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; Sara Jumping Eagle et al., Plaintiff-Intervenors, vs. U.S. Army Corps of Engineers, Defendant-Cross-Defendant, and Dakota Access, LLP, Defendant-Intervenor-Cross-Claimant.	**Civil No. 1:16-cv-01534-JEB (Consolidated Case Nos. 1:16-cv-01796 and 1:17-cv-00267)**

AMICUS BRIEF OF THE STATE OF NORTH DAKOTA IN SUPPORT OF DEFENDANTS AND OPPOSING VACATUR OF EASEMENT

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CORPORATE DISCLOSURE STATEMENT

The State of North Dakota is a state government, not a corporation, and therefore, no corporate disclosure statement is required under LCvR 7(o)(5) or Fed. R. App. P. 29(a)(4)(A).

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STATEMENT OF AMICUS CURIAE AND INTRODUCTION

In its March 25, 2020 Memorandum Opinion on Plaintiffs' Motions for Summary Judgment and Defendant U.S. Army Corps of Engineers' ("Corps") Cross-Motions for Summary Judgment, the Court remanded the matter to the Corps, ordering it to prepare an Environmental Impact Statement. ECF No. 496, pp. 2, 35, 42. However, the Court stopped short of vacating the easement for the Dakota Access Pipeline ("DAPL") that crosses the Missouri River. Id. at p. 42. The Court delayed its ruling on whether to vacate the easement, and ordered the litigants to submit briefs on the issue of whether the easement should be vacated during the remand. Id. Specifically, the Court requested that the parties address the two factors courts consider relative to the question of whether an easement should be vacated when a federal agency's National Environmental Policy Act analysis is remanded to the agency, in Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-151 (D.C. Cir. 1993). ECF No. 496, p. 42. As established in Allied Signal, "[t]he decision whether to vacate depends on '[1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequence of an interim change that may itself be changed.'" 988 F.2d 146, at 150-151 (citing Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)).

Court ordered vacatur, which would require DAPL to shutdown, would have significant disruptive consequences on North Dakota. The State of North Dakota submits this brief as amicus curiae specifically to address the second Allied-Signal factor, in order to provide the Court with additional information on the disruptive consequences that will directly impact North Dakota if the Court orders vacatur. North Dakota is the second highest oil and gas producing state, with a significant portion of its economy and tax revenue derived from the production of oil and gas. A Court ordered shutdown of DAPL would result in a serious reduction in economic

output in North Dakota and corresponding loss of tax revenue to the state.

The State of North Dakota is authorized by LCvR 7(o)(1) to file an amicus brief without consent of the parties and without leave of Court.

ARGUMENT

I. A Court Ordered Shutdown Of DAPL Would Be Severely Disruptive To The State Of North Dakota.

Under the second Allied-Signal factor, the Court should consider "the disruptive consequence of an interim change that may itself be changed.'" 988 F.2d at 150-151 (citing Int'l Union, 920 F.2d at 967). As this Court recognized in its Memorandum Opinion, vacatur "would 'carry serious consequences that a court should not lightly impose . . . .'" ECF No. 496, p. 42 (quoting Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101, 147 (D.D.C. 2017)).

A. Oil And Gas Production In North Dakota.

North Dakota is a small state in terms of population and overall economic output. Declaration of Joe R. Morrissette, Jr.[1] ("Morrissette Decl."), Ex. A, ¶ 4. Out of the 50 states, North Dakota ranks only 48th in population size and 46th for gross domestic product. Id. However, despite the small overall size of North Dakota's economy, North Dakota is a large producer of oil and natural gas. Id.; Declaration of Lynn D. Helms[2] ("Helms Decl."), Ex. B, ¶ 6. As a consequence of its abundant natural resources, a large portion of North Dakota's economy is based on oil and gas production, placing North Dakota second out of the fifty states in oil and gas production. Morrissette Decl., Ex. A,

[1] Joe R. Morrissette, Jr. is the Director of the North Dakota Office of Management and Budget. Morrissette Decl., Ex. A, ¶ 2. The basis of his knowledge as to the matters within his Declaration (Ex. A) are contained in paragraphs 2-3 therein.

[2] Lynn D. Helms is the Director of the North Dakota Industrial Commission Department of Mineral Resources and serves as a member of the North Dakota Advisory Council on Revenue Forecasting. Helms Decl., Ex. B, ¶¶ 2, 4. The basis of his knowledge as to the matters within his Declaration (Ex. B) are contained in paragraphs 2-4, and 9 therein.

