IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant–Cross Defendant, and DAKOTA ACCESS, LLC, Defendant–Intervenor–Cross Claimant.	Case Number: 16-cv-1534 (JEB)

DAKOTA ACCESS, LLC'S REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

The United States Army Corps of Engineers now agrees with Dakota Access that the Court should shield a narrow set of details in a handful of documents through a protective order that avoids endangerment to public safety. Both Plaintiffs, however, view this motion as an opportunity to repeat their false assertions that the Corps and Dakota Access somehow hid the existence of important information that might support Plaintiffs' claims. The Court need only read the documents at issue and consult the relevant regulations to realize that Plaintiffs are grasping at straws. The "spill model discussion" documents to which they refer in their Response were *not* used by the Corps to conclude that "the risks and impacts of oil spills were so insignificant that no

EIS was necessary," as Plaintiffs baldly assert without a single citation to the record or relevant law. Resp. 2. Other publicly disclosed documents served that purpose. *These* documents instead were prepared to help improve pipeline design features and craft the most effective response plans, just as the relevant federal regulations contemplate. Such models simply are not—and those created here simply were not—used to decide whether a pipeline should be approved or how it should be routed.

The reason Dakota Access seeks to shield small portions of these five spill plans—as well as select items in six other documents that Plaintiffs ignore—is to avoid broad dissemination of site-specific details that would only help wrongdoers figure out the best locations to try to damage the pipeline. The intense public attention this case has received, along with criminal actions *already* taken by those opposed to the pipeline, *see infra* at 10-11, counsel *in favor* of extending confidentiality to portions of a small number of documents that are extraneous to Plaintiffs' claims. The Court should extend protection to that information.

* * *

One factual matter needs correction at the outset. In peddling the fiction that Plaintiffs had no idea the Corps received a small number of confidential documents from Dakota Access, Standing Rock asserts that November 2016 was "the first time the Tribes were *even aware* that there were additional documents in the Corps' possession relating to spill risk and response." Resp. 4 (emphasis added). That is demonstrably false. In March 2016—in the midst of the period for commenting on the draft Environmental Assessment—Standing Rock not only was aware of confidential documents, its representatives turned down an opportunity to see them. D.E. 159-1, Ex. Z (Comer declaration). The Tribe chose to forego that chance because it was unwilling to abide by the sensible condition that confidential documents be treated confidentially. *Id*; *cf*. D.E.

117-1 at 21 (Standing Rock asserts that confidential spill analyses "were never made available to" it). The Final Environmental Assessment confirms that Plaintiffs were aware of this well before November 2016. It expressly states that Dakota Access submitted response plans on a "confidential" basis because they contain "security sensitive" information. AR 71267 (Ex. L to D.E. 159-1). Once again, the Tribe wants this Court to endorse a failure-to-consult story that the facts contradict. *Cf.* D.E. 39, Sept. 9, 2016, Opinion at 15-33 (NHPA-related consultation), 40 ("the Tribe's assertion that the Corps did not engage in any NHPA consultations prior to promulgating NWP 12 is false").

As for the eleven documents at issue here, they fall into three categories: (1) a set of five documents entitled "Spill Model Discussion," prepared for five different pipeline locations (two in North Dakota and three in Illinois); (2) a set of five corresponding geographic response plans; and (3) a single prevention and response plan prepared by Dakota Access's Horizontal Directional Drilling contractor. Plaintiffs say nothing about the last two categories. For all three groups, Dakota Access merely seeks to keep certain details non-public. And, for each, the public interest in protecting those details far outweighs any possible rationale for making them public.

1. "Spill Model Discussion" documents. Plaintiffs describe the first category as "oil spill risk analyses" that "purport to evaluate" "oil spill risks and impacts," and they allege that the Corps "relied upon" these analyses "in making a critically important decision" to approve the pipeline. Resp. 2, 3. Given how important this assertion about the role of these documents is to this motion, as well as its importance to Plaintiffs' claims on the merits, Plaintiffs should offer at least one citation to the record or the relevant regulations. In fact, they do not cite anything because, as explained below, their assertion simply is untrue.

