

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Dakota Access, LLC  
Dakota Access Pipeline Pump Station – Emmons County  
Siting Application

Case No. PU-19-204

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**[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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January \_\_, 2020

**Appearances**

Commissioners Brian Kroshus, Julie Fedorchak, and Randy Christmann.

Lawrence Bender, Attorney at Law, Fredrikson & Byron, P.A., 1133 College Drive, Suite 1000, Bismarck, North Dakota 58501 and Bret A. Dublinske and Brandt M. Leonard, Attorneys at Law, Fredrikson & Byron, P.A., 505 E. Grand Avenue, Suite 200, Des Moines, Iowa 50309, on behalf of Dakota Access, LLC.

Zachary Pelham, Special Assistant Attorney General, P.O. Box 400, Bismarck, North Dakota 58502-0400, on behalf of the Public Service Commission.

Timothy Q. Purdon, Attorney at Law, Robins Kaplan, LLP, 1207 West Divide Avenue, Suite 200, Bismarck, North Dakota 58503, on behalf of Intervenor Standing Rock Sioux Tribe.

Timothy J. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

**Preliminary Statement**

Dakota Access, LLC (“Dakota Access”) owns the Dakota Access Pipeline (“DAPL”), a crude oil transmission facility commencing in North Dakota and terminating in Illinois. Within North Dakota, the DAPL is an approximately 358-mile, 12-, 20-, and 30-inch diameter crude oil pipeline and associated facilities in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and Emmons Counties, North Dakota with terminals near Stanley in Mountrail County, near Tioga in Williams County, near Epping in Williams County, near Trenton in Williams County, near Watford City in McKenzie County, and near Johnsons Comer in McKenzie County.

On December 22, 2014, Dakota Access made application to the North Dakota Public Service Commission (“Commission”) for a corridor certificate and route permit for the DAPL. On January 20, 2016, the Commission entered its Findings of Fact, Conclusions of Law and Order, granting Certificate of Corridor Compatibility No. 179 and Route Permit No. 191.

On April 6, 2016, Dakota Access made application to the Commission to amend Certificate of Corridor No. 179 and Route Permit No. 191, seeking reroute approval at fifteen (15) locations in order to accommodate landowner requests, make environmental protection adjustments, and incorporate construction modifications that would generally provide for more efficient installation and ultimately minimize long term impacts to landowners' property. The Commission initially approved fourteen (14) of Dakota Access's fifteen (15) requested reroute locations, entered its Supplemental Findings of Fact, Conclusions of Law and Order, and issued the First Amended Certificate of Site Compatibility No. 179 and First Amended Route Permit No. 191 for the Pipeline on May 24, 2016. The Commission requested additional information regarding certain stability concerns of the final reroute request ("Reroute Location 50").

After Dakota Access provided the additional information regarding Reroute Location 50 as requested by the Commission, the Commission entered its Second Supplemental Findings of Fact, Conclusions of Law and Order, issuing the Second Amended Certificate of Corridor Compatibility No. 179 and the Second Amended Route Permit No. 191 on June 22, 2016.

On June 20, 2019, Dakota Access made application to the Commission to amend Second Amended Certificate of Corridor No. 179 and Second Amended Route Permit No. 191 again, seeking approval of to build a new pump station in Emmons County (the "Emmons County Pump Station").

Also on June 20, 2019, Dakota Access made application to the Commission for waivers of procedures and time schedules established under Chapter 49-22.1 of the North Dakota Century Code and Article 69-06 of the North Dakota Administrative Code, which require separate filings, separate notices, hearings, and certain time schedules on such applications. The aforementioned June 20, 2019 applications are collectively referred to herein as the "Combined Application."

On July 10, 2019, the Commission deemed Dakota Access's Combined Application complete, and issued a Notice of Opportunity for Hearing ("Notice"), inviting interested parties to comment or request a hearing by August 9, 2019. The Notice also stated that the Commission could determine the matter without a hearing.

