

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE, *et al.*,

Plaintiffs,

v.

**U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants.**

Civil Action No. 16-1534(JEB)

EXHIBIT A:

***AMICI CURIAE* BRIEF OF THE AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS, THE AMERICAN PETROLEUM INSTITUTE,
THE ASSOCIATION OF OIL PIPE LINES, THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF
MANUFACTURERS IN SUPPORT OF
DAKOTA ACCESS, LLC'S BRIEF ON VACATUR**

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INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”), the American Petroleum Institute (“API”), the Association of Oil Pipe Lines (“AOPL”), the Chamber of Commerce of the United States of America (“Chamber”), and the National Association of Manufacturers (“NAM”) (collectively “Amici”), representing the interests of pipeline operators and petroleum product manufacturers/refiners in North America, submit this Amicus Brief in support of Intervenor-Defendant Dakota Access, LLC (“Dakota Access”).

Amici agree with Dakota Access that the appropriate remedy is to remand the matter to the U.S. Army Corps of Engineers (“Corps”) to conduct the additional National Environmental Policy Act (“NEPA”) review required by this Court’s June 14, 2017 Memorandum Opinion [ECF No. 239] (“June Opinion”) without vacating the Corps’ approvals for the Dakota Access Pipeline (“DAPL”) or ordering Dakota Access to cease operation of DAPL.

Vacating the Corps’ approvals for DAPL and ordering DAPL to cease operations is not warranted under the two-factor test identified by the U.S. Court of Appeals for the D.C. Circuit in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). For the reasons set forth below, vacatur would cause serious and irreparable harms that significantly outweigh any countervailing concerns stemming from the procedural error identified in the Court’s June Opinion.

First, the NEPA errors identified in this Court’s June Opinion are not serious enough to weigh in favor of vacatur because the *Corps*’ further assessment of spill risk will have no effect on the actual operations of the pipeline or the likelihood of a release from DAPL. Pipeline spill prevention and response is not regulated by the Corps; rather, it is subject to the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”)

extensive pipeline safety regulations, which are designed to mitigate the risk of spills. *See* 49 C.F.R. Part 195. The further environmental review undertaken by the Corps may describe impacts of DAPL that the Court determined were not fully described in the Corps' Environmental Assessment. However, the Corps cannot order any changes to DAPL operations because this would conflict with the need for uniform, nationwide safety standards, embodied in PHMSA oversight and enforcement. To the extent Plaintiffs assert that vacatur is warranted to ensure safety, the Court should take into account that PHMSA is the federal agency that exclusively oversees the safety of pipeline operations, not the Corps. Thus, while the Corps must conduct its additional environmental review, only PHMSA can order any changes to DAPL's safety and integrity operations.

Second, the severe and far-reaching consequences of a disruption of service on DAPL weigh heavily against vacatur. Ceasing DAPL operations would seriously harm businesses throughout the energy industry in the United States. *See* Declaration of David Murk in Support of Amicus Brief, at ¶¶ 5-6 (hereinafter "Murk Declaration"). DAPL was placed into service in June 2017 and transports 450,000 barrels per day ("bpd") of Bakken-produced crude oil from extraction sources in North Dakota to refinery destinations in the Midwest and beyond. Amici members have entered into numerous business arrangements in reliance on the expectation of shipping and/or receiving those crude volumes over the next several months. *See id.* at ¶ 9. Any disruption in DAPL service would result in substantial financial loss and uncertainty for upstream producers, shippers, downstream refiners, manufacturers, retailers and consumers who rely on crude oil products and services resulting from the pipeline's operations.

Further, alternative transportation arrangements are doubtful in the near-term because pipeline systems in North Dakota and the Bakken region are not able to compensate for the

additional capacity provided by DAPL should service on that pipeline cease. *See id.* at ¶ 11. Alternative non-pipeline transportation modes in the region are more costly and may not be readily available. The costs of these transportation alternatives would also constrain production levels, which, in turn, would decrease regional employment, tax revenue for states and counties, and leave refiners with feedstock shortfalls that could only be displaced by crude oil from less available and/or more expensive domestic and foreign sources. *See id.* at ¶ 14.

