IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB

REPLY BRIEF OF DAKOTA ACCESS, LLC REGARDING REMEDY

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INTRODUCTION

Plaintiffs argue the remedy issue as if this Court either ordered an EIS or found a defect in the Corps's decision so severe that the agency *must* reach a different substantive result on remand. But the remand here is narrower, and the possibility of the same outcome, after additional review and explanation, is serious (*i.e.*, non-trivial). Rather than accept this Court's ruling for what it is, Plaintiffs ask the Court to consider even more non-record material so they can tell the Corps that it must conclude differently on remand. That turns deferential review of agency compliance with NEPA's procedural requirements on its head. Given the limited nature of the remand, the extremely low likelihood of any harm if the pipeline remains operational, and the certain disruption should the Court order otherwise, remand without either vacatur or an injunction is warranted.

ARGUMENT

I. Plaintiffs Understate The Power Of Courts To Remand Without Also Halting A Completed Project's Operations.

This Circuit's law is clear: Vacating agency action that violates NEPA is nothing more than the "standard" remedy. D.E. 272 ("Opp.") 6 (quoting case law). Plaintiffs cite no case supporting their different assertion that the flipside—remand without vacatur—should be "applie[d] only in unusual or exigent situations." Opp. 6. Rather than use such restrictive language, the D.C. Circuit has expressly recognized, even for *incomplete* projects, that a NEPA violation "does not necessarily mean that [a] project must be halted." *PEER v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (construction had yet to even begin). That is why courts in this Circuit answer the vacatur question in NEPA cases by faithfully applying the familiar *Allied-Signal* factors. *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (citing APA cases).[1]

[1] Plaintiffs also go beyond mere vacatur (*i.e.*, setting permits aside as invalid) when they seek an order stopping the flow of oil in the pipeline. *Cf. Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) (discussing set-aside of leases and an injunction against drilling in disjunctive), *vacated*

Rather than accept *Allied-Signal*, Plaintiffs sweepingly assert that no court in this Circuit "has allowed a project to continue while the agency conducts a new NEPA analysis on remand." Opp. 7. But a recent D.C. Circuit case that Plaintiffs mis-cite proves them wrong. In *Delaware Riverkeeper Network v. FERC*, the plaintiffs also won remand by challenging an Environmental Assessment for an already operating pipeline. 753 F.3d 1304, 1309 (D.C. Cir. 2014) (two NEPA violations: segmenting project approvals for a complete overhaul of a gas pipeline and insufficiently analyzing cumulative effects). But the Court did not, as the Tribes suggest (Opp. 7), shut the pipeline down; it merely "remand[ed] the case to FERC for further consideration of these two issues." *Id.* at 1320. As should be the case here, the pipeline was allowed to remain in operation.[2]

Delaware Riverkeeper isn't the only case that proves Plaintiffs wrong. In *Alaska*, the D.C. Circuit expressly rejected the argument that the agency's "failure to comply fully with NEPA" required setting aside lease sales or halting drilling "until compliance has been achieved." 580 F.2d at 485. The Court explained that "where an injunction is not required to preserve the decision-maker's opportunity to choose, an ongoing project should obviously not be enjoined[.]" *Id.*

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in part by 439 U.S. 922 (1978). It is "erroneous" to assume "that an injunction is generally the appropriate remedy for a NEPA violation"; rather, the traditional (and demanding) test for injunctive relief must be met. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Because plaintiffs' proposed remedy of upending the status quo (stopping pipeline operations) "would have the effect of injunctive relief, it cannot be held that vacatur is the presumptive remedy" under NEPA. *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. 12-cv-9861, 2016 WL 4445770, at *6 (C.D. Cal. Aug. 12, 2016).

[2] Plaintiffs characterize the decision as "vacating" the pipeline approval, Opp. 7, but the word "vacated" appears only in Westlaw's summary. 753 F.3d at 1304. Nothing in the opinion, judgment, or briefing shows that any authorization was vacated or—more importantly—that the Court shut down a major pipeline. The only thing close to the topic was the Court's *denial* of an emergency motion for a stay of the project pending appeal. *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013). And, indeed, the decision on remand contains no suggestion that the pipeline was shut down after going into service, and then started up again. *See Tenn. Gas Pipeline L.L.C.*, 153 FERC P 61215, 2015 WL 7345796, at *3 & *13 (2015) (reporting that projects went into service before the D.C. Circuit decision, but no mention of any shutdown).

