ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE, ROBERT FLYING HAWK, CHAIRMAN OF THE YANKTON SIOUX TRIBE BUSINESS AND CLAIMS COMMITTEE; OGLALA SIOUX TRIBE, Plaintiffs-Appellees, and CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE, Intervenors for Plaintiff-Appellees, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant-Appellee, and DAKOTA ACCESS LLC, Intervenor for Defendant-Appellant.	No. 20-5197

DAKOTA ACCESS, LLC'S
<u>EMERGENCY MOTION FOR STAY PENDING APPEAL</u>

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GLOSSARY

DAPL:	Dakota Access Pipeline
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FONSI:	Finding of No Significant Impact
HDD:	horizontal directional drilling
NEPA:	National Environmental Policy Act
PHMSA:	Pipeline and Hazardous Materials Safety Administration
the Corps:	the U.S. Army Corps of Engineers
WCD:	worst-case discharge

INTRODUCTION

The Dakota Access Pipeline ("DAPL") is the safest, most environmentally friendly option for bringing to market around 40% of North Dakota's, and 4.5% of the nation's, crude oil production. The U.S. Army Corps of Engineers (the "Corps") conducted extensive environmental analyses before granting an easement authorizing a short segment of a nearly 1,200-mile pipeline to cross federal lands at North Dakota's Lake Oahe. The pipeline has been safely in service for over three years, but the district court has now ordered it shut down and emptied by August 5, 2020. That Order is unprecedented, rests on an erroneous reading of an intervening opinion from this Court that the Corps had no opportunity to consider in any event, and is unjustified under the governing law. Dakota Access, LLC requests that it be stayed pending this Court's expedited review.

Plaintiffs opposed the pipeline's construction, both in the administrative process and in litigation. Having failed to enjoin completion of the pipeline under various statutory theories, they turned to the National Environmental Policy Act ("NEPA") as the pipeline went safely into operation. The district court concluded that the Corps had substantially complied with NEPA by preparing an Environmental Assessment ("EA") analyzing the Lake Oahe crossing, but ultimately decided, years later, that the Corps should have prepared an Environmental Impact Statement

("EIS") because certain of Plaintiffs' project criticisms rendered it "highly controversial." That conclusion was based on *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019), a decision issued years after the Corps' EA. Still later, the court took the unprecedented step of ruling that this purported error requires vacating Dakota Access's easement, and that DAPL be shut down and emptied after more than three years of safe operation.

Each ruling is erroneous, and they will produce devastating consequences for the country, state and tribal governments, oil producers, other third parties, and Dakota Access. An extensive administrative record supports the Corps' thorough environmental analysis of oil-spill risks along DAPL's short Lake Oahe segment. That record fully justifies the Corps' conclusion that an EIS was unnecessary. The objections belatedly raised by Plaintiffs bear no resemblance to those the Court considered in *Semonite*—where the unaddressed views of other expert federal agencies were at issue. Nor do those objections cast any doubt on the Corps' repeated conclusion that the risk of a spill at the Lake Oahe crossing is infinitesimal. Separately, even had the district court been right that an EIS was needed, it erred under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993), in vacating the easement and mandating the pipeline's shutdown while that process takes place. Defendants' failure to anticipate the intervening *Semonite* decision scarcely justifies the district court's suggestion that they willfully failed to comply with the law and are now

asking for "forgiveness" instead of "permission." ER157-58. Infrastructure projects of any significance are routinely challenged in litigation, yet government processes enjoy a presumption of regularity, and regulated and other innocent parties may reasonably rely on them.

Absent a stay pending appeal, the Order will incurably and irreparably infringe Dakota Access's rights, including losses exceeding $1 billion. A stay is also essential to avoid irreparable injuries to other innocent parties and to the public interest. A shutdown would inflict $7.5 billion in losses on North Dakota companies, employees, and that state's budget alone through 2021. Thousands would be unemployed, with serious damage to national security and an already struggling national economy. The district court acknowledged *generally* "the serious effects that [the] shutdown could have for many states, companies, and workers." ER156. But it made no serious effort to grapple with the large number of innocent actors that its decision would irreparably harm. *Id.* (declining to "pick apart" the parties' "various positions" on the resulting economic harms).

