



DAKOTA ACCESS PIPELINE

BACKGROUND

The Dakota Access pipeline would extend 1,168 miles — just seven fewer than the now rejected Keystone XL pipeline — across North Dakota, South Dakota, Iowa, and Illinois carrying up to 570,000 barrels per day of fracked oil from the Bakken oil fields. If built, this pipeline would threaten communities, farms, Tribal land, sensitive natural areas, and wildlife habitat. It would pass within just half a mile of the Standing Rock Sioux reservation, near Cannonball, ND, putting sacred sites, burials, and culturally important landscapes at risk and pose a devastating public health threat to the Tribe's drinking water in the event of a spill. It would also cross directly through lands in North Dakota reserved for the Standing Rock Sioux Tribe, the Yankton Sioux Tribe, the Cheyenne River Sioux Tribe, and others by the 1851 Fort Laramie Treaty, as well as the Yankton Sioux Tribe's aboriginal title lands in South Dakota.

FAST TRACK PERMITTING OF DAKOTA ACCESS

The Dakota Access pipeline received approval at the State level in all four states under lax environmental requirements for oil pipelines and with minimal public input. At the federal level, Section 404 of the Clean Water Act (CWA) requires the Army Corps of Engineers to issue permits before pipelines and other projects can be constructed through streams, wetlands, and other waterways. These requirements were meant to trigger a transparent public review process that includes an environmental impact

statement pursuant to National Environmental Policy Act (NEPA), an analysis of the least damaging practicable alternative pursuant to the CWA, and consultation with tribes pursuant to the National Historic Preservation Act (NHPA).

However, the Corps now avoids those processes through the use of Nationwide Permit (NWP) 12, a fast-tracking process designed to exempt minor projects with up to a half-acre of impacts to waterways from any public notice or review processes. However, since 2012, the Corps has begun to approve massive interstate oil pipelines under NWP 12, artificially treating them as thousands of "single and complete projects," allowing them to bypass any meaningful environmental review or public engagement.

Earlier this year, construction of Dakota Access began after the Corps approved the 1,168-mile Dakota Access Pipeline behind closed doors using NWP 12. There was no public notice or opportunity to review the thousands of pipeline water crossings, no environmental impact statement of the pipeline (only two very limited environmental assessments that covered a few miles of the pipeline), and no meaningful consultation with tribes and landowners along the length of the pipeline route. Under NWP 12, it is up to the pipeline company's private consultants to survey the vast majority of the pipeline route and determine whether culturally-significant sites might be affected.

Approved in 2012, NWP 12 is valid for five years and expires in March of 2017. The Corps has proposed reissuing NWP 12 in unchanged form, which would allow it to continue fast-tracking massive oil and gas pipelines without any public scrutiny until 2022. A broad coalition of environmental and indigenous groups have submitted comments demanding that the Administration stop using NWP 12 to fast-track approvals of major fossil fuel projects.

GROWING MOVEMENT OF OPPOSITION

Since early spring, members of the Standing Rock Sioux Tribe and other indigenous nations have occupied a spirit camp, the Camp of the Sacred Stones, located between the pipeline's proposed crossing of the Missouri River and the water intake valves for the Tribe's drinking water supply. The camp is the center of spiritual and cultural opposition to the pipeline, with the goal of stopping construction through prayer and nonviolent direct action. Members of the Standing Rock Sioux Tribe have been joined by thousands of Native and non-Native people from across the continent, including representatives from over 250 tribes and First Nations.

In Iowa, landowners and farmers are resisting handing over their land to Dakota Access with a lawsuit defending their property rights from eminent domain abuse. Environmental and Native allies are working shoulder to shoulder with landowners engaging in civil disobedience and formal proceedings at the Iowa Utilities Board.

Tribal and local governments from across the government have also stood with water protectors. An unprecedented 188 tribal resolutions have been issued in support of Standing Rock, as well as city council resolutions from Seattle, WA; St. Paul, MN; Minneapolis, MN; Portland, OR; Bellingham, WA; St. Louis, MO; and Lawrence, KS.

LEGAL BATTLES CONTINUE

On July 27th, the Standing Rock Sioux Tribe filed a lawsuit challenging the Corps' approval of the Dakota Access pipeline under NWP 12 without adequate consultation or environmental review. The complaint, filed in federal court in Washington D.C.,

CLIMATE IMPACTS

In addition to its potential impacts on land and water, new analysis shows that building the pipeline would also be inconsistent with the United States' climate goals. According to an analysis by Oil Change International (OCI),¹ the pipeline would lock in greenhouse gas emissions in an amount equivalent to that of 30 coal plants. By reducing shipping costs for large amounts of dirty oil, particularly with current oil prices so low, building this pipeline would significantly increase the amount of crude oil getting to market. OCI calculated that, at typical utilization rates of 95% of capacity, total lifecycle emissions from producing, transporting, processing, and burning the products derived from the oil would amount to 101.4 million metric tons of CO₂e per year. Given this estimated impact and the White House's recent guidance on how federal agencies should assess climate impact,² it is only logical that climate impacts would be analyzed for this project, but thus far no analysis has been conducted by the Administration.

alleged that the Army Corps of Engineers violated the National Historic Preservation Act by failing to address the Tribe's concerns regarding the pipeline's impact to sacred sites and culturally-important landscapes; and that the Corps failed to evaluate the pipeline's environmental impacts as required by the NEPA and CWA. Standing Rock has since been joined in its suit by the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe has also filed a complaint against the Corps and the U.S. Fish and Wildlife Service.