The continued operation of DAPL is thus in both the regional and national interest, as recognized by the President.¹ Accordingly, the court should not vacate the Corps' approval in its remand order.

INTEREST OF THE AMICI

Amici are trade associations whose members have a significant interest in the continued transportation of North American-produced crude oil. Collectively, Amici represent entities that account for, among other things, the vast majority of petroleum products that are transported, manufactured, and sold in the United States, including crude oil and other liquid hydrocarbons that are transported by pipelines and other modes in interstate commerce.

AFPM is a national trade association representing approximately 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM members receive crude oil and other liquids products via the midstream sector, which includes pipelines, rail roads, barges, tankers, and trucks. AFPM's member companies have an interest in ensuring that they consistently and reliably receive the North American crude oil volumes that are necessary to meet U.S. energy consumption demand.

¹ *See* Memorandum of January 24, 2017, Construction of the Dakota Access Pipeline, 82 Fed. Reg. 11,129 (Feb. 17, 2017).

API is a national trade association that represents all segments of America's oil and natural gas industry. API's approximately 640 members – including exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms – provide much of the nation's energy, including in North Dakota and the Bakken region. API is also the worldwide leading standards-making body for the oil and natural gas industry. Accredited by the American National Standards Institute ("ANSI"), API has issued more than 500 consensus standards governing all segments of the industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations. API speaks for the oil and natural gas industry to the public, Congress, the Executive Branch of the Federal Government, state governments, and to the media.

AOPL is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 96 % of the crude oil and petroleum products moved by pipeline in the United States, including in North Dakota. Its members deliver crude oil and refined products to market through pipelines that extend approximately 192,396 miles across the United States. These pipelines safely, efficiently, and reliably deliver approximately 14.9 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by PHMSA. American consumers benefit when AOPL's member pipelines deliver crude oil and other liquid products to market to meet refinery, and hence, public energy consumption demand. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and cost effective method.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country—including in states served by DAPL. It regularly represents the interests of its members by filing amicus briefs in cases, like this one, that involve issues of concern to the nation's business community. The Chamber's members include producers, transporters, and users of crude oil, and they depend on stable, predictable, and national transportation of North-American-produced oil.

The NAM is the largest manufacturing association in the United States, representing large and small manufacturers in every industrial sector and in all 50 states, including those in the oil industry. Manufacturing employs more than 12 million men and women, contributes \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The issue now before the Court is of great importance to Amici because any order by this Court requiring DAPL to cease operations would have the consequence of impeding the transport of substantial crude oil volumes that are currently relied on by Amici's members, including producers, shippers, operators, refiners, and manufacturers. The decision before the Court is also of great importance in terms of the precedent that it could establish – any decision by this Court to vacate the Corps' decision and order DAPL to cease operations could result in similar rulings in other pipeline cases for NEPA violations by federal agencies, regardless of the

significance of the violation or the fact that such agencies (other than PHMSA) have no jurisdiction over the safety of crude oil pipeline operations.

BACKGROUND

I. The Free Flow of Petroleum Products is Imperative to U.S. Energy Security

North America has an extensive pipeline system that safely and efficiently carries, nearly 15 billion barrels of liquid products each year.² Pipelines such as DAPL thus play a vital role in safely and reliably transporting significant volumes of unrefined petroleum products from extraction points to refinery destinations in North America and beyond.

The North American crude oil industry is complex and interrelated. The inability to transport crude oil on one pipeline not only impacts the owner and operator of that pipeline, but also: (i) the many upstream producers who extract crude oil and are otherwise unable to transport their crude to market; (ii) the shippers who, independent of the pipeline owner/operator, pay for the transportation of crude oil on a pipeline and profit from sales of that crude to refinery customers; (iii) the downstream liquid terminal operators who store oil; (iv) refiners and manufacturers who produce end-use products; (v) the retailers who sell the end-use petroleum products to consumers; and (vi) consumers, including households and businesses, who may otherwise face potentially higher prices for gasoline as a result of pipeline outages. Every part of this complex web of goods and services is directly impacted when crude oil service ceases on a midstream pipeline, such as DAPL.

