a sufficient remedy where an underground pipeline is located on property without an easement or other right to be there.

Finally, to the extent the Petitioners are arguing that construction of the pipeline will, by itself, cause irreparable harm to the land, Dakota Access notes that the Board's rules require the company to fully mitigate any harm to the land caused by construction; rule 199 IAC 9.4(2)(d) requires, for example, that drain tile damaged by construction must be repaired "to its original or better condition." Further, Dakota Access says that the Petitioners have conceded they have extensive tile systems on their properties; Dakota Access says the Petitioners cannot argue that the soils will

be irreparably harmed by pipeline construction when they have disturbed the soils in the same manner in order to install tile.

The Board finds that the Petitioners have shown that if the motion for stay is denied, they may suffer harm in the form of limitation of their remedies on appeal. If the stay is granted and they win on appeal, then they may be able to completely prevent construction of this pipeline on their property. If the stay is not granted, then it appears likely that the pipeline will be constructed and then, even if they win on appeal, they will only receive the monetary damages they have already received or are already entitled to.

Either way, however, Petitioners will have all their due process rights to pursue their appeal. The difference is only in the remedies that may be available to them, if they win. Still, the Board finds that the Petitioners have made a showing that the denial of the stay would cause them irreparable harm in the form of loss of the remedy they desire.

3. *Substantial harm to other parties.*

Petitioners argue that Dakota Access will not be substantially harmed if a stay is granted. Petitioners recognize that Dakota Access claims it will suffer significant financial costs if a stay is granted, but Petitioners say that is caused by Dakota Access's decision to set an aggressive construction schedule that left no flexibility for the legal challenges that should have been anticipated by Dakota Access. Further, Petitioners argue that no financial injury to Dakota Access from granting a stay can

overcome the Petitioners' loss of their constitutional due process rights if the stay is denied. Finally, Petitioners argue that so long as Dakota Access is unable to operate the pipeline (that is, so long as any other part of the pipeline is not yet completed), the stay would not be the cause of any operational losses the company might claim.

Dakota Access argues that a stay (and any associated interruption in construction work) will harm many who are not even parties to this proceeding. Approximately 8,000 workers are now in the field along the entire pipeline route; delay could adversely affect those workers. Dakota Access says those workers are spending money on goods and service in the various communities along the route; delay could adversely affect those local communities, as well.

Dakota Access further argues that a delay in construction would increase the likelihood of having to delay final grading and restoration of at least some parcels of land until the spring of 2017, interfering with a second growing season on those properties, and therefore adversely affecting those other landowners. (Att. G to the resistance filed August 24, 2016.)

Dakota Access also argues that a stay would harm the company and its partners. Dakota Access offers the affidavit of Mr. Joey Mahmoud (Attachment G to the resistance filed August 24, 2016), who states that when there is no construction due to delays the cost to Dakota Access is approximately \$1.3 million per spread per day. In addition, if construction is stayed on Petitioners' parcels and Dakota Access has to move its construction spreads around those parcels, the cost of each such

move is approximately \$535,000. Mahmoud also says that if the anticipated in-service date for the pipeline is delayed, Dakota Access and its partners will lose approximately \$83.3 million per month in revenues. Mahmoud does not indicate what the anticipated in-service date might be; however, at oral argument counsel for Dakota Access stated his belief that the in-service date is some time in November 2016.

Dakota Access concludes that granting the stay would very likely cause millions of dollars of harm to Dakota Access, and potentially much more. Dakota Access notes that the decision of the Petitioners to delay their request for stay until the eleventh hour has exacerbated these harms, as the company cannot realistically alter its construction schedule at this stage to avoid these parcels at reasonable cost.

As described in the previous section of this Order, the Board finds that Petitioners have made a case that their relief options on appeal may be adversely affected if the motion for stay is denied. If a stay is granted and Petitioners ultimately win on the merits of their appeal, then they (or at least most of them) would be able to entirely avoid having their soil disturbed by the construction and continuing presence of the pipeline.

If a stay is denied, however, the construction schedule information provided by Dakota Access shows the pipeline may be completed and in operation before the judicial review proceeding is completed. Under those circumstances, if the Petitioners were to win on the merits, the only realistic remedy left to them would be

monetary damages; the disturbance of their soil for pipeline construction could not be undone. The Petitioners point out they are already entitled to monetary damages under Iowa Code chapters 6B and 479B, so as far as they are concerned a denial of the motion for stay would make judicial review proceedings ineffective.

Dakota Access has also made a persuasive case that granting a stay pending judicial review would cause substantial harm to the company and, perhaps, to others who are not parties to this proceeding. The Board must balance these conflicting potential harms. In doing so, the Board will also consider the first factor, the Petitioners' likelihood of success on the merits. Because the Board has already concluded that the Petitioners are not likely to be ultimately successful on appeal, the risk of actual harm occurring to their interests is reduced.

