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Truth  Compassion

Remember Who We Are

May 8, 2023

Honorable Michael L. Connor
U.S. Department of the Army
Assistant Secretary - Civil Works
108 Army Pentagon
Washington D.C. 20310-0108

**RE: On-going lack of genuine consultation, transparency and honesty
by the Corps of Engineers in the NEPA process for DAPL**

Dear Assistant Secretary Connor,

Thank you for agreeing to visit the Standing Rock Reservation on May 11, 2023. We look forward to field visits so you may observe the devastating impact that the Corps of Engineers' mismanagement of Missouri River stream flows is inflicting on our land, water and infrastructure, as well as undermining the emergency plans to clean up an oil spill from the Dakota Access Pipeline.

We must also address the of lack genuine consultation, transparency and honesty exhibited by the Corps of Engineers in its dealings with the Standing Rock Sioux Tribe. In your letter to me dated February 17, 2022, you stated that "I have requested that the Omaha District pause the scheduled release of the draft EIS in the Federal Register in order to... discuss your concerns." Over one year later, none of Standing Rock's concerns have been addressed in the least.

We have received none of the information requested about emergency plans to address an oil spill, the modeling of oil spill impacts on our Reservation, or other documents related to safety of the pipeline. Virtually none of the issues raised in the 110-page Scoping Report submitted to the Corps of Engineers on November 24, 2020 are addressed in the Administrative Draft Environmental Impact Statement that has been circulated. Meanwhile, the Corps of Engineers has drained the Oahe Reservoir, causing our drinking water system to impose shortages,

damaging our irrigation intakes, destroying fish and wildlife habitat, damaging the homes and properties of Tribal members, and rendering oil clean-up to be virtually impossible, if there were to be an oil spill today.

On-going Dishonesty on Consultation

I am especially concerned that representations that you have made to me personally have proven to be false. For example, during your previous visit to Standing Rock on March 2, 2022, you stated that you were recently confirmed as Assistant Secretary and were new on the job, and still learning the issues. You explained that you were not yet in a position to engage in substantive dialogue on DAPL. You agreed that in light of the fact that your mission was to listen but not engage in substantive dialogue, the Army would not characterize the meeting as a government-to-government consultation.

Nevertheless, the Administrative Draft EIS lists the March 2nd meeting as “government-to-government consultation” on page 1-29. The Administrative Draft states the opposite of what you said during your prior visit to Standing Rock. This is important, because the Omaha District routinely mischaracterizes interactions with our Tribe to make it look as if it works cooperatively with Standing Rock, when it does not.

The point is not insignificant, because our Tribe has made specific requests for consultation that have been completely ignored by the Corps of Engineers. For example, on November 24, 2020, the Tribe requested consultation on the procurement by the Corps of any consultants retained for the EIS, out of concern that the Corps would contract with a biased oil industry consultant. We were not consulted, and in fact the Omaha District hired Environmental Resources Management (ERM), a member of the American Petroleum Industry, which filed a legal brief against our Tribe and in support of DAPL in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engr's*, 440 F. Supp.3d 1 (D.D.C. 2020).

Failure to Engage in Early Consultation and Selection of Consultant with Conflict of Interest

Our concern that there was a need for pre-decisional consultation on the issue of the Corps’ consultants for the DAPL EIS were well-founded. Yet the Omaha District ignored our consultation request, in violation of Executive Order 13175, the DoD Native American Policy and President Biden’s *Memorandum on Tribal Consultation on Strengthening Nation-to-Nation Relationships* (January 26, 2021).

I met with Omaha District Commander Mark Himes on July 25, 2022, and requested that the Corps discontinue the ERM contract and re-do its work. ERM has a conflict of interest and is biased in favor of the oil industry, of which it is a member. It should have no role in the evaluation of DAPL’s environmental impacts at Standing Rock. Nevertheless, Col. Himes refused my request outright, without any discussion or negotiation.

