

**NORTH DAKOTA PUBLIC SERVICE COMMISSION**

*In the Matter of*

Dakota Access, LLC Consolidated Application  
for an Amended Certificate of Corridor  
Compatibility and Amended Route Permit;  
Dakota Access Pipeline Pump Station -  
Emmons County Siting Application

Case. No. PU-19-204  
OAH File. No. 20190280


**INTERVENOR STANDING ROCK  
SIOUX TRIBE'S MOTION FOR  
ISSUANCE OF A SUBPOENA**

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Pursuant to the Administrative Agencies Practice Act under N.D.C.C. § 28-32-33, Rule 45 of the North Dakota Rules of Civil Procedure, and N.D.A.C. §§ 69-02-05-03 and 98-02-03-02, Intervenor Standing Rock Sioux Tribe (the "Tribe") hereby requests a subpoena for the production of documents, electronically stored information, or tangible things be issued to Applicant Dakota Access, LLC. The subpoena seeks documents relevant to determining whether Dakota Access's Application for Amended Certificate of Corridor Compatibility and Amended Route Permit (the "DAPL Capacity Expansion") will produce minimal adverse effects on the environment and on the welfare of the citizens of North Dakota, in accordance with N.D.C.C. § 49-22.1-02. Dkt. 1. This Motion is based on the brief submitted herewith, and all of the pleadings, testimony, and other materials previously submitted in this proceeding.

Dated this 6th day of February, 2020.

**ROBINS KAPLAN LLP**

By:  \_\_\_\_\_

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Tribe*

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**BRIEF OF INTERVENOR  
STANDING ROCK SIOUX TRIBE IN  
SUPPORT OF MOTION FOR  
ISSUANCE OF A SUBPOENA**

**INTRODUCTION**

Intervenor Standing Rock Sioux Tribe (the “Tribe”) herein submits this Brief in Support of its Motion for Issuance of a Subpoena pursuant to the Administrative Agencies Practice Act under N.D.C.C. § 28-32-33, Rule 45 of the North Dakota Rules of Civil Procedure, and N.D.A.C. §§ 69-02-05-03 and 98-02-03-02. The North Dakota Public Service Commission (“Commission”) is presently conducting an adjudicative proceeding in the above-captioned matter regarding Dakota Access, LLC’s (“Dakota Access”) application to nearly double the capacity of the Dakota Access Pipeline (“DAPL”) from 570,000 barrels per day (bpd) to 1,100,000 bpd. *See* Dakota Access Pipeline Optimization, Dkt. 1.2 at 2 (the “Application” or “DAPL Capacity Expansion”). Based on the information set forth herein, the Tribe respectfully requests the attached subpoena be issued to Dakota Access for the production of documents, electronically stored information, or tangible things relevant to this proceeding.

## STATEMENT OF FACTS

On June 20, 2019, Dakota Access filed an Application for Amended Certificate of Corridor Compatibility and Amended Route Permit which would permit Dakota Access to nearly double the capacity of the Dakota Access Pipeline (“DAPL”) from 570,000 barrels per day (bpd) to 1,100,000 bpd. Dkt. 1.

On August 21, 2019, the Commission published a notice of hearing on the Application for November 13, 2019. Dkt. 24. The issues to be considered included “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?,” as required under N.D.C.C. § 49-22.1-02.

On August 28, 2019, the Tribe filed a Petition to Intervene in this proceeding under N.D.A.C. §69-02-02-05. Dkt. 29. The Tribe’s Petition to Intervene was granted on September 12, 2019. Dkt. 30.

On November 1, 2019 the Tribe submitted pre-filed testimony of Richard Kuprewicz (Dkt. 42), Donald Holmstrom (Dkt. 41), and Jon Eagle (Dkt. 40) identifying numerous reasons why the DAPL Capacity Expansion risks imposing substantial adverse effects on the environment and the welfare of the citizens of North Dakota in contravention of N.D.C.C. § 49-22.1-02. The testimony of Mr. Kuprewicz and Mr. Holmstrom identified numerous documents that are understood to be in the possession of Dakota Access but which have not yet been produced to the Commission in this proceeding and which are necessary to make the “minimal adverse effects” determination called for under N.D.C.C. § 49-22.1-02. The documents identified by Mr. Kuprewicz and Mr. Holmstrom (the “Requested Materials”) included:

1. The transient surge analysis and recommended mitigation measures that Dakota Access commissioned for the DAPL Capacity Expansion and which was produced to the Illinois Commerce Commission in October 2019.
2. Hydraulic profiles of the 30-inch pipeline system within North Dakota for the 570,000 bpd base case and the 1.1 million bpd expansion case, sufficient to show how the DAPL Capacity Expansion will increase operating pressures throughout the system.
3. An identification of all high-consequence areas (HCAs) by milepost within North Dakota and Dakota Access's plans for periodically reassessing the integrity of its pipeline in areas where an inadvertent release would impact those HCAs.
4. Dakota Access's analysis of estimated oil release volumes and locations based on and as informed by its transient flow modeling and the pipeline's hydraulic profile.
5. Documents sufficient to show whether Dakota Access has developed a DAPL-specific Integrity Management Plan (IMP) that complies with PHMSA regulations and industry standards.
6. Documents sufficient to show whether, post-expansion, Dakota Access will adhere to all applicable API best practices, including RP 1173 (Pipeline Safety Management Systems), RP 1175 (Leak Detection Program Management), RP 1160 (Managing System Integrity for Hazardous Liquid Pipelines), and RP 1130 (Computational Pipeline Monitoring for Liquids).
7. Documents sufficient to show whether Dakota Access has prepared an updated WCD for the DAPL Capacity Expansion that properly incorporates all factors required by PHMSA regulations.
8. Any revised spill models based on the updated WCD and corresponding changes to the DAPL Facility Response Plan and Lake Oahe Geographic Response Plan.

On November 8, 2019 Dakota Access filed a motion to strike the Tribe's pre-filed testimony in total, arguing that "none of the testimony is relevant" to the proceeding. Dkt. 50. At the outset of the hearing conducted on November 13, 2019, Dakota Access's motion to strike was rejected by Administrative Law Judge Dawson, the presiding hearing officer, who expressly found that the testimony offered by the Tribe was relevant to the proceeding. Dkt. 53.

At the November 13, 2019 hearing, the Commission received fulsome testimony establishing that the Requested Materials are necessary and relevant to the Commission's "minimal adverse effects" analysis. Dkt. 58. The Tribe offered further argument as to the need to review the Requested Materials in a post-hearing brief filed on December 30, 2019. (Dkt. 90).

On January 23, 2020, the Commission held a work session where it indicated that it would decline to seek the Requested Materials, based on the belief – unsupported and mistaken, in the Tribe's view – that the Commission lacks legal authority to request such documents. Dkt. 98.

### ARGUMENT

**A. Subpoenas may be issued to compel the production of documentary evidence in adjudicative proceedings such as this.**

The Commission is an administrative agency subject to the Administrative Agencies Practice Act. See N.D.C.C. ch. 28-32. Pursuant to the Administrative Agencies Practice Act, "[i]n any adjudicative proceeding, upon the request or motion of any party to the proceeding . . . a hearing officer may issue subpoenas . . . in accordance with the North Dakota Rules of Civil Procedure." See N.D.C.C. § 28-32-33. Under the Administrative Agencies Practice Act, "'Adjudicative proceeding' means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving . . . a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing. . .," such as an Application for an Amended Certificate of Corridor Compatibility and Amended Route Permit. See N.D.C.C. § 28-32-01. Rule 45 of the North Dakota Rules of Civil Procedure

allows for a subpoena to be issued commanding each person to whom it is directed to produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control. *See* N.D.R.Civ.P. 45.

**B. The documents sought are relevant to this adjudicative proceeding.**

The Tribe is entitled to receive and analyze the following categories of documents in order to evaluate, and to assist the Commission in evaluating, whether the DAPL Capacity Expansion will produce minimal adverse effects on the environment and the citizens of North Dakota:

1. The transient surge analysis and recommended mitigation measures that Dakota Access commissioned for the DAPL Capacity Expansion and which was produced to the Illinois Commerce Commission in October 2019 and all drafts, correspondence, and analyses related thereto.