Further, Iowa Code § 17A.19(5) requires that the Petitioners show "irreparable" harm to justify a stay, while the other parties must only show "substantial" harm to resist one. This difference reflects a decision by the General Assembly that the burden on a party seeking to interfere with the effectiveness of an administrative agency's order is a heavy one, heavier than the burden on those opposed to a stay. This consideration also tips the balance against granting the motion or stay, as Dakota Access has shown a significant likelihood of substantial harm not only to itself, but also to others who are not parties here, if the motion for stay is granted.

Finally, the Board is guided by the decision of the *Nichols* Court, holding that in a situation where sewer lines were found on property where there was no easement for them, “the [property owners] can be adequately compensated by damages.” 687 N.W.2d at 572. In *Nichols*, the city gave a deed to a private party and that deed did not reserve to the city the right to have sewer mains on the property. The Court found monetary damages provided an adequate remedy. The result here, if the Dakota Access pipeline is built and the Petitioners are ultimately successful on appeal, would be much the same.

The Board notes that this analysis also addresses Petitioners’ argument that their property is unique such that monetary damages cannot be adequate. The *Nichols* decision holds otherwise.

Accordingly, the Board finds that the Petitioners have not established that they will be irreparably harmed by a denial of the stay, while Dakota Access has shown that it, and others, are likely to suffer substantial harm if a stay is granted. These two factors, considered together, weigh against granting the motion for stay.

4. *The public interest.*

Petitioners argue the public interest factor supports their motion for stay. They say that the public interests identified by the Board in the March 10 Order (which Petitioners describe as public safety reasons and economic benefits) are either unsupported by substantial evidence in the record (for the public safety reasons) or represent a factor the Board is prohibited from considering (for the economic

benefits). Petitioners conclude that even if some public interest were identified that would tend to justify a stay, it could never outweigh the Petitioners' constitutional right to pursue their appeals.

Dakota Access argues that the Board has already considered the public interest as it is affected by this project and the Board has concluded that the project will promote that interest. The safety and economic benefits of the project have already been determined and, according to Dakota Access, "a stay of construction denies the public those benefits."

The Board has determined that this project, when completed, will promote the public convenience and necessity. Any delay in achieving that public benefit is potentially counter to the public interest. However, it is likely that benefit will be achieved regardless of whether the stay is granted, even if it might be somewhat delayed; the Board finds that this factor tends to weigh against granting the motion for stay, but it is not a major factor in the overall balancing test.

B. Rulings on other pending motions

1. Dakota Access's motion to dissolve temporary stay.

The motion to dissolve temporary stay filed by Dakota Access on August 23, 2016, asserts that the Board committed error by issuing a stay that alters the status quo without holding a hearing, without considering the four-factor balancing test, and without requiring a bond. Dakota Access asks that the temporary stay be dissolved. The Board will deny the motion.

First, the Board notes that it did not issue a temporary stay. Iowa Code § 17A.19(5) allows an administrative agency to “grant a stay on appropriate terms **or other temporary remedies** during the pendency of judicial review.” (Emphasis added.) The Board’s August 23, 2016, order is clear that the agency was issuing a “temporary remedy.” The names attached to agency action can be important; for example, in *East Buchanan Tele. Coop. v. Iowa Utils. Bd.*, 738 N.W.2d 636 (Iowa 2007), the Iowa Supreme Court held that the Board had the authority to order a telephone company to refrain from blocking certain calls, but the agency lacked the authority to characterize that order as an “injunction” because that is a judicial remedy enforceable through a court’s authority to find a party in contempt. 738 N.W.2d at 641. However, the substance of the Board’s order was still effective because the Board has the authority to make decisions regarding regulation of utilities and “the corresponding power to issue orders implementing them.” *Id.* at 642. Here, the Board expressly did not issue a stay; it issued a “temporary remed[y] during the pendency of judicial review.”

Second, the Board has the authority to take any action necessary or appropriate to the discharge of its duties, consistent with law and with the rules and orders of the Board. 199 IAC 7.3(10). Here, the Board issued the temporary remedy in order to allow it time to gather the information and arguments from the parties that is necessary to apply the four-factor test to the motion for stay. This was a necessary and appropriate action to fulfill the mandate of 199 IAC 7.28.

Third, the temporary remedy has not adversely affected Dakota Access's construction schedule. Attachment A to the response Dakota Access filed on August 24, 2016, shows the projected schedule of pipeline-related activities on the Petitioners' properties. It shows only one activity with a date that could be affected by the temporary remedy; all other activities are scheduled to occur after the temporary remedy has expired. Further, that one potentially-affected activity (staking on the LaVerne Johnson property) has already been completed, according to the affidavit filed by Mr. Johnson on August 25, 2016.

