

**STATE OF IOWA**  
**BEFORE THE IOWA UTILITIES BOARD**

<b>IN RE:</b>  <b>REVIEW OF RESTORATION OF AGRICULTURAL LANDS DURING AND AFTER PIPELINE CONSTRUCTION RULES [199 IAC CHAPTER 9]</b>	<b>DOCKET NO. RMU-2016-0013</b>
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**JOINT UTILITY COMMENTS**

In response to the Iowa Utilities Board’s (“Board”) July 17, 2019, Order Requesting Stakeholder Comment on Potential Rule Changes, Black Hills/Iowa Gas Utility Company, LLC, d/b/a Black Hills Energy (“Black Hills”), Interstate Power and Light Company (“IPL”), the Iowa Utility Association (“IUA”) and MidAmerican Energy Company (“MidAmerican”) (collectively, the “Joint Utilities”) file these joint comments.

The Joint Utilities appreciate the opportunity to comment on the Board’s Chapter 9 rules, as the Restoration of Agricultural Land rules are impactful to landowners and the utility business. As such, the Joint Utilities respectfully request the Board’s consideration of the following proposed changes:

**Renumbered 199 IAC 9.1(2) (*Definitions*)**

Significant changes have been made to the definitions. The Joint Utilities have provided several comments for the Board’s consideration which the Joint Utilities believe improve clarity and better align with definitions included in the Iowa Code.

The Joint Utilities maintain their recommended changes submitted through Joint Comments filed on July 9, 2019 in Docket No. RMU-2016-0004, and suggest the following update to the new definition of “Affected Person”:

“Affected person” means any person with a recorded legal right or recorded interest in the property, including but not limited to, a contract purchaser of record, a tenant occupying the property under a recorded lease, a record lienholder, and a record encumbrancer of the property.

Additional comments regarding the use of the term “affected person” are identified below in discussion of 199 IAC 9.3(2) and 9.6.

The Board has fully revised the definition of “Agricultural Land”. To avoid creation of a discrepancy between the Iowa Administrative Code and Iowa Code, the Joint Utilities suggest use of the definition already provided within Iowa Code § 6A.21(1):

*“Agricultural land”* means real property owned by a person in tracts of ten acres or more and not laid off into lots of less than ten acres or divided by streets and alleys into parcels of less than ten acres, and that has been used for the production of agricultural commodities during three out of the past five years. Such use of property includes, but is not limited to, the raising, harvesting, handling, drying, or storage of crops used for feed, food, seed, or fiber; the care or feeding of livestock; the handling or transportation of crops or livestock; the storage, treatment, or disposal of livestock manure; and the application of fertilizers, soil conditioners, pesticides, and herbicides on crops. Agricultural land includes land on which is located farm residences or outbuildings used for agricultural purposes and land on which is located facilities, structures, or equipment for agricultural purposes. Agricultural land includes land taken out of agricultural production for purposes of environmental protection or preservation.

“Board” is defined at 199 IAC Chapters 1, 7, and 9. The Joint Utilities observe that these definitions, as currently adopted and in proposed rules, each differ, as follows:

*Chapter 1:*

**199—1.5(17A,474) Organization.** The board consists of the three-member board, the technical and administrative staff, and the general counsel.

**1.5(1) *The board.*** The three-member board is the policy-making body for the utilities division. The chairperson serves as the administrator of the utilities division. As administrator, the chairperson is responsible for all administrative functions and decisions.

*Chapter 7 (proposed):*

199-7.2

*“Board”* means the Iowa utilities board.

*Chapter 9 (proposed):*

*“Board”* means the utilities board within the utilities division of the department of commerce.

The Joint Utilities respectfully request that the Board describe the purpose of maintaining a unique definition for each chapter, and whether there should be a distinction between the three-member board and the utilities division.

The Joint Utilities observe that some county boards may meet infrequently, and, if a county board has already contracted engineering services for the purpose of inspections pursuant to Iowa Code § 479.29, designation of an individual professional engineer may not require the county board to reconvene. Awaiting a county board of supervisors meeting to designate an inspector may result in unnecessary project delays. Therefore, the Joint Utilities propose the following redline change to the definition of “County Inspector”:

*“County inspector”* means a person acting under the supervision of a professional engineer that is licensed under Iowa Code section 542B and is familiar with agricultural and environmental inspection requirements, who is designated by the county ~~board of supervisors~~ to be responsible for completing an on-site inspection for compliance with this chapter and Iowa Code chapters 479 and 479B.