**Relevance:** Reviewing the requested transient surge analysis and related drafts, correspondence, and analyses is the only method by which the Tribe and the Commission can meaningfully assess the risk that the DAPL Capacity Expansion will increase the likelihood of surge overpressure occurrences exceeding 110% of DAPL's maximum operating pressure ("MOP"). Surge overpressure occurrences exceeding 110% of MOP represent one of the gravest risks to the environment and welfare of the citizens of North Dakota posed by the DAPL Capacity Expansion. The Tribe's experts have provided unrebutted testimony establishing that, absent effective mitigation measures, the DAPL Capacity Expansion will increase the risk of surge overpressure occurrences exceeding 110% of MOP. Dakota Access has produced this transient surge analysis in parallel proceedings before regulatory bodies in other states, but has made no such production to the Commission.

2. Hydraulic profiles of the 30-inch pipeline system within North Dakota for the 570,000 bpd base case and the 1.1 million bpd expansion case, sufficient to show how the DAPL Capacity Expansion will increase operating pressures throughout the system.

**Relevance:** Reviewing the requested hydraulic profiles is the only method by which the Tribe and the Commission can meaningfully assess how the DAPL Capacity Expansion will increase operating pressures throughout the DAPL system. DAPL segments with the highest operating pressures will be at the greatest risk of failure post-expansion, and the hydraulic profiles are necessary to assess the location and magnitude of these operating pressure increases. Without consulting the hydraulic

profiles, it is impossible to quantify and identify those pipeline segments most likely to impose substantial adverse effects on the environment and the welfare of the citizens of North Dakota.

3. An identification of all high-consequence areas (HCAs) by milepost within North Dakota and Dakota Access's plans for periodically reassessing the integrity of its pipeline in areas where an inadvertent release would impact those HCAs.

**Relevance:** Pipeline operators such as Dakota Access are required to periodically reassess the integrity of hazardous liquid pipeline sections where an inadvertent release would affect populated areas, drinking water sources, or sensitive ecological resources. These resources are referred to as "High Consequence Areas," or HCAs. An inadvertent release in an HCA would likely impose substantial adverse effects on the environment and the welfare of the citizens of North Dakota. Accordingly, having Dakota Access identify all HCAs in North Dakota and explain how it intends to periodically reassess the integrity of the pipeline in those segments is the only method by which the Tribe and the Commission can meaningfully evaluate whether the DAPL Capacity Expansion will produce minimal adverse effects in the HCAs put at risk by the pipeline.

4. Dakota Access's analysis of estimated oil release volumes and locations based on and as informed by its transient flow modeling and the pipeline's hydraulic profile.

**Relevance:** To date, Dakota Access has failed to provide an analysis of estimated oil release volumes and locations as informed by its transient flow modeling and the pipeline's hydraulic profile. These analyses are relevant to determining where inadvertent releases may occur and how severe such releases are likely to be. Accordingly, they are necessary to evaluate whether the DAPL Capacity Expansion will produce minimal adverse effects on the environment and on the welfare of the citizens of North Dakota.

5. Documents sufficient to show whether Dakota Access has developed a DAPL-specific Integrity Management Plan (IMP) that complies with PHMSA regulations and industry standards.

**Relevance:** These documents are relevant to determining whether Dakota Access has developed an Integrity Management Plan (IMP) that is sufficient to minimize the adverse effects that the DAPL Capacity Expansion risks imposing on the environment and the welfare of the citizens of North Dakota.

6. Documents sufficient to show whether, post-expansion, Dakota Access will adhere to all applicable API best practices, including RP 1173 (Pipeline Safety Management Systems), RP 1175 (Leak Detection Program Management), RP 1160 (Managing System Integrity for Hazardous Liquid Pipelines), and RP 1130 (Computational Pipeline Monitoring for Liquids).

**Relevance:** Dakota Access's corporate parent, Energy Transfer Partners (ETP), possesses the worst hazardous liquid safety record in the industry over the past 13 years. *See* Dkt. 41 at 57-63. In order to assess the degree to which the DAPL Capacity Expansion is likely to compound ETP's poor safety record – to the detriment of the environment and the citizens of North Dakota – it is necessary to determine which, if any, industry best practices Dakota Access adheres to.

7. Documents sufficient to show whether Dakota Access has prepared an updated WCD for the DAPL Capacity Expansion that properly incorporates all factors required by PHMSA regulations.

**Relevance:** To date, Dakota Access has not confirmed whether it has developed a worst-case discharge (WCD) estimate (a key metric used in oil spill response planning efforts) that accounts for the massive increase in throughput proposed by the DAPL Capacity Expansion. The Tribe and the Commission are entitled to documents that will enable them to evaluate the magnitude of DAPL's post-expansion WCD and assess the adverse effects that such a WCD may impose on the environment and the citizens of North Dakota.