Thus, pipelines enable “the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life.”³ Pipelines are one of

² See Energy Infrastructure, Pipeline, *available at* <http://www.energyinfrastructure.org/pipeline>.

³ See PHMSA, General Pipeline FAQs, *available at* <http://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgne>

the safest and least costly ways to transport energy products. The more than 2.6 million miles of pipelines in the United States safely deliver hundreds of billions of tons of liquid petroleum products per mile each year.⁴ These pipelines are therefore crucial to satisfying the energy demands of U.S. businesses and citizens and cannot be efficiently or feasibly replaced by other transportation modes. It would, for example, take a constant line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest-sized pipeline. *Id.* The railroad-equivalent of a modest-sized pipeline would be a train of seventy-five 2,000-barrel tank rail cars every day. *Id.*

U.S. energy demands cannot be satisfied without a fully-functioning pipeline system. In setting forth policy for the review and approval of pipelines by federal agencies, President Obama recognized that the U.S. must “expand[] and moderniz[e] our Nation’s pipeline infrastructure” because pipelines are “a vital part of a sustained strategy to continue to reduce our reliance on foreign oil and enhance our Nation’s energy security.” *See* Memorandum of March 22, 2012, Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, 77 Fed. Reg. 18,891, 18,891 (Mar. 28, 2012). Because “rising production is outpacing the capacity of pipelines to deliver the oil to refineries,” the only option is for new pipelines to be constructed or for existing pipelines to be reconfigured to meet that demand. *Id.* Pipelines thus “create jobs, promote American energy production, and ultimately benefit consumers.” *Id.*

The public benefits from the U.S. pipeline systems are immeasurable. Pipelines enhance access to secure and reliable supplies of North American crude oil; reduce the nation’s reliance

xtoid=a62924cc45ea4110VgnVCM1000009ed07898RCRD&vgnnextchannel=daa52186536b8210VgnVCM1000001ecb7898RCRD&vgnnextfmt=print (last updated: Jan. 23, 2013).

⁴ *Id.*

on imports from nations that are less stable or unfriendly to U.S. interests; ensure refineries in the U.S. continue to operate at a high utilization rate and receive the type of oil needed to satisfy public demand for petroleum products; and generate millions of dollars of tax revenue for communities along the pipeline routes that provide funding for schools, roads and other community needs.

II. Crude Oil Pipelines Are Subject to Extensive Federal Regulation and Oversight

Every aspect of the operation and maintenance of a crude oil pipeline is fully regulated by PHMSA, pursuant to its delegation of authority under the Pipeline Safety Act (“PSA”), 49 U.S.C. §§ 60101, *et seq.* PHMSA’s regulations govern all facets of pipeline operations, including design, specifications, operation, and maintenance so as to ensure that they are safely operated. *See, e.g.*, 49 C.F.R. Part 195. PHMSA regulations, for example, dictate the design and specifications for all segments of a pipeline (49 C.F.R. § 195.200, *et seq.*) and the pressures at which such pipelines may be operated (49 C.F.R. § 195.406). Those regulations further establish the frequency within which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even *potential* threats must be inspected and repaired (49 C.F.R. § 195.452). PHMSA regulations further address possible releases, establishing the procedures under which an operator is to control a pipeline, including responding to alarms or triggers that may be indicative of a release (49 C.F.R. § 195.446); the placement of valves that may be remotely shut to minimize a potential release (49 C.F.R. § 195.116); and other matters.

To respond to, contain, and minimize a release to the environment (should one occur), Amici’s members are also subject to extensive emergency response planning requirements under the Oil Pollution Act (“OPA”), also administered by PHMSA for onshore pipelines such as DAPL. *See* 33 U.S.C. § 1321. In accordance with OPA, Amici’s members have prepared and

implement comprehensive emergency response plan documents, which include hundreds of pages worth of tactics and strategies to respond to a release from regulated facilities, including pipelines, storage tanks, and vessels. These robust plans are designed to: (i) ensure that a release of oil is quickly contained; (ii) direct initial clean-up efforts to mitigate adverse consequences to natural resources; and (iii) establish procedures for coordinating with state and federal agencies regarding a long-term response effort. *See* 49 C.F.R. Part 194.