Nor did the court properly weigh those grave and tangible harms against the extremely remote likelihood of any harm befalling Plaintiffs from continued pipeline operation—either during the time needed to prepare an EIS or during proceedings in this Court. No crude oil pipeline in this country is safer than DAPL, which has

transported more than *half a billion* barrels of oil nearly 1,200 miles with *zero* main-line releases. Extensive government data prove that the likelihood of a leak at Lake Oahe materially larger than any the Corps has extensively modeled is about *1 in 200,000 years*. DAPL's many extra safety features and its location more than 90 feet below the lakebed make the likelihood even lower. A stay would preserve that safe status quo. But closing DAPL would *increase* environmental and health risks by shifting some oil to rail transport, which is statistically more likely to result in spills and related incidents. Because no agency would be tasked with reviewing those risks, a shutdown would be the judicial equivalent of a major federal action with no regulatory oversight or environmental agency review or approval. ER661-62 ¶ 5.

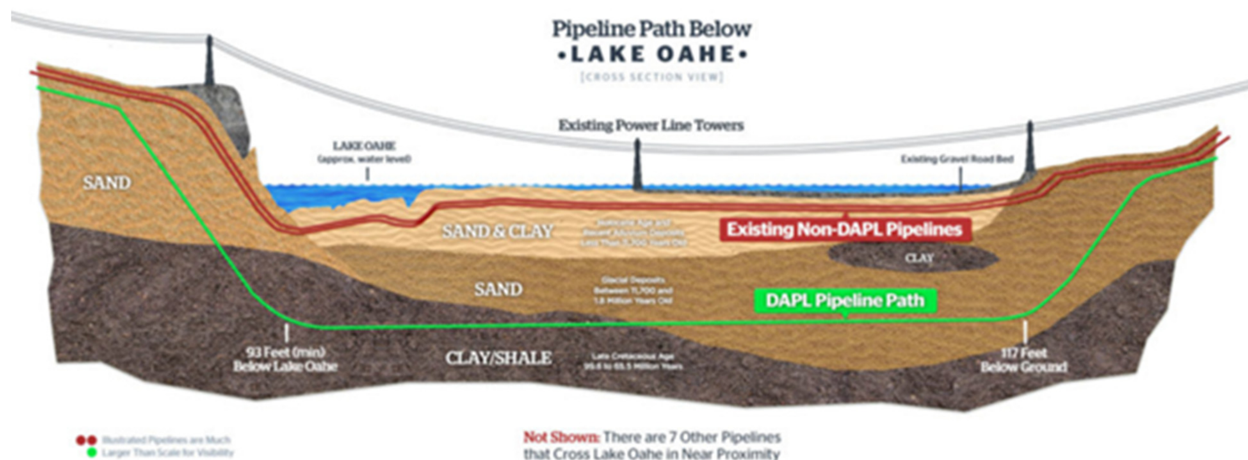
Dakota Access seeks a ruling on this motion no later than July 20, 2020, or a prompt administrative stay in the event of a later decision date. Dakota Access would incur a number of irreparable expenses to shut down DAPL well before this Court can rule on the merits. ER1603 ¶ 6 & n.1. Dakota Access respectfully asks that the appeal be expedited to the greatest extent possible. Pursuant to D.C. Cir. Rule 8(a)(2), Dakota Access has notified counsel for all other parties.

BACKGROUND

For over three years, DAPL has safely transported approximately 200 million

barrels of crude oil annually from North Dakota to Illinois, for further pipeline delivery to the Gulf Coast. DAPL brings to market around 40% of the oil currently produced in North Dakota, the nation's second largest oil-producing state, ER1289 ¶ 4, 1531-35 ¶¶ 10-11, without *any* spills on its mainline, ER963 ¶ 24, 1408 ¶ 20. According to Plaintiffs' own expert, DAPL is even less likely to leak after its "brand new" phase, ER385, making DAPL among the safest crude oil pipelines in the country, ER954 ¶ 4(a), 959 ¶ 15.