The issues to be considered in the application for waiver of procedures and time schedules include:

1. Are the proposed facilities of such length, design, location, or purpose that they will produce minimal adverse effects and that adherence to applicable procedures and time schedules may be waived?
2. Is it appropriate for the Commission to waive any procedures and time schedules as requested in the application?

The issues to be considered in the applications for an amended certificate of corridor compatibility and an amended route permit are:

1. Will the location and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Are the proposed facilities compatible with the environmental preservation and the efficient use of resources?
3. Will the proposed facility locations minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

On July 30, 2019, Mike Faith, Jr., Chairman of the Standing Rock Sioux Tribe filed a written request for hearing. Mr. Faith indicated that a hearing was necessary to 1) determine if Dakota Access's Combined Application complies with recognized and generally accepted oil and gas industry standards and the applicable regulations for an increase in flow rate; 2) to address increased over-pressurization risk of the DAPL; 3) to evaluate whether a pattern of hazardous liquid spills and purported violations by Dakota Access throughout North Dakota and the United States requires denial of the application; and 4) to evaluate the increased risk from doubling the flow of the DAPL.

Dakota Access responded to the request for hearing on August 19, 2019, arguing that none of the issues presented in Mr. Faith's request for hearing were cognizable before the Commission because they concerned pipeline safety, which is under the jurisdiction of the federal Pipeline Hazardous Materials Safety Administration. Additionally, Dakota Access argued that the request for hearing 1) misplaces the applicability of the Pipeline Safety Management Systems and Managing System Integrity for Hazardous Pipelines, which are recommended practices for the industry; 2) overstates the significance of irrelevant incidents elsewhere in the country; 3) misstates or otherwise omits key details of Dakota Access's Combined Application; 4) seeks to re-litigate the merits of issues that apply to the original DAPL construction; 5) misstates industry phrases and terms applicable to natural gas pipelines but not liquid pipelines; and 6) attempts to impose oversight by the Commission on areas not within its jurisdiction. Dakota Access argued that a hearing was not justified.

On August 21, 2019, the Commission issued a Notice of Hearing and scheduled a hearing on Dakota Access's Combined Application for November 13, 2019 ("November Hearing").

On August 28, 2019, Standing Rock Sioux Tribe ("Standing Rock"), by and through its counsel, Timothy Q. Purdon, Robins Kaplan, LLP, filed a petition to intervene, arguing that Standing Rock has a right to protect its interests in its members' reliance on Lake Oahe for drinking water and irrigation for its farmers and ranchers, and believes that its interests may be affected by the Optimization, as the Standing Rock Sioux Reservation is located less than one-half mile downstream from the DAPL where it crosses Lake Oahe. There was no opposition to this petition; thus, the Administrative Law Judge ordered that Standing Rock was permitted to appear at the November Hearing as an intervenor in this matter.

On October 9, 2019, Charles and Donna Kurszewski also filed a petition to intervene, which was denied due to insufficient information to satisfy the statutory intervention requirements set forth in N.D.C.C. § 28-32-28 and N.D. Admin. Code § 69-02-02-05. The Kurszewskis were not excluded from participating in the public testimony portion of the November Hearing.

In preparation for the November Hearing, Dakota Access pre-filed the written testimony of Charles Frey, Todd Stamm, Dr. Jeff D. Makholm, and Dennis Woods, and filed a prehearing brief. Standing Rock pre-filed the written testimony of Jon Eagle, Donald Holmstrom, and Richard Kuprewicz, and also filed a prehearing brief.

The November Hearing occurred on November 13, 2019 as scheduled.

Having heard all interested persons an opportunity to be heard, and having reviewed and considered all testimony and evidence presented, the Commission makes the following:

### **Findings of Fact**

1. The sole issue before the Commission in this above-captioned case involves the proper siting of the Emmons County Pump Station in accordance with North Dakota Century Code sections 49-22.1-06 and 49-22.1-07 and North Dakota Administrative Code chapter 69-06-08.

2. Dakota Access testified that it has experienced a substantial increase in demand for crude oil transportation service on the DAPL since the original issuance of Certificate of Site Compatibility No. 179 and Route Permit No. 191. Dakota Access's testimony and documentary evidence presented at the November Hearing regarding such increase in demand was not refuted by Standing Rock.

