



IOWA DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

December 13, 2023

Attn: Brent Cossette  
U.S. Army Corps of Engineers  
CENWO-ODT-N  
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**RE: *Dakota Access Pipeline Draft EIS Comments***

Dear Mr. Cossette:

The undersigned Attorneys General of the States of Iowa, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming (“States”) urge the U.S. Army Corps of Engineers (“Corps”) to reissue the easement allowing Dakota Access Pipeline (“DAPL”) to cross Corps-owned lands at Lake Oahe, North Dakota. The Draft Environmental Impact Statement (“DEIS”)<sup>1</sup> does not account for the harms certain options will impose on States. The Corps should reject the DEIS alternatives that result in its denying the easement, a denial that would have significant, negative effects on the States. The States urge the Corps to fully consider our comment in the Corps’ Final Environmental Impact Statement (“FEIS”).

DAPL has operated safely since 2017.<sup>2</sup> Most Environmental Impact Statements issue before a project’s completion and operation. But here, DAPL has been operating safely for over six years. The three proposed alternatives involve (Alternative 1) digging up already laid pipe—creating potential for chaos and increasing the risk of an accident; (Alternative 2) abandoning the

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<sup>1</sup> U.S. Army Corps of Eng’rs (Omaha District), *Dakota Access Pipeline Oahe Crossing Project Draft Environmental Statement*, available at <https://perma.cc/K2GL-WZ2J> (September 2023).

<sup>2</sup> *Id.*, Section 1.1.3; *Id.*, Section ES.3.1.8.

pipe in the ground—erasing all prior, safe, work on building DAPL and potentially causing its own environmental risks; or (Alternative 5) building a new DAPL along a new path to do the same job elsewhere—despite DAPL currently doing the job safely.

Despite more than 1,500 pages of comments, there is a dearth of analysis for potential economic impacts should DAPL cease operating. As explained later in this Comment, if the oil currently transported by DAPL is instead transported by rail or truck, there will be significant economic harm to many industries throughout the Midwest—and the rest of the country. In 2014, North Dakota railroads transported up to 800,000 barrels of oil a day.<sup>3</sup> In its extremely limited assessment of the direct effects of managing the oil flow (limited to the time it would take to construct an alternate route), the DEIS suggests that it might take 100 car-long trains and 15,000 tanker trucks “driving around the clock,”—both of which could lead to an increase of accidents or fatalities.<sup>4</sup> None of that accounts for the crowding out effect of, for example, agricultural producers and farmers who will be priced out of competition. This lacuna in the economic analysis should be addressed.

The States recommend that the Corps reissue the requested easement under Alternatives 3 or 4. Those alternatives allow DAPL to continue to operate safely without onerous additional conditions. The States conversely recommend that the Corps reject proposed Alternatives 1, 2, and 5. Those alternatives involve digging up, abandoning, or rebuilding hundreds of miles of pipeline. Each of those alternatives will cause significant, adverse impacts to the States, our citizens, and our regions.

The States include both States that DAPL crosses and those that it does not. But all the States, even those that DAPL does not cross, will suffer if the Corps does not reissue DAPL’s easement. The DEIS inadequately addresses the significant, adverse consequences each state will suffer if the Corps chooses Alternatives 1, 2, or 5. We provide these comments for the Corps to consider and address in the FEIS.

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<sup>3</sup> *Id.*, Section 3.9.3.5.254–55.

<sup>4</sup> *Id.*

## I. Federalism and States' Authority

A. *The Corps should be mindful of the existing limitations on the States' ability to protect themselves from the risks associated with increased transportation of crude oil via truck and rail transportation. Alternatives 1, 2, or 5 do not reasonably reflect these risks or how not reissuing easement will exacerbate those risks.*

State and local governments have few options to protect themselves from the risks associated with increased transportation of crude oil via non-DAPL alternatives. The Interstate Commerce Commission Termination Act<sup>5</sup> preempts states and localities from imposing many safety regulations on rail transportation. For example, courts have held that States may not: regulate train-created air pollution;<sup>6</sup> prohibit railroad switching activities;<sup>7</sup> set train speed limits;<sup>8</sup> prohibit idling;<sup>9</sup> set train negligence standards;<sup>10</sup> or regulate the use of sidings.<sup>11</sup> Nor may States enact many common-sense regulations as to truck safety. The Federal Motor Carrier Safety Regulations preempt certain State laws on commercial motor-vehicle safety.<sup>12</sup> That one-size-fits-all approach leads to potential harm to the human environment, including significant public health and safety risks. The FEIS should acknowledge that Alternatives 1, 2, or 5 will each result in increases in such adverse impacts, and the Corps should consider those impacts in its ultimate decision. The DEIS does not adequately do so.