The five similarly formatted documents are titled "spill model discussion." *See, e.g.,* AR 12398 (Ex. A to D.E. 93). The documents themselves carefully explain, in sections that Dakota Access is not seeking to shield from the public, that the "US Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA)" required Dakota Access to prepare models for "the purposes of determining the *relative* consequences associated with a spill occurring along the DAPL pipeline system." AR 12403 (Ex. A to D.E. 93) (emphasis added). The documents also explain that contrary to being tools for assessing the likelihood of a spill or measuring a real spill's actual consequences (that is, measuring absolute spill volumes), the purpose of the model is to compare risks along the length of the pipeline (thus providing "relative" values). *Id.* By "determin[ing] which locations along the pipeline pose the greatest risk," the various simulated spills "allow[] DAPL to mitigate potential risks in the design phase." *Id.* In short, these models are not used—nor does PHMSA intend that they be used—to decide *whether* or *where* to build a pipeline.

Nothing in the record supports Plaintiffs' erroneous contrary view that the Corps used these documents to make any pipeline approval decision that turns on spill likelihood or spill consequences. Federal law requirements for how to prepare these models prove Plaintiffs wrong. The relevant PHMSA regulation—entitled "Worst case discharge"—is found under "Response Plans for Onshore Oil Pipelines." 49 C.F.R. § 194.105. That provision dictates how a worst case discharge must be calculated. *Id.* at § 194.105(b). For projects like this one, the "largest volume" must be computed by taking the pipeline's "maximum release time in hours, plus the maximum shutdown response time in hours," and multiplying it "by the maximum flow rate expressed in barrels per hour (based on the maximum daily capacity of the pipeline), plus the largest line

drainage volume after shutdown of the line section(s) in the response zone expressed in barrels (cubic meters)." *Id.* at § 194.105(b)(1).

Plaintiffs do not dispute that Dakota Access faithfully followed this regulation when it made its worst case calculations. And the modeling documents themselves prove that Dakota Access properly implemented Section 194.105(b)(1) by taking "a conservative analysis approach" at every step, which is to say it repeatedly erred in favor of using the largest volume. AR 12410 (Ex. A to D.E. 93). For example, it determined the maximum release volume by "assum[ing] a full diameter break (guillotine) in the pipeline," even though it is physically impossible for a pipeline buried deep beneath the ground to be sheared completely in two. *See, e.g.*, AR 12404 (Ex. A to D.E. 93). Similarly, Dakota Access followed the requirement to measure the amount of oil that would be released for a pipeline "lying directly on top of the water" even though, in reality, the ground surrounding the "deeply installed pipeline restricts the spill volume that could be released and restricts the affected area." AR 12410 (Ex. A to D.E. 93). It also assumed there would be an "entire release of oil between valves" on either side of the break, even though "anti-siphon effects" would "take over" beyond "the immediate area of the pipeline adjacent" to the break, thus "minimiz[ing] any further release of oil from the pipeline." AR 12414 (Ex. A to D.E. 93). And while oil "evaporates as it spreads over land," the "spill model software" that Dakota Access used for leaks over land "assumes evaporation ceases to occur once the total oil spill volume has been released." AR 12405 (Ex. A to D.E. 93). In *every* respect, Dakota Access calculated spill volumes to the max, regardless of how implausible those volumes are for this pipeline.

The end result of this modeling process was a better alignment of shutoff valves near Lake Oahe. AR 74726 (Ex. A to D.E. 93) (achieving a reduction of approximately 45% in interaction

with high consequence areas). Worst case discharge exercises like this also inform development of appropriate response plans by helping to prioritize resources. Under another PHMSA regulation, "[e]ach response plan must include procedures and a list of resources for responding, to the maximum extent practicable, to a worst case discharge and to a substantial threat of such a discharge." 49 C.F.R. § 194.107(a).

