

Dakota Access Pipeline Shutdown Order: What Happened and What's Next

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On July 6, 2020, U.S. District Judge James A. Boasberg ordered the operator of the Dakota Access Pipeline (“DAPL”), Dakota Access, LLC (“Dakota Access”)¹, to shut down DAPL, which has been in operation since 2017 and has the capacity to transport 570,000 barrels of Bakken crude each day, and to remove all oil from DAPL until the U.S. Army Corps of Engineers (“USACE”) completes an environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”) (the “Shutdown Order”).² The court gave Dakota Access until August 5, 2020, to drain the approximately 1,200-mile pipeline of oil despite the USACE’s estimate that an EIS could take between 12–15 months to complete.³

This post describes the Shutdown Order and subsequent court action and lays out some considerations for North Dakota crude oil producers in view of the resulting uncertainty.

Background of Shutdown Order

DAPL litigation has centered on a segment of the pipeline that runs underneath Lake Oahe, a large reservoir lying behind the Oahe Dam on the Missouri River in South Dakota and North Dakota. Lake Oahe is a vital source of water for drinking and agriculture and is sacred land for several American Indian Tribes whose reservations are in close proximity (the “Plaintiff Tribes”).⁴ The Plaintiff Tribes sought to enjoin USACE from granting permits and easements for the construction and operation of DAPL by challenging the sufficiency of the USACE’s initial environmental review.

In 2015 and 2016, USACE published an Environmental Assessment (“EA”) (a much

less extensive review than an EIS) and a mitigated finding of no significant impact (“FONSI”) which concluded that granting the easement for the Lake Oahe segment would not result in a significant environmental impact.⁵ In late 2016, the easement was declined by the USACE at the urging of the Obama administration, and USACE announced it would require DAPL to suspend construction and prepare an EIS. However, in early 2017, the Trump administration issued a presidential memorandum directing the expedited approval for construction and operation of the remaining portion of DAPL, and USACE granted the easement.⁶

The Plaintiff Tribes claimed that the permits were issued by USACE without conducting an EIS, which they argued was required. In June 2017, the D.C. District Court found three deficiencies in the USACE’s environmental review and ruled that the USACE had “inadequately considered, in accordance with its obligations under NEPA: (1) whether the project’s effects were likely to be “highly controversial”; (2) the impact of a hypothetical oil spill on the [Plaintiff] Tribe’s fishing and hunting rights; and (3) the “environmental-justice effects of the project” (the “2017 Order”).⁷ The court then remanded the matter to USACE to address these issues through a more thorough environmental review, which was completed in February 2019.

Subsequently, the Plaintiff Tribes moved for summary judgement and argued that USACE failed to remedy the specified inadequacies. On March 25, 2020, the D.C. District Court ruled that USACE violated NEPA by not preparing an EIS when circumstances dictated, and issued an order requiring USACE to prepare an EIS (the “March 25 Order”).⁸ The court relied on recent D.C. Circuit precedent, which found the USACE’s approval of an electricity transmission project violated NEPA because the USACE prepared an EA instead of an EIS.⁹ The March 25 Order focused on inadequacies in USACE’s review of DAPL’s leak-detection system, the safety record of DAPL’s operator (ETP and Sunoco, which completed a merger in 2017) and the impact of North Dakota’s harsh winter conditions on response efforts in the event of a spill.¹⁰ Further, the March 25 Order acknowledged that shutting DAPL down until completion of the EIS would disrupt North Dakota’s oil industry and consumers in the region, but that such disruption was outweighed by the severity of the USACE’s violation of NEPA by failing to prepare an EIS. In addition to requiring the preparation of an EIS, the court asked the parties for a briefing on whether the Lake Oahe easement should be vacated and if DAPL should be shut down during the EIS preparation remand – leading to the Shutdown Order.

On July 6, the D.C. District Court issued the Shutdown Order vacating the easement and requiring that DAPL be shut down and drained of oil within 30 days. After further acknowledging the effects of a shutdown on the industry and the people

relying on DAPL, the court focused significantly on the seriousness of USACE's error in not preparing an EIS.¹¹ On the same day, Dakota Access requested a provisional stay of the Shutdown Order with the D.C. District Court, and filed a notice of appeal, seeking appeal to the D. C. Circuit of the Shutdown Order, the March 25 Order, and the 2017 Order (the "Merits Appeal").