Having been stonewalled by the Omaha District, I authorized a Freedom of Information request relating to ERM’s conflict disclosures. We received a highly redacted Conflict of Interest Declaration submitted by ERM. The document indicates that ERM has contracted with at least five separate companies with an ownership interest in DAPL. The Declaration states, “[T]he corporation has worked for, or is currently working for Multiple Entitles on the following projects and capacities... [totally redacted].

All of the information relevant to ERM’s conflict of interest has been redacted. The identity of the companies that ERM serves, the work they performed, the frequency of their conflicting work, and the financial benefits are all concealed by the Corps of Engineers. The secrecy surrounding ERM’s conflict of interest reflects the Corps’ total lack of transparency in the NEPA process.

Total Lack of Transparency in the NEPA Process

We are deeply disturbed by the secrecy and overall lack of transparency in the NEPA process for DAPL. The Tribe's 2020 Scoping Report requested disclosure of numerous documents and data sets, to enable our Tribe to critically review the Corps' findings on DAPL's environmental impacts on the Standing Rock Reservation. I personally requested this information from you on March 2, and April 28, 2022. On March 2, you said you would look into it. We met again on April 28, at which time you suggested that the Tribe should ask the state of North Dakota, or file a request under the Freedom of Information Act.

We are a Tribal Nation and signatory to the 1868 Fort Laramie Treaty and 1851 Fort Laramie Treaty with the United States. We have a Nation-to-Nation relationship with your government. You should have more respect for our Tribe.

We are also an environmental justice community. The EPA defines environmental justice as “the *fair treatment and meaningful involvement* of all people, regardless of race, color, national origin or income, with respect to the... implementation and enforcement of environmental laws.” www.epa.gov/environmental/justice. In correspondence with your office and the Omaha District, and in meetings with you and with Col. Himes, Standing Rock has made it clear that we cannot have “meaningful involvement” in the NEPA process for DAPL without access to the information relied upon for the findings in the EIS. The secrecy surrounding the data used for the DAPL EIS clearly violates environmental justice.

An accurate assessment of environmental risk is also essential for environmental justice. Accordingly, in our Scoping Report, Standing Rock requested that the Corps dispense with the index method of risk assessment used in the 2016 Environmental Assessment. That request was ignored, and the Corps uses the outdated index - the very analytical tool that is clearly inapplicable to environmental justice communities - on page 3-4 of the Administrative Draft EIS. The document brazenly fails to include the requisite risk analysis necessary to achieve environmental justice.

The Corps is also violating the applicable Council on Environmental Quality regulations. The regulations provide that:

NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and actions are taken. The information must be of high quality... public scrutiny (is) essential to implementing NEPA. 40 CFR §1500.1(b) (2019).

Standing Rock has asked for nothing more than “environmental information,” the disclosure of which is required under the regulations. The refusal to disclose the worst case discharge and unreacted Facility Response and Geographic Response Plans puts the lives of Tribal first responders at risk during an oil spill response. It is important to note that the Omaha District publicly disclosed the worst case discharge for a different pipeline, the Sacagawea Pipeline in North Dakota, in 2016, at virtually the same time it refused to release this information for DAPL. The 2016 Amended Environmental Assessment Addendum for the Sacagawea Pipeline states on page 59 that the Sacagawea worst case discharge was 500,000 barrels. <https://usace.contentdm.oclc.org/digital/api/collection/p16021coll7/id/2672/download>. This very same information was redacted in the 2016 EA for DAPL, and remains hidden by the Corps.

More effective communication and transparency with Tribal responders is required by the EPA in recent guidance implementing Executive Order 13650 on *Improving Chemical Facility Safety and Security*. The EPA guidance emphasizes the need *enhance* information-sharing with Tribal Emergency Response Commissions, such as the

Standing Rock TERC. The report identifies the need to disclose incident data, hazard analysis, risk minimization with Tribes. The Corps of Engineers ignores all of this in the Administrative Draft EIS.