Plaintiffs rely on a December 4, 2016, opinion by the former Solicitor for the Department of Interior—an opinion that the Secretary of Interior has since withdrawn—to incorrectly ascribe a different purpose to spill modeling. Quoting that opinion, Plaintiffs complain that the model for Lake Oahe "does not correlate with the majority of actual releases that occur during the operation of an oil pipeline." Resp. 5. The Interior Solicitor further criticized the model for "assum[ing] that the pipeline is aboveground rather than considering the actual pathway of a buried pipeline[.]" D.E. 117-6 at 28.

These criticisms fundamentally mischaracterize the operation and purpose of PHMSA-mandated spill models. As just explained, PHMSA's regulations *required* Dakota Access to "assume" a pipeline at the surface that suffers a full guillotine "release"—that is, the worst event imaginable for *any* pipeline-crossing-configuration at that location.[1] By developing and implementing a response plan that could handle this vastly inflated worst case release scenario—and Plaintiffs do not dispute that this *was* a vastly inflated release volume—Dakota Access is more

[1] This also fully answers Plaintiffs' objection that the model for the Lake Oahe crossing omits the possibility that oil could reach the water if a pipeline leaked at a location uphill from Lake Oahe. Resp. 13. That possibility was not ignored. As the modeling document plainly states, the model was applied literally thousands of times at hypothetical spill points "spaced at 200 foot intervals along the pipeline." AR 74718 (Ex. A to D.E. 93). The model that Dakota Access submitted for Lake Oahe was the correct one for the simple reason that a guillotine break of a pipeline sitting on the surface of a lake will release more oil into the lake than a break that occurs on land. Plaintiffs' expert does not refute this fact.

than adequately prepared for anything that could happen under real-life conditions. *See* AR 71311 (Ex. L to D.E. 159-1) ("In the unlikely event of a release" of oil, "sufficient time exists to close the nearest [water] intake valve to avoid human impact.").[2] Finally, and more to the point of the need for a protective order, the former Interior Solicitor's opinion would warrant no deference on this issue, even if it had not been withdrawn, because the federal agency with competence and expertise in this area (PHMSA) *supports* confidentiality. *See infra* at 8-9.

Plaintiffs, their expert, and the former Interior Solicitor only needed to read the Final Environmental Assessment to avoid this key error. In a 6-page section devoted to "Reliability and Safety," the EA explains that a "worst case discharge (WCD) scenario specific to Lake Sakakawea and Lake Oahe" was "calculated by guidance in 49 CFR § 194.105." AR 71315 (Ex. L to D.E. 159-1). The EA spells out the assumptions used in the calculation, including that "the pipeline is on top of the river," meaning the true available "response time" will be "greater" than the model predicts. *Id.* The EA also states that Dakota Access provided the Corps a "tactical GRP" or Geographic Response Plan "specific to a response strategy for Lake Sakakawea and Lake Oahe" that "includes specific response strategies and equipment for all affected water." *Id.* And the EA expressly characterizes these response plans as "security sensitive documents" that Dakota

[2] It is all the more inexplicable that someone whom Plaintiffs proffer as an expert on oil pipelines would also get this wrong. Despite clear references in the Lake Oahe crossing model to the regulation that requires a worst case discharge calculation, Richard Kuprewicz expresses concern, based on his review of the report for that model, that Dakota Access and the Corps "have failed to consider all threats that could cause pipeline rupture." D.E. 118, Sealed declaration ¶ 11. But, as just explained, the spill model has nothing to do with identifying which "threats" could "cause pipeline rupture." Under the regulation, an operator *assumes* the worst possible threat has materialized and uses the output for pipeline design and response plans. Kuprewicz also says he "cannot reach an informed conclusion as to the reasonableness of the route selection based on this Report." *Id.* Yet he does not support—or even explain how he arrived at—his mistaken premise that spill models could somehow inform the *selection* of the route when the PHMSA regulations do not require that operators prepare spill modeling for route alternatives.