The Joint Utilities have reviewed the Board's proposed changes to the definition of "Pipeline Construction" and suggest retaining the current "substantial disturbance" threshold. Additionally, the Joint Utilities believe that tree clearing is not construction and clear delineation of that distinction within this definition would be beneficial for ensuring construction can begin on schedule. This aligns with 199 IAC 9.4(2) which does not require that an inspector be present for tree clearing. Furthermore, scheduling tree clearing may require flexibility to accommodate bat populations. Therefore, the Joint Utilities propose the following redline change to the definition of "Pipeline Construction":<sup>1</sup>

~~f.k~~ *"Pipeline construction"* means a substantial disturbance to agricultural land activity associated with installation, relocation, replacement, removal, operation or maintenance of a pipeline ~~that disturbs agricultural land~~, but shall not include work performed during emergency conditions or tree clearing completed on land under easement with landowner awareness. Emergency means a condition involving clear and immediate danger to life or health, or essential services, or a risk of a potentially significant loss of property. When the emergency condition ends, pipeline construction will be in accordance with these rules.

The definition of "Proper Notice to County Inspector" has been substantially expanded in the Notice of Intended Action (NOIA) to include a list of activities which require inspection; however, the list may not be necessary as it appears to not be exhaustive with the "including, but not limited to" qualification. By including a large number of potential activities, Joint Utilities are concerned that it would be difficult to determine whether notice is required for activities outside of the listed group. Additionally, the Joint Utilities believe that electronic communication may also serve as 'notice'. Therefore, the Joint Utilities propose the following redline change to the definition of "Proper notice to the county inspector":<sup>2</sup>

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<sup>1</sup> Redlines have been applied to the July 17, 2019 Notice of Intended Action (NOIA) version of the definition.

<sup>2</sup> Redlines have been applied to the July 17, 2019 Notice of Intended Action (NOIA) version of the definition.

*“Proper notice to the county inspector”* to the county inspector means that the pipeline company and its contractors shall keep the county inspector continually informed of the work schedule and any changes to the schedule, and shall provide at least 24 hours’ written notice before commencing or continuing ~~any construction activity which requires inspection by the county inspector, including, but not limited to, right-of-way staking, clearing, boring, topsoil removal and stockpiling, trenching, tile marking, tile screening, tile repairs, backfilling, decompaction, cleanup, restoration, or testing at any project location.~~ Written notice may be in the form of electronic communication. The pipeline company may request that the county inspector designate a person to receive such notices. If proper notice is given, construction shall not be delayed due to a county inspector’s failure to be present on site.

The Board has fully revised the definition of “Topsoil”. To avoid creation of a discrepancy between the Iowa Administrative Code and Iowa Code, the Joint Utilities suggest use of the definition already provided within Iowa Code § 208.2(17):

*“Topsoil”* means the natural medium located at the land surface with favorable characteristics for the growth of vegetation.

The Joint Utilities suggest that, in addition to maintaining alignment with Iowa Code, this definition avoids the need to define “certified professional soil scientist,” a new term introduced in the NOIA proposed definition of “Topsoil.”

The Board requested comment on whether a definition of “above-ground structures” should be added to the definition section. The Joint Utilities are unable to find the use of “above-ground structures” anywhere within Chapter 9 rules, and therefore believe a definition of “above-ground structure” is unnecessary.

#### **199 IAC 9.2(1)“e” (*Content of Plan*)**

The Joint Utilities respectfully request further direction from the Board regarding the new requirement which requests “A unique identification number that follows a linearly sequential pattern on each tract of land over which the pipeline will be constructed.” It is not clear to the utilities what is expected to be provided.

The Board has also asked for comment on “how and when pipeline companies should provide the Board with land restoration plans relating to those pipeline construction projects or underground storage facility construction projects for which no permit is required.” The Joint Utilities submit that the Board should not require that a land restoration plan be filed where no permit is required. Such a position is consistent with Iowa Code §479.29(9), which provides that “[p]etitioners for a permit for pipeline construction shall file with the petition a written land restoration plan showing how the requirements of this section, and of rules adopted pursuant to this section, will be met. . . .” If a dispute were to result from a project where no permit was required, the plan could be filed at that point to aid the Board in resolving the matter.