Plaintiffs challenged the Corps' decision to grant a Mineral Leasing Act easement allowing DAPL to cross federally owned lands on each side of Lake Oahe. That segment—1.73 miles between two valves—can detect leaks even smaller than 0.75% of the flow rate within 45 minutes. ER955 ¶ 6, 957 ¶ 9, 1411 ¶ 23. The horizontal directional drilling ("HDD") installation method used there—illustrated below—"'virtually eliminate[s] the ability of a spill to interact with the surface water.'" ER1621. Leaked oil would follow the bore-hole path to land on the sides of the Lake, rather than rise 92 feet to the lakebed through low-permeability materials. ER666 ¶ 15, 970 ¶ 41, 1621-27, 1890. Also, from 2010 to 2018, only *one* 1.7-barrel leak was reported on *any* crude oil pipeline installed using HDD. ER665 ¶ 13, 1420 ¶ 40, 1627.



ER663.

The Corps prepared a 163-page EA to determine if an easement would "significantly" affect the "quality of the human environment." 42 U.S.C. § 4332(C) (requiring EIS, if so). NEPA does not "mandate particular results," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), "only procedural requirements," *DOT v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).

The EA addressed both the likelihood and consequences of a hypothetical worst-case spill at Lake Oahe, including through project-specific models designed in accordance with Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations. ER1720-21, 1751-52. It determined that although a large spill there could have serious consequences, its *likelihood* was "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." ER583. Based on this judicially approved "high consequence, but low likelihood" mode of reasoning, *see New*

York v. NRC, 681 F.3d 471, 478-79 (D.C. Cir. 2012), the Corps prepared a Finding of No Significant Impact ("FONSI"), making an EIS unnecessary. After six months of even further comment and review, the Corps delivered the easement. ER299.

In June 2017, the district court held that the EA "substantially complied with NEPA," identifying just three discrete issues that the Corps "did not adequately consider." ER284. The one relevant here is whether the project's effects are "highly controversial," 40 C.F.R. § 1508.27(b)(4), given criticisms Plaintiffs submitted *after* the EA, ER284. The court remanded to the Corps without vacating the easement, allowing the pipeline's continued operation. ER413.

The Corps completed its 280-page remand analysis on August 31, 2018, reaffirming the EA and FONSI, ER1609-1748, after addressing in detail all *339* of Plaintiffs' post-EA criticisms, ER1749-1888.

Plaintiffs again challenged the Corps' conclusions under NEPA. In March 2020, the district court ordered the Corps to prepare an EIS because "the pipeline's 'effects on the quality of the human environment'" remained "'highly controversial.'" ER131. It cited "significant guidance" from *Semonite*, ER97—decided six months *after* the Corps completed the remand, D.E. 362—and pointed to four items on which the Corps had "not 'succeeded' in 'resolving … controversy'" regarding its "'analytical process and findings,'" ER113, 130 (alteration omitted).

After further briefing, ER137, the court vacated the easement and ordered that

"Dakota Access shall shut down the pipeline and empty it of oil by August 5, 2020," ER138-39. The court reasoned that "precedent favoring vacatur during such a remand coupled with the seriousness of the Corps' deficiencies outweigh[ed] the negative effects." ER141. The court denied Dakota Access's motion for stay pending appeal, reasoning that the relevant factors "were essentially subsumed in" the vacatur opinion. ER165.

ARGUMENT

This Court considers four factors in deciding motions for stays pending appeal: (1) "likelihood" of "prevail[ing]" on the merits; (2) "irreparabl[e] harm[] absent a stay"; (3) whether "others will be harmed if the court grants the stay"; and (4) "the public interest." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). Before *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), this Court applied a sliding scale, whereby "a plaintiff need only raise a 'serious legal question' on the merits" if "the other three factors strongly favor issuing an injunction." *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014).

A stay is warranted regardless of *Winter*'s effect on the sliding scale. The equitable factors strongly favor a stay because acknowledged, irreparable harms to the public and Dakota Access vastly outweigh the risks to Plaintiffs from an extraordinarily unlikely spill. And Dakota Access is likely to prevail on appeal.

I. The Equitable Factors Favor A Stay

This Court has repeatedly recognized the "quite disruptive" consequences of shutting down an "operational" pipeline, *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019); *e.g.*, *Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010), or any large infrastructure project, *e.g.*, *Massachusetts v. NRC*, 924 F.2d 311, 336 (D.C. Cir. 1991) (nuclear power plant operating license). Shuttering DAPL would cause unprecedented irreparable injury, including ***billions*** of dollars in unrecoverable costs and lost revenue and ***thousands*** unemployed. As the district court recognized, these irreparable, "immediate harm[s]"—"particularly in a highly uncertain economic environment"—would be "no small burden." ER156.