Access submitted as "Privileged and Confidential." AR 71267 (Ex. L to D.E. 159-1). (Recall again Plaintiffs' insistence—despite what the Final EA says—that they did not even know such confidential response plans *existed* until four months after the Final EA was issued.)

Viewed in this light—the *proper* light—these models are irrelevant to Plaintiffs' claims. Plaintiffs themselves identify nothing of relevance that they would be unable to put in a public pleading if this motion is granted. Dakota Access has no objection to the models being publicly available with minor redactions. Plaintiffs need nothing more. In fact, Plaintiffs' sealed expert declaration does not point to a single to-be-redacted passage that he believes is important to critiquing the Corps's finding of no significant impact, and he did not use (nor is there any suggestion that he would need to use) the confidential portions to make any of his points. It is particularly telling that in their recent summary judgment motions Plaintiffs do not include any of the models as sealed exhibits in support of their claims.[3]

Although these models are irrelevant to Plaintiffs claims, disclosure of the passages at issue in this motion would be detrimental to the public interest. As Dakota Access explained in its motion, the goal of the requested protective order is to make it less likely that someone wishing to do harm will be assisted by access to certain information in these models. The unredacted versions would help such a person choose where best to try to damage the pipeline for the greatest environmental injury. After all, the purpose of such modeling is to make a determination of *relative* risk along the length of a pipeline, AR 12403 (Ex. A to D.E. 93), for the different and legitimate purpose of planning better for such an eventuality.

[3] In the highly unlikely event such a need materializes later in this lawsuit, the Court could consider whether changed circumstances warrant an item-specific change to the protective order.

The Corps disagrees that the information in question meets the statutory definitions of Sensitive Security Information and Protected Critical Infrastructure Information. But the Corps nonetheless has joined in Dakota Access's request to shield important information pursuant to a protective order. In the Corps's view, protection extends to "information that PHMSA would redact from public disclosure under 5 U.S.C. § 552(b)(7)(F), which protects records compiled for law enforcement purposes and that if released, could reasonably be expected to endanger the life or physical safety of any individual, and which PHMSA would also redact under 49 U.S.C. § 60138 and 5 U.S.C. § 552(b)(3) if the information were contained in oil spill response plans." D.E. 146-1 ¶ 5 (declaration of David Lehman, Director of Oil Spill Preparedness and Emergency Support Division, Office of Pipeline Safety, PHMSA).

The rationale offered by the Corps is fully consistent with Dakota Access's position. In fact, official PHMSA policy states that the agency will "protect information that is inextricably linked to the worst case discharge as being part of the process by which the owner or operator determines the worst case discharge." Policy No. PHMSA 2050.1A, PHMSA Facility Response Plan Policy (June 27, 2014) at 6. This policy makes protection available for even *more* than what Dakota Access includes in its proposed redactions: *i.e.*, "Worst Case Discharge Amounts"; "Worst Case Discharge Location"; and "Data inputs to methodology for calculating worst case discharge amounts, including values linked to isolation time, shutdown times, distance between valves, draindown attributes, . . . maximum release time, maximum flow rate, and other specific data needed to calculate worst case discharge amounts." *Id.* (noting that "several of the variables include values that could help an outsider gain 'insider information' on the type of safety/security devices used to ensure the continuity and safe operations of the pipeline infrastructure").

