

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
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**ORDER REGARDING NOTICE TO COUNTY INSPECTORS
AND APRIL 14, 2016, COMPLIANCE FILING**

(Issued May 3, 2016)

I. Notice to County Inspectors

On March 31, 2016, the Utilities Board (Board) issued an “Order Regarding Applications, Motions, and Requests and Taking Official Notice.” In that order the Board took notice, pursuant to Iowa Code § 17A.14(4), of certain email messages the Board had received stating that it appeared Dakota Access, LLC (Dakota Access), had engaged in surveying, route marking, tree clearing, and construction of an electrical substation for a pumping station, before receiving its chapter 479B permit. The Board said that the information provided by the public presented the question of whether the identified activities constitute “construction” for purposes of the “Final Decision and Order” issued in this docket on March 10, 2016 (the March 10 Order). The Board established a procedural schedule for Dakota Access and the other parties to file comments on the question.

Dakota Access, Sierra Club Iowa Chapter, Linda Sorenson, and Linda Murken filed comments. Having considered those comments, the Board concludes that the relevant issue is not a determination of what activities might constitute “construction;”

rather, the relevant issue is whether Dakota Access has complied with the Board's March 10 Order and the Board's rules with respect to providing notice to county inspectors before engaging in pipeline-related activities along the route.

There is one preliminary matter the Board must address before turning to that question, however. Dakota Access has argued that the Board's process is flawed. Dakota Access argues that the Board has improperly taken official notice of the email messages and that it appears the Board may have pre-judged the issue in a manner that is harmful to the interests of Dakota Access.

Dakota Access argues that under Iowa Code § 17A.14, administrative notice may be taken only of facts of which judicial notice may be taken and other facts within the specialized knowledge of the agency. The company says that hearsay statements and speculative statements in emails are not within the specialized knowledge of the Board, so notice may be taken only if judicial notice could be taken. Iowa Rule of Evidence 5.201(b) permits judicial notice only of facts that are not subject to reasonable dispute because they are either (1) generally known within the jurisdiction of the trial court or (2) capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned. Dakota Access argues that "no evidence has been presented that the activity on the property of the neighbors of the senders of the e-mail is 'generally known' within the Board's jurisdiction, *nor is the accuracy of the sources beyond question* – as is proven by the Board staff's inquiry as to whether it is in fact Dakota Access engaging in the activities." (Dakota Access Response at 5, emphasis in original.)

Dakota Access's arguments appear to be based upon a misunderstanding of the actions taken by the Board. The Board did not take notice of the email messages for the truth of the information contained therein; the Board only took notice of the fact that the public has been communicating with the Board concerning alleged construction activities. The Board did not consider the allegations in the public communications to be established fact.

As Dakota Access admits, the Board did not even assume that it was, in fact, Dakota Access engaging in the alleged activities. Instead, the Board took notice of the fact that it has received these comments from the public, and that is a fact capable of accurate and ready determination by reference to the Board's electronic filing system. The Board then provided Dakota Access (and the other parties) with an opportunity to contest or otherwise respond to the statements made in those comments, as required by Iowa Code § 17A.14(4). Official notice was merely the mechanism used to put the statements from the public before the parties for their consideration and comment.

By the same token, the Board has not prejudged the issue of whether Dakota Access has engaged in construction activities prior to issuance of the permit. The Board's order briefly outlined some arguments both for and against such a finding without making any decision. Dakota Access focuses on the analysis adverse to its position and ignores the analysis favorable to it in order to claim that its interests have been harmed. There has been no prejudging of this matter.