On July 9, the D.C. District Court heard arguments on Dakota Access' motion to stay the Shutdown Order while the Merits Appeal is decided in the D.C. Circuit. The court expressed reluctance in issuing a stay while such appeal is heard. Dakota Access, in an effort to get an appeal in front of the D.C. Circuit as soon as possible, insisted on an immediate ruling denying the stay. Later that day, the court issued such denial.

On July 10, Dakota Access filed an emergency motion for stay with the D.C. Circuit, and on July 14, a D.C. Circuit motions panel issued an administrative stay of the Shutdown Order, allowing DAPL to continue operating while the D.C. Circuit considers Dakota Access's emergency motion for stay.¹² On August 5, the D.C. Circuit issued an order staying the injunction portion of the Shutdown Order, stating that "[t]he district court did not make the findings necessary for injunctive relief."¹³ However, the August 5 order also denied Dakota Access' motion for stay of the portion of the Shutdown Order vacating the easement that allows DAPL to cross under Lake Oahe and said it expected appellants to clarify their positions before the D.C. District Court as to whether the USACE intends to allow the continued operation of the pipeline notwithstanding the vacatur of the easement.

Pursuant to the August 5 order, DAPL is not required to be shut down and emptied of oil, but if operations continue, they will do so without the necessary Lake Oahe easement. Therefore, with the Merits Appeal still looming, a new issue has arisen of whether the USACE will allow DAPL to continue operations without such easement and whether the D.C. District Court will find that acceptable. On August 10, at a status conference, the district court pressed the USACE for answers on how it would handle DAPL's operating status without the required easement. A report from USACE on this question is due to the court by August 31, and from there the court will schedule further hearings.

Considerations for North Dakota Crude Oil Producers

DAPL, which began operating in 2017, transports approximately 40% of the crude

oil production in North Dakota and services a large number of North Dakota oil producers. The Shutdown Order and subsequent litigation create many uncertainties not just for Dakota Access, but also for producers currently shipping volumes on DAPL, services companies in the region and numerous other potentially affected parties.¹⁴ The stay of the injunction portion of the Shutdown Order allows DAPL to continue operating pending the USACE's decision regarding how to address operations in the absence of the required easement. That decision, along with a potential decision on injunctive relief by the District Court, may allow DAPL to continue operating on an interim basis, or it may again direct DAPL to shut down until a decision on the Merits Appeal (which has an expedited schedule and could be decided by late 2020 or early 2021) or the completion of the USACE's EIS review (likely in late Q3 or Q4 2021). There is also the potential that, if the March 25 Order is not reversed on appeal, the court-mandated EIS process may result in findings that mandate the permanent shutdown of DAPL.

Analyze Rights under Existing Transportation Contracts. Producers shipping on DAPL should analyze their rights under existing transportation contracts, including what remedies may be available if Dakota Access is unable to provide shipping services on DAPL in the future. Although some agreements may expressly permit Dakota Access to suspend services under such circumstances pursuant to force majeure or other similar provision, the producers should understand whether such provision also suspends or terminates producers' minimum volume deficiency payment obligations. Additionally, some agreements may provide certain termination rights for extended suspension of shipping services, which could be valuable if there is an extended delay while the USACE completes an EIS. Ultimately, producers should understand their existing rights, remedies and continuing obligations if a shutdown is ordered in the near term as well as if a shutdown were to extend beyond completion of the EIS.

Evaluate Alternative Crude Transportation Options. Additionally, producers should evaluate alternative crude transportation options in North Dakota. Although Dakota Access is still accepting crude volume nominations for pipeline capacity in coming months, if the stay is lifted on appeal or if further injunctive relief is granted, producers could be left with few transportation options for the period while USACE completes the EIS review, and potentially longer, depending on the ultimate outcome of the EIS review and potential, subsequent litigation. Producers' transportation alternatives have been further constrained due to a Bureau of Indian Affairs Notification of Trespass Determination issued to Tesoro High Plains Pipeline Company LLC in early July ordering that Tesoro cease and desist the use of the Tesoro High Plains Pipeline in North Dakota due to its trespass on Indian reservation

lands without an approved right-of-way.

Consider Transportation by Rail or Trucking. Alternative transportation methods include transportation by rail or trucking. Despite typically being more expensive and having more limited capacity than pipeline transportation, rail and trucking transportation may provide a flexible, short-term transportation solution while producers are determining their long-term options.

Furthermore, because the COVID-19 pandemic has depressed demand for crude oil resulting in the shut-in of numerous producing wells, capacity of rail and trucking transportation may be less of an issue in the near term (although capacity limitations will likely present issues as demand increases if the Shutdown Order becomes effective for an extended period of time).

