IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

BRIEF OF STANDING ROCK SIOUX TRIBE AND CHEYENNE RIVER SIOUX TRIBE REGARDING REMEDY

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TABLE OF CONTENTS

Earthjustice
705 Second Ave., Suite 203
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TABLE OF AUTHORITIES

CASES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

STATUTES

OTHER AUTHORITIES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

REGULATIONS

Earthjustice
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INTRODUCTION

The Standing Rock Sioux Tribe ("Tribe"), joined by the Cheyenne River Sioux Tribe, hereby respectfully submits this joint response regarding remedy. This Court has granted the Tribes' motion for summary judgment on three grounds that go to the heart of this dispute, and that are fundamental to the Tribes and their Treaty rights. First, the Court held that the U.S. Army Corps of Engineers ("Corps") failed to address serious expert critiques of Dakota Access Pipeline's ("DAPL") oil spill risk analysis, which in turn call into question the Corps' conclusion that the pipeline is uncontroversial and the risks of an oil spill too insignificant to warrant deeper analysis. Second, the Court found fault in the Corps' disregard of any impacts an oil spill would have on the Tribes' Treaty rights to fish and hunt, rights that are existentially significant to the Tribes. Third, the Court found that the Corps conducted a skewed assessment that reached the indefensible conclusion that the selection of the Lake Oahe crossing site, a half mile upstream of some of the most economically disadvantaged communities in the nation, raised no environmental justice concerns. Under the Court's order, the Corps will have to reassess these questions and decide anew whether they compel preparation of a full environmental impact statement ("EIS"), like the one that was initiated in December 2016 but abandoned shortly thereafter.

The question before the Court now is whether the pipeline should continue operating, exposing the Tribes to the very risks that the Corps will be examining, while this remand is underway. Under both the law of this Circuit as well as the history of this action, the answer is no. Both the Corps and DAPL have made it abundantly clear that they will treat the remand as a paper exercise designed to generate additional explanation for decisions already made. Such an approach would make a mockery of the National Environmental Policy Act ("NEPA"), which calls for an objective and open-minded analysis of environmental impacts before, and in order to

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Seattle, WA 98104
(206) 343-7340

inform, agency decisions. Because this Court's task is to further the intent of Congress in establishing statutory mandates like those in NEPA, the Court should vacate the Corps' authorizations and ensure that the Corps' additional NEPA review guides the Corps' decisions about the future of this pipeline. Vacatur is particularly compelled because the Court held that the Corps gave short shrift to the Tribes' Treaty rights and the integrity of the Standing Rock Reservation homeland, adding insult to the injuries caused by the long legacy of broken promises made by the United States to the Sioux Nation. And while DAPL has asserted various types of harm that would follow from vacatur, its claims are variously exaggerated, unsupported by any evidence, or just wrong. Most importantly, any harm to DAPL's bottom line is its own fault, as it rushed the pipeline through construction to operation despite the legal cloud over it, and is not the type of harm that warrants deviating from the nearly universal remedy of vacatur during remand in NEPA cases.

ARGUMENT

I. THE APPROPRIATE REMEDY FOR A VIOLATION OF NEPA IS VACATUR OF THE UNDERLYING GOVERNMENT ACTION

A. The APA Explicitly Requires Vacatur of Unlawful Agency Action

The Administrative Procedure Act ("APA"), which provides the cause of action for NEPA claims like those raised in this case, explicitly directs that a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The U.S. Supreme Court has repeatedly described this remedy as mandatory. *Fed. Commc'n Comm'n v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is 'not in accordance with law.'") (emphasis added); *Citizens to Preserve Overton Park, Inc. v.*

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Volpe, 401 U.S. 402, 413–14 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."). When a plaintiff prevails on a claim brought under the APA, "it is entitled to relief under that statute, which normally will be a vacatur of the agency's order." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001).

Vacatur under the APA is *not* the same as an injunction, nor is it subject to the kind of equitable balancing that governs injunctions. In contrast to the statutory remedy of vacatur, the U.S. Supreme Court has described injunctions as a "drastic and extraordinary remedy" deserving a stricter analysis and balancing of equities. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The *Monsanto* Court directed that the "less drastic remedy" of vacatur should be used where it can redress plaintiff's injuries. *Id.* at 165-66; *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("While the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief ... both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA.") (citation omitted). The standard remedy of vacatur here would preclude further operation of the pipeline under Lake Oahe pending completion of the remand.

B. *Allied Signal* Embodies a Limited Exception to the Default APA Standard

As this Court recognized in its summary judgment order, the D.C. Circuit has recognized exceptions to the default remedy of vacatur in APA cases. Mem. Op. (ECF 239) at 67. In *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), the D.C. Circuit addressed a cost-recovery rulemaking by the Nuclear Regulatory Commission ("NRC") that exempted one class of market participants but not another. The court found that the agency's failure to explain its reasoning as to this differential treatment "cannot be viewed as

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(206) 343-7340

reasoned decisionmaking," but declined to vacate the rule for two reasons. First, in light of the record, the court observed that there was "at least a serious possibility" that the NRC could substantiate its reasoning on remand with additional explanation. Second, the court concluded that vacatur would be highly disruptive, as the agency would have to refund all fees collected that year, and would not be able to recover them under a later-enacted rule. *Id.*

The concept of remand without vacatur is controversial in this Circuit. *See, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 462 (D.C. Cir. 1994). Critics view the concept skeptically as it directly contravenes the language of the APA. *Id*. at 490-93 (Randolph, J., dissenting) ("Once a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency's action. The Administrative Procedure Act states this in the clearest possible terms"); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("when we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted").

In practice, the *Allied Signal* exception to the default remedy has been applied sparingly, and only in a handful of specific situations. The most common use of remand without vacatur is where an agency rule is found inadequate for being *insufficiently rigorous* in light of the purposes of the underlying statute. Vacating such a rule while a remand is underway would leave the plaintiffs with even less protection than the inadequate rule that they challenged. Such a case arose in *Davis County Solid Waste Mgmt. v. U.S. EPA*, where this Circuit found air pollution emissions guidelines to be legally inadequate, but declined to vacate them during the remand process since "greater emissions would occur" if the guidelines were vacated than if they

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(206) 343-7340

were left in place. 108 F.3d 1454, 1459-60 (D.C. Cir. 1997); *Envtl Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) (vacating invalid regulation would defeat petitioner's purpose of enhancing environmental protection required by the underlying clean air program); *North Carolina v. Envtl. Protection Agency*, 550 F.3d 1176, 1178 (D.C. Cir. 1990) (allowing legally flawed rule to remain in place during remand would "at least temporarily preserve the environmental values covered" by the rule); *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151-52 (D.C. Cir. 2005) (no vacatur where plaintiffs challenged safety rule as not protective enough); *Anacostia Riverkeeper v. Jackson*, 713 F. Supp. 2d 50, 52 (D.D.C. 2010) (staying vacatur of insufficiently stringent water pollution limits because the "public interest" would not be served by having no water pollution limits at all during remand). In such instances, both to further the purposes of the statute and to redress the harm to the prevailing plaintiff, courts have been willing to leave an insufficiently protective rule in place while the agency undertakes a remand to resolve the rule's inadequacies.

Remand without vacatur has also been found to be the appropriate remedy in situations where extensive agency implementation of a rule has already occurred in a way that cannot be "undone" through vacatur, *i.e.*, where "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante." *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). In *Sugar Cane Growers*, the court considered a challenge to the validity of an agency program that gave farmers surplus sugar in exchange for destroying crops, as part of an effort to address an oversupply problem. The court ruled that, in adopting the program, the agency had failed to comply with notice-and-comment rulemaking procedures. However, the agency had by that point disbursed large quantities of sugar to farmers who, in turn, had already plowed under their own crops in reliance on the program. Vacating the rule at

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that point, the court held, would be an "invitation to chaos." *Id*. Similarly, in *Milk Train*, 310 F.3d at 756, funds had been disbursed under an unlawful rule and could not be recovered, making vacatur effectively impossible. *See also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (declining to vacate FERC's order to energy trader to recoup already disbursed refund as it would prompt yet another refund during remand); *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (declining to vacate rules governing mutual funds because most companies had already come into compliance with new rules and vacatur would "sow confusion in the investing public.").