Since filing the lawsuit, Standing Rock submitted detailed findings of its archeologist to the court, which described human burial sites, stone prayer rings, and other sacred artifacts directly in the path of the proposed pipeline. According to the Sacred Stone Camp, of the 380 archeological sites that

face desecration along the entire pipeline route, from North Dakota to Illinois, 26 of them are located at the confluence of the Missouri and Cannonball Rivers. This area is a historic trading ground, a place held sacred not only by the Sioux Nations, but also the Arikara, the Mandan, and the Northern Cheyenne. The day after these filings, Dakota Access responded by bulldozing the specific areas described by Standing Rock. When protectors of the site entered the construction area, private security guards attacked them with dogs and pepper spray. The tribe filed for a temporary restraining order, which the judge granted in part until he could reach a decision on the preliminary injunction. However, the judge only enjoined construction to the east of the Missouri River, where pipeline construction is largely complete; but not the hotly-contested area west of Highway 1806.

On Friday, September 9th, the Washington, DC District Court denied Standing Rock's motion for preliminary injunction, allowing construction to proceed while the Tribe's lawsuit moves forward. Shortly thereafter, the Departments of Justice, Army, and the Interior issued a joint statement³ announcing that the Army Corps would not authorize construction of the pipeline on Corps land bordering or under Lake Oahe until it determines whether

further environmental review is warranted. The Army Corps has not yet sent over the finalized land easements to Congress, which is a necessary step in the permitting process. The Corps also requested a voluntary pause in construction for 20 miles to the east and to the west of the lake.

Standing Rock subsequently appealed the district court's denial of their injunction, and on Friday, September 16, the U.S. Court of Appeals for the D.C. Circuit again sided with the tribes, reinstating the injunction and prohibiting pipeline construction within 20 miles of Lake Oahe.

The Sierra Club has also filed a lawsuit challenging the Iowa Utilities Board (IUB) approval of the Dakota Access Pipeline and the company's use of eminent domain to build the pipeline through private property, much of it agricultural land. This case continues, along with a separate case filed by landowners, but construction on the pipeline was not halted while it moves through the court.



ADMINISTRATIVE ACTION

The current temporary halt to construction is not a permanent victory against this project. The Obama Administration can and should take several additional actions to pause construction of Dakota Access and conduct further review:

- The Army Corps should exercise their authority to revoke the project's permits under NWP 12 and instead require an individual §404 permit for the Dakota Access.⁴
- The Corps should exercise its discretion to order a full environmental review for the Dakota Access Pipeline, as the impacts of a project of this magnitude are clearly more than "minimal." There is a long history of the Corps and other agencies preparing EISs for oil pipelines and they should return to that practice.⁵
- The Corps has not yet issued the necessary easement for Dakota Access to cross Corps property on the west side of the Missouri River as required by the Mineral Leasing Act, 30 USC 185, and should not do so in this case.⁶ The Corps can and should withhold granting the easement until it has an opportunity to evaluate the effects of the pipeline in an environmental impact statement.

- In addition, pursuant to the National Historic Preservation Act, the Corps **cannot legally issue the easement for Dakota Access if it determines that the company intentionally destroyed or adversely affected potential historic sites along the pipeline's path.**⁷ The Corps must suspend all Corps authorizations of Dakota Access until it can investigate whether the company's actions of September 3 constitute "anticipatory demolition" under the NHPA.

TAKE ACTION!

Here are ways you can support activists on the front lines:

- Sign the Sierra Club's petition at sc.org/nodapl
- Donate to support the Sacred Stone Camp at gofundme.com/sacredstonecamp
- Call the White House at (202) 456-1111 to ask President Obama to rescind the Army Corps of Engineers' Permit for the Dakota Access Pipeline
- Spread the word on social media using #NoDAPL

ENDNOTES

¹ <http://priceofoil.org/2016/09/12/the-dakota-access-pipeline-will-lock-in-the-emissions-of-30-coal-plants/>

² <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>

³ <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>

⁴ See, e.g., 33 C.F.R. § 330.1(d) ("District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP...[i]f the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest..."); 33 C.F.R. § 330.4(2) ("A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires."); 33 C.F.R. § 330.5(d) (describing procedures for modifying, suspending, or revoking NWP authorizations and ordering individual permit review to protect the public interest).

⁵ Presidential Memorandum - Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (March 22, 2012), available at <https://www.whitehouse.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla>.

⁶ Before the Corps can grant a pipeline easement, the MLA requires it to first send a "notice of intention" to grant the right-of-way, together with "detailed findings" as to the proposed terms and conditions, to the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. 30 USC 185(w)(2). Although the Corps appears not to have promulgated implementing regulations as required by the MLA, it ordinarily waits 14 days after notifying the committees before issuing the easements. The Corps has indicated that it has finalized the easement, but has not yet sent notifications to Congress.

⁷ See 54 U.S.C. § 306113 ("the agency will not grant a ... permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur...").