A. Shutting Down DAPL Would Irreparably Injure The Public

North Dakota producers reliant on DAPL to transport their oil would need to "shut in" thousands of wells, ER421 ¶ 13, 477, 1294-95 ¶ 14, 1298 ¶ 18, 1336-38 ¶¶ 17, 20, and affiliated natural gas production facilities, ER1341 ¶ 6. They would lose hundreds of millions of dollars in revenue *every month*, with millions more in unrecoverable costs to shut in and maintain wells, ER475, 1331 ¶ 7, 1338-39 ¶ 21, totaling approximately $5 to $9 *billion* in losses through 2021, ER1346 ¶ 36, 1558 ¶ 7, 1560 ¶ 10(a) n.3; *see also* D.E. 551-1, at 13-15; ER438-41.

Even assuming railroads could transport DAPL's capacity of 570,000 barrels per day, the added expense of $5 to $10 per barrel would equate to $1 to $2 *billion*

dollars a year. ER1308 ¶ 36, 1336-37 ¶¶ 18-19, 1502 ¶ 44, 1541-44 ¶¶ 19-23, 1591-94. These costs would impair producers' investments, constrain production, and hurt workers and consumers. ER475, 477, 1340 ¶ 23, 1596-1600. Congestion and shipping costs for other rail users, including Midwest farmers, would also increase. ER1192-1200 ¶¶ 17-27, 1232-42 ¶¶ 60-84, 1265 ¶ 4, 1279-85 ¶¶ 29-41, 1514-15 ¶¶ 64-65.

Refineries and other pipelines reliant on DAPL would face serious losses too. ER471-72 ¶¶ 9, 11-12, 1300-02 ¶¶ 24-26; *see also* D.E. 551-1, at 15-16. Some pipelines connecting to DAPL would have to drastically alter or cease operations. ER462-68, 1300-01 ¶¶ 22, 24. Between 4,500 and 7,200 oil industry workers would be unemployed. ER436 ¶ 14, 479-84, 1331 ¶ 7, 1339 ¶ 22, 1585 ¶ 43.

State governments, already strained, would lose hundreds of millions of dollars in annual DAPL-generated tax revenue. ER486-87 ¶ 6, 1303 ¶ 28, 1343-44 ¶¶ 28-30; *see also* D.E. 551-1, at 16-17. Shut-ins and a shift to rail would likely cause North Dakota, alone, "hundreds of millions in reduced tax revenue," D.E. 537, at 4 (emphasis omitted); ER442-44, earmarked to support, for example, local governments, tribes, and public schools, ER427-32, 1343-45 ¶¶ 29, 31-35. Property taxes paid to six states in fiscal year 2021 would be reduced by tens of millions of dollars. ER1303-04 ¶ 29. Many wells on tribal lands would shut in, depriving tribal

governments of tax revenues, royalty payments, and jobs.[1] ER1304-05 ¶ 32. Each lost drilling rig would cost tribes around $8 million in annual tax revenue. *Id.*

Additional harm would include:

- Greater energy market volatility, distorting investment decisions, and threatening national economic recovery. ER1314 ¶ 5, 1323-27 ¶¶ 15-21.

- Increased infrastructure construction costs nationwide in reaction to a new precedent for shutting down safely operated major projects. ER1561 ¶ 11, 1588-89 ¶¶ 49-50.

- Reduced ability to respond to supply disruptions, and increased foreign oil dependence. ER1257-58 ¶ 16, 1260 ¶¶ 21-22.

See also D.E. 551-1, at 17-18.

Environmental harms would more than offset the speculative advantage of avoiding an extremely low-probability spill:

- Every barrel of oil that shifts to rail means a net increase in spill risks, potential fatalities and injuries, and air pollution. ER676-79 ¶¶ 31-35; D.E. 538-1, at 22-23.