The Corps (and PHMSA) have failed to consult with the Standing Rock Sioux Tribe on emergency planning for DAPL. Vital information remains withheld. There has been no communication or cooperation with the Standing Rock Tribal Emergency Response Commission (TERC) on issues such as emergency notifications, response planning, joint exercises, available resources for emergency response and additional needs. The lack of transparency and coordination with emergency planning jeopardizes the Tribe and the Reservation environment.

Access to the updated DAPL spill model and environmental receptor reports are also essential, because they will demonstrate the unmitigated impacts of a worst case discharge (however underestimated that may be). An evaluation of the spill model is especially important with Oahe Reservoir levels approaching historical low levels, to determine if low water scenarios in the model resemble the real-world conditions at Oahe.

Other documents that we have requested, such as the Integrity Management Plan for the Lake Oahe crossing, and the Operations, Maintenance and Emergency Procedures Manual for DAPL, directly relate to the environmental risk facing our Reservation. The requested Management of Change documentation is required by industry safety standards - API RP 1160 (2019) and RP 1173 (2015). The documentation should identify critical safety upgrades for doubling DAPL's capacity to 1.1 million barrels per day. Yet these documents remain secret, and we do not know if they even exist at all.

Under the regulations, the Corps must demonstrate that the information relied upon in the DAPL EIS is "of high quality," and be subject to "public scrutiny." The veil of secrecy imposed by the Corps in the NEPA process for DAPL prevents any evaluation of whether the information is high quality and it completely circumvents public scrutiny.

The Corps Ignores Energy Transfer's Horrendous Safety Record and Criminal Convictions

Significantly, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a Notice of Violation to Energy Transfer dated July 22, 2021, for failure to install adequate pressure control in violation of PHMSA pipeline safety regulations at 49 CFR §195.406; as well as the failure to produce an Integrity Management Plan in violation of 49 CFR §195.401(b)(1) and an Operations Manual compliant with 49 CFR §195.402. Thus, during the time period in which the Corps of Engineers has been preparing the EIS for DAPL, and hiding important documents from our Tribe and the public, PHMSA cited ET because the requisite plans and manuals *did not even exist*.

Overall, Energy Transfer has a horrendous safety record. It is among the worst violators in PHMSA's recent data base. From 2016 (when DAPL was constructed) to 2020, Energy Transfer pipelines experienced 125 hazardous liquid spills. Over the four-year period, the company averaged 2.4 spills per month. Forty-three of these incidents (one out of every three) are categorized by PHMSA as significant spills. During this period, ET pipelines released over 1,000,000 gallons of oil (25,597 barrels), leading to nearly \$35 million in property damage. At least 21 oil spills affected environmentally-sensitive High Consequence Areas, such as the DAPL Lake Oahe crossing at Standing Rock.

From 2016 to the present, PHMSA has initiated 37 enforcement actions and collected over \$3.3 million in penalties. The recent PHMSA enforcement actions suggest that Energy Transfer's safety performance is getting worse over time.

In the Administrative Draft EIS, the Corps of Engineers downplays Energy Transfer's terrible safety record. In evaluating the potential for an oil spill at Standing Rock, the Corps refuses to consider Energy Transfer's own record, and instead relies on industry-wide data. The Administrative Draft EIS states on page 3-14, "using only Dakota Access or Energy Transfer owned pipelines would result in limited data and is therefore less appropriate than using generic data provided by PHMSA."

The Corps continues to rely on an outdated risk management approach. Recent pipeline risk management standards adopted in response to major accidents and federal recommendations emphasize the safety record of the individual pipeline operator. Industry standards require a continuous assessment and improvement approach called "Plan-Do-Check-Act." This approach focuses on the real-world pipeline safety risk based upon the operator's performance history, not by generic incident data. The risk assessment analysis contained in the Administrative Draft EIS is outdated, self-serving and fails to properly identify DAPL's risk to the Reservation environment at Standing Rock.