3. Issues regarding the safe operation of the DAPL are not properly before the Commission. The federal Pipeline Hazardous Materials Safety Administration has exclusive jurisdiction over the safe operation of crude oil pipelines, including issues related to surge and potential spill volumes.

### **Size, Type, and Preferred Location of Facility**

4. The Emmons County Pump Station will consist of five, 6,000 HP electrically driven motors and pumps contained within a building.

5. The Emmons County Pump Station will allow for the transportation of up to 1,100,000 total barrels per day of crude oil and the DAPL.

6. The fence line of the property upon which the Emmons County Pump Station will be located will encompass approximately 20.8 acres.

7. The Emmons County Pump Station will operate within the existing maximum operating pressure of the DAPL.

8. The total cost of the Emmons County Pump Station is estimated to be approximately \$35 to \$40 million.

9. Standing Rock did not present testimony or documentary evidence opposing the proposed size, type, and/or preferred location of the Emmons County Pump Station. The testimony and documentary evidence presented by Dakota Access regarding the proposed size, type, and/or preferred location of the Emmons County Pump Station was likewise not refuted at the November Hearing or otherwise.

#### Study of Preferred Location

10. The proposed location for the Emmons County Pump Station is located in the S1/2SE1/4 of Section 5, Township 132 North, Range 77 West, in Emmons County, North Dakota.

11. The Emmons County Pump Station site boundary extends approximately 16.6 acres outside of the corridor designated by the Second Amended Certificate of Corridor No. 179 and approximately 19.5 acres outside of the route designated by the Second Amended Route Permit No. 191.

12. The Emmons County Pump Station is positioned within an approximately 20.8-acre parcel, which Dakota Access has purchased an option for, and will ultimately own in fee simple.

13. The Emmons County Pump Station falls within the one-mile-wide study area ("Study Area") analyzed in the original DAPL application. This Study Area evaluated wetlands and waterbodies, vegetation, trees and shrubs, wildlife, protected species and critical habitats, soils, and geology.

14. Dakota Access conducted a Class I cultural resources literature search on the Study Area.

15. Dakota Access conducted a Class III cultural resources field inventory on the Study Area.

16. Dakota Access conducted a Class II/III cultural resources field inventory for the route and corridor associated with the present Combined Application.

17. An environmental analysis and an Exclusion and Avoidance Areas analysis were performed for the route and corridor associated with the present Combined Application.

18. The following agencies were contacted by Dakota Access: the Aeronautics Commission; the Attorney General; the County Commission; the Department of Agriculture; the Department of Career and Technical Education; the Department of Commerce; the Department of Human Services; the Department of Transportation; the Department of Trust Lands; the Energy Development Impact Office; the Federal Aviation Administration; the North Dakota Game and Fish Department; the North Dakota Office of the Governor; the Indian Affairs

Commission; the North Dakota Department of Labor and Human Rights; the North Dakota Pipeline Authority; The North Dakota Transmission Authority; the North Dakota Parks and Recreation Department; the North Dakota State Soil Conservation Committee; the State Department of Health; the State Historical Society of North Dakota; the State Water Commission; the United States Army Corps of Engineers; the United States Department of Defense; and the United States Fish and Wildlife Services.

19. In a response dated July 29, 2019, the North Dakota Water Commission indicated that the Emmons County Pump Station would not require a conditional or temporary permit for water appropriation, nor were any floodplains identified and/or mapped where the proposed pump station would take place.

20. Standing Rock did not present testimony or documentary evidence opposing the study of the preferred location of the Emmons County Pump Station. The testimony and documentary evidence presented by Dakota Access regarding the study of the preferred location of the Emmons County Pump Station was likewise not refuted at the November Hearing or otherwise.

#### Siting Criteria

21. The Commission has established criteria pursuant to North Dakota Century Code chapter 49-22.1 to guide the Commission in evaluating the suitability of granting a certificate of corridor compatibility and route permit. The criteria, as set forth in North Dakota Administrative Code chapter 69-06-08, are classified as Exclusion Areas, Avoidance Areas, Selection Criteria, and Policy Criteria. Dakota Access evaluated the proposed Emmons County Pump Station with respect to the Exclusion, Avoidance, Selection, and Policy criteria of the Commission.