- Rail transport increases the risk of spilled oil reaching those who rely on a new tribal water intake. ER679 ¶ 36, 1208-09 ¶ 34, 1381 ¶ 37, 1515 ¶ 66 n.56. A worst-case train wreck's volume there exceeds the pipeline's worst case by [redacted]%, ER679; and the rail crossing is much closer to the intake, *compare* ER679 ¶ 36, 1208-09 ¶ 34, 1381 ¶ 37, 1515 ¶ 66 n.56, *with* ER667-68 ¶ 17, 1368-69 ¶ 16.

- No agency would need to approve or review increased rail traffic; no regulation would require response plan updates; and existing rail response plans

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[1] Private landowners also will receive dramatically reduced royalty payments. ER1340.

are not tailored to a wreck into Lake Oahe. ER1382-88 ¶¶ 39-42, 1516-19 ¶¶ 68-70.

- Many closed oil wells emit significant amounts of methane. ER680-81 ¶ 38 & n.13.

See also D.E. 551-1, at 18-21.

B. Dakota Access Would Be Irreparably Harmed Too

Shuttering DAPL would deprive Dakota Access (and a connected pipeline operator) of all revenue from its only material asset at losses of $2.8 to $3.5 million in revenue *every day* DAPL is idle in 2020, ER1292-93 ¶¶ 9-10, 1537-39 ¶¶ 13-15, and $1 to $1.4 billion for 2021, ER1293; *see also* D.E. 551-1, at 10-12. It would take about three months and cost Dakota Access approximately $24 million to safely purge DAPL of oil and preserve it for future use. ER375-79, 1603 ¶ 6 & n.1. Dakota Access would also incur $67.5 million in unrecoverable annual expenses to keep DAPL safe while unoperated. ER971 ¶ 44, 1293 ¶ 11.

The harm is irreparable. The "loss of profits … could never be recaptured," *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962), and a shutdown would cause a "severe economic impact," *Wash. Metro. Area Trans. Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977). Injuries that "threate[n] the very existence of [a] business" "may constitute irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

C. Preserving The Status Quo Would Not Harm Plaintiffs

A stay pending appeal will not harm Plaintiffs. DAPL's state-of-the-art components and leak-detection systems, the HDD installation process and thicker pipe walls beneath Lake Oahe, enhanced safety features, and response plans make "the risk of an inadvertent release in, or reaching, Lake Oahe … extremely low." ER583; *see also* ER312, 965 ¶ 28, 1420 ¶ 40; D.E. 551-1, at 21-23.

DAPL has significantly outperformed the industry average for safe operation. ER939-41 ¶¶ 18-20. Moreover, PHMSA historical data for *all* pipeline incidents put the chance of a major leak for the length of pipe beneath Lake Oahe at 1 in nearly 200,000 years. ER941 ¶ 21; *see also* D.E. 551-1, at 22.

Harms from even a highly unlikely large spill would be mitigated. Modeling for a release that would never happen—[redacted] barrels directly into the Lake with 10 days of zero response effort—showed limited, temporary impacts on tribal use of Lake Oahe and *no* impact to their water supplies or intakes. ER667-69 ¶¶ 14, 16-19. Moreover, plans are already in place to respond swiftly and effectively to a spill roughly [redacted] *larger*. ER961 ¶ 19; *see also* D.E. 551-1, at 22-23.

II. Dakota Access Will Likely Succeed On The Merits

Given the balance of the equities, this Court should decide the "serious legal question[s]" raised by the decisions below before they take effect. *Holiday Tours*,

559 F.2d at 844. Three rulings—granting Plaintiffs partial summary judgment, requiring an EIS, and vacating the easement while that EIS is prepared—present "serious" and "substantial" questions that warrant '"more deliberative investigation"' on appeal before imposing devastating, disruptive, and irreparable harm to many third parties and the economy as a whole. *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

A. Summary judgment: The court invoked "significant guidance" from *Semonite* to hold that "the pipeline's 'effects on the quality of the human environment are likely to be highly controversial'" because the Corps did not resolve discrete controversies as to a possible high-consequence spill at Lake Oahe. ER97, 131. That holding is triply flawed.