("[E]specially where, as here, there are substantial public interests in the project's continuation"). The Corps's "opportunity to choose" will be affected even less by denial of vacatur here, because the pipeline is already operating. Nobody will be completing an unfinished project during remand, thus making things "progressively harder to undo the longer it continues[.]" *Mass. v. Watt*, 716 F.2d 946, 953 (1st Cir. 1983) (Breyer, J.) (Plaintiffs' case); *see also Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C. 2016) (Plaintiffs' case; stopping rail construction where more disruptive "to proceed with the project … only to subsequently determine that another alternative is preferable")[3]; *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77 (D.D.C. 2010) (multi-use development project still in progress). Continued DAPL operation "preserv[es] the full range of options" (Opp. 12) *currently* available to the Corps, such as consideration of other operating conditions, to the extent still relevant (*see, e.g.,* Opp. 36-39).

Every one of Plaintiffs' vacatur cases differs materially from this one, in which (i) construction is complete under the permits at issue (as just noted); (ii) there is a serious possibility that the agency can substantiate its original decision by reviewing data that largely already exists; and (iii) a shut-down would cause significant disruption. For example, in Plaintiffs' cases:

- The agency's failings were more serious than those here.[4]
- Environmental harm was certain absent vacatur.[5]

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[3] The D.C. Circuit nonetheless has stayed pending appeal the vacatur, which had amounted to injunctive relief halting the rail project. *Fitzgerald v. Fed. Transit Admin.*, No. 17-5132 (D.C. Cir. July 19, 2017).

[4] *E.g.*, *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (wide range of statutory violations); *Johanns*, 520 F. Supp. 2d at 18 (failed to "undertake any review pursuant to NEPA"); *Humane Soc'y of U.S. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 16 (D.D.C. 2006) (EIS required on remand); *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 44 (D.D.C. 2000) (same); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1039 (D. Mont. 2006) (both NEPA and NHPA violations, including "no public process involved in reaching the FONSI conclusion"); D.E. 260 ("Dakota Access Br.") at 12 (summarizing other cases).

[5] *E.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) ("concrete,

- The disruption of vacatur was less severe than would be true here.[6]
- The Court did not even need to address vacatur because there was no violation.[7]

The case law thus supports non-vacatur in NEPA cases like this.

II. There Is More Than A "Serious Possibility" That The Corps Can Further Substantiate Its Decision On Remand.

The choice of remedy does not turn on whether the *topics* to be addressed on remand (*e.g.*, fishing and hunting rights) are at "the very heart of the Tribes' concerns." Opp. 17. Rather, the focus is the "seriousness" of the agency's "deficiencies" in *handling* those topics. Plaintiffs also get it backwards when they ask the Court to wade through parts of the potential remand record (including yet additional expert declarations on the remand topics) and predict what the Corps might decide and whether those possible decisions could be upheld. The test instead is much narrower: whether a "serious possibility" exists that the Corps "will be able to substantiate its decision on remand." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993). The D.C. Circuit has accordingly declined to vacate if the "likelihood" of the same outcome after remand is "non-trivial." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 861 (D.C. Cir. 2008). That standard is more than met here.

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substantive environmental harms"); *Diné Citizens Against Ruining Our Environment v. U.S. Office of Surface Mining Reclamation and Enf't*, 12-cv-01275, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015) ("cumulative effects" of coal combustion during remand would "endanger public health and the environment"); *Van Antwerp*, 719 F. Supp. 2d at 80 (need "to prevent significant harm" from "continuing development"); *Fed'n of Japan Salmon Fisheries Coop. Ass'n v. Baldridge*, 679 F. Supp. 37, 49 (D.D.C. 1987) ("certain that unlawful takings of marine mammals will occur" and "Congress has already determined that such takings are harmful to the environment").

[6] *E.g.*, *PEER v. U.S. FWS*, 189 F. Supp. 3d 1, 3-4 (D.D.C. 2016) ("very little substance or certainty" to claimed harm); *Diné CARE*, 2015 WL 1593995, at *3 (even with vacatur, intervenor could meet its contractual obligation to supply coal for the next 15 months); *Mont. Wilderness*, 408 F. Supp. 2d at 1037, 1039 (no mention of any harm from *continuing* the shutdown of a pipeline, and economic benefit from operation of leases was "miniscule"); *Sierra Club v. Watkins*, 808 F. Supp. 852, 876 (D.D.C. 1991) ("deleterious effect" not "specifically demonstrated").