#### **199 IAC 9.3(2) (*Procedure for Review of Plan*)**

This section indicates that the utility “shall provide copies” of the approved land restoration plan to “all affected persons”. The Joint Utilities believe that only those persons with interests in land would need to be served a copy of the plan. The Joint Utilities note that providing the plans in the Board’s Electronic Filing System (EFS) would allow Joint Utilities to focus their resources on providing copies of the plan to those parties with actual interests in the land that are speculative. Additionally, utilities may already make the plan available to the public on their corporate websites. Therefore, the Joint Utilities suggest the following redline changes:<sup>3</sup>

**9.3(2)** After the board has approved the plan as part of the board’s review and approval of the petition, but prior to construction, the pipeline company shall provide ~~copies of the final plan approved by the board to all affected landowners~~persons that will be disturbed by the construction, the county board of supervisors in each county affected by the project, the county engineer of each affected county, and the county inspector in each affected

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<sup>3</sup> Redlines have been applied to the July 17, 2019 Notice of Intended Action (NOIA) version of the definition.

county. The plan will be available to any other affected persons through the board's electronic filing system.

As with Rule 9.3, discussed above, the Joint Utilities reiterate that the Board should not require the filing of a land restoration plan for projects that do not require a permit.

#### **199 IAC 9.4(1) (*Easement Staking*)**

This new subrule requires that an inspector be present for easement staking. The Joint Utilities respectfully request additional information from the Board as to why the inspector's presence would be necessary for this activity. Inspection costs are likely to increase with this additional requirement.

Additionally, the Joint Utilities would like clarification that the provision identified within the definition of "proper notice to the county inspector" (*"If proper notice is given, construction shall not be delayed due to a county inspector's failure to be present on site."*) would also be applicable to easement staking.

#### **199 IAC 9.4(2) (*Trees and Brush*)**

The Joint Utilities respectfully request additional clarification from the Board as the need for this prescriptive approach to tree valuation, including discussion of how appraisal of tree values fall under the Board's jurisdiction. The Joint Utilities suggest the following revisions to this subrule to ensure reasonable ability to comply:

a. If there are trees of commercial or other value to the landowner, the pipeline company shall allow the landowner the right to retain ownership of the trees with the disposition of the trees to be negotiated prior to commencement of land clearing. ~~The pipeline company shall hire a forester with local expertise to appraise the commercial value of any timber to be cut for construction of the pipeline. The pipeline company shall compensate the landowner for the full appraised commercial value of any timber removed. In no event shall any trees be left on or adjacent to the easement.~~ The pipeline company shall remove all cleared trees and debris from the easement.

b. If the trees to be cleared have been determined to have no commercial ~~or other~~ value to the landowner and there is no negotiated agreement between the pipeline company and the landowner for the disposition of the trees in advance of clearing of the easement, removal and disposal of the material shall be completed at the discretion of the pipeline company.

**Addition of renumbered 199 IAC 9.5(1) (*Topsoil survey*)**

The Board proposes to create a new, renumbered subsection 9.5(1), requiring (under subsection “a”) that the pipeline company conduct a topsoil survey prior to removal of any topsoil, under supervision of “a certified professional soil scientist.” Proposed subsection “a” also specifies the manner in which the survey is to be conducted and subsection “b” requires the pipeline company to submit the survey to “the county board of supervisors, county inspector, county engineer, and affected landowners at least six weeks prior to commencing construction.” First, the Joint Utilities do not believe it will always be feasible to conduct such a survey prior to the removal of any topsoil and, relatedly, that it may not be possible to provide the results of such survey at least six weeks prior to commencing construction. For example, it is not clear how the survey would be completed when crops are present, or when the ground is still frozen. This requirement may, therefore, add cost and delay into the project planning.

Second, with regard to proposed subsection 9.5(1)“a”, the Joint Utilities submit that it is not clear who constitutes a “certified professional soil scientist” under the sub-rule. As the Joint Utilities have noted, “certified professional soil scientist” is not defined, and it is unclear what qualifications or certifications the Board would deem appropriate to comply with the phrasing. Third, the Joint Utilities also suggest that it could be more cost-effective for customers if the rule permitted soil samples to be sent to the soil scientist for analysis or if soil maps were utilized as a survey method.