First, *Semonite* is distinguishable. *Semonite* reaffirmed that a project is not highly controversial simply because '"some people may be … willing to go to court over the matter."' 916 F.3d at 1083. Instead, "'information in the record"' must '"cas[t] substantial doubt on the adequacy of the agency's methodology and data.'" *Id.* (quoting *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1275 (10th Cir. 2014)). Critical to *Semonite*, "federal and state agencies with relevant expertise harbor[ed] serious misgivings," not just about the agency's mode of analysis, but also its substantive decision: to permit electrical towers across the historic James River. *Id.* at 1077. NEPA operates through input from federal agencies with

"special expertise." 42 U.S.C. § 4332(C)(v). *Semonite* thus focused on "critical comments" from two subject-matter-expert federal agencies that found the agency's analysis '"superficial'" and "'completely contrary to accepted professional practice,'" and stated that the project's "'adverse effects'"—"'irreparably alter[ing]'" a landscape of '"transcendent national significance'"—"'could not be mitigated.'" 916 F.3d at 1080-86 (alteration omitted).

Here, by contrast, federal agencies did not pursue the topics of controversy. *E.g.*, ER114. Two federal agencies said the Corps' *draft* EA warranted further analysis, and the Corps addressed those issues. *See* D.E. 551-1, at 26-27. Neither agency questioned the Corps' ability to justify the easement. *Id.* There also is at least a serious question whether *Semonite*'s reference to criticisms from expert government "agencies … and organizations with subject-matter expertise," 916 F.3d at 1086, extends to any committed opponent who relies almost entirely on non-governmental consultants and has no documented expertise, *see* ER111-12.

Second, even giving Plaintiffs the benefit of the doubt on each controversy's merits, none calls into question the Corps' undisputed determination that the "extremely low" *likelihood* of a large spill near Lake Oahe supported an easement. ER544, 583, 588; *see also*, *e.g.*, ER1609, 1627, 1727. The district court upheld this "top-line conclusion" as reasonable. ER32; *see* ER136 ("[T]his Court has accepted" that "the possibility of a future spill" is "low."), 390, 399. On remand, extensive

PHMSA data bolstered the Corps' conclusion; releases exceeding 10,000 barrels—a level below what the Corps modeled—are "extremely uncommon." ER1626-27. The odds of either a large spill at an HDD crossing or any leak ever reaching the water are "even lower." ER1666; *see supra*, at 5. The Corps thus acted well within its discretion in foregoing an EIS after '"discount[ing]"' the "'significance of possible adverse consequences … by the improbability of their occurrence.'" *New York*, 681 F.3d at 478-79.

The controversies the district court identified do not affect that conclusion. Three of them—slow-leak detection, winter-spill response capabilities, and premises of the Corps' worst-case-discharge ("WCD") analysis, ER114-17, 119-21, 125-27—address only a large spill's potential consequences, not its *likelihood*. They also pertain mainly to effects of *even lower-probability* perfect-storm events: multiple independent systems failing simultaneously. ER114-15, 128. Particularly because a full-bore rupture would be detected almost instantaneously even without DAPL's state-of-the-art system, ER956 ¶ 8, nothing in NEPA required the Corps to dwell on these extremely low probability events, ER1863; *Robertson*, 490 U.S. at 354 (NEPA has not required a "worst case analysis" since 1986). Regardless, the PHMSA data the Corps used already accounts for each factor's effect on spill sizes. ER1626.

The fourth topic—the past safety record of DAPL's recently acquired opera-

tor, Sunoco—also does not alter the reasonableness of the Corps' conclusion. Plaintiffs never showed that Sunoco's *frequency* of spills *per mile* of pipelines operated—the relevant metric for spill likelihood—exceeded industry averages. *See* ER1622. Further, the Corps properly relied on DAPL safety features, distinguishing it from older pipelines under different management, plus Sunoco's post-acquisition safety-practices improvements. ER965 ¶ 27, 1847, 1400-01 ¶ 7, 1410 ¶ 22. And a safety record well outside the norm would still align with the Corps' FONSI given the once-in-200,000-years likelihood of a high-consequence spill at Lake Oahe based on PHMSA data that includes much older pipelines with many fewer safety features. ER1626.