In short, while this Court has recognized a limited exception to the standard remedy of vacatur in APA cases, the exception applies only in unusual or exigent situations. A comprehensive analysis of the caselaw concluded that remand without vacatur is "unusual" and "uncommon," and "there appears to be a presumption against the remedy that is consistent with a long history of routine vacation of unlawful agency actions," Administrative Conference of the United States - Final Report, *The Unusual Remedy of Remand without Vacatur* (Stephanie J. Tatham, Jan. 3, 2014).

C. Courts Virtually Never Apply the *Allied-Signal* Framework to Remand Without Vacatur in NEPA Cases

The standard APA remedy of the vacatur (or, alternatively, the more robust remedy of an injunction) is virtually always imposed where an agency violates NEPA. This is particularly true in this Circuit, which has declared, and consistently reaffirmed, that "[p]ursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007), *citing Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *Public Employees for Envtl. Responsibility v. U.S. Fish and Wildlife Service ("PEER v FWS")*, 189 F. Supp. 3d 1, 2

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Seattle, WA 98104
(206) 343-7340

(D.D.C. 2016) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations."). In fact, no party has identified *any* case in this Circuit where a court has allowed a project to continue while the agency conducts a new NEPA analysis on remand. Nor has any party explained why this Court should be the first.[1]

In the vast majority of NEPA cases in this Circuit, *Allied-Signal* and the possibility of remand without vacatur is not even discussed at all. Rather, vacatur is simply imposed without additional analysis, even though disruptive consequences are likely. *See, e.g., Delaware Riverkeeper Network v. Federal Energy Reg. Comm'n*, 753 F.3d 1304 (D.C. Cir. 2014) (vacating approval of gas pipeline after finding NEPA violations); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (vacating plan allowing snowmobiles in national park); *National Wildlife Fed. v. Norton*, 332 F. Supp. 2d 170, 188 (D.D.C. 2004) (vacating Corps permit for private mine after finding EA invalid); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) (vacating grazing leases issued in violation of NEPA); *Friends of the Earth v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 44 (D.D.C. 2000) (vacating Corps permit for riverboat casino that was unlawfully issued based on EA rather than EIS); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 38 (D.D.C. 2007); *Humane Soc. of U.S. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 25 (D.D.C. 2006).

In a handful of NEPA cases, courts discuss the *Allied Signal* factors, but vacate anyway.

[1] Even in the rare situation where vacatur was not imposed, the court imposed an alternative remedy that had the same practical effect of preventing the action from continuing before completion of the required NEPA review. For example, in *Sierra Club v. U.S. Dept. of Agric., Rural Util. Serv.*, 841 F. Supp. 2d 349, 362 (D.D.C. 2012), this Court found that an agency had violated NEPA by failing to prepare an EIS for a series of approvals of financial transactions that allowed a coal-fired power plant to be built. On the issue of remedy, all parties agreed that vacating approvals of the already-completed transactions was no longer possible. Instead, the Court enjoined new approvals that would allow construction of the coal plant until after an environmental impact statement had been prepared. *Id.*

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In these instances, courts generally find that vacatur is necessary to satisfy NEPA's goals by ensuring that the agency has unfettered discretion to make a different decision once the remand is complete. For example, in *Friends of the Capital Crescent Trail v. Federal Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C. 2016), this Court vacated permits for a rail line involving nearly a billion dollars in federal funding. Citing *Allied-Signal*, the Court held that "[w]hile a temporary halt in the project is not ideal, it would make little sense and cause even more disruption if defendants were to proceed with the project while the SEIS was being completed, only to subsequently determine that another alternative is preferable." *Id*.; *see also Reed v. Salazar*, 744 F. Supp. 2d 98, 118-20 (D.D.C. 2010) (vacating funding agreement between agency and Tribe governing management of bison, despite costs); *Van Antwerp,* 719 F. Supp. 2d at 78-80 (finding that "[b]ecause interveners intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place."). This is typically the case in courts outside this Circuit as well. *See, e.g.*, *High Country Conserv. Advocates v. U.S. Forest Se*rv., 67 F. Supp. 3d 1262 (D. Colo. 2014) (vacating coal leases because NEPA remand may result in decision "to forgo granting the lease modifications altogether").

Frequently, courts skip over the question of vacatur altogether, and issue injunctions after finding violations of NEPA. In *Govt. of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010), for example, this Court enjoined further progress on a drinking water pipeline after finding NEPA violations, despite the substantial disruption that would be caused. "The Court is acutely aware that Reclamation and North Dakota have built miles of pipeline and that the citizens of the area want the Project completed. These facts do not excuse Reclamation's failure to follow the law." Similarly, in *Sierra Club v. Watkins*, 808 F. Supp. 852, 875-76

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(D.D.C. 1991), the Court found that the EA for the low-risk, high-consequence action of importing spent nuclear fuel was "almost adequate," despite specific flaws. As to the remedy, the Court nonetheless enjoined the action to protect the public until the agency came into compliance with NEPA. *Id.; see also American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 21-22 (D.D.C. 2000) (enjoining implementation of fishing plans after finding EA inadequate).

The Corps and DAPL struggle to identify *any case from any circuit* in which a court declined to vacate a decision undertaken in violation of NEPA during a remand. The handful that are identified offer nothing to support declining to vacate here. In *California Communities Against Toxics v. U.S. E.P.A.*, Corps Brief at 13 n. 7, for example, a case involving air pollution impacts, the Ninth Circuit refused to vacate a rule in a way that would suspend the *construction* of a power plant (which had no air pollution impact), but affirmed that *operations* could not start prior to finalization of the NEPA remand. 688 F.3d 989, 994 (9th Cir. 2012). The Corps' reliance on *Maryland Native Plant Society v. U.S. Army Corps of Engineers*, 332 F. Supp. 2d 845, 848 (D. Md. 2004) is similarly unavailing. The successful claim there arose under the Clean Water Act, not NEPA, and the Court was quite clear that the only legal flaw in the agency's decision was a failure to fully explain its reasoning. A*micus* American Fuel and Petrochemical Manufacturers cites a few other cases, but they are equally unpersuasive. In *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1108 (E.D. Cal. 2013), a district court declined to vacate an updated forest management plan despite minor NEPA violations, finding that the new plan was "environmentally superior" to the old one that would be resurrected if the new rules were vacated. In *Today's IV, Inc. v. Fed. Transit Admin.*, 2014 WL 5313943, at *19 (C.D. Cal. Sept. 12, 2014), *aff'd sub nom. Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016), the court rejected "complete vacatur" of the underlying actions because it

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would result in "substantial delay to parts of the Project for which no NEPA violation has been identified." *Id*. The court imposed a partial vacatur targeted to the narrow illegalities instead. And in *WildEarth Guardians v. U.S. Office of Surface Mining*, 104 F. Supp. 3d 1208 (D. Colo. 2015), vacated as moot, 652 Fed. Appx. 717 (10th Cir. 2016), the court issued an order delaying vacatur for 120 days to give the agency time to correct minor procedural flaws.[2] In none of these cases did a court do what the Corps asks this Court to do here: allow a project to continue, exposing the plaintiff and the public to the very impacts that the agency unlawfully failed to analyze in the first place.

In sum, remand without vacatur is an unusual remedy, limited to narrow situations. Its use where an agency has violated NEPA is either minimal or nonexistent.

II. THIS COURT SHOULD VACATE THE EASEMENT, FONSI, AND APPROVALS PENDING COMPLETION OF A LAWFUL NEPA ANALYSIS

Remand without vacatur here, in a case involving significant NEPA violations for a major piece of crude oil infrastructure, would constitute both a major expansion of the narrow *Allied-Signal* exception, as well as a sharp break with this Circuit's extensive NEPA precedent. Accordingly, this Court should apply the standard remedy of vacatur here.

A. The Remedy for the Corps' NEPA Violations Should Be Guided by NEPA's Purposes

As with any remedy, the decision as to whether to apply an exception to the standard remedy of vacatur should be made in light of the purposes of the underlying statute. *See*

[2]*Amicus* incorrectly represents another case—in which a "minor" error in an "incredibly complex environmental regulation" resulted in a short remand without vacatur—as a NEPA case, when it is not. *See Home Builders Ass'n of N. California v. U.S. Fish & Wildlife Serv*., 2007 WL 201248 (E.D. Cal. Jan. 24, 2007). Similarly, *N. Coast Rivers All. v. United States Dep't of the Interior*, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016), is inapposite, as that case involved the agency's motion for a voluntary remand—*i.e.*, remand before any finding of illegality. *Id*. at *13.