22. An Exclusion Area may not encompass more than fifty percent of a corridor width unless there is no reasonable alternative. An Exclusion Area must be excluded in the consideration of a route for a transmission facility. A buffer zone to protect the integrity of the Exclusion Area must be included. A transmission facility route must not be sited within an Exclusion Area.

23. Dakota Access's Class I cultural resources review, using a 1-mile radius centered on the approximately 20.8-acre site for the proposed Emmons County Pump Station, indicated that there are three previously-reported archaeological sites located within 1-mile of the proposed site; however, none of these archaeological sites are located within the proposed Emmons County Pump Station site.

24. Dakota Access's Class II/III cultural resources inventory within the approximately 20.8-acre proposed site for the Emmons County Pump Station has determined that no archaeological sites or cultural resources will be impacted by the Emmons County Pump Station.

25. Wetlands and waterbodies are considered to be Exclusion Areas. No wetlands were identified within the proposed Emmons County Pump Station site. One ephemeral drainage was identified, which encompasses approximately 0.02-acre of the approximately 20.8-acre site. The construction of the Emmons County Pump Station will avoid all impacts to the ephemeral drainage location.

26. Areas that may impact migratory birds protected under the Migratory Bird Treaty Act are considered to be Exclusion Areas. A portion of the site for the proposed Emmons County Pump Station is characterized as an active agricultural field that would not provide suitable nesting habitat for protected migratory birds. The remaining portion of the site is characterized as open pastureland, and could provide nesting habitat. Dakota Access intends to complete clearing efforts prior to the migratory bird nesting season. Should clearing be delayed, Dakota Access will develop a Migratory Bird Conservation and Compliance Plan to outline measures it will implement to avoid, minimize, and reduce possible impacts on migratory birds.

27. No other Exclusion Areas are present within the proposed Emmons County Pump Station site.

28. No Exclusion Areas will be impacted by amending the Second Amended Certificate of Corridor No. 179 and Second Amended Route Permit No. 191.

29. An Avoidance Area is a geographical area that may not be considered in the routing of a transmission facility unless the applicant shows that, under the circumstances, there is no reasonable alternative. In determining whether an Avoidance Area should be designated for a transmission facility, the Commission may consider, among other things, the proposed management of adverse impacts, the orderly siting of facilities, system reliability and integrity, the efficient use of resources, and alternative routes.

30. A transmission facility route may not be sited within an Avoidance Area unless the applicant demonstrates that under the circumstances there is no reasonable alternative. Economic considerations alone are not sufficient to establish no reasonable alternative.

31. Dakota Access testified that a release from the Emmons County Pump Station will not impact Beaver Creek, which is located south of the proposed Emmons County Pump Station site. Any potential release from the Emmons County Pump Station will be initially contained within the building housing the Emmons County Pump Station, as there will be a berm around the facility's storage tank, sized for one hundred percent of the capacity of the storage tank and the freeboard amount. Dakota Access will also incorporate remote leak detection at the Emmons County Pump Station, which will allow for immediate shut down of the facility should a release occur. Moreover, North Dakota Highway 13 serves as a natural berm between the Emmons County Pump Station and Beaver Creek.

32. No Avoidance Areas will be impacted by amending the Second Amended Certificate of Corridor No. 179 and Second Amended Route Permit No. 191.

33. In accordance with the Commission's Selection Criteria, a transmission facility route shall be designated if it is demonstrated that any significant adverse effects resulting from the location, construction, and maintenance of the transmission facility will be at an acceptable minimum, or will be managed and maintained at an acceptable minimum.

34. A majority of the proposed Emmons County Pump Station site is utilized for agriculture and livestock production. Construction and operation of the Emmons County Pump

Station will result in the permanent conversion of 20.8 acres for agricultural land to industrial land, which will result in the loss of crop production. Dakota Access testified that it will compensate the landowner of the 20.8-acre proposed Emmons County Pump Station site for all crop losses and/or reduced yields caused by the Emmons County Pump Station's construction.