That preemption blocks States from protecting their citizens' health and safety—but that can be ameliorated through permanent and safe pipelines. For example, courts have held that States and localities may not even prohibit trains from blocking intersections.<sup>13</sup> When trains block intersections, they impose significant burdens on the economies and quality of life of rural (and

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<sup>5</sup> 49 U.S.C. § 10501(b).

<sup>6</sup> *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

<sup>7</sup> *City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169 (Wash. 2002).

<sup>8</sup> *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

<sup>9</sup> *Delaware v. Surface Transp. Bd.*, 859 F.3d 16 (D.C. Cir. 2017).

<sup>10</sup> *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011).

<sup>11</sup> *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004).

<sup>12</sup> *See* 49 U.S.C. § 31141(a) (2018) (“A State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.”).

<sup>13</sup> *See State v. Norfolk S. Ry. Co.*, 107 N.E.3d 468 (Ind. 2018); *but see Ohio v. CSX Transportation, Inc.*, 143 S. Ct. 1018 (2023) (No. 22-459).

sometimes urban) communities. Such blockages can impair public safety—police and fire departments may be delayed or unable to reach emergency sites or hospitals in the many communities where rail crossings intersect main roads, which are often the only viable routes in smaller or older towns. Towns in upper midwestern states suffered increased instances of blocked intersections during the 2014 peak congestion—peak congestion likely to reoccur if the Corps were to select Alternatives 1, 2, or 5. Those alternatives entail permanently or temporarily stopping DAPL’s operation and diverting crude to be transported by rail. The Corps in the FEIS should consider and discuss the States’ inability to mitigate these impacts of increased truck and rail transport. The DEIS does not adequately do so.

*B. Alternative 5 exceeds the Corps’ jurisdiction and infringes on States’ jurisdiction over land use.*

Alternative 5, which requires building 111 miles of additional pipeline and a new Missouri River crossing, impedes State sovereignty by violating North Dakota’s sovereign control over the locations of crude oil pipelines within its borders. Moreover, the DEIS does so with only the barest acknowledgment that the North Bismarck Route “presents a conflict with the state’s past analysis.”<sup>14</sup> The Corps lacks authority or jurisdiction to force a State to accept the Corps’ determination of what is and is not the best route for a hazardous liquids pipeline that crosses that State’s lands. Despite that, and despite the Corps and the North Dakota Public Service Commission (“Commission”) both having previously rejected the proxy route used to underpin Alternative 5, the Corps continues to consider this rejected route.<sup>15</sup> That is an obvious legal error that the Corps cannot ignore.

The current route is the environmentally preferable route. The DEIS does not address the Commission’s choice of the current DAPL route over the North Bismarck Route because the current route “would best minimize adverse human and environmental impacts.”<sup>16</sup> The FEIS should fully acknowledge, consider, and incorporate the Corps’ and the Commission’s previous analysis in DAPL’s original permitting proceeding and 2016 Environmental

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<sup>14</sup> DEIS, Section 3.6.1.3.

<sup>15</sup> DEIS, Section 3.6.1.3.173.

<sup>16</sup> U.S. Army Corps of Eng’rs, *Environmental Assessment: Dakota Access Pipeline Project*, at 8 (July 25, 2016), <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2801>.

Assessment of the North Bismarck Alternative’s impacts—the route on which Alternative 5’s proxy North Bismarck Reroute is based.

## II. Socioeconomic Impacts to the States

### *A. The FEIS should fully consider the negative economic impacts of Alternatives 1, 2, and 5 on States’ agriculture industries.*

The Corps should consider in the FEIS the environmental and socioeconomic harms that would result under each of Alternatives 1, 2, and 5 because of their adverse effects on our States’ agriculture industries. Many of our States produce large amounts of grain currently shipped by rail. That grain will be displaced due to competition with higher-revenue oil for access to rail transport if volumes currently flowing on DAPL shift to rail.