Turning to the substantive issue, in the March 10 Order the Board stated that the permit would not be issued until Dakota Access filed, and the Board accepted, certain compliance filings. The Board specifically stated that “[C]onstruction cannot begin until all of these filings (the conditions for issuing a permit) have been made and accepted by Board order and a permit has been issued.” (Order p. 154.) The Board’s intent in the March 10 Order was that no activity related to construction of the pipeline would take place until the permit was issued and notice of construction activity was provided to landowners and the county inspector in compliance with the Board’s March 10 Order and the Agricultural Impact Mitigation Plan (AIMP). In fact, the role of the county inspector in this process formed a significant part of the Board’s discussion in the March 10 Order, being addressed at pages 76-81, 98, and Ordering Clause No. 3, paragraphs a and d, all relating to the county inspector notice requirements as specified in the AIMP. The Board relies upon the county inspectors to observe and enforce the AIMP and they cannot fulfill those duties if they are not notified, in advance, of pipeline-related activities.

Further, the Board’s rules also make express reliance on notice to the county inspectors prior to any pipeline-related activity. For example, 199 Iowa Admin. Code 9.6 allows pipeline companies and landowners to enter into separate agreements with terms different from the AIMP, but only when those agreements are in writing and a copy is provided to the county inspector. The point is that the system of ensuring compliance with the AIMP and any separate agreements depends upon

notice to the county inspector prior to any pipeline-related activities (other than surveying or other activities permitted by statute).

Dakota Access has acknowledged that it has engaged in some tree clearing prior to the issuance of the permit on April 8, 2016. Even though Dakota Access has stated that it only undertook these activities after getting consent from the affected landowners, there is no indication that Dakota Access contacted the relevant county inspector to inform them that these activities were taking place or that Dakota Access gave the landowner the notice required by the AIMP.

The Board's consideration of this issue does not depend on whether the activities constitute "construction." The Board's intent was that no pipeline-related activity would occur until after notice to county inspectors was provided in accordance with the AIMP so that there could be effective monitoring and enforcement of the AIMP and any separate agreements pursuant to rule 9.6.

Since the intent of the Board's March 10 Order was that Dakota Access was not to engage in any pipeline-related activities without notice to the county inspectors, the activities engaged in by Dakota Access are in violation of the Board's March 10 Order. Dakota Access should not have engaged in any of these pipeline-related activities without notifying the county inspectors in advance.

Since Dakota Access has admitted that it engaged in activity related to construction of the pipeline prior to issuance of the permit and without notice to the county inspector, the next issue to be addressed is whether the activity engaged in by Dakota Access rises to the level that civil penalties should be assessed. In this

instance, the record shows that Dakota Access has undertaken activities only on property where Dakota Access has obtained voluntary easements, that Dakota Access had permission of the landowners, and that Dakota Access has not engaged in pipeline-related activities on these parcels beyond staking and clearing trees using hand tools. In this situation, the Board determines that Dakota Access should not be assessed civil penalties. However, Dakota Access is put on notice that any future violations of the Board's orders, especially the requirement for notice to county inspectors, may result in action by the Board, including civil penalties.

II. The April 14, 2016, Compliance Filing

On April 14, 2016, Dakota Access made a filing described as a "Compliance Filing" that included a copy of "Nationwide Permit 12" issued by the U.S. Army Corps of Engineers on March 19, 2012. The same day, Sierra Club filed a response to the Dakota Access filing, asserting that filing Nationwide Permit 12 was "an attempt to fool the Board into thinking that the Corps has authorized construction of the pipeline over Corps jurisdictional areas." Sierra Club asserts that Dakota Access "does not have any authorization from the Corps to construct the pipeline until the Corps issues specific authorizations for each waterbody crossing." Sierra Club concludes that Dakota Access cannot begin any construction until it has obtained and filed those specific authorizations.

On April 22, 2016, Dakota Access filed a reply to Sierra Club's response. Dakota Access says that on "April 14, 2016, Dakota Access filed all of the materials identified in the April 8 Order as outstanding deliverables for pre-construction

compliance...” Dakota Access says Nationwide Permit 12 is the only permit required to authorize construction of the pipeline as a whole, although the company acknowledges that additional consultation and verification of specific plans to cross specific jurisdictional locations is also required. Dakota Access concludes that the Board should affirm that the company has now met all conditions precedent to beginning construction, subject to the notice requirements of the Board’s prior orders.