Should any release of crude oil into waters of the United States result from a pipeline spill, the Clean Water Act (“CWA”) establishes a liability framework, whereby the Federal Government may seek civil or criminal penalties and impose injunctive measures applicable at any facility from which a release has occurred or is threatened. *See, e.g.*, 33 U.S.C. § 1321. The CWA, as amended by OPA, also sets forth requirements for owners and operators of facilities from which oil has been discharged to coordinate with the Federal Government to clean-up, remediate, and restore natural resources. Further, the CWA establishes the Oil Spill Liability Trust Fund, which provides local governments and the public with the ability to recover any damages or costs (including natural resource damages) that may be incurred as a result of an oil release. *See* 33 C.F.R. Part 136. Thus, any individual, community, or resource that may be harmed by an oil spill will be fully compensated by the Oil Spill Liability Trust Fund for any and all resulting costs and damages, and those funds will ultimately be recovered by the Federal Government from the pipeline owner and/or operator.

In sum, there is a broad and pervasive federal regulatory regime in place to protect against potential releases of crude oil from pipelines, ensure a prompt response and cleanup of any resulting releases of crude oil, compensate any party that may be harmed as a result of a

release, and assess and allocate damages to compensate for natural resources, including tribal resources, that may be harmed as a result of an oil release.

ARGUMENT

In deciding whether to decline to vacate an agency action, the D.C. Circuit evaluates two factors originally articulated in *Allied-Signal, Inc.*, 988 F. 2d at 150-51: (1) “the seriousness of [an agency’s errors]” and (2) “the disruptive consequences [that would result from vacatur].” *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Here, the two *Allied-Signal* factors weigh heavily against vacatur and the cessation of DAPL operations.

I. The Deficiencies Identified by this Court Do Not Rise to the Level of Seriousness Requiring Vacatur

The NEPA deficiencies to be addressed on remand are insufficiently serious to support vacatur. NEPA is a procedural statute only; it does not “mandate particular results” in the Corps’ consideration of DAPL’s applications. *See Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015). Thus, the Corps still has the authority to grant DAPL the necessary approvals, irrespective of what impacts its further NEPA review may disclose.

There is no reason to think the Corps will change its reasoned conclusion on those approvals. *See* June Opinion at 67 (citing *Allied-Signal*, 988 F.2d at 151 (“[A] serious possibility that the [agency] will be able to substantiate its decision on remand” cautions in favor of remanding rather than vacating.”)). Indeed, this Court recognized that, even where the Corps’ analysis was flawed, “it may well be the case” that the Corps reasonably analyzed the issues, but simply did not lay out the proper analysis in its EA. June Opinion at 34. Thus, in remanding to

allow the Corps to address shortcomings in its “controversial” decision analysis, this Court noted that Dakota Access “offers a scathing assessment of the [critical] reports’ ‘material flaws.’” *Id.* In this instance, as in others, the Corps is likely to simply restate its conclusion with amended analysis. *Id.* at 53-54 (noting agency reached conclusion as to “the lack of disproportionate impacts of an inadvertent release to the Tribe and the reservation,” that the EA “takes some steps toward satisfying” environmental justice purpose, but that further reasoning is required on remand). This conclusion is reinforced by the fact that this Court recognized that the Corps’ environmental analysis “substantially complied” with NEPA in the first place. *Id.* at 2.

More importantly, additional NEPA analysis may provide further assessment of the impacts of DAPL, but will have no effect on how DAPL is operated and maintained to reduce spill risk. PHMSA – not the Corps – is the federal agency tasked with regulating the safety and integrity of crude oil pipelines to ensure that spills are avoided. *See Sierra Club v. U.S. Forest Service*, 828 F.3d 402 (6th Cir. 2016) (recognizing that PHMSA is the federal agency responsible for regulating the safety of pipelines, including spill risk, and that the agency granting the right to cross federal lands was not). PHMSA’s safety regulations specifically dictate how DAPL is to be operated to avoid a spill and how Dakota Access is to respond to a hypothetical release. *See supra*, at 7-9. The Corps’ additional NEPA review will have no bearing on the DAPL’s integrity and leak detection programs, which are already governed by PHMSA regulations. Thus, vacatur would not advance any legitimate safety concerns.