[7] *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015).

The *nature* of the deficiencies provides the answer. This Court explained, *e.g.*, "[i]t may well be the case that the Corps reasonably concluded that" the relevant expert reports "were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects," but simply "never said as much." D.E. 239 ("Op.") 34. When it "may well be" that the agency can explain the decision on remand, remand should be without vacatur. Dakota Access Br. at 7 (citing D.C. Circuit authority). Plaintiffs plan to argue on remand that the Corps has no choice but to engage in yet more "data collection, analysis, and discussion" and then reach "a different outcome," D.E. 272-4 ¶¶ 19, 27 (Holmstrom Decl.); Opp. 19, but that does not render trivial the possibility the Corps will see things differently. The Corps has already reviewed substantial information on each topic, and that agency's disagreement with Plaintiffs' experts is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." Op. 30 (upholding Corps's analysis of landslide and spill risks and impacts; citations and internal quotation marks omitted).[8] This Court did not rule on the *merits* of Plaintiffs' expert opinions, meaning there is at least a serious possibility the Corps will be able to explain how the reports "did not actually create any substantial evidence of controversial effects" (Op. 34)—something that warrants remand without vacatur.

Plaintiffs also contend that the Corps "lacks discretion" whether "to prepare an EIS" if it

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[8] Plaintiffs new declarations are flawed, in any event. Contrary to their assertions, in the highly unlikely event of a spill there would be "a limited effect" on hunting and fishing. Ex. 13 (Stamm Decl.) ¶ 12. Benzene levels would not rise above toxic levels for local fish and wildlife, and the released oil would be contained soon after a spill. *Id.* ¶ 12. Plaintiffs' criticisms of the spill release models also display a fundamental misunderstanding of them. *Id.* ¶ 11. Because any spill will be contained within a small geographic area and its effects would be "limited," a potential release would not raise significant environmental justice concerns. As for likelihood of spills, the "bathtub" graph cited by one of Plaintiffs' declarants, *see* Third Kuprewicz Decl. ¶ 9, has no numbers on either axis, comes from an outdated 1996 report, and is inapplicable to DAPL, *see* Ex. 13 (Stamm Decl.) ¶ 7. It remains the case that the Tribes' reports are susceptible to serious criticism. *See* Dakota Access Br. at 8 n.1.

finds *effects* of a spill would be significant. Opp. 16 & 22-25. But "[a]n agency may find no significant impact if … the *combination* of probability and harm is sufficiently minimal." *New York v. NRC*, 681 F.3d 471, 478-79 (D.C. Cir. 2012) (emphasis added). Moreover, an EIS will be "unnecessary," "even if there is an impact of true significance," so long as "changes or safeguards in the project sufficiently reduce the impact to a minimum." *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006). Thus, the Corps can reaffirm its finding of no significant impact and its approval of the project in multiple "non-trivial" ways.

III. Ordering A Potentially Prolonged Halt To Pipeline Operations Would Cause Serious Disruptions And Unnecessarily Increase Environmental Risks.

An order shutting down—for a prolonged period—greater than 1,100 miles of infrastructure that delivers in excess of 300,000 barrels of crude oil *per day* would cause much more than "inconvenience." Opp. 25. Plaintiffs act as if replacements of that magnitude—*e.g.*, hundreds of rail cars and all associated equipment and personnel, D.E. 260-1, Ex. 2, AR 71230—can be summoned on short notice. But they point to no real-world precedent. They give no examples plausibly refuting declarations by those with actual industry experience that for a period of weeks or even months the inability to transition quickly over to other transportation methods will cause severe economic hardship up and down the supply chain: to oil producers, oil refiners, other pipeline companies that depend on connections to DAPL, employees of all of the above, consumers, and States and their citizens who rely on tax and royalties revenues. *See also* Ex. 12 (Hanse Decl.) ¶ 8 (explaining how many DAPL customers rearranged or ended long-term, contractual relationships with other parties in reliance on the availability of DAPL).[9] Nor can Plaintiffs refute the

[9] Plaintiffs contend that an Executive Vice President of Business Development for a major pipeline company with more than 30 years of experience in the energy industry, *see* D.E. 260-1, Hanse Decl., "isn't qualified to offer expert opinions" on "crude oil transportation," Opp. 27. But if Plaintiffs think someone with that background "is hardly in a position to offer meaningful input about what other people would do" in the event the pipeline shuts down, there is no reason to listen

harm to the government-permitting process if private actors no longer may rely in good faith on permits that can be supported by appropriate agency findings. These disruptive consequences—and more—warrant remand only.

