

September 22, 2021

Mr. Jaime Pinkham  
Acting Assistant Secretary of the Army for Civil Works  
Office of the Under Secretary of the Army  
United States Department of the Army  
108 Army Pentagon  
Room 3E446  
Washington, D.C. 20310

Re: *Environmental Review of Dakota Access Pipeline*

Dear Acting Assistant Secretary Pinkham:

As the chairmen of the Standing Rock Sioux Tribe (“Standing Rock”), the Cheyenne River Sioux Tribe, and the Oglala Sioux Tribe (collectively, the “Tribes”), we write today with great urgency and frustration regarding the initial draft environmental impact statement (“DEIS”) prepared by the U.S. Army Corps of Engineers (“Corps”) for the Lake Oahe crossing site of the Dakota Access Pipeline (“DAPL”). The process for the development to this document is fatally flawed and its content irredeemable. We ask that you step in to fix the process immediately.

In 2020, after over four years of litigation, the U.S. District Court in Washington D.C. confirmed what the Tribes have been arguing from the inception of this process: the impacts of the decision to route DAPL yards upstream of Standing Rock’s reservation was significant enough to warrant a full EIS. That decision was affirmed unanimously on appeal, by the D.C. Circuit. The Tribes were heartened that their long-standing position was so fully validated, and looked forward to engaging in good faith with the Corps on a valid EIS that fully assessed the risks and potential impacts of operating a massive oil infrastructure project on Great Sioux Nation’s treaty lands and at Standing Rock’s reservation doorstep.

Our participation in the EIS process and review of the initial draft reveals that the Corps has fundamentally misunderstood the courts’ directive and the requirements of the law.

The Corps has selected as contractor to perform the EIS a company that is a member of an organization that actively opposed the Tribes in the litigation. The contractor—Environmental Resources Management (“ERM”)—is a member of the American Petroleum

Institute (“API”),<sup>1</sup> which filed two amicus briefs in the district court on behalf of its members arguing against vacating the easement for DAPL.<sup>2</sup> Moreover, ERM staff people testified in the South Dakota Public Utility Commission proceeding in favor of permitting the pipeline.<sup>3</sup> In essence, ERM is an agent of DAPL, rather than a neutral party.

The selection of ERM as a contractor violates applicable law and guidance which make clear that the contractor cannot have a “financial or other interest in the outcome of the project.” *See e.g.*, 40 C.F.R. 1506.5(c)<sup>4</sup>; U.S. Army Corps of Engineers Regulatory Guidance Letter 1 (RGL 05-08)<sup>5</sup>; Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) (“If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.”). The selection of ERM clearly compromises “the objectivity and integrity of the NEPA review process” and, thus, results in substantive flaws in the EIS.

Given ERM’s inherent bias, it is no wonder that the draft EIS largely ignores the last five years of history and the thousands of pages of detailed technical and cultural material shared by the Tribes. Instead of a good faith examination of the critical issues of siting this pipeline in the Tribes’ treaty lands, just upriver of the Standing Rock Sioux Reservation, and upriver of the Cheyenne River Sioux Reservation and the Oglala Sioux Tribe’s water intake, this is an advocacy document that appears to be prepared by the proponent for a single purpose: to justify issuance of a new easement of the pipeline at its current location. In example after example, the document entirely ignores critical technical and cultural information that we have presented to the Corps.

Moreover, as during the last court-ordered remand, the Corps is withholding key technical analysis from the Tribes, relying on the conclusions of proponent-prepared technical materials without subjecting them to external scrutiny. No explanation for the decision to keep these crucial documents secret has been provided to us, even though this has been a key area of dispute for many years. Without sharing this critical information with the Tribes, the Corps is making a mockery of its obligations to engage with us in government-to-government consultation, as required by this Administration. Memorandum on Tribal Consultation and

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<sup>1</sup> See <https://www.api.org/membership/members#E>; <https://web.archive.org/web/20170703123252/https://www.api.org/membership/members> (ERM listed as a member of API on July 3, 2017); <https://web.archive.org/web/20200408144253/https://www.api.org/membership/members> (ERM listed as a member of API on April 8, 2020).

<sup>2</sup> Amicus Curiae Brief of the American Fuel & Petrochemical Manufacturers, et al., in Support of Dakota Access, LLC’s Brief on Vacatur, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 16-cv-01534 (D.D.C. Aug. 28, 2017), ECF No. 279 (“Amici are trade associations whose members have a significant interest in the continued transportation of North American-produced crude oil.”); Amicus Curiae Brief of the American Fuel & Petrochemical Manufacturers, et al., in Support of Dakota Access, LLC’s Brief on Vacatur, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 16-cv-01534 (D.D.C. April 30, 2020), ECF No. 517 (same).

<sup>3</sup> E.g., Testimony of David Nickel, an employee of Natural Resources Group, LLC (“NRG”), an ERM Company, at 4 (July 6, 2015) (“Based on NRG’s review of Dakota Access’s Revised Application, we agree that the project is not likely to pose a threat of serious injury to the environment.”), <https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/staffexhibits/exhibit11.pdf>.

<sup>4</sup> These are the former regulations, which are applicable to this EIS.

<sup>5</sup> <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rpls/rgl05-08.pdf>.

Strengthening Nation-to-Nation Relationships (January 26, 2021) (citing Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments)).

At this early stage of the process, the Corps is already gravely off track. The DEIS is filled with major errors, omissions, and misstatements. It is being conducted without the transparency that the situation requires, by a biased contractor. The current process is fundamentally broken. Accordingly, we have several requests of you to begin remedying the situation.

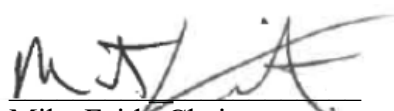
First, your Administration should terminate its contract with ERM, who has inherent bias, and who has repeatedly demonstrated that it is not up to the task of preparing a lawful and adequate EIS that centers Tribal concerns. The EIS process should be run out of Corps headquarters, not the Omaha District, with a new consultant (selected in consultation with us) or internal staff, with oversight from the Assistant Secretary for Civil Works or his Deputy.

Second, the Corps has consistently demonstrated an institutional lack of sensitivity to and understanding of Tribal concerns. The Administration must bring in the U.S. Department of the Interior as a co-equal cooperating agency with appropriate expertise to assist the Corps in centering Tribal impacts and concerns which motivated this EIS in the first place. Given that other agencies have already agreed to join the EIS process as cooperating agencies (including the EPA), it makes sense to start over with full participation from all cooperating agencies.

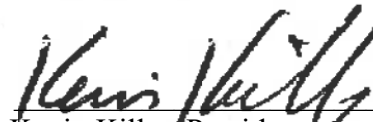
Third, we insist on full transparency of all technical documents and communications. The current DEIS is based on a secretive record of correspondence and one-sided technical data prepared by DAPL and unavailable to review and comment by us. This is precisely the problem that has plagued the agency in the past and led to multiple court losses. Our Tribes are sovereign nations and some are cooperating agencies in the EIS process. We should have access to all the underlying information with an adequate opportunity to review.

Finally, we request an opportunity for a full government-to-government consultation to discuss these important requests at the nearest available opportunity.

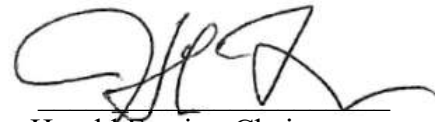
Sincerely,



Mike Faith, Chairman  
Standing Rock Sioux Tribe



Kevin Killer, President  
Oglala Sioux Tribe



Harold Frazier, Chairman  
Cheyenne River Sioux Tribe