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Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). Accordingly, NEPA's purposes form the starting place for this Court's analysis.

Congress designed NEPA to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) ("the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action *before* the action is taken") (emphasis added). The purpose of NEPA is "to foster excellent action," 40 C.F.R. § 1500.1(c), and a NEPA review must "not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. To the contrary, agencies must embark on a NEPA review with an "open mind," such that the process could yield a different outcome than originally anticipated. *Kleppe v. Sierra Club*, 427 U.S. 390, 417–18 (1976) (Marshall, J., concurring in part and dissenting in part); *PEER v. FWS*, 189 F. Supp. 3d at 5 (admonishing agency not to treat remand as a "mere formality"). As the D.C. Circuit recently observed, "[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed." *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 45 (D.C. Cir. 2016) (internal quotations omitted). This remains true even in the usual case where a project is completed before a court can determine whether NEPA has been satisfied. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 43 (D.C. Cir. 2015) (NEPA challenge to completed crude oil pipeline not moot because pipeline could be shut down, and "more extensive environmental analysis could lead the agencies to different conclusions, with live remedial implications").

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(206) 343-7340

Accordingly, "the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates." *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974). Remedies in NEPA cases, therefore, focus on ensuring the integrity of the decisionmaking process and preserving the full range of options. *Alaska*, 580 F.2d at 485 ("where courts have enjoined ongoing projects, they have done so primarily to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA."). Then-Judge Breyer identified this concern:

> It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action…. Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'

Com. of Mass. v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983); *see also Davis v. Mineta*, 302 F.3d 1104, 1127 n.7 (10th Cir. 2002) ("If construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project."); *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (if County is allowed to continue highway construction prior to valid EIS, they "would stand like gun barrels pointing into the heartland of the park. . . It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent") (internal quotations omitted).

In a case that bears a significant resemblance to this one, a district court held an agency's

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(206) 343-7340

NEPA compliance for gas leases and an accompanying gas pipeline invalid. *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006). By the time of the court's decision, however, the pipeline already had been built and had begun operating. On the question of remedy, the court discussed at length the difficulty of an agency "fulfilling its procedural obligations without favoring a predetermined outcome" in such circumstances, citing the risk that the goals of energy development would be prioritized by giving "a nod and a wink to half-hearted observance of environmental laws and procedure." 408 F. Supp. 2d 1032, 1037-38 (D. Mont. 2006). Accordingly, the court issued an injunction shutting down further pipeline operations pending completion of either an EA or finalization of an EIS. *Id*. at 1039.

Similarly, the court in *Diné Citizens Against Ruining Our Environment v. U.S. Office of Surface Mining Reclamation and Enforcement ("Diné CARE")* held that the agency violated NEPA when it approved a mine related to a nearby coal-fired power plant. 2015 WL 1593995 (D. Colo., April 6, 2015). On the issue of remedy, the court rejected arguments that the project should continue to operate while the NEPA remand was underway, in large part to preserve the integrity of the NEPA and decisionmaking processes. As the court observed, "[r]emand alone will not fulfill NEPA's purpose. Absent some limitation on [the company's] ability to continue its operation while [the agency] corrects its NEPA violation, [the agency's] compliance with NEPA would become a mere bureaucratic formality." *Id*. at *3. The court vacated the approvals, despite finding that doing so would create considerable economic harm to the intervenor. *Id.; see also Lands Council v. Cottrell*, 731 F. Supp. 2d 1074, 1092 (D. Idaho 2010) ("it would defeat the purpose of NEPA … if the Forest Service could fail to adequately assess the impact of its proposed project on a project area and then claim that its actions would be necessary and beneficial to the health of the project area in order to defeat an injunction").

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B. The Court Must Ensure that the Corps Approaches the Remand with an Open Mind and Not as a Forgone Conclusion

The Court's role in ensuring that NEPA compliance is more than a "bureaucratic formality" is especially important in this case. The Corps' remedy brief all but acknowledges that it is approaching the remand as a *pro forma* paperwork exercise that will justify the decisions it already made, rather than a transparent and open-minded review of the expert critiques of the EA, the Tribes' Treaty rights, and environmental justice that this Court compelled. According to the Corps, vacatur simply would be a waste of time because the remand process will invariably support the same outcome—authorization to build and operate a major crude oil pipeline under Lake Oahe just upstream of the Standing Rock Reservation without an EIS, based on a dismissal of the risks and impacts of oil spills. *See, e.g.*, Corps Brief at 7-8 (legal violations do not disturb Corps conclusion that oil spill risks will be low; Corps will be able to substantiate its decisions); *id*. at 10-11 (Treaty rights and environmental justice analysis likely to reach same result because of low oil spill risk). Indeed, it plans to complete the remand on an accelerated timetable that does not even allow time to collect meaningful comment, let alone prepare an EIS.[3] The Corps may perceive the President's "Memorandum" directing expedited approval of this pipeline as an uncompromising directive, but it is not—the Corps must comply with NEPA as well as the underlying statutes authorizing the pipeline. ECF 89-1 (directing approval of pipeline "to the extent permitted by law and as warranted"). It is the role of this Court to ensure the Corps does so.

Viewing the remand as a limited paper-pushing exercise violates both the spirit and letter of NEPA. The Court held that the Corps violated NEPA in three ways that are fundamental to

[3] While telling this Court that it intends to reach out to the Tribe to solicit input, to date it has not done so. 3rd Archambault Decl. ¶ 21.

Earthjustice
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the Tribes—robust expert criticism of its "not significant" determination, impacts of oil spills to the Tribes' Treaty Rights to hunt and fish, and the failure to recognize the environmental justice implications of selecting the route that disproportionately burdens the Tribes. A fair and candid assessment of these issues should lead to a revised finding that the impacts of this project are significant enough to warrant a full EIS, as the Tribes have long advocated. At a minimum, it would lead to additional and more robust measures to mitigate risks, such as better spill response management and third-party oversight of DAPL's operations, as the Pipeline and Hazardous Material Safety Administration ("PHMSA") recommended but the Corps rejected. *See infra* § II.D.

The Corps violated NEPA by failing to fully consider these issues, despite the extraordinary effort of the Tribes and others to bring them to the Corps' attention. It must now conduct the analysis anew, *with an open mind to reaching a different outcome*. The only way to preserve the integrity of that process is to vacate the underlying authorizations. Leaving the unlawfully issued authorizations in place, and allowing the pipeline to operate in the interim, all but guarantees that the remand will be nothing more than a paperwork exercise justifying decisions already made—not the honest "hard look" that NEPA requires. Allowing the pipeline to continue operating during remand would also expose the Tribes to the very risks and harms that the remand is supposed to be analyzing—a scenario that has little or no precedent in NEPA's history.

DAPL makes much of the fact that NEPA is procedural in nature, and that as long as its procedures are fully satisfied an agency has discretion to choose whatever lawful option it wishes. DAPL Brief, at 11. But this Court found that the Corps had *not* satisfied its procedural obligations under NEPA. If the pipeline is likely to cross the threshold of "significant" risks and

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impacts, as the Tribe has argued from the very initiation of this process, NEPA requires preparation of an EIS, and the Corps has no discretion to authorize the pipeline prior to preparing one. *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 510 (D.C. Cir. 1974) ("an agency's duties to issue a statement on a project and to consider environmental factors at each stage of agency decisionmaking … are not inherently flexible or discretionary"). "Compliance with the procedural requirements [of NEPA] is not discretionary." *Govt. of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 53 (D.D.C. 2005). In other words, while NEPA does not itself impose substantive limits on the ultimate decision, the Corps lacks discretion as to whether or not to prepare an EIS. If the combination of risks and impacts rise to the level of significance identified in the regulations, then an EIS is mandatory. *See New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 478-79 (D.D.C. 2012).

Moreover, the Corps' argument ignores the fact that the Corps has underlying *substantive* obligations under the Mineral Leasing Act ("MLA") that require it to carefully weigh various factors and ensure that any easement meets substantive criteria. *See, e.g.,* 30 U.S.C. § 185(b)(1) (prohibiting easement if agency is "inconsistent with the purposes of the reservation"). The MLA also imposes a substantive duty to include pipeline conditions to protect the environment and the public, especially those who rely on fish and wildlife for subsistence, from leaks and spills. *Id*. § 185(g), (h). Similarly, the Corps can only issue a § 408 permit upon a finding that it is in the "public interest" to do so. 33 U.S.C. § 408; Solicitor Op. at 31 (finding that there was never a public interest determination for the Oahe crossing). These substantive duties, of course, are to be informed by the environmental analysis provided via NEPA. The claim that the Corps can do whatever it wants, regardless of what an EIS or revised EA says, is flatly false.