**Amendment to renumbered 199 IAC 9.5(2) (*Topsoil separation and replacement*)**

The Joint Utilities are generally supportive of the Board's proposed revisions to renumbered section 9.5(2), relating to topsoil separation and replacement. However, the Joint Utilities wish to comment on newly-inserted subsection "c", regarding "stockpile stabilization," which requires that topsoil stockpiles "be stabilized with seeding and mulch within fourteen calendar days of stockpiling" and that "[b]etween October 15 and March 15, soil tackifier shall be used in place of seeding and mulch." The Joint Utilities note that the Iowa Department of Natural Resources already requires a Stormwater Pollution Prevention Plan (SPPP) to prevent runoff from topsoil piles and additional Board requirements are not necessary and may be overly prescriptive. The Joint Utilities suggest that it would be sufficient for the rule to state that "the pipeline company shall stabilize topsoil stockpiles" without prescribing the methodology.

**Addition of renumbered 199 IAC 9.5(3) (*Pumping of water from open trenches*)**

With regard to the new, renumbered section 9.5(3), the Joint Utilities only wish to comment on subsection "c", which states that "[w]ritten permission from the landowner is required before the pipeline company can pump water from trenches onto adjacent land." It is not clear from this section what would constitute "adjacent land." Given that subsection "d" provides that "[a]ll pumping of water shall comply with existing state drainage laws, local ordinances, and federal statutes," the Joint Utilities submit that new subsection "c" is unnecessary.

**Amendment to renumbered 199 IAC 9.5(4) (*Temporary and permanent repair of drain tile*)**

The Joint Utilities generally support the Board's proposed revisions to renumbered section 9.5(4), but wish to comment regarding subsection "d." First, with regard to the

requirement that permanent repairs to be completed “within 14 days after the pipeline is installed in the trench and prior to backfilling of the trench over the tile line,” instead of “as soon as is practical,” the Joint Utilities believe the original wording should be left in place, as it would be unnecessarily burdensome to track and monitor compliance with the proposed 14-day timeframe.

With regard to subsection “d”(4), the Joint Utilities suggest the addition of the following language: “using a laser transit, or similar instrument or method . . .”, which will give the County Inspector and pipeline company appropriate flexibility.

With regard to subsection “d”(6), the Joint Utilities do not believe the addition of the term “televising” makes sense and are also not clear on what would constitute a “working easement,” as that term is not defined elsewhere.

**Amendment to renumbered 199 IAC 9.5(6) (*Restoration after soil compaction and rutting*)**

The Board has proposed the following revision to section 9.5(6):

Tillage shall be at least 18 inches deep in land used for crop production and 12 inches deep on other lands and shall be performed under soil moisture conditions which ~~permit effective working of the soil~~ result in a maximum standard penetration test (SPT) reading of 300 psi pursuant to ASTM D1586-11 performed by a qualified person. Decompaction shall not occur in wet conditions.

The Joint Utilities do not believe it is clear who is “a qualified person” under this subsection. Additionally, this new requirement has the potential to add costs to the project.

**Amendment to renumbered 199 IAC 9.5(8) (*Revegetation of untilled land*)**

The Joint Utilities wish to comment on new, renumbered subsection “c” to section 9.5(8), regarding weed control. First, the Joint Utilities believe that only the last sentence

of this new subsection should remain (that is, “[i]f the pipeline company fails to control weeds within 45 days after receiving written notice from the landowner, the pipeline company shall be responsible for reimbursing all reasonable costs of weed control incurred by owners of adjacent land”). The remainder is overly prescriptive as to the methods of weed control and may rule out other effective methods. In addition, the vegetation management plan submitted by the pipeline company already addresses this issue, rendering the first two sentences of the section unnecessary.

**Amendment to renumbered 199 IAC 9.5(12) (*Construction in wet conditions*)**

The Board proposes to add a requirement that “[t]he county inspector shall determine when construction should not proceed in a given area due to wet conditions.”

The Joint Utilities would like to see this sentence revised as follows:

The county inspector shall determine, in consultation with the pipeline company,  
when construction should not proceed in a given area due to wet conditions.

These revisions will ensure collaboration and facilitate job site planning, so as to minimize cost increases incurred from downtime on the project site.

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**Amendment to renumbered 199 IAC 9.6 (*Designation of pipeline company point of contact*)**

The Board’s proposed changes to section 9.6 largely relate to revising “landowner” to “affected persons.” The Joint Utilities refer to the above discussion and comments on the Chapter 10 rulemaking with regard to the definition of “affected persons.” For example, it is not clear why a lienholder would need to have the designated contact

information for the pipeline company and the county inspector prior to the start of construction (if ever).