This shift will lead to higher prices and, ultimately, a potential for food shortages. For example, grain producers in Iowa—the nation’s largest producer of corn and the second-largest producer of soybeans—will suffer up to \$100 million in annual losses as shippers pass back freight costs to farmers via lower bid prices. And that process means that freight costs will also increase for fertilizers and other agricultural chemicals shipped by rail.<sup>17</sup> Further, the DEIS estimates that under Alternative 5, impacts could last up to four years—meaning \$400 million in total losses.<sup>18</sup> The Corps provides no estimate of the costs accompanying Alternatives 1 or 2, which involve DAPL’s permanent shuttering. The FEIS must update the DEIS analysis of Alternatives 1, 2, and 5 to properly account for the resulting damage should the Corps not reissue DAPL’s easement. Estimates for damages to the agriculture industry could exceed \$10 billion in the timeframe analyzed by the EIS.<sup>19</sup> That would be catastrophic.

### *B. The FEIS should further detail and analyze the tax losses that States will suffer under Alternatives 1, 2, or 5.*

The DEIS mentions in passing that certain States will suffer a combined \$45 to \$65 million in property-tax losses as a result of well shut-ins associated with removing DAPL from service.<sup>20</sup> It also briefly ponders that Alternatives 1

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<sup>17</sup> Elaine Kub, *Freight Congestion: Ag Impacts*, at 3 (July 2023), <https://elainekub.com/freight-congestion>.

<sup>18</sup> *See id.*; DEIS, Section 2.6.3.23.

<sup>19</sup> *See id.*

<sup>20</sup> DEIS, Section 3.8.1.3.

and 2 will result in “millions of dollars of property tax losses in several states.”<sup>21</sup> These two fleeting mentions comprise the DEIS’s entire analysis of State or municipal tax losses associated with Alternatives 1, 2, or 5 and do not constitute the consideration required of the foreseeable harms to the human and physical environment for those taxpayers.

The FEIS should further detail the tax losses that States would suffer under Alternatives 1, 2, and 5 and should consider those losses and associated harms in the body of its analyses in Chapter 3. Now, the DEIS mentions those losses only in the Chapter 5 impact summaries. The DEIS’s treatment of tax losses associated with Alternative 1, 2, and 5 is inadequate and lacks reason.

The FEIS should recognize and consider that States through which DAPL passes will lose *ad valorem* and other State taxes assessed on Dakota Access. In Iowa alone, Dakota Access has paid to the counties DAPL traverses over \$100 million in property tax revenue since commencing operation—revenue that is at risk for those counties should there be a disruption in service to DAPL. The counties use that revenue for many benefits to the public, including supporting schools, road construction and maintenance, emergency services such as fire and police, and other essential ongoing needs of the counties. The FEIS must consider those permanent socioeconomic losses under Alternatives 1 and 2 and long-term to permanent losses under Alternative 5. The DEIS does not do so.

The FEIS should also acknowledge and analyze the tax losses that will accrue for States that are not on DAPL’s route but will nonetheless suffer related tax consequences under Alternatives 1, 2, and 5. For example, DAPL is the primary supply source for the Energy Transfer Crude Oil Pipeline (“ETCOP”), which begins in Patoka, Illinois, where DAPL terminates, and runs south from Patoka across Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana and terminates on the Gulf Coast near the Louisiana/Texas border. ETCOP thus connects the Bakken region with the large refining industry and supporting infrastructure in the Gulf Coast region. Disrupting service on DAPL under Alternatives 1, 2, or 5 will impact ETCOP and disrupt feedstock to refineries in southern Illinois near Patoka (which does not have a train offloading facility) and the Gulf Coast. Many of our States collect *ad valorem* taxes from ETCOP. Although ETCOP itself will not be shut down under Alternatives 1, 2, or 5, if ETCOP does not receive oil from DAPL,

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<sup>21</sup> DEIS, Sections 5.2.7, 5.3.

then tax revenues in the States through which ETCOP passes could decline, too.<sup>22</sup> The FEIS should discuss these impacts in its socioeconomic impacts analyses.

The FEIS should acknowledge that both states along DAPL's route and states not along DAPL's route will suffer tax losses under Alternatives 1, 2, and 5. These consequences will lead to a decline in the availability and quality of government services like public safety, emergency services, public health, waste management, and education.