Plaintiffs say Dakota Access and its customers "have only themselves to blame." Opp. 25. Apart from Plaintiffs ignoring the many *other* parties to whom the disruptions just noted extend, it was reasonable to complete and begin operating the pipeline in reliance on the rule of law. Twice Plaintiffs lost motions to pause the project while this litigation proceeded. Each time the courts found Plaintiffs unlikely to succeed on the merits and denied a halt to construction. Only with the pipeline *completed* do Plaintiffs now invoke a statute (NEPA) that they chose *not* to include in the two earlier efforts. Plaintiffs have themselves to blame for *their* choices. *See also Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 118 (D.D.C. 2011) (vacatur "would punish" intervenor "for following the Agency's directions"); *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (vacatur would impose disruptive consequences on third parties structuring business decisions in reliance on the rule). *All* large infrastructure projects entail litigation risk, yet no court has put developers to the Hobson's choice of either postponing any construction until litigation of all possible challenges ends, or forfeiting the chance to point out the disruptive consequences of vacatur. It would significantly delay (and likely kill) this country's largest infrastructure projects if they could be held captive to litigation that way.

Plaintiffs are also wrong to "question[ ]" whether "financial impacts" carry "much or even any weight" in NEPA cases. *Compare* Opp. 25 *with NRDC v. NRC*, 606 F.2d 1261, 1272 (D.C.

to *their* declarant, who has a bachelor's degree in civil engineering and has never worked in *any* industry. D.E. 272-5, Ex. A, Goodman CV (entire career in "consulting," with the great bulk of it working at his own firm). In any event, Plaintiffs ignore the other declarations, including that of the Pipeline Director for a trade association representing 640 participants in all parts of the oil and natural gas industry. D.E. 259-2, Murk Decl. for American Petroleum Institute.

Cir. 1979) (weighing "the social and economic costs of delay" before deciding whether to halt project during remand). The answer to Plaintiffs' question is in a case they cite. Right after the part of *Davis County Solid Waste Management v. EPA* that Plaintiffs quote, Opp. 4-5, the Court said that the "[m]ore important[ ]" reason not to vacate was that "leaving" the rule "in place will have no prejudicial effect" on the plant operators because the emissions standards would change "at most minimally." 108 F.3d 1454, 1459 (D.C. Cir. 1997).[10]

Plaintiffs dispute the disruption of vacatur, asserting that excess pipeline capacity and "alternative modes of transport" are available. Opp. 27-29; Goodman Decl. ¶¶ 4-9. That blinks reality. First, *their own* maps (Goodman Decl. ¶ 7) show that existing pipelines do not service the same markets as DAPL, which terminates in southern Illinois, and it would be necessary to build new infrastructure (*e.g.* gathering lines) or deploy costly and unsafe truck transport. Murk Decl. ¶ 11 (existing pipelines insufficient); Ex. 12 (Hanse Decl.) ¶¶ 5-8. Dakota Access and amici have also explained the concrete costs and difficulties of switching to rail in the short term. Plaintiffs offer only the conclusory speculation that perhaps extra trains and trucks will somehow materialize, as if owners of those means of transportation need not plan ahead through long-term contracts. Oil producers began preparing many months beforehand to switch over to DAPL once it came online. Murk Decl. ¶ 9. These long-in-the-making, extended-term arrangements cannot simply be unwound and replaced if DAPL must cease operating. Parties have based their drilling programs and purchase and sale agreements on the operation of the pipeline, and have built midstream

[10] *See also Hopper*, 827 F.3d at 1084 (D.C. Circuit weighs economic costs of vacatur—it "could be quite costly"—but deems it "imprudent" to "*begin* construction before" the intervenor could "ensure that the sea floor [is] able to support" its wind farm project (emphasis added)). Rather than question the relevance of economic disruption, Plaintiffs' cases instead show merely that *real* environmental harm can outweigh relatively *minor* economic effects (*e.g.*, $3 million or less), *Diné CARE*, 2015 WL 1593995 at *2; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1037, or that economic harm must be more than speculative, *Reed v. Salazar*, 744 F. Supp. 2d 98, 120 (D.D.C. 2010). Neither point applies here.

