

Summary of Letter Requesting Further Review of the Dakota Access Pipeline (DAPL)

On October 10, 2016, Sierra Club, Honor the Earth, and Indigenous Environmental Network requested that the Corps take the following actions with respect to the DAPL:

1. Investigate whether DAPL intentionally destroyed sacred and culturally-significant sites as prohibited by the National Historic Preservation Act (NHPA).

- Section 110(k) of the NHPA prohibits the U.S. Army Corps of Engineers (Corps) from granting any additional permits to DAPL if it has intentionally destroyed historic-eligible sites. 54 U.S.C. § 306113 (“Anticipatory Demolition”). The Corps is evaluating whether to grant a permit and easement for DAPL to cross Corps jurisdictional areas under and adjacent to Lake Oahe in North Dakota. The Corps must investigate whether DAPL intentionally destroyed historic-eligible sites and deny the Lake Oahe permits if it finds in the affirmative.
- On September 2, 2016, the Standing Rock Sioux Tribe (Standing Rock) submitted detailed findings of its archaeologist, Tim Mentz, describing an unusually dense collection of cultural and historic sites located on the pipeline route, including five stone features and 27 grave sites. Mentz described it as “one of the most significant archeological finds in North Dakota in many years.” The archaeologist Thomas F. King, Ph.D. confirmed that Mentz possesses all the qualifications to inform his studies of the site and that his observations are derived from a lifelong immersion in the traditional culture of Standing Rock.
- Early the next morning, DAPL arrived at the exact 2-mile location described by Standing Rock in their filing and bulldozed the sites that Standing Rock had identified. As court filings explain, many factors suggest this was intentional. For example, the work crews normally proceed in a linear fashion, but had not previously been working within 20 miles of that site. They arrived immediately after the sites were identified with security guards wielding attack dogs and pepper spray.

2. Prepare an environmental impact statement (EIS) or supplemental EIS (SEIS) for the Corps’ approval of the Lake Oahe crossing (and/or an SEIS for NWP 12 as it applies to DAPL).

- The National Environmental Policy Act (“NEPA”) requires agencies to supplement their NEPA analyses if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §1502.9. Similarly, the Corps cannot authorize a project under Nationwide Permit 12 (NWP 12) if information shows the project would have more than “minimal adverse environmental effects.” 33 U.S.C. § 1344(e)(1). If projects exceed this threshold, or if further review would serve the public interest, they must undergo an individual CWA §404 permit process and attendant NEPA analysis, *even if the Corps has already approved a project under NWP 12*. See, e.g., 33 C.F.R. § 330.1(d) (discussing the modification, revocation, or suspension of NWP authorizations).
- The Corps has never devoted a single page of analysis to the risks of oil spills and leaks from DAPL, which is alarming considering that contamination of waterways is among the most controversial aspects of DAPL. New information on oil pipeline spills, many of which have occurred since the Corps’ EA was published, demonstrate: (a) the frequency and impacts of pipeline accidents; (b) the inability of pipeline operators to detect and respond to spills; (c) the number of spills that are detected and reported by citizens; and (d) the inability of federal agencies to regulate pipelines once they are constructed. For example, in September 2016, a

passerby reported a 336,000 gallon pipeline spill in Alabama; and in June of 2016, a resident of Ventura, CA reported a 30,000 gallon spill of crude oil near his home. On September 30, 2016, Reuters reported that PHMSA data shows that out of 466 pipeline spills in the last six years, more spills were detected by the public (21%) than by the monitoring system DAPL would use (19%).

- Nor has the Corps ever analyzed greenhouse gas emissions associated with DAPL. On August 1, 2016, the Council on Environmental Quality (CEQ) released its Final Guidance on Greenhouse Gases and Climate Change, which instructs agencies to take a comprehensive, broad approach in analyzing the climate impacts of federal actions. The Corps' EA for Lake Oahe makes absolutely no attempt to quantify the greenhouse gas emissions associated with the operation of DAPL, which are significant. For example, an analysis published by Oil Change International on September 12, 2016 estimates that the pipeline would result in an additional 101.4 million metric tons of CO₂ emissions per year, which is equivalent to 30 coal fired power plants or over 21 million U.S. passenger vehicles. An increasing body of scientific literature, including a September 26, 2016 study in Nature Climate Change, indicates that expanding fossil fuel infrastructure like DAPL will jeopardize our ability to meet our climate reductions targets agreed to in the Paris climate accord.
- The Corps must evaluate the environmental justice implications of DAPL as required by Executive Order 12898 and other directives, including whether the pipeline would disproportionately impact Native American communities. On August 18, 2016, the Bismarck Tribune revealed that DAPL originally considered routing the pipeline through Bismarck, but declined to do so over fears that the pipeline could contaminate the city's drinking water supply. Instead, DAPL chose a route that passes directly under Lake Oahe near Standing Rock's drinking water supply over the objections of EPA. The EA fails to address these glaring inequities, and the Corps must do so in an EIS. On September 23, 2016, the United Nations special envoy for the rights of indigenous people called on the U.S. government to halt construction due to threats to the drinking water supplies and sacred sites of Standing Rock and other indigenous nations.

3. Revoke and/or suspend approvals in federal jurisdictional areas pending the preparation of an EIS and/or an individual §404 permit

- NEPA requires the Corps and other agencies to suspend all approvals in federal jurisdictional areas along DAPL while an EIS is being prepared. Otherwise, the entire 1,168-miles of the pipeline will be already constructed up to the edges of Lake Oahe, which will unduly prejudice the outcome and limit the Corps' choice among alternatives.
- First, NEPA prohibits agencies from segmenting their approval of a project, as it requires all "connected" actions to be analyzed together unless they would have independent utility. *See* 40 C.F.R. § 1508.25 (a)(1). None of the federally-approved parts of DAPL meet the independent utility test, and thus must be considered in a single EIS. Those include, but are not limited to: the Corps' consideration of the Lake Oahe permits; the Corps' grant of §408 permits for pipeline segments in Illinois; the Fish and Wildlife Service's grant of easements across federal grasslands and wetlands in North and South Dakota; and the Corps' Omaha, Rock Island, and St. Louis districts' issuance of verifications of DAPL's water crossings under NWP 12.
- Second, where more than one federal agency is "involved in the same action" or are "involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity," the agencies *shall* select a lead agency to "supervise the preparation of an environmental impact statement." 40 C.F.R. § 1501.5(a). The Fixing America's Surface

Transportation Act further requires the selection of a lead agency to identify all federal approvals and coordinate them in a single NEPA review.

- Third, NEPA prohibits agencies from approving component parts of an interrelated project before the NEPA review is complete, because piecemeal approval and construction would limit the choice among project alternatives and exert undue pressure on the final decision-maker. Until the final approval of a project, agencies cannot take any actions that would “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a).
- Therefore, the Corps, FWS, and other federal agencies should suspend or revoke all permits or approvals of DAPL in federal jurisdictional areas, and notify DAPL that it cannot proceed with construction in those areas until the agencies can select a lead agency and prepare an EIS that encompasses all federal aspects of the connected project.