In this situation, the unusual *Allied Signal* exception to the "standard" remedy of vacatur

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is inappropriate. The Corps' failures were not shortcomings of explanation that can be corrected by providing the missing rationale for the agency action. *See Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971). Instead, the Corps must prepare a new NEPA analysis of key issues at the heart of this dispute and make a new decision based on a full and objective analysis. The only way to ensure the integrity of that process, and reduce the risks to the Tribes that the process is supposed to be analyzing, is by applying the default remedy of vacatur—as virtually every court to face a similar situation has done.

C. The Legal Failings Are Serious and Cut to the Heart of the Tribes' Concerns

Allied Signal identified two factors that should be considered in determining whether remand without vacatur would be appropriate. As to the first factor—the significance of the legal violations—the Corps and DAPL seek to characterize the EA's flaws as trivial and easily remedied. The effort must fail. The EA's flaws identified in this Court's order cut to the very heart of the Tribes' concerns about the DAPL project—the risks of oil spills in light of weighty expert criticism of the EA's analysis, the impacts of spills on the Tribes' Treaty rights, and the undeniable environmental justice implications of selecting the Oahe crossing over an alternative route that did not place the oil spill risks on some of the most disadvantaged people in the nation. The decision explicitly characterizes these flaws as "substantial."[4] Op. at 66.

1. Failure to Consider Expert Criticism of Spill Risk and Impacts

This Court first found that the Corps failed to acknowledge and address the extent to which the decision may be "highly controversial," in light of expert reports submitted by the

[4] Furthermore, by emphasizing that the Court's role is not to "flyspeck" the Corps' analysis, Op. at 22, and by upholding other portions of the EA under a standard of review that heavily favors the Corps, the Court implicitly recognized that the flaws requiring remand were serious.

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Tribes.[5] The Corps was "presented with evidence of scientific flaws" in DAPL's oil spill risk analysis, yet never addressed these weighty critiques—as such, "the Court cannot conclude that the Corps made a convincing case of no significant impact or took the requisite hard look." Op. at 34. This is no trivial matter, as it cuts to the heart of the key question in this case: whether the threshold of significance had been crossed. *See* 40 C.F.R. § 1508.27; *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("In the past we have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion."). The Interior Solicitor cited these expert reports in finding that the Corps "has not considered relevant issues as required by NEPA." *See* Tribe's SJ Brief (ECF 117-1) at 31. The expert reports constitute credible and well-documented critiques of the two foundational findings of the EA: that the risk is low and that the impacts would be insignificant. For example, Standing Rock's pipeline expert Kuprewicz describes the Corps' failure to fully disclose and evaluate landslide risks and the risk of undetectable slow leaks, as well as shortcomings in its worst case spill determination. He expanded upon these findings in a declaration that discussed the spill model documents that had been previously withheld from the Tribe at the time he wrote the initial report. Kuprewicz Decl. (ECF118) (stating that DAPL worst case spill analysis "seriously understates the risks and worst case release" at Oahe, and spill volumes and risks are "considerably understated").[6] Once new documents (including additional easement conditions

[5] The Court focused on two reports submitted by Standing Rock and Oglala Sioux that were included in the administrative record for the easement decision. However, the Tribe identified and included a third expert report that had been submitted to the Corps by the Cheyenne River Sioux Tribe criticizing the same risk analysis. *See* ECF 117-23 (Ex. 21 to SRST summary judgment motion) ("Envy Report"). The Envy Report is dated Jan. 5, 2017, and predates the cutoff of Feb. 8, 2017 that the Court used for evaluating whether to consider extra-record evidence. The Envy Report was submitted to the Corps, but its exclusion from the administrative record has never been explained.

[6] While the Court's decision observes that DAPL offered a "scathing assessment" of the expert

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and DAPL-generated responses to his report) became available, Mr. Kuprewicz filed a second declaration with detailed additional testimony as to these issues.[7] The EarthFax report touched on these issues and many more, specifically criticizing some of the assumptions and data lying behind the Corps' conclusion that major oil spills would not result in environmental harm to Lake Oahe, and even finding clear data errors that called into question the ultimate conclusion that risks could be dismissed. ESMT 624.

Another technical expert with extensive industry and regulatory agency experience, Don Holmstrom, explains in additional detail how the Corps' failure to address these flaws is not some minor or ministerial oversight that can be remedied with additional paperwork. *See* Holmstrom Decl. To the contrary, fully assessing the issues identified in the expert reports requires a detailed analysis, and implicates the ultimate decision—whether to grant the easement in the Oahe location and, if so, what additional mitigation and spill response conditions to impose. *Id*. at ¶¶ 23, 25-27.

The detailed technical expert critiques of the Corps' conclusions substantially raise the bar for the Corps on remand. The Corps can conclude that DAPL's impacts are "insignificant" enough to avoid an EIS *only* if it provides a "convincing," "well-reasoned explanation" that explicitly addresses and finds meritless each of the many technical criticisms and supporting data presented in the expert reports. *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722,

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reports, Op. at 34, the Tribe's expert discredited DAPL's assessment as lacking any expert authentication and failing to respond to the scientific points raised in the Tribe's expert reviews. 2nd Kuprewicz Decl. ¶ 15 (ECF 195) ("My primary reaction to this document is one of surprise that anyone would give it any credence whatsoever. It is neither signed nor dated. Neither its author nor the qualifications of the author are identified. The text of the report does not respond to a single question I raised.").

[7] While the Court declined to consider Mr. Kuprewicz's second declaration on the merits of the Tribe's challenge, there is no bar to considering it on remedy. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). The Tribe is resubmitting the document and asks that it be considered now.

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736 (9th Cir. 2001). Otherwise, the project's impacts are "controversial" enough to warrant a full EIS that delves into these matters in much greater details. 40 C.F.R. § 1508.27; *U.S. Army Corps of Engineers,* 109 F. Supp. 3d 30, 43 (D.D.C. 2000) (finding EIS was required where record revealed that casino project "is genuinely and extremely controversial"); *National Wildlife Fed'n v. Norton,* 332 F. Supp. 2d 170, 185 (D.D.C. 2004) (controversy for NEPA purposes "exists where the Corps is presented with scientific evidence specifically evaluating the environmental effects of the proposed project or calling into question the adequacy of the EA").[8] In other words, the Court's holding on this issue does not reflect a trivial or easily explained oversight: it reflects a fundamental challenge to the core finding of the EA itself. It is the kind of substantial legal flaw that weighs in favor of vacatur. *See Friends of the Capital Crescent Trail,* 200 F. Supp. 3d at 254 (vacating EIS where "important recent information" raised "serious questions" about the project).

2. Failure to Consider Impacts to Treaty Rights

The same must be said of the Court's findings about the Corps' failure to evaluate the impacts of an oil spill on the Tribes' Treaty rights to fish and hunt in and around Lake Oahe. The Court cited credible record evidence of serious impacts, which in turn would support a finding of "significance" warranting an EIS, and held that the Corps violated NEPA by never addressing the impacts of an oil spill on the Tribes' Treaty fishing and hunting rights. Mem. Op. at 43 (citing declaration of Tribe's director of fish and game department). The record is replete with evidence of the significance of these rights to the Tribe. As the Tribal Chairman explains:

> Hunting and fishing sustained our ancestors across many generations and remain vitally important to our culture and traditions today. Treaty hunting and fishing are subsistence

[8] Indeed, even if the Corps were to disagree with the experts' findings, the degree to which a project's impacts are "highly uncertain" weighs in favor of an EIS. 40 C.F.R. § 1508.27(b)(5).

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> activities, providing an important component of the diet of many Tribal families on the Reservation. . . .Without hunting and fishing, many of our Tribal member families would be hungry – particularly in winter. And without hunting and fishing, our cultural connection with our ancestors and our traditional way of life would be impaired.