Regardless of whether the Court agrees with Dakota Access that the information falls within the definitions of Sensitive Security Information or Protected Critical Infrastructure Information, the Court has broad discretion under Rule 26(c), Fed. R. Civ. P., to prevent unnecessary threats to the life or safety of others. *See In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1216 (D.C. Cir. 2004). As a general matter, a court has "broad discretion . . . to decide when a protective order is appropriate." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). This discretion is guided by a number of factors including "(1) the need for public access to the documents at issue; (2) the extent to which the public has access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." *Anderson v. Ramsey*, No. 04-cv-56, 2005 WL 475141 at 2 (D.D.C. Mar. 1, 2005) (citing *United States v. Hubbard*, 650 F.2d 293, 324–25 (D.C. Cir. 1980)).

These factors strongly weigh in favor of the proposed redactions sought in this motion. Any public need will be met by release of the documents with the minimal redactions sought by Dakota Access. The details that Dakota Access seeks to protect have not been made public before. Dakota Access, the party seeking protection, is the entity responsible for operating the pipeline. The public interest favors protecting the information to ensure the safety of vital infrastructure and to avoid reckless damage to the environment. Given the violence and other unlawful conduct that has already occurred, the Court should err on the side of caution. And there will be no prejudice to the Tribes because they and the Court have access to the original documents. The Tribes are free to use the information in litigation provided they make minimal redactions in documents released to the public. Finally, these documents were prepared to plan a response to the remote

possibility of pipeline failure. Public dissemination of the redacted information would serve only to enable those planning to carry out pipeline attacks. This is not some imagined risk. It is worth stressing that protesters of *this* pipeline have already engaged in unlawful conduct that risked catastrophic failures of pipelines already in operation. *See e.g.*, Liz Hampton & Ethan Lou, "Bolt cutters expose vulnerability of North America's oil pipeline grid" REUTERS Oct. 12, 2016, available at:

http://www.reuters.com/article/us-usa-canada-pipelines-vulnerabilities-idUSKCN12C0BK.[4]

Plaintiffs' argument that "Rule 26 is inapposite to this case because no party is seeking discovery" misses the mark. Resp. 9. This Court has the general authority to require filing under seal and to issue protective orders that "require redaction" or "limit or prohibit a nonparty's remote electronic access to a document filed with the court." Fed. R. Civ. P. 5.2(d)-(e). And that authority allows the Court to limit access to confidential information and insist on redactions in relation to the administrative record. *See Poett v. United States*, 657 F. Supp. 2d 230, 234 n.2 (D.D.C. 2009) (describing "two versions of the Administrative Record": "The first is an unredacted version that is filed under seal," "[t]he second is a redacted version that is available on the public docket"); *Raytheon Co. v. Dep't of Navy*, No. 89-2481, 1989 WL 550581, at *1 n.2 (D.D.C. Dec. 22, 1989) ("[T]he full administrative record and pleadings were filed under seal, with redacted versions

[4] Last October, in the midst of protests over *this* pipeline, "climate activists . . . carr[ied] out an audacious act of sabatoge on North America's massive oil and gas pipeline system" by simultaneously "twist[ing] shut giant valves on five cross-border pipelines." *Id.* Pipeline operators, safety experts, and even Plaintiffs' own witness (Kuprewicz) warned that such actions on "heavily pressurized" pipelines are "extremely dangerous" and could "cause ruptures that are 'catastrophic' for the environment." *Id.* (analogizing the actions to halting a freight train; "Protesters were taking a chance that a weak spot in a line would not explode, and that employees in operations hubs would spring into action after hearing alarms"; Kuprewicz agreeing that such conduct "could kill people"). With friends of the environment like this, the Court has good reason to avoid giving any help to enemies intent on causing harm to the public.

thereof filed in the public record."). The fact that Dakota Access did not force Plaintiffs to seek these records through discovery—but instead agreed to make them available subject to the possibility of a protective order—is no bar to this Court giving them the same protection as documents subject to routine civil discovery disputes.