Third, the Corps appropriately concluded that several conservative features of the spill modeling more than offset supposed controversy over a large spill's *magnitude*. For example, the district court noted disagreement whether the modeled WCD of [redacted] barrels needed to include another 3 minutes of rupture detection time. ER125. Although the Corps correctly accounted for detection time, *see* D.E. 456, at 29-31, adding 3 minutes would only increase the WCD by 1,248 barrels—less than [redacted]%, *id.* On the other side of the ledger: (1) nowhere near that amount—if any at all—would reach the Lake, *see supra*, at 5, 16; (2) a full-guillotine cut is inconceivable for a pipeline buried so deep, *see* ER1914; and (3) the modeling overstates released amounts in three separate ways, ER1752, 1900.

Similarly, the court took issue with the Corps' consideration of the effects of '"winter conditions"' on cleanup efforts. ER120. The Corps reasoned correctly, *see* D.E. 509-1, at 29-30, but any controversy would be immaterial. It conservatively assumed no spill response for 10 full days, even though Dakota Access responded faster than the required six hours during drills, ER668 ¶ 18, 963 ¶ 23, 1827.

This Court has repeatedly rejected the sort of "'flyspeck[ing]'"—"in search of 'any deficiency no matter how minor'"—that Plaintiffs invited here. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322-23 (D.C. Cir. 2015).

B. Decision to order an EIS: Even assuming the Corps needed to do more, the court erred in requiring an EIS. ER137. Its first remand order directed the Corps to address for the first time criticisms Plaintiffs submitted post-EA. ER36. When the Corps responded by addressing 339 items, ER1718, 1749-888, it lacked the benefit of the "significant guidance" the district court drew from this Court's later *Semonite* decision, ER97.

Remand will be the Corps' first opportunity to defend its low-likelihood, significant-effect assessment after further analyzing the likelihood and consequences of the scenarios the district court raised. Because NEPA "imposes only procedural requirements," *Pub. Citizen*, 541 U.S. at 756-57, the Corps should have that chance.

C. Vacating the easement: Even assuming the need for an EIS, the decision whether to vacate an agency's order depends on (1) '"the seriousness of the order's

deficiencies"' and (2) '"the disruptive consequences of an interim change."' *Allied-Signal*, 988 F.2d at 150-51. "A strong showing of one factor may obviate the need to find a similar showing of the other." *Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 674 (D.C. Cir. 2019). Each factor should have prevented vacatur here.

1. The district court wrongly dismissed the "serious possibility" that the Corps will be able to substantiate its easement decision after preparing an EIS. *Allied-Signal*, 988 F.2d at 151; *see, e.g.*, D.E. 507, at 10-14; D.E. 538-1, at 11-16. The Corps, through over 1,000 pages of analysis, already addressed nearly all issues required in an EIS. And the court had already upheld much of that analysis with respect to the easement in the first round of summary judgment, narrowing the *disputed* items significantly. ER4; *see also* ER386 (same). NEPA encourages agencies to rely on prior analysis to "[f]acilitate preparation of [an EIS] when one is necessary." 40 C.F.R. § 1508.9(a)(1), (3). "[F]illing the analytical gap identified [by the court]" through that EIS is the Corps' "only obligation." *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005).

On remand, the Corps can readily address the controversies the court identified. *See supra*, at 16-17. And this time the Corps would not need to "do away with [any] controversy," ER129, or disprove that a "'dispute exists,'" *id.* at 13. It need only *decide* any remaining disputes, with the "choice of … method[ology]"—even if controversial—left to its "wisdom and experience," *Citizens Against Burlington,*

Inc. v. Busey, 938 F.2d 190, 200-01 (D.C. Cir. 1991), and "dispute[s] … of fact" left to its "'informed discretion,'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989). If the Corps' "'decision is not arbitrary or capricious'" and "'adequately consider[s] and disclose[s] the environmental impact'" of the easement, it will be sustained. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013).

In ruling otherwise, the district court "focus[ed] on the Corps' decision not to prepare an EIS" rather than on "whether 'the Corps will likely substantiate its substantive *easement* decision.'" ER150-51. Under *Allied-Signal*, though, an agency need only "'be able to justify'" the ultimate order the court is deciding "whether to vacate"—here, the easement. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009). The question is whether the Corps can show that it ultimately "chose correctly," *Allied-Signal*, 988 F.2d at 150, not whether it can do the impossible: justify a process the court *already rejected* as flawed. *Accord Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 526, 538 (D.C. Cir. 2018); ER150-51. Because the Corps can substantiate the easement after preparing an EIS, a stay is warranted.