See 3rd Archambault Decl. ¶ 5.[9]

A valid analysis of oil spills on fish and wildlife would be a substantial undertaking, requiring a multi-pronged study. Holmstrom Decl. ¶ 26-27 (discussing complicated analysis to determine oil spill impacts on fish and wildlife). It would have to consider not just the impacts of a spill, but also spill response and clean up, which itself can have adverse impacts on fish and wildlife. Kelly Affidavit, ¶ 13 (ESMT 808). Taken together, it is certainly possible that, in light of the high importance the Tribes place on hunting and fishing for subsistence, cultural, and other purposes, a clear-eyed look at the issue would yield a new decision that the risk and consequences of an oil spill are significant enough to warrant an EIS. *See, e.g.*, 40 C.F.R. § 1508.27 (b)(10) (significance may turn on whether action violates Federal law, which includes Treaties).[10] It is therefore not the kind of minor "failure to explain" that some courts have found to weigh against vacatur.

3. Invalid Environmental Justice Analysis

The Corps' legal failings are likewise serious with respect to its environmental justice analysis. *See* Op. at 54 ("the Court agrees with the Tribe that the Corps did not properly consider the environmental justice implications of the project and thus failed to take a hard look at its

[9] While the Court concluded that the Corps had adequately considered the impact of oil spills on water, many of the expert criticisms discussed above directly undermine the Corps' conclusion that spills would have no significant impacts.

[10] As a matter of federal law, Indian Treaty rights, including hunting and fishing rights, are "fundamental," *United States v. Dion*, 476 U.S. 734, 739 (1986), and represent the "supreme law of the land" pursuant to the U.S. Constitution. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876).

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environmental consequences"). The Tribe's summary judgment brief laid out the obligations imposed by the 1994 Executive Order and CEQ Guidance, which specifically addresses environmental justice considerations under NEPA. *See* ECF 117-19 (Ex. 17 to Tribe's SJ Memorandum). The Tribe challenged the selection of the Oahe alternative, just upstream of two reservations with some of the nation's poorest citizens and a long history of government-sponsored dispossession, over an alternative location upstream of the prosperous and mostly white capitol city of Bismarck. *See id*. ("Agencies should recognize the interrelated cultural, social, occupational, historical or economic factors that may amplify the natural and physical effects of the proposed agency action."). With the Standing Rock Reservation just half a mile downstream of the Oahe crossing (and the Cheyenne River Reservation directly below that) and abundant record evidence that spills from crude oil pipelines can travel dozens of miles, it is undeniable that the Tribes would bear the brunt of any oil spills. "No other community, on either side of the river, is geographically as close to the pipeline crossing as Cannonball," a community that is 90% tribal and has a 70% poverty rate. 3rd Archambault Decl. ¶¶ 3-4.[11]

This Court held that the Corps' environmental justice analysis is fatally flawed first because it looked at upstream impacts when oil spills flow downstream, and second because the Corps arbitrarily looked at only a half-mile downstream of the crossing, when the Standing Rock Reservation is 0.55 miles downstream. When the Corps conducts a lawful environmental justice

[11] According to the 2010 census, Sioux County, which is located wholly within the Standing Rock Sioux Reservation, was the poorest county per capita in North Dakota, and the seventh poorest in the United States. *See* Wikipedia, *List of North Dakota Locations by Per Capita Income*, (https://en.wikipedia.org/wiki/List_of_North_Dakota_locations_by_per_capita_income). Ziebach County, which is located wholly within the Cheyenne River Sioux Reservation, was the poorest county per capita in the nation**.** RAPID CITY JOURNAL, *Nation's Top Three Poorest Counties in Western South Dakota* (Jan. 22, 2012).

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analysis, it will inevitably conclude that siting the crossing at Lake Oahe disproportionately impacts the Native American and low-income populations compared to alternative crossing sites. No other outcome is possible. Such a conclusion, in turn, would lend even more weight to the Tribe's contention that the project's significance warrants an EIS. *See* ECF 117-19 at 10 ("Agency consideration of impacts on low-income populations, minority populations, or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects *that are significant* and that otherwise would be overlooked.") (emphasis added); *Coal. for Healthy Ports v. United States Coast Guard*, 2015 WL 7460018 (S.D.N.Y. Nov. 24, 2015), at *26–27 (EIS required where environmental justice impacts are "significant"). This is no trivial oversight that can be remedied with greater explanation. To the contrary, a valid environmental justice analysis would find disproportionate burdens on the Tribes, which should yield a different outcome on the core question of whether an EIS is required.

The Corps makes several arguments to the contrary, but they must fail. For example, the Corps makes the odd leap that since the risks of a spill are low, then the consequences of such a spill must also be low, regardless of the many errors in the original analysis. Corps Brief at 9 (nonsensically arguing that "if the risk of an oil spill is low, then risks posed by a low-possibility spill are likely low regardless of" various risk factors).[12] Courts have repeatedly recognized that

[12] Both DAPL and the Corps place great weight on the Court's findings upholding the Corps' conclusion that the risk of an oil spill is low. However, the Court also held that the Corps failed to address the expert critiques of its conclusions, *the majority of which challenged its conclusion that risks were low*. *See, e.g.*, Accufacts at 3-4 (failure to assess landslide risk); 4-5 (overstating leak detection capabilities); 6-7 (understating worst case discharge); EarthFax Report (ESMT 624) at 1-2 (underestimating spill volumes); 7-8 (understating winter response capabilities); 9-10 (overstating valve closure times); Envy Rep (ECF 117-23) at 11-12 (documenting unique construction risks of lengthy underground pipeline bore). This suggests that the Corps' risk analysis was adequate as to the information it explicitly considered, but inadequate as to the issues and supporting evidence presented in the expert reports. Accordingly, the Corps' determination that the "risks are low" is a key question to be addressed on remand, not one that

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the risks of an unlikely event must be considered independently from the consequences should that event come to pass. *New York v. NRC*, 681 F.3d at 479. Even if the risk is low, the consequences of a spill may be so grave as to cross the threshold of "significance" requiring an EIS. *Id*.

The Corps also implies that it has already addressed the Tribes' concerns by adding conditions to the easement. Corps Brief at 10. But most of these conditions were already required by operation of law or merely add additional specificity to existing requirements. 2nd Kuprewicz Decl., ¶¶ 7-14. The Tribes' expert found that while the easement conditions are not themselves objectionable, "they do not in my view materially alter the risks or address the flaws in the Corps' analysis of spill risk and response, which continue to suffer from a number of grave flaws that render its continual disregard for spill impacts invalid." *Id*. ¶ 14; *see also* Declaration of Steve Martin (ECF 132-1), at ¶ 16 -17 ("It is my opinion that the additional 36 easement conditions placed on the easement by the Corps do not mitigate the risks identified in the ENVY report and Addenda issued by Hakan Bekar of ENVY."); Declaration of Hakan Bekar (ECF 132-2), at p. 21 ("…none of the 36 conditions submit appropriate conclusions or items to minimize the risks…"). The Corps also declined to incorporate recommendations by PHMSA that it add conditions like a third-party audit and greater public reporting. *Infra* § II.D. The record is devoid of any explanation for why these recommendations were rejected. In short, the easement conditions do not reduce, in any way, the seriousness of the issues to be reviewed on remand.

In sum, the legal violations identified by this Court are serious, not minor or ministerial, and counsel in favor of vacatur. A lawful remand process must do more than generate additional paperwork to backfill the Corps' prior decisions. Instead, it must reopen the question of whether

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has been predetermined.

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the project's effects are significant enough to warrant an EIS. *Gov't of the Province of Manitoba v. Salazar*, 926 F. Supp. 2d at 192 ("Properly understood, NEPA requires an environmental analysis of the full consequences of a large federal project—with the inevitable, and necessary, possibility that those consequences will result in a no-project determination."). Remanding without vacatur would effectively endorse the Corps' plans to treat the remand as a sham proceeding, and give the Corps a green light to paper over its decision with more explanation without taking the "hard look" that NEPA requires but that has yet to occur on these key issues. By vacating the permits, in contrast, the Court will confirm that the remand is serious and the flaws identified by the Court require close and honest scrutiny, and an open-minded reconsideration as to how to proceed.

D. DAPL's Claims of Disruption Fall Short of the Type of Consequences That Warrant Departure from the Standard Remedy of Vacatur

Both the Corps and DAPL (as well as their *amici*) posit a number of sweeping claims about the potential impacts of vacatur. The Tribes do not dispute that shutting off a major crude oil pipeline would inconvenience DAPL and its customers and impact anticipated profits. However, the parade of horribles offered by DAPL is variously irrelevant, exaggerated, or lacking in evidentiary support. Perhaps most critically, DAPL and its customers have only themselves to blame for any harm to their bottom line that would follow from vacatur in light of the risks they took by rushing the project into operation.