Nor will the Corps’ further assessment of spill risks relative to tribal treaty rights, environmental justice, and spill risk methodology bear on any operational aspects of DAPL. The Corps does not have the requisite expertise to assess (or the statutory authority to impose) appropriate safety measures to reduce the likelihood of a release. *See Sierra Club, Inc. v.*

Bostick, 787 F.3d 1043, 1050 (10th Cir. 2015) (concluding that “the risk of oil spills fell within the domain of other agencies” (i.e., PHMSA), and not the Corps). Indeed, the Corps’ further environmental assessment on remand will not change the fact that DAPL is to be operated in accordance with safety regulations promulgated by PHMSA, and that such matters are beyond the purview of the Corps.

In sum, the Corps’ NEPA errors are not substantial enough to support vacatur because: (i) there is a high probability that the Corps’ additional environmental analysis will not change the Corps’ decision to grant the DAPL approvals or have any safety-enhancing impact; and (ii) the Corps’ further NEPA review will not (and cannot) permit the Corps to impose substantive design or operational changes that will influence spill risk. *See Mayo v. Jarvis*, 177 F. Supp. 3d 91, 139 (D.D.C. 2016), *amended* 203 F. Supp. 3d 31 (D.D.C. 2016) (remand, not vacatur, is appropriate when same decision will ultimately be achieved by agency following additional NEPA review).

In similar circumstances, a number of federal courts have chosen not to vacate agency approvals for what they deem “relatively minor” NEPA deficiencies. *See, e.g., Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1108–09 (E.D. Cal. 2013) (declining to vacate Forest Service decision on account of “relatively minor” “defect in the NEPA analysis”); *see also Today’s IV, Inc. v. Fed. Transit Admin.*, 2014 WL 5313943, at *18 (C.D. Cal. Sept. 12, 2014), *aff’d sub nom. Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) (rejecting complete vacatur of agency decision “[b]ecause the NEPA violation was so narrow”); *Home Builders Ass’n of N. California v. U.S. Fish & Wildlife Serv.*, 2007 WL 201248, at *7 (E.D. Cal. Jan. 24, 2007) (declining to vacate agency endangered species listing and instead giving agency 120 days to correct an error that was “minor in the grand scheme of its [NEPA] analysis”). This Court should reach the same conclusion here.

II. The Disruptive Consequences That Would Result from Vacatur Warrant an Order by This Court that Allows DAPL Operations to Continue

At the same time, “the disruptive consequences” of rescinding the Corps’ approvals and Environmental Assessment far “outstrip the consequences” of allowing DAPL operations to continue. *North Coast Rivers Alliance v. United States Department of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *11 (E.D. Cal. Dec. 16, 2016) (granting the federal defendants’ motion for voluntary remand without vacatur of the NEPA documents that applied to water contracts). Vacating the Corps’ approvals and ordering DAPL operations to cease would have serious adverse economic impacts throughout the oil industry and local and regional economies, which cannot be avoided or mitigated in the interim through the use of feasible transportation alternatives.

DAPL plays an integral role in the North Dakota and regional economy, currently transporting over a third of all oil produced in the Bakken region.⁵ The vast volume of crude oil that is shipped on DAPL *on a daily basis* is worth over \$20.2 million, or more than \$600 million each month that DAPL remains in operation.⁶ Thus, if DAPL were to be taken out of service for even six months, the direct financial impact of the stalled crude deliveries would be staggering. Also, shutting off DAPL without first emptying out the oil that is contained in the pipeline would leave tens of millions of dollars-worth of crude stranded, thereby preventing the owners of that crude from re-investing those proceeds until such time that the pipeline is once again allowed to operate. Murk Declaration at ¶ 10.

The continued operation of DAPL is also of particular importance to upstream Bakken producers, which include Amici members. DAPL has enhanced market access to regional-

⁵ EIA, “Bakken Region Drilling Productivity Report” (June 2017).