Conclusion

The Shutdown Order, which ETP and many others believe is unprecedented and exceeds the court's authority,¹⁵ has created significant uncertainty for producers and related businesses in North Dakota and in the Bakken. Oil producers should begin contingency planning sooner, rather than later, both for near-term and longer-term alternatives. It is critical that affected producers and shippers take steps now to understand their rights and potential remedies under existing transportation contracts and the availability and costs of alternative transportation solutions in the region, as it is now clear that, while emergency stay requests may be decided quickly, the longer-term viability of DAPL operations will continue to be subject to regulatory and litigation challenges for some time.

1. Energy Transfer Partners L.P. ("ETP") is not a party to the subject litigation; Dakota Access, LLC, which is controlled by ETP, is a Defendant in the subject litigation along with USACE.↩

2. *Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Eng'rs et al.*, Case No. 1:16-cv-01534, U.S. District Court for the District of Columbia, July 6, 2020, ORDER, ECF No. 545, and MEMORANDUM OPINION, ECF No. 546.↩

3. *Id.*↩

4. The Plaintiff Tribes include the Standing Rock, Cheyenne River, Oglala and Yankton Sioux Tribes.↩

5. 2015 EA: <https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll7/id/2426>; 2016 EA and Mitigated

FONSI: <https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll7/id/2801>.↵

6. Presidential Memorandum: <https://www.govinfo.gov/content/pkg/DCPD-201700067/pdf/DCPD-201700067.pdf>.↵

7. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101 (D.D.C. 2017).↵

8. *Standing Rock Sioux Tribe, et al v. U.S. Army Corps of Eng'rs*, Case No. 1:16-cv-01534-JEB, U.S. District Court District of Columbia, March 25, 2020, Order, ECF No. 495, MEMORANDUM OPINION, ECF No. 496.↵

9. *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019).↵

10. ECF No. 496.↵

11. The court stated that in determining whether to vacate a deficient agency action during remand it must first consider “the *seriousness of the order’s deficiencies* (and thus the extent of doubt whether the agency chose correctly)” and, second, it must analyze “the *disruptive consequences* of an interim change that may itself be changed.” [ECF No. 546, citing *Allied-Signal v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), emphasis added.] In considering the seriousness of the deficiencies in the USACE’s previous environmental assessment, the court found that the USACE could not adequately explain its decision not to prepare an EIS when it was required. [ECF No. 546.] In considering the disruptive consequences of its shutdown order, the court evaluated the potentially significant harm to the public health, economy and environment, but ultimately found that, on balance, the lack of decisive weight either way should not prevent its shutdown order. [i.d.]↵

12. In its July 14 order, the D.C. Circuit panel stated that the purpose of the administrative stay is to “give the court sufficient opportunity to consider the emergency motion for stay and should not be construed in any way as a ruling on the merits of [the emergency stay] motion.” [See *Standing Rock Sioux Tribe, et al., v. United States Army Corps of Eng'rs, et al.*, Case No. 20-5197, United States Court of Appeals for District of Columbia Circuit, July 14, 2020, PER CURIAM ORDER, Doc. No. 1851652.]↵

13. *Standing Rock Sioux Tribe, et al., v. United States Army Corps of Eng'rs, et al.*, Case No. 20-5197, United States Court of Appeals for District of Columbia Circuit, August 5, 2020, PER CURIAM ORDER, Doc. No. 1855206.↵

14. The breadth of the potential effects of a shutdown of DAPL are evidenced by the numerous parties filing amicus briefs in support of Dakota Access’s motion for stay. Such amicus briefs were filed by the following parties: State of North Dakota; State of Indiana; State of Montana; State of Arkansas; State of Iowa; State of Alabama; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Nebraska; State of Ohio; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of West Virginia; State of Wyoming; State of Kansas; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Association of Oil Pipe Lines; Chamber of Commerce of the United States of America; North

Dakota Petroleum Council; Western Dakota Energy Association; North Dakota Water Users Association; North Dakota Farm Bureau; North Dakota Grain Dealers Association; North Dakota Grain Growers Association; South Dakota Corn Growers Association; South Dakota Farm Bureau Federation; and South Dakota Soybean Association. [*Standing Rock Sioux Tribe, et al., v. United States Army Corps of Eng'rs, et al., Case No. 20-5197, United States Court of Appeals for District of Columbia Circuit.*][↩](#)

15. ETP statement on the Shutdown Order: <https://ir.energytransfer.com/news-releases/news-release-details/energy-transfer-statement-dakota-access-pipeline>[↩](#)

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