infrastructure in reliance on the pipeline as well. Plaintiffs grossly oversimplify what would be needed—and how long it would take—to find other ways to ship all of the oil now transported by DAPL. Murk Decl. ¶ 9; Ex. 12 (Hanse Decl.) ¶¶ 5-8.[11]

As noted above, *supra* note 5, Plaintiffs rely on cases where the environmental risks of not vacating were certain. It is just the opposite here: For one thing, even Plaintiffs concede that the vacatur remedy they seek would *itself* "present risks" to the environment. Opp. 29 (rail risks). And while Plaintiffs advance the questionable proposition that rail transport would be better for them and their members, the Court must consider risk of harm to all. Nobody denies that pipelines are both safer and more energy efficient *overall* than rail.

As for the potential corrosion damage from an extended shutdown, Plaintiffs miss the mark in arguing that "all pipeline operators must be prepared for, and explicitly plan for, the suspension of operations." Opp. 29-30. Brief shutdowns like those are nothing like a complete suspension of operations for an extended and unknown duration. (On that score, recall Plaintiffs' insistence that the remand include a time-consuming EIS.) Failure from internal corrosion *is* unlikely, but continued operations makes all risk even *less* likely.[12]

Bottom line, the statistical chance of a significant leak during the expected remand period (*i.e.*, through the end of 2017) for a one-mile stretch of *any* oil pipeline is about 1 in 3,600 (60

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[11] It makes no difference that the possibility of a shutdown was announced mid-June. Opp. 31. No court has required parties to impose vacatur on themselves (by switching to more expensive and less safe transportation means) before the court can itself decide on remedy.

[12] In trying to argue otherwise, Plaintiffs vastly exaggerate the odds *and* impact of a leak. Their own exhibit, ESMT 1257, proves an average of 60 significant crude oil pipeline incidents per year—not 283. *See* Opp. 33 (erroneously relying on data at ESMT 592-93 & n.171 for leaks of *all* pipeline types). Worse yet, Plaintiffs err *by a factor of 60* in saying the "average spill amount" is 47,000 barrels. Opp. 33. That is the average annual total for *all* significant crude oil incidents. ESMT 1257. This won't be the first time the Court needs to correct Plaintiffs for this *same* type of error. Op. 80 (CRST erroneously used the same exhibit to conflate the annual cost figure for *all* incidents with the *per-incident* cost average).

incidents per year = 20 incidents per four-month period divided by 72,562 miles, *see* ESMT 1255). That is consistent with this Court's rejection of Plaintiffs' challenges to the Corps' conclusion that spill risks are exceedingly low. Op. 27-31. Plaintiffs have identified no order of vacatur where likelihood of harm was so low, much less where the direct costs just to treat a shut-down pipeline would be tens of millions of dollars and take up to three months. *Cf. Alaska*, 580 F.2d at 486 (while "continued operations … might conceivably cause some environmental harm," that risk "is simply too small and too speculative to justify" halting operations); *Mont. Wilderness*, 408 F. Supp. 2d at 1035-36 (gas development "would have" negative wildlife *and* economic consequences) & 1038 (environmental harms "undeniable").

Plaintiffs alternatively seek equitable remedies. Without even trying to meet the standard for injunctive relief, Plaintiffs ask the Court to leapfrog the Corps on its remand work. The Corps will decide, based on the remand record, whether there is any basis to add the types of conditions Plaintiffs urge, with deferential judicial review to follow. *See* Op. 30 (resolution of factual disputes implicates agency expertise). Plaintiffs also have their facts wrong again. A PHMSA-approved response plan is in place, as is response equipment.[13] *Compare* Opp. 37 *with* Ex. 13 (Stamm Decl.) ¶ 4. The Court should reject Plaintiffs' effort to squeeze substantive judicial commands out of remedy briefing for claims brought under a procedural statute.

CONCLUSION

This Court should remand without vacatur.

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[13] No Court order is needed to involve SRST in future emergency planning. Dakota Access will do so voluntarily. Nor did Plaintiffs need an equitable remedy if they previously wished to send along descriptions of supposed "oversights and errors" in earlier plans. *See* Opp. 37.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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