During the course of this proceeding, Dakota Access made a voluntary commitment to the Board that it would file with the Board “***permits, approvals or other similar documents from the U.S. Army Corps of Engineers***...prior to commencing construction.” (Dakota Access Reply Brief filed February 2, 2016, at page 53, emphasis added.) In the March 10 Order, the Board acknowledged this commitment (and others made by Dakota Access) and stated that “if the permit is granted, the Board expects Dakota Access to fulfill each of these commitments....” (March 10 Order at 70-71.)

Clearly, Dakota Access committed to file not only a permit from the Corp of Engineers but also “approvals or other similar documents.” The permit process used by the Corps of Engineers was the subject of much testimony at the hearing in this matter; see, for example, transcript pages 408 through 444; 495-96; 1354; 2298-2305. Dakota Access witness Howard testified that certain activities are authorized by Nationwide Permit 12 but “others, you still need additional permissions for.” (Tr. 409.) Howard explained that for a certain subset of water crossings, Dakota Access must file a Pre-Construction Notice (PCN) that requires an additional level of review

by the Corps of Engineers. (Tr. 444.) Howard described that level of review as a “verification.” (Tr. 495.) Dakota Access witness Mahmoud testified that there are “quite a few” verifications required from the Corps of Engineers, but did not identify a specific number. (Tr. 2298.) Howard did not offer a specific number either, but testified regarding 17 PCNs in Iowa based upon a suggestion from a questioner. (Tr. 413.) Finally, OCA witness Doershuk indicated there could be as many as 29 PCNs, but it is not clear whether that number refers only to Iowa PCNs. (Tr. 2922.)

The verification or acceptance of a PCN is an “approval” from the Corps of Engineers. Dakota Access committed to filing those approvals prior to commencing construction. In this order, the Board will require that Dakota Access file those approvals as they are received and prior to commencing construction. In order to make it clear to all parties just how many verifications are expected, the Board will require Dakota Access to file a list identifying each PCN submitted to the Corps for any location in Iowa. That information should include the best available estimate of the time when those PCN verifications will be received. As each PCN is filed, it should be identified with sufficient information to allow an interested person to determine which PCN verifications have been filed at any point in time going forward.

As noted above, Dakota Access said that it would provide all “permits, approvals or other similar documents from the U.S. Army Corps of Engineers ... prior to commencing construction.” Those approvals include the PCN verifications. It appears from Dakota Access’s Exhibit MH-4 that the company anticipated it would receive the verifications in December 2015 and January 2016. If delaying

construction until the verifications are received and filed will have adverse impacts on landowners or parties in possession of land to be crossed by the pipeline, then Dakota Access shall make a filing explaining those adverse impacts in reasonable detail and requesting that it be permitted to commence construction, at its own risk, in areas outside those areas addressed in a PCN. The Board will consider that request if and when it is filed.

Further, the Board notes that the List of County Inspectors filed by Dakota Access on April 14, 2016, indicates that Lyon County had not, as of that time, retained an inspector. Dakota Access will be required to file an updated List of County Inspectors when Lyon County has retained an inspector.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Dakota Access, LLC, engaged in construction-related activities without notifying the relevant county inspectors in violation of the Board's March 10, 2016, "Final Decision and Order" and the Board's rules.
2. Civil penalties will not be assessed against Dakota Access, LLC, for the violation found in Ordering Clause 1; however, Dakota Access, LLC, is put on notice that future violations may result in civil penalties.
3. The Board finds that the "Compliance Filing" of April 14, 2016, is not sufficient to establish full compliance with the Board's previous orders in this docket.

4. Within ten days of the date of this order, Dakota Access, LLC, shall file a list identifying each Pre-Construction Notification site in Iowa, as described in the body of this order.

5. Dakota Access, LLC, shall file an updated List of County Inspectors when Lyon County has retained an inspector.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

/s/ Nick Wagner

Dated at Des Moines, Iowa, this 3rd day of May 2016.