*C. Impacts to our States' agriculture industries will cause harm to the human environment.*

Competition for freight capacity is likely to resurrect the market conditions that existed before DAPL became operational in 2017—intractable railroad congestion, rotting grain, higher food prices and, ultimately, a potential for food shortages. The FEIS should better consider these foreseeable socioeconomic harms that would result from such competition under Alternatives 1, 2, or 5.

The FEIS should analyze each of these harms caused by economic losses to our States' farmers:

- a. Grain displaced by oil in rail transportation will have to be stored for longer periods until it could get to market. When elevators run out of storage, some grain must be stashed in temporary storage bunkers or open grain piles rather than sealed elevators. Such temporary storage—especially open-pile storage—eventually leads to grain rot, which, among other consequences, emits CO<sub>2</sub>, contributes to food shortages and inflation, and attracts disease-carrying insects and rodents.
- b. Losses to corn, soybean, barley, and wheat growers could likewise result in shortages of critical manufactured goods and foods. We saw that exact phenomenon result from the 2013–2014 oil-induced rail shortages, which caused production delays and shortages for several important food processors like General Mills.

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<sup>22</sup> Second Declaration of Glenn Emery at P 25, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-cv-1534 (June 11, 2020), Dkt. 542-3.

- c. An inability to move products to markets could also result in ethanol shortages. Domestic ethanol shortages could foreseeably increase the importation of foreign-produced ethanol or of foreign-grown grain to boost ethanol production. Such imports will have obvious negative environmental effects like the associated greenhouse gas (“GHG”) and air emissions.

The DEIS fails to meaningfully address rail congestion, which is itself also a public safety concern for rural communities and small towns in our States. Railroads often cross the main thoroughfares in small towns and rural communities. Trains can block crossings for a long time, and the nearest alternative route may be dozens of miles away. Additional congestion at those rail crossings may prevent first responders from responding to emergencies in our communities in a timely manner. As discussed above, courts have held that our States’ authority to protect our citizens from those issues is largely preempted by the ICCTA. Thus, the FEIS should explore the effects of rail congestion on public safety. The DEIS does not do so.

As the DEIS recognizes, pipeline releases are much rarer than releases on either rail or truck.<sup>23</sup> Transportation by pipeline is 4.5 times less likely to result in a spill than transport by rail.<sup>24</sup> Trucks spill more oil and gas than both rail and pipeline, averaging around 326 barrels per million tons moved every mile. By contrast, Alternatives 3 and 4 allow DAPL’s safe operation to continue and vastly reduce the risks of spills or leaks. Yet the Corps downplays the risk of a release under truck or rail, concluding that because truck and rail would likely result in “more frequent, lower volume crude oil releases,” the effects of Alternatives 1 and 5 or Alternatives 2 and 5 would not be significant.<sup>25</sup> That is factually incorrect and not supported by the record. The FEIS should better emphasize that crude oil pipelines are more environmentally friendly than truck or rail.

*D. The FEIS improperly considers “environmental justice.”*

The Corps’ consideration of “environmental justice” in determining which alternative to pursue is improper. There is no statutory authority to consider disparate impacts or race-based social engineering within the DEIS

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<sup>23</sup> DEIS, Sections ES.3.9, 5.5.1, 5.5.3.

<sup>24</sup> Kenneth P., T. Jackson Green, *Safety in the Transport of Oil and Gas: Pipelines or Rail?*, The Fraser Institute (Aug. 2015).

<sup>25</sup> DEIS, Sections 3.3.1.3, 3.9.3.5.



framework. Executive Order 14096’s attempt to redefine “environmental justice” does not override the statutory requirements of the National Environmental Policy Act (“NEPA”).<sup>26</sup>

In other contexts, “environmental justice” has led to inappropriate consideration of prohibited factors in decision-making. To the extent the Corps considered race or other constitutionally suspect categories—particularly as a “central consideration”—the DEIS violates the constitutional command of Equal Protection. *See, e.g., Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

*E. Alternative 5 is not a standalone alternative; it results from Alternative 1 or 2 and leads to the same impacts as Alternative 3 or 4.*

The FEIS must also address that Alternatives 1, 2, and 5 suffer not only their own significant adverse impacts but also will result in whatever adverse impacts the Corps concludes will result from Alternatives 3 and 4. For example, if DAPL were relocated 35 miles north of its current location under Alternative 5, the adverse impacts would include all of the impacts needed to remove the existing pipeline and relocate it (Alternatives 1, 2, and 5), which would also necessarily result in adverse impacts from DAPL’s operation (Alternatives 3 or 4). Moreover, opponents of DAPL claim, without evidence, that any release could impact water intakes between 75 and 200 miles downstream of the crossing. Thus, assuming that their claims are correct, moving DAPL 35 miles north will not reduce the risks and potential impacts associated with Alternatives 3 or 4. The FEIS must make clearer that Alternative 5 subsumes not only the effects of Alternative 1 or 2, but would also have the same impacts as Alternatives 3 and 4.