Moreover, not all PHMSA-regulated companies are convicted criminals. On August 5, 2022, Energy Transfer-related companies pled no contest to 23 criminal violations of Pennsylvania's Clean Water Act. As a result of Energy Transfer's criminal convictions, the EPA Office of Inspector General has proposed debarring the company and its subsidiaries from government contracts or financial assistance agreements pursuant to 2 CFR Parts 189 and 1532. This is evidenced by the Form 10-K Annual Report filed by Energy Transfer with the U.S. Security and Exchange Commission on February 17, 2023. Energy Transfer LLP is a criminal enterprise with the worst pipeline safety record in the United States. In the Administrative Draft EIS, the Corps of Engineers ignores this and proposes to evaluate DAPL's risk to Standing Rock based on the safety record of other pipeline companies regulated by PHMSA.

As an environmental justice community, Standing Rock is entitled to "fair treatment" in the environmental review of DAPL. It is manifestly unfair to the Standing Rock Sioux Tribe for the Corps of Engineers to ignore Energy Transfer's criminal history and government-wide debarment and downplay its terrible safety record.

Under Article I of the 1868 Fort Laramie Treaty, the United States is required to keep "bad men" - criminals amongst the non-Indians - out of our Treaty territory. Energy Transfer is barred from our Reservation under the 1868 Treaty. This has implications for the operation of the pipeline and the clean-up of an oil spill.

The DAPL Facility Response Plan Violates the Clean Water Act and Tribal Law

As explained in the Tribe's 2020 Scoping Report, oil spill clean-up from DAPL on the Standing Rock Reservation must be conducted pursuant to Tribal law. The Standing Rock Department of Emergency Management, in consultation with EPA's Federal On-Scene Coordinator, will supervise oil spill remediation on the Reservation, as it does for any release of hazardous material. Consequently, it is absolutely imperative for the Corps of Engineers to disclose complete and unredacted copies of DAPL's worst case discharge and Facility and Geographic Response Plans.

We are concerned that the Corps of Engineers has accepted facility response and geographic response plans that fail to comply with the requirements of the Clean Water Act and the Standing Rock Emergency Response and Community Right-to-Know Code. Under the federal Clean Water Act, Energy Transfer must prepare a facility response plan "for responding, to the maximum extent practicable, to a worst case discharge." 33 U.S.C. §1321(j)(5)(A)(1).

The worst case discharge estimate fails to comply with the requirements for the calculation in the PHMSA regulations. With reservoir levels in the low 1590's, the boats, booms, vacuums and other heavy equipment

identified in the plan cannot be mobilized in the braided river. Thus, the plan fails to include response provisions for the oil spill clean-up “to the maximum extent practicable” as required by the statute.

The facility response plan fails to address the specific chemical hazards of Bakken crude, which is information needed by Tribal first responders during an oil spill. Energy Transfer’s spill mitigation plan appears to be contracted by its own spill model. There is no accurate hydrogeologic analysis at the DAPL Missouri River crossing. Ultimately, the plan fails to apply modern pipeline safety standards and community involvement requirements.

The Corps’ Stream Management of Missouri River Streamflows Causes Severe, Adverse Impacts at Standing Rock

The Corps of Engineers itself has rendered the Facility and Geographic Response plans unworkable, by draining Oahe Reservoir in order to maintain navigation service on the lower Missouri River. The Corps has admitted that navigation traffic on the lower river is minimal, yet the Corps’ operations degrade our Reservation water supplies in order service a small number of barges on the lower Missouri. These misplaced operational priorities at Oahe Dam conflict with the need to maintain minimum reservoir levels for implementation of the DAPL Facility and Geographical Response Plans.

The 2023 Annual Operating Plan for the Missouri River Main Stem Reservoirs will make things worse. The plan states on page 10, “a full length navigation season would be provided for median runoff and above, with the two upper runoff scenarios including a 10-day extension of the navigation season.” That is outrageous.