⁶ Env. Assessment (450,000 barrels/day); WTI (\$45.05 per barrel price as of June 29, 2017).

produced crude by creating direct and cost-effective transportation solutions to the North Dakota market that were not adequately served by existing pipeline capacity. *Id.* at ¶ 5. The June 2017 startup of DAPL, in fact, marks the first time since 2011 that there has been available pipeline capacity to transport the volumes that are being produced in the Bakken region by Amici's members. *Id.* at ¶ 11.

That availability has had positive economic impacts, resulting in increased netback⁷ for North Dakota producers, which, in turn, is expected to increase investment and production in the state. Murk Declaration at ¶¶ 13-14. For example, a number of new production wells have been placed into service in North Dakota in 2017, and leading Bakken producers have announced plans for adding rigs and completing 'drilled but uncompleted' wells.⁸ Energy analyst RBN Energy attributes this activity in part to DAPL's operation and "the lower crude transportation costs ... that DAPL will bring."⁹

The ensuing capital investment will drive economic activity that benefits the local economy. For example, a recent study by the North Dakota State University found that in 2015 each drilling rig operating in the Bakken resulted in \$58 million of in-state direct expenditures and supported 182 direct and secondary jobs.¹⁰ Any disruption to DAPL service would threaten existing and future capital investments, and in turn harm forecasted crude oil production and the local economy. Murk Declaration at ¶ 14.

The transportation agreements in place between producers, shippers, and refiners also highlight the adverse short-term economic consequences that would result from any disruption of

⁷ Operating netback is a measure used in the oil and gas industry to reflect the net profit on oil and gas after royalties, production, and transportation expenses.

⁸ RBN Energy "What a Difference a DAPL Makes" (Mar. 5, 2017).

⁹ *See id.*

¹⁰ Dean Bangsund & Dr. Nancy Hodur, "Economic Effects of Petroleum Sector on North Dakota's Economy" North Dakota Energy Date (Mar. 7, 2015).

services. Murk Declaration at ¶ 8. While DAPL has been operational for only a few months, Amici members have made business arrangements that depend on DAPL continuing to be in service in the coming months to transport approximately 450,000 bpd of crude oil. *Id.* at ¶ 9. Should that service cease, Amici members would not be able to immediately fill that supply gap because decisions on shipping/receiving crude oil via pipeline are usually made several months prior to the time that the crude oil is actually transported on the pipeline. *Id.* Thus, while Amici members were previously able to ship and receive crude oil from other modes prior to June 2017, they are now dependent on DAPL's operation for at least the next several months in order to perform existing contracts. *Id.*

The first few months of any service disruption on DAPL would therefore have especially severe economic impacts on Amici members, including refiners that will be unable in the near-term to receive enough feedstock to sustain current refining levels. *Id.* at ¶ 7. This is because ever since the pipeline was commissioned and began operating, businesses at both ends of the pipeline now fully depend on its operation and cannot avoid the harm if service is disrupted for any period of time. *Id.* at ¶ 9.

In addition, DAPL operations benefit local and regional economies up and down the supply chain.¹¹ For example, communities in Midwestern states stand to benefit from \$54.9 million in additional annual average tax receipts between 2017 and 2021 generated by DAPL operations.¹² During the first full year of DAPL operation alone, local governments are

¹¹ Letter from Energy Equipment and Infrastructure Alliance to President Barack Obama, Oct. 5, 2016, *available at* <https://www.eeia.org/aboutus/files/Supply%20Chain%20Letter%20to%20President%20re%20DAPL.pdf>.

¹² Harvey Siegelman, et al, "An Assessment of the Economic and Fiscal Impacts of the Dakota Access Pipeline in North Dakota, South Dakota, Iowa and Illinois," Nov. 12, 2014, p. 40. (hereinafter referred to as the "Strategic Economics Study").

estimated to collect an additional \$54.8 million in property tax revenues, which in many jurisdictions is the primary funding source for public schools.¹³