8. Documents sufficient to show whether Dakota Access has developed any revised spill models based on the updated WCD and corresponding changes to the DAPL Facility Response Plan and Lake Oahe Geographic Response Plan.

**Relevance:** To date, Dakota Access has not confirmed whether it has developed any revised spill models and or made corresponding changes to the DAPL Facility Response Plan or the Lake Oahe Geographic Response Plan in light of any updated WCD. The Tribe and the Commission cannot meaningfully assess whether the DAPL Capacity Expansion will produce minimal adverse effects on the environment and on the citizens of North Dakota until they have an opportunity to review Dakota Access's revised spill models and changes to its facility and geographic response plans developed in response to those spill-model revisions.


For the reasons explained above, the above-listed categories of documents are relevant to determining whether Dakota Access's plan to nearly double the quantity of oil transported through DAPL can be accomplished without imposing substantial adverse effects on the environment and the welfare of the citizens of North Dakota.

**CONCLUSION**

Based on the authority granted to issue subpoenas in administrative matters, the Tribe respectfully submits that the subpoena attached hereto be issued to Dakota Access to produce documents, electronically stored information, or tangible things in this adjudicative proceeding.

Dated this 6th day of February, 2020.

**ROBINS KAPLAN LLP**

By:  \_\_\_\_\_

Timothy Q. Purdon (ND #05392)  
1207 West Divide Avenue, Suite 200  
Bismarck, ND 58503  
(701) 255-3000  
TPurdon@RobinsKaplan.com

*Attorney for Intervenor Standing Rock Sioux  
Tribe*

**NORTH DAKOTA PUBLIC SERVICE COMMISSION**

*In the Matter of*

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Case. No. PU-19-204  
OAH File. No. 20190280

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**SUBPOENA FOR THE PRODUCTION OF DOCUMENTS, ELECTRONICALLY  
STORED INFORMATION, OR TANGIBLE THINGS  
ISSUED TO DAKOTA ACCESS LLC**

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**To:** Dakota Access, LLC, c/o Lawrence Bender, Fredrikson & Byron P.A., 1133 College  
Drive, Suite 1000, Bismarck, ND 58501

**YOU ARE HEREBY COMMANDED**, pursuant to North Dakota Rule of Civil  
Procedure 45, to produce for inspection on or before **February 21, 2020** to the Intervenor  
Standing Rock Sioux Tribe in care of Tim Purdon at the offices of Robins Kaplan LLP, 1207  
West Divide Avenue, Suite 200, Bismarck, North Dakota 58501, *or* emailed to Tim Purdon at  
tpurdon@robinskaplan.com, all documents within your possession, custody, or control that are  
set forth below.

## DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the North Dakota Rules of Civil Procedure.

1. "All" shall be construed to include the collective as well as the singular and shall mean "each," "any," and "every."

2. "Any" shall be construed to mean "any and all."

3. "Dakota Access" means Dakota Access, LLC and all agencies, sub-agencies, offices, departments, divisions, subdivisions, boards, commissions, officers, agents, employees, investigators, representatives, consultants, or other entities or persons within Dakota Access's control, and any predecessor, successor, parent, subsidiary, division, or affiliate.

4. "DAPL Capacity Expansion" means the proposal to expand the capacity of the Dakota Access Pipeline from 570,000 bpd to 1.1 million bpd as set forth in the Application for Amended Certificate of Corridor Compatibility and Amended Route Permit filed with the North Dakota Public Service Commission on June 20, 2019, Case No. PU-19-204, Dkt. 1.

5. "Document(s)" has the full meaning ascribed to it under the North Dakota Rules of Civil Procedure, and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Dakota Access's possession, custody, or control. "Document(s)" include, but are not limited to, books, papers,

contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, databases, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

6. “Electronically Stored Information” or “ESI” is used consistent with how the term is defined and construed under North Dakota law and includes without limitation all electronic data (including reasonably accessible active, archival, or backup data, such as backup tapes, distributed data, electronic mail, forensic copies, metadata, and residual data) stored in a medium from which information can be reasonably obtained.

7. “Including” shall be construed to mean “including but not limited to.”