We have repeatedly articulated all of the problems caused at Standing Rock from the failure of the Corps to engage in adaptive management at Oahe Dam during the current drought. By developing a 2023 plan calling for *increasing* water releases to the lower basin, the Corps is exacerbating the erosion of our land and culture sites, damage to our Reservation infrastructure, and degradation of our water and the habitat for fish and wildlife. Moreover, the plan will further undermine the ability of first responders to clean up an oil spill from DAPL. The Corps must amend the 2023 AOP immediately, dispense with the proposal to increase navigation releases in 2023, and instead decrease navigation flows in order to maintain adequate reservoir levels at Oahe Reservoir.

Misleading and Erroneous Information Provided to Sen. Merkley

You addressed the issue of low water in your April 25, 2023 letter to Senator Jeffrey Merkley. Your response was disconcerting:

[W]e have taken steps to investigate this matter with Energy Transfer. The company asserts that there is no impact to its spill response capabilities presented by these conditions.

Your agency possesses a trust responsibility to our Tribe that is supposed to meet “the most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 297 (1942). Neither the Corps nor your office has addressed our Tribe’s concerns with DAPL consistent with the “exacting fiduciary standards” to which we are entitled as an Indian Nation, nor do you confer the “fair treatment” to which we are entitled as an environmental justice community. In the Administrative Draft EIS, the Corps merely amplifies oil industry speaking points. Notwithstanding the fact that all of the boat ramps identified in the FRP were inoperative in 2022 (and some of the purported access points are not even ramps), in your letter to Sen. Merkley, you tout the assurances of a convicted criminal.

The letter is replete with falsehoods and distractions. You state, "I understand the need for Tribal participation in this EIS process," but *none* of our Tribe's concerns are getting addressed by the Corps, or your office. Simple things, like the proper identification of Tribal agricultural intakes on the Missouri River, are not accurately identified in the Administrative Draft EIS. We raised that issue in the Scoping Report, emphasizing the need for genuine consultation with our Tribe but the Corps continues to ignore our input, including the need to properly identify our water intakes. In spite of our best efforts, there has been no substantive dialogue whatsoever.

You state that, "The Corps has discussed our limitations on releasing the documents in full with (Standing Rock)." There has been no discussion, or attempt at collaboration. As stated above, on March 2, 2022 you said "I'll look into it," and on April 28 you said "ask North Dakota." On July 25, Col. Himes said "ask PHMSA."

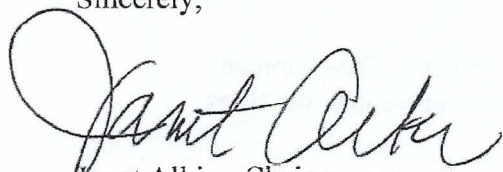
The EIS for DAPL is being prepared by the Corps of Engineers, not PHMSA. The Corps is obligated to comply with the CEQ regulations and the Executive Order and Administration directives on Environmental Justice in this NEPA process. You shouldn't pass the buck.

You wrote to Sen. Merkley, "I... have ensured that the Corps is providing the Standing Rock Sioux Tribe and all Tribal Nations the greatest degree of transparency... available under law." As stated above, the Corps refuses to release the worst case discharge or an unreacted copy of the DAPL facility response plans. Section 6 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 allows for disclosure of this information. The statute provides that "the Secretary... may provide, upon a written request... the most recent response plan, which may exclude... worst case discharges." 49 U.S.C. §60138(a).

Redactions are discretionary, not mandatory. The authority to release this information to our Tribe is clear. The language in your April 25th letter to Senator Merkley implying that the law prohibits disclosure of this information to Standing Rock is misleading and should be clarified.

Standing Rock has been trying to have a substantive discussion of our concerns with DAPL with the Department of the Army for nearly 10 years. We have been living with an unsafe pipeline operated by criminals for almost 6 years. Justice for Standing Rock is long overdue. Our May 11th meeting provides the Army with such an opportunity. I look forward to meeting with you.

Sincerely,



Janet Alkire, Chairwoman
Standing Rock Sioux Tribe

Enclosures: ASCW Connor Letter to Sen. Merkley, April 25, 2023
Sen. Merkley Letter to ASCW Connor, March 14, 2023