Aside from increased tax revenue, the operation of DAPL also supports \$23.1 million in additional annual economic activity for surrounding states.¹⁴ The pipeline, for example, adds nearly \$9 million to annual production and sales in North Dakota, plus about \$4 million in Iowa and South Dakota each and \$3 million in Illinois.¹⁵ But the economic impact goes far beyond the new DAPL employees and contractors who operate and service the pipeline, and indirect and induced economic benefits account for nearly half of the new production and sales.¹⁶ New jobs have also sprung up in industries that support pipeline operations, such as food service, retail, and medicine, and total additional labor income across the four states will amount to \$3.6 million.¹⁷

All of this positive economic growth would come to an abrupt end if this Court were to order DAPL operations to cease. These extensive adverse impacts at a local, regional, and industry-wide level are reason alone for this Court to allow DAPL operations to continue while the Corps completes the additional NEPA review that is required by the Court's June Opinion. *See, e.g., California Communities Against Toxics v. EPA*, 688 F.3d 989, 993-994 (9th Cir. 2012) (despite the flaws in the agency's NEPA process, the court reasoned that the "delay and trouble vacatur would cause [were] severe" and the potential job losses and electricity blackouts would be "economically disastrous" resulting from delay in the "much needed power plant."); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1290 (11th Cir.

¹³ *Id.*

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 32.

¹⁶ *Id.* at 35.

¹⁷ *Id.* at 33.

2015) (declining to invalidate a national Clean Water Act permit on the grounds that “vacatur could suspend a substantial amount of surface mining in the state of Alabama”); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enft*, 104 F. Supp. 3d 1208, 1232 (D. Colo. 2015) (delaying entry of vacatur order despite NEPA defects on grounds that immediate vacating of mining permit would result in layoffs and disruption of power plant operations), *order vacated on other grounds, appeal dismissed*, 652 F. App’x 717 (10th Cir. 2016); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1116 (E.D. Cal. 2013) (declining to vacate national forest plan despite NEPA defects due to harm vacatur would cause to timber and forest products industry in Sierra Nevada region).

Finally, no near-term feasible alternatives exist to transport all of the 450,000 barrels of Bakken crude that is currently transported on a daily basis from North Dakota to refinery markets if DAPL operations were ordered by this Court to cease. Murk Declaration at ¶ 11. DAPL would not have been constructed in the first place if there were better or cheaper alternatives. DAPL indeed exists because the limited, higher-priced network of pipelines that have served the Bakken region pre-DAPL are already stretched to their limits, unable to accommodate DAPL’s full design capacity volume. *Id.* For example, if DAPL operations are halted, the total capacity for the region’s five remaining pipelines is approximately 760,000 bpd, whereas total production in the Bakken region served by DAPL is currently about 1.033 million bpd.¹⁸ Thus, a substantial volume of crude oil that is currently being produced in the region could not be transported on existing pipelines following any disruption of service on DAPL. In fact, the presence of DAPL has spawned investment in new oil wells in the Bakken region, the economics of which are dependent on continued access to DAPL to reliably transport North

¹⁸ EIA, “Bakken Region Drilling Productivity Report” (June 2017).

Dakota-extracted crude to regional and national refinery destinations. Murk Declaration at ¶ 14.

While rail infrastructure exists in the Bakken region, the availability of crude-by-rail transport in the near-term is not a guarantee. *Id.* at ¶ 12. For example, the availability of a sufficient supply of railcars to transport the entire volume of oil that is currently being transported by the DAPL is open to doubt given the likely re-positioning of such cars since DAPL was placed into service; nor is it guaranteed that Bakken producers or shippers would choose in the near-term to ship oil on transportation modes other than DAPL due to existing and prospective cost structures. *Id.* As a result, any cessation of DAPL operations could directly or indirectly result in a decreased netback for Bakken producers, which in turn could result in a sudden decline in North Dakota production levels. Murk Declaration at ¶ 13. Any such decline would likely lead to an increase in local and regional unemployment levels and a decrease in oil-generated tax revenue, thereby impacting local and regional economies that are directly dependent on North Dakota-produced crude. *Id.* at ¶ 14.

CONCLUSION

For the foregoing reasons this Court should allow DAPL operations to continue while the Corps completes additional NEPA review.

RESPECTFULLY SUBMITTED this 17th day of July 2017.

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CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on July 17, 2017, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

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