8. “Relate to,” “related to,” “relates to,” “relating to,” and “concerning” mean referring to, summarizing, reflecting, constituting, containing, concerning, embodying, mentioning, discussing, describing, consisting of, comprising, showing, commenting on, tending to support or tending to refute, or in any way logically or factually connected with the matter that is the subject of the Request.

## REQUESTS

1. The transient surge analysis and recommended mitigation measures that Dakota Access commissioned for the DAPL Capacity Expansion and which was produced to the Illinois Commerce Commission in October 2019 and all documents, drafts, correspondence, and analyses related thereto.
2. Hydraulic profiles of the 30-inch pipeline system within North Dakota for the 570,000 bpd base case and the 1.1 million bpd expansion case, sufficient to show how the DAPL Capacity Expansion will increase operating pressures throughout the system.
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7. Documents sufficient to show whether Dakota Access has prepared an updated WCD for the DAPL Capacity Expansion that properly incorporates all factors required by PHMSA regulations.

8. Documents sufficient to show whether Dakota Access has developed any revised spill models based on the updated WCD and corresponding changes to the DAPL Facility Response Plan and Lake Oahe Geographic Response Plan.

It shall constitute compliance with this subpoena if you provide the requested records to counsel for the Intervenor Standing Rock Sioux Tribe within the time requested. Responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**PLEASE BE ADVISED** that no formal appearance by your representative is necessary at the date set forth above for production of these materials, provided only that the materials themselves are provided to counsel for Intervenor Standing Rock Sioux Tribe at or before the date specified. This subpoena requires you to permit inspection, copying, testing, or sampling of the materials.

**PLEASE ALSO BE ADVISED** that you may object to this Subpoena by sending or delivering a written objection, stating your valid reason, to Timothy Q. Purdon, Attorney for Intervenor Standing Rock Sioux Tribe. Any objection must be received within ten (10) days after you receive the Subpoena. If the time specified in the Subpoena for compliance is less than ten (10) days, any objection must be received at least twenty-four (24) hours before the time specified for compliance. If you make a timely objection, you do not need to comply with this subpoena unless the hearing officer orders otherwise. You will be notified if the party serving the subpoena seeks an order compelling compliance with this subpoena. You will then have the

opportunity to contest enforcement. Failure to obey this subpoena, without making a timely objection, and stating a valid reason, may be contempt of court.

Dated this \_\_\_\_\_ day of February, 2020.

By: \_\_\_\_\_  
Timothy J. Dawson  
Administrative Law Judge

**BEFORE THE NORTH DAKOTA PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA**

<p><i>In the Matter of</i></p> <p>Dakota Access, LLC Consolidated Application for an Amended Certificate of Corridor Compatibility and Amended Route Permit; Dakota Access Pipeline Pump Station - Emmons County Siting Application</p>	<p>Case No. PU-19-204 OAH File No. 20190280</p> <p><b>Certificate of Service</b></p>
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**Certificate of Service**

I, the undersigned, hereby certify that true and correct copies of:

1. Intervenor Standing Rock Sioux Tribe's Motion for Issuance of a Subpoena
  - a. Brief of Intervenor Standing Rock Sioux Tribe in Support of Motion for Issuance of a Subpoena
  - b. Proposed Subpoena
  - c. This Certificate of Service

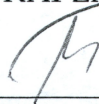
by Intervenor Standing Rock Sioux Tribe and cover letter filed by hand-delivery with the Office of Administrative Hearings, Attn: Timothy Dawson, the Administrative Law Judge, were, on February 6, 2020, served on the following:

<p><i>By US mail, postage paid</i></p> <p>Lawrence Bender Fredrikson &amp; Byron, P.A. 1133 College Drive, Suite 1000 Bismarck, ND 58501</p>	<p><i>By US mail, postage paid</i></p> <p>Zachary Pelham Special Assistant Attorney General c/o Pearce Durick PLLC 314 East Thayer Avenue Bismarck, ND 58501</p>	<p><i>Seven copies by hand-delivery</i></p> <p>Public Service Commission State of North Dakota Executive Secretary 600 East Boulevard Ave, Dept. 408 Bismarck, ND 58505</p>
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Dated this 6th day of February, 2020.

ROBINS KAPLAN LLP

By:



\_\_\_\_\_  
Timothy Q. Purdon (ND 05392)  
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