1. Economic impacts carry little weight in NEPA cases

As a threshold matter, it is questionable whether the financial impacts and diminished profits about which DAPL complains carry much or even any weight in the context of a NEPA violation. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance

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of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). This Court has repeatedly applied that logic when considering injunctive relief to find that potential environmental harm outweighs financial impact. *See, e.g., Fed'n of Japan Salmon Fisheries Coop. Ass'n v. Baldridge*, 679 F. Supp. 37, 48-49 (D.D.C. 1987) (finding that risk of irreparable harm to marine mammals outweighed economic harm to interested parties); *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 261 (D.D.C. 2003) ("Public interest weighs in favor of protecting ecosystem over avoiding economic harms.").

As this Court stated in *PEER v. FWS*, a case explicitly weighing economic harms in the context of a proposed vacatur for NEPA violations, "it is not clear that economic concerns are as relevant in an environmental case like this one… the Court is reluctant to rely on economic disruption as the basis for denying" requested relief. 189 F. Supp. 2d at 3-4 (further finding that "disruption" of halting an activity that had been found legally flawed cannot be the basis for an exception to the default remedy, as if it was, then "vacatur would never be appropriate"), *citing Center for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010) (applying D.C. Circuit law to vacate decision despite economic harm; expressing doubt over the propriety of considering "economic consequences in environmental cases"); *Reed v. Salazar*, 744 F. Supp. 3d 98, 120 (D.D.C. 2010) ("The fact that there may be some costs or 'field level' effects associated with the rescission does not mean that there should be an exception from the default rule that arbitrary and capricious agency action be set aside."); *see also Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1243 (D. Colo. 2011) (finding economic impacts of vacatur on transportation, energy development, and agriculture projects to be "irrelevant" in environmental case); *Diné CARE*, 2015 WL 1593995, * 2-3 (vacating decision despite potential for significant

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delay and expense as "prospective economic harm does not outweigh" concerns regarding a flawed EA/FONSI); *Montana Wilderness Ass'n*, 408 F. Supp. 2d at 1033 ("A third party's potential financial damages from an injunction [in a NEPA case] generally do not outweigh potential harm to the environment"). Furthermore, these assertions of economic harm pale in comparison to the economic harm to the tribal communities who will bear the economic brunt of an oil spill. That harm cannot be remedied by the easement conditions, nor by monetary damages. ECF 131-4, Decl. Harold Frazier at ¶6-10 ("The Tribe does not have the economic resources to withstand a loss of water supply for even one month.").

2. DAPL's sweeping assertions of "disruption" are either unsupported or inaccurate

DAPL offers mostly self-interested conclusions from its executives and consultants, with little in the way of actual evidentiary support. It has introduced no contracts, ledgers, or other documentary support for its assertions regarding reduced profits, costs, or alternative modes of transport. In particular, DAPL executive Lee Hanse makes a range of wholly unsupported claims about lost "anticipated" revenues and "cascading impacts" to other business entities. Hanse Decl ¶ 3. He offers no evidence to support his claim of lost tax revenues to states. *Id*. at ¶¶ 6-7. Mr. Hanse isn't qualified to offer expert opinions on the supposedly "devastating impacts" on people who use crude derivatives, *id*. at ¶ 4, or claimed "increased prices for numerous consumer goods" and harm to "consumer confidence," *id*. at ¶¶ 7-8, nor does he attempt to support his claims with any evidence. Actual experts in crude oil transportation give such hyperbole little credence. *See* Goodman Decl., ¶ 54-56; 80-81. As a DAPL executive, Mr. Hanse is hardly in a position to offer meaningful input about what other people would do if DAPL operations were suspended. *Id*. ¶ 10.

Similarly, DAPL consultant Brigham McCown offers general safety statistics and

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opinions that are not supported by citation to any authority, and that are mostly wrong or misleading. McCown Decl. ¶ 8-9; *compare* Goodman Decl., ¶ 89-96. DAPL also reproduces now-irrelevant affidavits from the preliminary injunction phase of this proceeding, when the Court was evaluating whether to stop construction. For example, Ed Weiderstein, who runs a pro-infrastructure advocacy group, offers only general endorsements in support of infrastructure and touts the *construction* jobs associated with DAPL—jobs that would not be affected by a shutdown now, and that indeed would benefit from a route realignment as the Tribes propose. Weiderstein Decl., ¶¶ 2-3; *see also* Ackerman Report (ECF 131-5) at 222-233.

Courts have declined to rely on these kinds of conclusory, generalized assertions to establish that "disruption" warrants vacatur under the *Allied-Signal* factors. In *PEER v FWS*, this Court criticized the agency's "entirely conjectural" claims of economic disruption, which "rest on very little substance or certainty." 189 F. Supp. 3d. at 3-4; *see also Bldg. Indus. Legal Def. Found. v. Norton*, 231 F. Supp. 2d 100, 106 (D.D.C. 2002) ("In assessing the 'disruptive consequences' of vacatur…the Court cannot rely upon intervenors' abstract policy arguments; rather, there must be some factual basis for determining what the disruptive consequences might be."). Insofar as the bulk of DAPL's factual assertions regarding potential disruption involve generalized and unsupported claims from self-interested parties, they must be similarly rejected.

Moreover, many of DAPL's allegations are either exaggerated or simply wrong. For example, DAPL's affiants assert that it will be difficult, if not impossible, to move the oil currently using the pipeline onto trains or other sources. But DAPL initiated operations only two weeks before this Court's ruling. Prior to that time, oil traveled through other pipelines or on trains, and that capacity remains available to transport the oil during the remand process. Goodman Decl., ¶¶ 4-9. As the Tribe's oil transportation expert explains, the impact of a

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temporary shutdown of the pipeline can readily be mitigated through alternative modes of transport. *Id*.; *PEER v. FWS*, 189 F. Supp. at 5 ("The availability of these alternative measures counsels in favor of vacatur."); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (Rogers, J., concurring) (vacatur appropriate when other measures "would mitigate the disruption caused by vacating the rule").

DAPL also claims that the environmental risks of shutting off the pipeline are greater than allowing it to continue operations. While the Tribes agree that transporting Bakken crude by rail presents risks, the claim that pipelines are universally "safer" is faulty and one-sided. While shipping crude by rail involves a greater number of incidents, pipelines have more serious "worst case incidents" when they occur, and also can leak in ways that cannot be detected for years or decades. Goodman Decl., ¶¶ 83-96. Moreover, contrary to DAPL's belief that a new pipeline is the safest, data show that the risks of oil spills from pipelines are actually higher when pipelines are new than when they have been in operation for some time. 3rd Kuprewicz Decl., ¶¶ 9-10; *see also* 2nd Kuprewicz Decl. ¶ 2. Even though a lot of Bakken crude was previously transported via rail, the Tribes are unaware of an incident adversely affecting their Treaty area or water from crude oil rail transportation in recent decades.[13]

DAPL also complains that the pipeline will be damaged if operations are temporarily suspended. These claims are wildly overblown. By law, all pipeline operators must be prepared for, and explicitly plan for, the suspension of operations. Crude oil pipelines are shut down all

[13] Indeed, DAPL may also be seriously over-representing the amount of oil the pipeline is currently transporting and by extension the impacts of a shutdown. While its declarant testifies under oath that the pipeline carries half of North Dakota's current oil production, Hanse Decl. at ¶ 4, that may be untrue. Evidence suggests that DAPL is operating at around half of its total capacity, which would mean impacts are substantially more modest than DAPL represents. Goodman Decl., ¶¶ 21-24.