### **III. Misuse of the Social Cost of GHGs**

*A. The DEIS misuses the Social Cost of GHGs in its assessment of greenhouse gas impacts.*

The DEIS uses the Social Cost of GHGs (“SCG”) to assess GHG impacts of the five alternatives. NEPA neither mandates nor permits the Corps to use the SCG in this way. NEPA’s hard-look requirement and proximate-cause

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<sup>26</sup> *See* E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25251 (April 21, 2023).

standard do not permit agencies to rely on speculative conclusions or conclusions that the agency knows reflect substandard and outdated science. The SCG contains both. Many of our States raised concerns when other agencies attempted to use SCG in their pipeline permitting reviews.<sup>27</sup> The FEIS should not rely on that flawed SCG analysis in its impact determinations.

Indeed, the Biden Administration has embraced a “whole-of-government approach” that is fairly characterized as a hostility to fossil fuels and purported GHG emissions. *See* Pipeline Safety: Gas Pipeline Leak Detection and Repair, 88 Fed. Reg. 31,890, 31923 (May 18, 2023). Under that approach, EPA and other federal regulatory bodies have proposed multiple rules that adversely impact fossil fuel development and the attendant cost of electric generation. *See, e.g.*, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021); *see also* Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023). Suffice it to say, the Biden Administration’s SCG approach has been called into question as violating the major questions doctrine, contrary to law to the extent it considers global effects, and likely arbitrary and capricious on multiple grounds. *See Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), *vacated for lack of standing*, *Louisiana by and through Landry v. Biden*, 64 F. 4th 674 (5th Cir. 2023).

The DEIS admits that “it is currently not possible to determine localized or regional impacts from GHG emissions from the Project” and “[t]here is currently no basis for choosing a particular discount rate or for designating a particular monetized value as significant.”<sup>28</sup> The FEIS should go a step further by declining to determine the monetary cost of GHG emissions from DAPL. At a minimum, the FEIS should explain why the Corps insists on using the outdated, unreliable SCG analysis, especially when the Corps ultimately properly finds that the EIS cannot determine the significance of DAPL’s alleged contribution to climate change.

Given the stakes to quality of life and human health, the Corps should show its work, and demonstrate that the DEIS—particularly its cumulative

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<sup>27</sup> For example, on April 16, 2021, the Attorneys General of 22 States submitted comments in a rulemaking docket wherein the Federal Energy Regulatory Commission (“FERC”) requested comments on whether the Natural Gas Act or NEPA authorize or mandate the use of SCG when FERC considers pipeline certificate applications. *See* FERC Docket No. PL18-1-000.

<sup>28</sup> DEIS, Section 3.12.4.

impact given EPA and other agencies' rulemaking in the same space—can be successfully implemented without leaving Americans subject to rolling blackouts, skyrocketing heating and electricity prices, and a decreased standard of living.

#### **IV. Conclusion**

The DEIS analysis ignores the true nature and extent of harm to our States should the Corps select Alternatives 1, 2, or 5. Our comments, if implemented in the FEIS, at a minimum will help address these faults in the DEIS analysis. We thank you for your consideration of our comments and look forward to seeing them addressed in the FEIS.

The States urge the Corps to reissue the easement allowing DAPL to cross Lake Oahe.

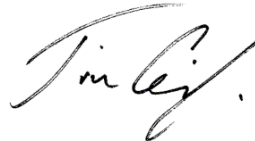
Respectfully Submitted,



Brenna Bird  
Attorney General of Iowa



Steve Marshall  
Alabama Attorney General



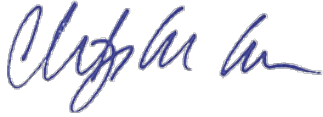
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