It may be that a bond should have been required; the Board is not deciding in this case whether an administrative stay or other temporary remedy under Iowa Code § 17A.19(5) requires a bond. However, if one were required, Dakota Access has not provided a specific amount for the bond; at oral argument, counsel for Dakota Access stated that he had not seen or read the contract that supports Dakota Access's request for bond, so he could not answer the Board's questions about the contract. In the absence of adequate information about the terms of the contract, such as an ability to determine whether the contract's move-around provisions have exceptions or other relevant exclusions, there is no adequate basis to determine the proper amount of any bond that might be required. Accordingly, the Board will not make any decision on this issue.

For all of these reasons, the motion to dissolve the temporary stay will be denied. Further, the temporary relief ordered by the Board on August 23, 2016, will

remain in place until 9 a.m. on Monday, August 29, 2016, to allow the Petitioners an opportunity to exercise their right to seek a stay from the District Court under Iowa Code § 17A.19(5)(c).

2. *Dakota Access's motion to dismiss.*

On August 25, 2016, Dakota Access filed a motion to dismiss the motion for stay, arguing that Petitioners failed to file information required by the Board's August 23, 2016, order in a timely manner. Dakota Access argues that the Petitioners seek extraordinary relief with their motion for stay, and "having created an emergency which the Board and Dakota Access have jumped through hoops to respond to timely, there is no excuse for Petitioners not taking the required steps to promptly prosecute their own case as required by the Board's August 23 Order."

The August 23 order required that the Petitioners file written answers to the Board's questions by 2 p.m. on August 24, 2016. However, it also provided that "to the extent Petitioners are unable to provide complete written answers in that time frame, Petitioners should be prepared to answer these questions at oral argument...." (Order at p. 7.) Petitioners were prepared to answer the questions at oral argument; the motion to dismiss will be denied.

CONCLUSION

The Board has reviewed and considered the arguments presented by the parties and concludes that the emergency motion for stay should be denied.

However, the temporary remedy ordered by the Board on August 23, 2016, will remain in effect until 9 a.m. on August 29, 2016.

The other pending motions described in this order are also denied.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Emergency Motion to Stay Enforcement of the March 10, 2016, Final Decision and Order in Docket No. HLP-2014-0001 is denied.

2. The temporary remedy ordered by the Board in its August 23, 2016, “Order Requiring Information, Scheduling Oral Argument, and Issuing Temporary Remedy” shall continue to be in effect until 9 a.m. on August 29, 2016. Dakota Access, LLC, continues to be prohibited from conducting any construction or other pipeline-related activities on any of the properties that are the subject of the emergency motion for stay filed in this docket on August 22, 2016, until that time.

3. The “Emergency Motion to Dissolve Temporary Stay” filed by Dakota Access, LLC, on August 23, 2016, is denied.

4. The "Motion to Dismiss Petitioners' Motion for Stay" filed by Dakota Access, LLC, on August 25, 2016, is denied.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano _____
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 26th day of August 2016.

DISSENT

For the reasons stated in my Dissent to the Board's August 23, 2016, "Order Requiring Information, Scheduling Oral Argument, and Issuing Temporary Remedy," I respectfully dissent from Ordering Clause No. 2 of this order, granting a temporary remedy prohibiting construction or other pipeline-related activities on the subject properties until 9 a.m. on August 29, 2016. I continue to believe that 199 Iowa Admin. Code 7.28 requires that the four-factor analysis be used when determining whether to grant a motion for stay and that there is no difference between a temporary remedy that is in effect a stay and a stay itself. Therefore, the Board must consider the four-factor analysis in connection with the temporary remedy and that has not been done. Thus, the Board cannot continue a temporary remedy that has the same effect as a stay. Furthermore, the Board has appropriately applied the four-factor analysis to the Petitioners' request for stay and in this order finds that the balance of the four factors does not support granting the motion for stay. Since it continues to be my opinion that the temporary remedy is in effect a stay, the Board must reach the same decision on the temporary remedy as was reached on the Petitioners' motion for a stay.

The Petitioners, by their own admission, indicated that the motion for a stay could have been filed with the Board any time after April 28, 2016. Motions for stay could have also been filed in each of the condemnation proceedings. Even after receiving 48-hour construction notices, Petitioners still chose not to seek a stay in

any jurisdiction. Because of these facts, any emergency that is perceived by the Petitioners is of their own making.

The Petitioners also argue that a court review is meaningless without a stay as it deprives them of their due process. For the same reasons stated above, this is also of the Petitioners' own making. They had ample opportunity to exercise due process and chose not to pursue it until this late date. The denial of a stay does not necessarily deprive the Petitioners of their due process because it was the Petitioners' decision not to exercise their due process prior to the current request. The Petitioners have had multiple opportunities to follow the process established by law and have chosen not to follow that process. Any deprivation of due process is due to their decisions.

I concur in the remainder of this order.

/s/ Nick Wagner

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 26th day of August 2016.