In opposing protection for these documents, Plaintiffs have a serious consistency problem. Standing Rock leads off its summary judgment motion arguing that an *accidental* "oil spill affecting Lake Oahe would pose an existential threat to the Tribe's rights, culture, and welfare," D.E. 117-1 at 1, but just weeks later it asks the Court to discount the harm from an *intentional* oil leak because oil pipeline security is not nearly as important as "transportation security." Resp. 6; *id.* at 8-9 (Plaintiffs argue this situation is "not close at all to the protections that SSI and CII normally cover, such as nuclear weapons storage and airline transportation safety").

When it comes to these five modeling documents, the Corps and Dakota Access disagree only on such details as how to treat certain location identifiers. Although some (though not all) of the information at issue could be derived by piecing together publicly available data from disparate sources, Dakota Access believes the balance is best struck by not making the task at all easier for anyone intent on misusing these models. That is not a request based on mere speculation. Plaintiffs have made no effort—none whatsoever—to explain in the sealed portions of their Response what possible value these location identifiers would have. That failure is even more glaring for the documents that have nothing to do with Lake Oahe or even North Dakota. Plaintiffs don't even have a theory for why location details about pipeline segments in Illinois are of any possible relevance to their claims. Even for documents involving North Dakota, the best Plaintiffs can muster is that protection is not needed because the Corps and Dakota Access seek to include redactions of maps that are elsewhere in the record. The simple response is that Plaintiffs are free

to cite and use maps from those other documents, because in those documents a connect-the-dots risk based on context does not exist. Similarly, while the route of the pipeline may be well known, this motion is about protecting information that would help wrongdoers target a *particular spot* on a route that exceeds 1,100 miles.

2. Geographic Response Plans. The second category of documents consists of five geographic response plans—one for each model in the first category. The information at issue here is detail within those response plans that would give wrongdoers a road map for anticipating and thwarting the response if they inflict damage on the pipeline. These details include which authorities will be first responders, their contact information, and the types of resources they would employ in their effort to contain any harm. Armed with this information, those intent on damaging the pipeline could follow up with a campaign of misdirection aimed at these first responders. Plaintiffs themselves have argued that response time is a key issue when it comes to mitigating the harm from a spill or leak. D.E. 117-1 at 11 (Standing Rock complains that the Environmental Assessment "overstated the effectiveness of remote sensing technologies," which alert the pipeline operator to the need to respond).

Plaintiffs do not even *try* to explain how such details could have any bearing on their claims, especially when the public versions of the documents will reveal the *type* of information being withheld, just not the specific identifiers. *E.g.*, AR 12463 (Ex. A to D.E. 93) (proposed redaction allows reader to see that nine county agencies are included on the response team, but not specifics such as county names and phone numbers for the first responders). Plaintiffs have not even referred to such plans in their summary judgment briefing. As with the models in the first group, the Court should err on the side of protecting the public from disclosure of details that Plaintiffs have no plausible ground for making a part of this case.

3. Inadvertent Release Prevention and Response Plan. Dakota Access's contractor prepared a contingency plan for the inadvertent release of non-hazardous drilling fluid in the horizontal directional drilling process. Plaintiffs do not even acknowledge this document in their Response, likely because it quite literally has not even a remote connection to the Lake Oahe crossing. The cover of the document says it deals with crossings the next State over. And Dakota Access only seeks protection for a single table listing South Dakota HDD crossing details (mile posts and HDD pipe lengths) in a document that sets forth response plans. While the first two categories of documents have a more direct connection to the goal of promoting public safety, the balance here also tips in favor of confidentiality. It is not possible to imagine a single way in which the information at issue in this document could be relevant to any claim in this case, and Plaintiffs have not even hinted at one.

CONCLUSION

The public disclosure of unredacted versions of the eleven documents will create unnecessary risks to the public. Plaintiffs either misunderstand or choose to mischaracterize the first category to press a false narrative that these documents are somehow relevant to their claims. And Plaintiffs ignore the other two categories. For the reasons stated above, the Court should issue the Protective Order.

Dated: March 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Columbia using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel:

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