35. Dakota Access testified that the maximum sound level at the fence line of the proposed Emmons County Pump Station site will be 55 decibels. Dakota Access will incorporate sound mitigation measures to ensure compliance with the 55-decibel maximum, including housing the Emmons County Pump Station within a building which includes sound-attenuating insulation.

36. Dakota Access has analyzed the impacts of the Emmons County Pump Station in relation to all of the relevant Selection Criteria. No significant adverse impact will result from the location, construction, and operation of the Emmons County Pump Station.

#### Measures to Minimize Impact

37. Dakota Access has developed control documents as a part of its construction of the DAPL. Such control documents, where applicable, will be utilized during construction activities related to the Emmons County Pump Station in order to minimize and mitigate impacts to environmental resources. Dakota Access's control documents include, at a minimum: Stormwater Pollution Prevention Plan; Spill Prevention, Containment, and Countermeasure Plan; Unanticipated Discoveries Plan; Noxious Weed Plan; and Dust Control Plan.

38. To further ensure compliance with permits, plans, obligations, and commitments, Dakota Access will employ at least one Environmental Inspector ("EI") during the construction of the Emmons County Pump Station. The EI will be responsible for monitoring construction activities and will provide reports of the same to Dakota Access.

#### Conclusions of Law

39. The Commission has jurisdiction over Dakota Access and the subject matter of the Combined Application under North Dakota Century Code Chapter 49-22.1.

40. Dakota Access is a utility as defined in North Dakota Century Code section 49-22.1-01(13).

41. The Emmons County Pump Station is a facility as defined in North Dakota Century Code section 49-22.1-01(5).

42. The location, construction, and operation of the Emmons County Pump Station will produce minimal adverse effects on the environmental preservation and the efficient use of resources.

43. The location, construction, and operation of the Emmons County Pump Station is compatible with the environmental preservation and the efficient use of resources.

44. The Emmons County Pump Station will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.

45. The Emmons County Pump Station is of such design and location that it will produce minimal adverse effects, as defined under North Dakota Century Code section 49-22.1-05.

46. It is appropriate for the Commission to waive those certain procedures and time schedules as requested in the waiver application under North Dakota Century Code section 49-22.1-05.

From the Findings of Fact and Conclusions of Law, the Commission makes the following order:

### **Order**

The Commission orders:

1. Dakota Access's application for a waiver of procedures and time schedules is granted.
2. Third Amended Certificate of Corridor Compatibility No. 179 is issued to Dakota Access, designating a corridor for the construction, operation, and maintenance of the approximately 20.8-acre site for the Emmons County Pump Station, to be located in Emmons County, North Dakota. The corridor will consist of the Emmons County Pump Station site as depicted in Exhibit A and Exhibit B to the Combined Application, filed on June 20, 2019. Third Amended Certificate of Corridor Compatibility No. 179 is updated as depicted in the Combined Application.
3. Third Amended Route Permit No. 191 is issued to Dakota Access, designating a route for the construction, operation, and maintenance of the approximately 20.8-acre Emmons County Pump Station site. The designated route for this purpose is depicted in Exhibit A and Exhibit B to the Combined Application, filed on June 20, 2019. Third Amended Route Permit No. 191 is updated as depicted in the Combined Application.
4. Dakota Access is required to comply with all applicable laws, rules, and/or regulations in the event it desires to construct another or a different transmission facility than was specified in the Combined Application within the corridor granted in this proceeding.
5. Dakota Access shall comply with all rules and regulations of all agencies having jurisdiction over any phase of construction, operation, and maintenance of the Emmons County Pump Station, and shall obtain and file with the Commission prior to beginning construction all necessary licenses and permits for construction of any portion of the Emmons County Pump Station for which the license or permit is required.

**State of North Dakota  
Public Service Commission**

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**Julie Fedorchak  
Commissioner**

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**Brian Kroshus  
Chairman**

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**Randy Christmann  
Commissioner**

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