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the time, in a variety of planned and unplanned situations. 3rd Kuprewicz Decl., ¶¶ 3-4. Moreover, it is extraordinarily unlikely that any additional internal corrosion could take place during the relatively short period of the remand. *Id*. Finally, while DAPL argues that emptying the entire pipeline would be difficult or costly, there may be no need to do so. *Id*.[14]

In perhaps its boldest assertion, one made without citing any evidence at all, DAPL claims that since the pipeline has the capacity to carry half the oil produced in the state, shutting off the pipeline would jeopardize half of all oil jobs in the region. DAPL Brief at 2 ("half of the oil jobs in the Bakken region, and all of the jobs that depend on those jobs, are dependent in part on the continued operation of DAPL."). Of course, the Bakken region produced comparable and even larger volumes of oil long before DAPL built this pipeline. Before DAPL commenced operations, barely two weeks before this Court's summary judgment ruling, the oil industry in North Dakota had been enjoying robust (albeit declining) performance for years. In fact, both the Corps and DAPL have previously represented that DAPL will have zero impact on the amount of oil produced in the Bakken region, claiming that it will simply shift transportation from one mode (rail) to another (the pipeline). *Compare* EA, at 98 (proposed action will not result in growth or increased production in North Dakota) *with* DAPL Brief at 15-18 (cost advantages of DAPL "encourage oil production—and hence employment—by North Dakota producers"). DAPL cannot have it both ways.

[14] It is puzzling that the Corps suggests vacatur might place DAPL in violation of the Mineral Leasing Act since the government would have the power to decide what enforcement action to take. This case differs from *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), where private parties had plowed under crops in reliance on the invalid government rule and might pursue private remedies.

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3. DAPL knowingly took a risk by initiating operations despite the legal cloud over the project

From the beginning of this litigation, DAPL aggressively moved this project forward despite unprecedented Tribal and public opposition, and extensive legal and political risk that alternative routes or additional environmental review would be required. It did so knowingly, even acknowledging several times that it took these steps "at its own risk." ECF 6-60 at 5 ("Dakota Access has full confidence in receiving the PCNs from the [Corps] and is prepared to move forward with construction at its own risk to keep the Project on schedule…."); ECF 6-61 at 9 ("Any such activities [*i.e.*, construction prior to receiving Corps permits] will be conducted at the company's own risk."); AR 5729 ("Talked to Joey [Mahmoud] – he is aware that any work in [waters of the U.S.] is taken at his own risk…").

DAPL built a significant portion of the pipeline before it had obtained *any* federal permits. Preliminary Injunction Order (ECF 39) at 52 ("Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has secured a permit to then build across"). It disregarded the federal government's repeated requests that it cease construction in the Oahe area. Sept. 9, 2016 Statement (ECF 42-1) ("we request that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe"). Shockingly, construction around Lake Oahe continued even after the Army Corps declared in early December 2016 that it would perform an EIS that considered "route alternatives." ECF 65-1. And it chose to initiate operations in early June even though the Tribes' formidable (and ultimately partially successful) summary judgment motions were fully briefed and pending before this Court. Mem. Op. at 17. DAPL's supporting affidavits reveal that, had the company not chosen to start operations while the Tribes' motions were pending, virtually none of the postulated harms associated with suspending operations now would come to

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pass.[15] DAPL rolled the dice and bet that the project would ultimately prevail over these challenges, and it must bear the consequences. It should not be allowed to leverage its own irresponsible risk-taking to foreclose adequate relief for the Tribes.

In other NEPA cases, courts refuse to credit economic harm that arises from a defendant's own risk-taking. For example, in *Sierra Club v. U.S. Army Corps of Engineers*, 645 F. 3d 978, 998 (8th Cir. 2011), a court enjoined construction of a power plant that was almost complete despite claims of significant economic harm to its owner. The court reasoned that the company "commenced plant construction a year before the § 404 permit was issued, repeatedly ignoring administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk." *Id*. at 996*; Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("The state entities involved in this case have 'jumped the gun' on the environmental issues by entering into contractual obligations that anticipated a pro forma result. In this sense, the state defendants are largely responsible for their own harm"); *see also Winkler v. Andrus*, 614 F.2d 707, 714 (10th Cir. 1980) ("one who deals with property while it is in litigation does so at his own peril"); *Diné CARE*, 2015 WL 1593995, at *3 ("it is important to note that the responsibility for such delay and expense lies with Respondents and not with Petitioners"). As announced in the June 14 summary judgment order, this Court is openly considering shutting down the pipeline. Any potentially affected party that is not preparing now for that eventuality by, for example, making alternative transportation arrangements, does so at its own peril.

Courts have not shied away from ordering appropriate remedies in NEPA and other

[15] The Corps implies that since the Tribes did not prevail on their preliminary motions for injunctive relief, the blame for DAPL continuing construction and operation rests on the Tribes. Corps Brief at 14. The argument is nonsensical. The preliminary relief motions involved different causes of action—this Court never had occasion to judge the merits of the NEPA issues until the final easement was issued and the Tribes moved for summary judgment.

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environmental cases that are costly or that impose burdens on private projects. As the D.C. Circuit stated when generally discussing the more drastic remedy of injunctive relief, "[t]he fact that the present project is currently under construction by no means insulates it from the equity power of a court." *See, e.g., Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). In the case of a NEPA violation, enjoining ongoing projects "preserve[s] for the agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA, e. g., after finding out about the possible adverse environmental effects of its actions." *Id.* This furthers the goals of NEPA, as "the more time and resources (the agency is) allowed to invest in this project, the greater becomes the likelihood that compliance with section 102 of the NEPA, and the reconsideration of the project in light of the provisions of section 101, will prove to be merely an empty gesture." *Id.* (*citing Envtl. Def. Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1183-84 (6th Cir. 1972)). Accordingly, the claimed economic disruption that could arise from requiring valid NEPA compliance does not weigh against vacatur.

4. The Court should also weigh the "disruption" that would occur if an oil spill occurs

To the extent that the Court is inclined to weigh the "disruption" of shutting down the pipeline, it should balance it against the "disruption" that would be caused by an incident that this Court has found to be inadequately examined under NEPA. The Tribes' summary judgment filings document extensive evidence that oil spills from crude oil pipelines—both old and new—are commonplace, regular events that carry very significant environmental and economic costs. *See, e.g.,* ESMT 565 (Interior Solicitor Memo) (documenting 283 "significant" pipeline incidents annually, a number that is trending upwards); ESMT 1067 (average spill amount was over 47,000 barrels at an average annual cost of $131 million); SRST SJ Memo (ECF 117-1) at 22; SRST SJ Reply (ECF 195) at 4-6. PHMSA regulation and oversight of crude oil pipelines has

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been widely regarded as inadequate. *Id.*; Holmstrom Decl. ¶¶ 7-8. The National Transportation Safety Board ("NTSB"), the independent federal agency that investigates pipeline accidents and makes safety recommendations, has agreed, describing PHMSA's oversight of pipelines as "inadequate" due to "weak regulation," "ineffective oversight of pipeline integrity management programs," "inadequate regulatory requirements for facility response plans," and other factors AR 73877-78.[16] This Court ordered a remand for the Corps to conduct a more in-depth examination of the risks and impacts of a crude oil spill at Lake Oahe, and abundant record and non-record evidence indicates that those impacts would be catastrophic.

The Corps and DAPL are dismissive of such impacts, observing that because the Tribe has constructed a new water intake facility further downstream from the crossing site, there would be even more time to respond to an oil spill and, hence, the Tribe's concerns are misplaced. Leaving aside the fact that the Fort Yates water intake remains in service, the argument reflects an almost breathtaking failure to heed any of the lessons of this drawn out dispute. The waters of Lake Oahe, including those *immediately downstream* of the crossing site, are foundational to the Tribe's economy, culture, and way of life. Chairman Archambault explains how life on the Reservation—especially the community of Cannonball, which is within sight of the crossing—would be compromised by a spill:

> Many of our families, and especially our elders, would face the prospect of not having enough to eat if the fish and game they rely upon for subsistence are impaired by an oil spill. Our children would have no place to swim – and Tribal parents would have to worry about preventing their children from using the Lake which

[16] NTSB made a series of safety recommendations that would strengthen PHMSA oil pipeline regulations and PHMSA standards for and review of oil spill response plans. ESMT 2274. In the Pipeline Safety, Regulatory Certainty, and Job Creation Act, Public Law 112-90, Congress mandated improvements in PHMSA safety regulations, but many have not yet been put in place. ESMT 2271, 2275-79; *see, e.g.*, 80 Fed. Reg. 61610 (Oct. 13, 2015) (proposed pipeline safety rule not yet finalized).

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> would be unsafe and unhealthy. Our economy would suffer – as we would not be able to irrigate our lands with water contaminated by an oil spill. The amenities at Prairie Knights [the Tribal casino and main source of revenue] that rely on a clean Lake Oahe would likely shut down – as no one will want to camp on the banks of the fouled Lake. And our religious ceremonies that rely on clean water would be jeopardized.