The district court also leaned heavily on the asserted rarity of cases rejecting vacatur under *Allied-Signal* in the unique context of orders directing agencies to prepare an EIS. ER150. *But see Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 357 (D.D.C. 2012) (first *Allied-Signal* factor favored agency despite no environmental analysis whatsoever; no vacatur while agency prepares EIS). But the

court cited no other cases vacating in this posture. That dearth of case law simply reflects the extraordinariness of ordering an agency to complete an EIS rather than leaving the choice to the agency. In numerous cases under the more common latter scenario, the first *Allied-Signal* factor has weighed against vacatur. *See* D.E. 551-1, at 36 (citing cases). More importantly, no court has stopped an already operational pipeline, especially one operating safely for over three years. *See* D.E. 538-1, at 4.

2. The same "disruptive consequences" that support this motion independently warrant no vacatur. *Allied-Signal*, 988 F.2d at 150-51; *see supra*, at 9-12. The district court "acknowledge[d] that … shutting down the pipeline will cause significant disruption to DAPL, the North Dakota oil industry, and potentially other states." ER162. The court nonetheless reasoned that remand without vacatur would somehow subvert NEPA. ER157-58. Here too, the procedural history forecloses that concern. Each time Plaintiffs tried to stop the project, the court found no lawful basis to do so. *See* ER188 (denying SRST's motion for preliminary injunction); ER246 (denying Cheyenne River's motion for preliminary injunction); ER387 (remanding without vacatur). Indeed, Dakota Access only moved forward with construction at Lake Oahe after receiving its easement. Dakota Access sought and repeatedly received "permission." ER157. It did not act hoping for "forgiveness." ER158.

As for '"potentially disruptive effects"' absent vacatur, ER158-59, the court

recognized that the likelihood of a high-consequence spill is low, *id.* at 20, while failing to account for the Corps' extensive remand analysis of spill effects and how Dakota Access can detect slow leaks and respond appropriately to a spill in winter. *See* D.E. 509-1, at 20-21, 23-25; D.E. 538-1, at 13-14.

3. At a minimum, Dakota Access is likely to prevail on appeal because the Order goes beyond mere vacatur. "[V]acatur" would merely have "deprive[d]" the easement of '"any legal consequences,"' *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 17 (D.D.C. 1998) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)), leaving the Corps to determine the remedy for any resulting property encroachment, D.E. 536, at 19-20. The order to shut down and empty the pipeline—one '"directed to a party, enforceable by contempt, and designed to accord … some … of the substantive relief sought by a complaint"'—is an "injunction," *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 749 (D.C. Cir. 2016), triggering the exacting standard for injunctive relief, *see*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 148, 156-57, 160 (2010) (leaving in place vacatur, under NEPA, of agency decision but reversing order "*enjoining* [*the agency*] from allowing" relevant activities pending EIS).

The requirements for an injunction, which the court did not address, are not satisfied here. Supreme Court precedent precludes "recourse to the … extraordinary relief of an injunction" when the "less drastic remedy" of vacatur is "sufficient to

redress" a NEPA violation. *Monsanto*, 561 U.S. at 165-66. To assume "that an injunction is generally the appropriate remedy for a NEPA violation"—without addressing injunctive relief requirements—is "erroneous" and reversible. *Id.* at 157. Even relief labeled "vacatur" is disfavored if it "ha[s] the effect of injunctive relief." *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, 2016 WL 4445770, at *6 (C.D. Cal. Aug. 12, 2016). This error is compounded by the injunction's breadth, requiring Dakota Access to "empty [DAPL] of oil" even though the easement is limited to a 1.73-mile segment between two valves. At a minimum, the injunctive portion of the Order should be stayed.

CONCLUSION

The Court should grant Dakota Access's stay motion.

DATED this 10th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 5185 words; and

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: July 10, 2020

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CERTIFICATE OF SERVICE

I certify that on July 10, 2020, the foregoing document and attachments were filed via the Court's CM/ECF system and served upon ECF-registered counsel for all parties to this proceeding.

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