**Amendment to renumbered 199 IAC 9.7 (*Separate agreements*)**

The Board requested comment on whether it should amend renumbered 199 IAC 9.7 to provide that the pipeline company must file with the Board a copy of any separate agreement. The Joint Utilities believe that a new requirement requiring the filing of any separate agreement with the Board is not necessary as the pipeline company is already required to provide a copy of any separate agreement to the county inspector.

**Addition of renumbered 199 IAC 9.8 (*Halting construction*)**

The Board proposes to adopt a new rule 9.8, which would specify the process by which the county inspector notifies the pipeline company of a violation of the standards adopted in chapter 9, Iowa Code §§ 479.29 or 479B.20, or a separate agreement between the pipeline company and the landowner, and halts construction. The Joint Utilities believe the rule leaves unclear whether the halt would be only for a segment of pipeline construction or for the entire project, and for how long. Additionally, the new requirement appears to be unnecessarily prescriptive, not providing the necessary flexibility for construction issues to be timely resolved between the pipeline company and inspector to minimize potential cost overruns. Therefore, the Joint Utilities propose the following redline changes to the subrule:

A county inspector may temporarily halt construction if construction is not in compliance with the standards adopted in this chapter, ~~the land restoration plan, or the terms of an independent agreement between the pipeline company and landowner regarding land restoration or line location until the county inspector consults with a supervisor of the pipeline company or contractor. If, after consultation with a supervisor of the pipeline company or contractor, agreement on corrective action to address the violation~~

~~cannot be reached, the county inspector may submit a request to the county board of supervisors for resolution of the issue. Construction may not resume at the disputed location until either (1) the county inspector and a supervisor of the pipeline company reach agreement on a resolution or (2) where the board of supervisors has been contacted, until the board of supervisors has responded or after one business day after contact by the county inspector. If a resolution is not reached, construction may continue; however, the pipeline company will be responsible for any damages or for correcting any violation.~~

#### **199 IAC 9.10 (*Project completion*)**

The Joint Utilities believe that this new subrule should be revised to appropriately reflect the county's jurisdiction over a pipeline project. For example, a county inspector would not be expected to have full knowledge of project completion in terms of gas flowing. Therefore, the Joint Utilities suggest the following redline changes to the subrule:

The county inspector for each county affected by the pipeline project shall recommend to the county boards of supervisors that ~~the pipeline project be considered complete upon completion of~~ restoration of all affected agricultural lands is complete and seventy percent growth is established in locations requiring seeding. The county boards of supervisors shall determine whether ~~the project~~ land restoration is completed.

#### **199 IAC 9.11 (*Document Submittal*)**

The Joint Utilities posit that the final public version of pipeline maps submitted to the Board following project completion, should also be sufficient for use by the county. Additionally, GPS level detail regarding location of tile would be considered confidential. Therefore, the Joint Utilities propose striking 9.11(2).

Dated this 16th day of August, 2019.

Respectfully submitted,

**Black Hills Energy**

/s/ Adam Buhrman

Adam Buhrman  
Corporate Counsel  
Black Hills Energy  
1102 E. 1st Street  
Papillion, NE 68046  
Telephone: (402) 221-2630  
[Adam.buhrman@blackhillscorp.com](mailto:Adam.buhrman@blackhillscorp.com)

**Interstate Power and Light Company**

/s/ Lissa Koop

Lissa Koop  
Senior Attorney  
Alliant Energy Corporate Services, Inc.  
4902 N. Biltmore Lane  
Madison, Wisconsin 53718  
(608) 458-4826 (telephone)  
[lissakoop@alliantenergy.com](mailto:lissakoop@alliantenergy.com)

**Iowa Utility Association**

/s/ Chaz Allen

Chaz Allen  
Executive Director  
400 East Court Ave., Suite 120  
Des Moines, IA 50309  
Phone: 515-282-2115  
Email: [callen@iowautility.org](mailto:callen@iowautility.org)

**MidAmerican Energy Company**

/s/ Andrew L. Magner

Andrew L. Magner  
Attorney  
666 Grand Avenue, Suite 500  
Des Moines, Iowa 50309  
Phone: (515) 281-2376  
Email: [ALMagner@Midamerican.com](mailto:ALMagner@Midamerican.com)