3rd Archambault Decl., ¶ 10. After everything that has happened to date, the Corps' perception that the Tribe would be affected by an oil spill only if it reached its drinking water plant is profoundly troubling.

An oil spill or leak at Oahe would not just be disruptive; it would constitute an existential threat to the Tribe. Time and again throughout the modern history of the Standing Rock people, the financial interests of outsiders have been placed above the interests and rights of the Tribe. Archambault Decl., ¶¶ 15-16. If the Court is going to consider the financial impact to a company that embraced a known risk, it should give full consideration to this history and the impacts to the Tribe of a spill as well. As Chairman Archambault stated:

> The protection of the Tribe's Reservation homeland, our Treaty rights to hunt and fish, our economy and the health and safety of our people – these interests are more important than money, and they support the shut down of the pipeline during the course of the remand.

Id. ¶ 24.

III. IF THE COURT DECLINES TO VACATE THE EASEMENT, IT SHOULD IMPOSE ALTERNATIVE MEASURES TO ENSURE BOTH THE TRIBE'S SAFETY AND THE INTEGRITY OF THE REMAND PROCESS

For the foregoing reasons, this Court should apply the standard remedy and vacate the unlawful authorizations, which would have the effect of shutting down pipeline operations pending completion of a lawful environmental review. If this Court decides otherwise, and remands without vacatur, it should provide alternative relief to the Tribes to ensure their safety. The Tribes offer this alternative proposal reluctantly, as anything short of vacatur places a

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continuing unacceptable and illegal risk on the Tribes. However, in the event the Court does not impose vacatur, alternative relief, while wholly inadequate, is critical to protecting the interests of the Tribes.

This Court has the authority to impose alternative measures to address the Corps' legal violations, under its general equitable powers to address federal agency wrongdoing. *See Hecht v. Bowles*, 321 U.S. 321, 328-30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."); *Montana Wilderness Ass'n*, 408 F. Supp. 2d at 1033 ("The district court's equitable powers are broad and it is within the court's authority to fashion a remedy that fits the particular facts of the case before it."). In *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016), the D.C. Circuit responded to a legally deficient EIS by vacating the EIS and enjoining the agency to supplement it before any construction could begin, but not vacating the underlying lease and other regulatory approvals received to that point. 827 F.3d at 1084 ("[I]t would be imprudent to allow Cape Wind to begin construction before it can 'ensure that the seafloor is able to support' its facilities."). Similarly, in *Sierra Club v. Van Antwerp*, this Court "partially" vacated decisions issued in violation of NEPA, but allowed certain aspects of the project to go forward given that some construction had already been completed and active management of the site was necessary. 719 F. Supp. 2d at 79-80*; aff'd in part, rev'd in part*, 661 F.3d 1147, 1157 (D.C. Cir. 2011), as amended (Jan. 30, 2012); *see also Sierra Club v. Rural Utilities Serv.*, 841 F. Supp. 2d at 363 (issuing injunction rather than vacatur in light of facts).

In this case, an alternative remedy should include the following:

1) *Finalization and implementation of spill response plans at Oahe*: As this Court

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may recall, the Standing Rock Sioux Tribe became aware of the Lake Oahe geographic response plans ("GRP"), which are site-specific planning documents for responding to oil spills, very late and only after moving for summary judgment. The Tribe documented its grave concerns that these plans proposed to divert oil for collection onto the Reservation, without any prior coordination with the Tribe. *See* Ward Decl. (ECF 195-2) (filed under seal). DAPL responded by filing with the Court updated draft GRPs that proposed different collection sites off the Reservation, but these updated drafts still contained oversights and errors. Given that the Tribes are sovereign governments with responsibility to manage emergencies in their own territory, and that any oil spill at the Oahe site would immediately and primarily affect their Reservations, the Tribes need to be full partners in preparing for oil spills. However, neither the Corps nor DAPL has *ever* communicated with the Tribes about spill response planning. The Tribes do not know whether a final GRP exists. The Tribes have tried to work cooperatively with DAPL to coordinate emergency response planning, but have received no response from DAPL. 3rd Archambault Decl. ¶ 20 and Ex. A.

Moreover, to the best of the Tribes' knowledge, there is *still* no emergency response equipment in place to respond to an incident at Lake Oahe. The Corps' decision authorizing construction and operations at Oahe gave DAPL a full year from the start of operations to have that material in place. AR 71178. That means that, should an incident occur while the remand is underway, there is neither a plan in place, nor the resources onsite, to address it. This is simply unacceptable. The Tribes ask that DAPL and the Corps be directed to immediately coordinate finalization of the GRP with the Tribes' emergency management department, and implement spill response and preparedness activities like equipment staging. The Court should further consider a limited vacatur until such time as those plans are in place.

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2) *Implementation of PHMSA Recommendations*: In its comments to the Corps, PHMSA made several recommendations about additional easement conditions. In finalizing the MLA easement, the Corps adopted some of them, but not others—with no explanation as to why. The Tribes ask the Court to impose two of these recommendations as a condition of continued operation in the absence of vacatur.

(a) Third-party compliance audit: PHMSA recommended a third-party audit of DAPL's compliance with easement conditions and safety standards. Specifically, PHMSA stated:

> Third Party Independent Expert Engineering Annual Audit: Operator and [Army Corp of Engineers District office] must jointly select a Third Party Independent Expert Engineering Company to review these conditions and to report on the implementation of these conditions by Operator and any other integrity threats that need to be implemented to maintain safety on the pipeline segment to the [Army Corp of Engineers District office]. Annual Third Party audits must be posted by the Operator by April 1 of the following year on the operator website.

ESMT 1189-90. The Tribes agree that an independent audit of DAPL's compliance with all easement conditions and applicable standards is appropriate. The Tribes ask that the Court direct the Corps and DAPL, in consultation with the Tribes, to arrange for the independent audit proposed by PHMSA prior to the end of the remand process, currently estimated to be the end of this year, with the results filed with this Court. The Tribes further ask that the Corps be directed to involve the Tribes' experts in this audit.

b) *Public Reporting*: PHMSA further recommended that the Corps direct DAPL to provide public reports on a number of safety and operational parameters. Specifically, PHMSA recommended as follows:

> Annual Reporting: For the previous year operations in the pipeline segment, Operator must annually report by February 15th of the next year the following to the [Army Corp of Engineers District office]

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> and post on an operator website for public review [Note: This would give public a way to monitor pipeline segment integrity.]:
>
> > a) The results of any [inline inspection] run or direct assessment results performed on the pipeline during the previous year;
> >
> > b) The results of all internal corrosion management programs;
> >
> > c) Any new integrity threats identified during the previous year;
> >
> > d) Any encroachment in the right-of-way;
> >
> > e) Any [high consequence area] changes during the previous year;
> >
> > f) Any reportable incidents that occurred during the previous year;
> >
> > g) Any leaks or ruptures on the pipeline that occurred during the previous year;
> >
> > h) A list of all repairs on the pipeline made during the previous year;
> >
> > i) On-going damage prevention initiatives on the pipeline and an evaluation of their success or failure;
> >
> > j) Any changes in procedures used to assess and monitor the pipeline; and
> >
> > k) Any company mergers, acquisitions, transfers of assets, or other events affecting the management of the pipeline segment

ESMT 1189-90 (bracketed material in original). The Tribes submit that this reporting would be of significant value to the Tribes and other interested parties, and would increase transparency and accountability in the highly unusual situation of the pipeline operating in the absence of a valid NEPA analysis. The Tribes propose that such report be mandatory on a monthly basis pending the completion of a valid NEPA analysis.

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CONCLUSION

For the foregoing reasons, the Tribes respectfully request that the Court impose the standard remedy of vacating the Army Corps' Feb. 8, 2017 MLA easement decision and July 25, 2016 FONSI and CWA authorizations for DAPL to cross the Missouri River at Lake Oahe, pending completion of a lawful and valid environmental review pursuant to NEPA. If this Court declines to vacate these authorizations, the Tribes ask in the alternative that the Court impose its proposed three-part plan to reduce the risk to the Tribes while the remand is underway.

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing *BRIEF OF STANDING ROCK SIOUX TRIBE AND CHEYENNE RIVER SIOUX TRIBE REGARDING REMEDY* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
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