¶ 4; Helms Decl., Ex. B, ¶ 6. The great majority of the oil and gas produced in North Dakota comes from the Williston Basin. The Williston Basin is a large sedimentary basin located in the north-central United States and south-central Canada with multiple geologic formations currently producing oil and gas. Declaration of Justin J. Kringstad [3] ("Kringstad Decl."), Ex. C, ¶ 5. The United States portion of the Williston Basin contains oil producing fields in the states of Montana, North Dakota, and South Dakota. Id. North Dakota is the largest oil producing state in the United States portion of the Williston Basin. Id. February 2020 is the most recent month with complete data[4] available to the state, showing the following production and activity that month:

- Daily production of 1.451 million barrels of oil and 3.1 billion cubic feet of natural gas
- 54 active drilling rigs
- 16,118 active oil and gas wells
- 2,091 inactive wells
- 1,694 approved drilling permits

Helms Decl., Ex. B, ¶ 6. At year-end 2019, oil production in the United States portion of the Williston Basin was estimated to be 1.53 million barrels per day, with North Dakota accounting for 1.4 million barrels per day. Morrissette Decl., Ex. A, ¶ 4; Kringstad Decl., Ex. C, ¶ 6. In total, approximately 524.2 million barrels of oil were produced in North Dakota in 2019. Morrissette Decl., Ex. A, ¶ 4.

B. Oil Transportation In North Dakota.

North Dakota accounts for approximately 12% of the crude oil produced in the United States. Morrissette Decl., Ex. A, ¶ 9. However, there is limited in-state capacity

[3]Justin J. Kringstad is the Director of the North Dakota Industrial Commission Pipeline Authority and serves as a member of the North Dakota Advisory Council on Revenue Forecasting. Kringstad Decl., Ex. C, ¶¶ 2, 4. The basis of his knowledge as to the matters within his Declaration (Ex. C) are contained in paragraphs 2-4 therein.

[4] Based on current estimates, it is possible that in light of the current economic situation, as many as 5,000 wells may now be shut-in. Helms Decl., Ex. B, ¶ 6.

for refining. Id. North Dakota has two oil refineries with a combined refining capacity of about 90,000 barrels of crude oil per calendar day, which is less than one-tenth of the state's daily oil production. Id. Consequently, continued oil production in North Dakota is dependent upon reasonable methods of transporting crude oil produced in the state to out-of-state refining facilities. Id. Oil production in the Williston Basin is transported through privately owned transportation systems to centers around the United States. Kringstad Decl., Ex. C, ¶ 5. Oil produced in North Dakota makes up the largest share of pipeline and rail transportation volumes from the region. Id. The most efficient and cost-effective method of transporting crude oil is through existing pipeline infrastructure, including DAPL. Morrissette Decl., Ex. A, ¶ 9. DAPL is the largest service provider in the region at just over 40% of regional egress capacity. Kringstad Decl., Ex. C, ¶ 6; Morrissette Decl., Ex. A, ¶ 9. Any reduction in pipeline capacity will increase costs of transporting North Dakota crude oil to refining facilities. Morrissette Decl., Ex. A, ¶ 9.

In the month of February 2020, North Dakota Industrial Commission Pipeline Authority estimated that 66% of U.S. Williston Basin oil production was moved by pipeline to refineries outside of the region. Kringstad Decl., Ex. C, ¶ 7. An estimated 19% of oil production was moved by railcar to refineries outside of the region. Id. Additionally, an estimated 5% of production was refined locally in North Dakota and 10% was estimated to be moved by truck north into the Canadian Williston Basin for further transport by pipeline or rail. Id. Long distance transportation by truck to most refining centers is generally not considered an economically feasible alternative to pipelines or rail. Id.

C. North Dakota Derives A Major Portion Of Its Budget From The Taxation Of Oil And Gas.

As a small state with a small population base and relatively small economy, North Dakota state government is extremely dependent upon revenues from its dominant industry, the extraction and production of oil and natural gas. Morrissette Decl., Ex. A, ¶ 4. This economic activity results in direct revenue of $4.9 billion over a two-year budget

period, based on the official forecast for the state's current two-year budget period (July 1, 2019 to June 30, 2021). Id. In comparison, the state expects to collect general fund revenues of $3.7 billion from sources other than oil and gas taxes. Id.

The state legislature has attempted to insulate the state general fund from the impact of fluctuations in oil and gas tax revenue by limiting the amount of oil and gas tax revenue allocated to the state general fund. Id. ¶ 5. The legislature has created a series of designated special funds in which oil and gas taxes are deposited. Id. Each fund is established for a specific purpose or program or to provide distributions to different levels of political subdivisions or tribal governments. Id. For the 2019-21 biennium, based on the official revenue forecast adopted by the 2019 legislature, those allocations are estimated as follows:

- $661 million, or 14%, allocated to cities and counties in areas where oil and gas are produced.
- $525 million, or 11%, allocated to tribal governments based on a revenue sharing agreement for production within reservation boundaries.
- $1.3 billion, or 27%, to the Legacy Fund, a constitutional state endowment fund.
- $213 million, or 4%, to the Foundation Stabilization Fund to support state school aid in the event of a revenue shortfall.
- $213 million, or 4%, to the Common Schools Trust Fund to support the public schools.
- $433 million, or 9%, to the Resources Trust Fund, to support water supply and flood control projects in the state.
- $400 million, or 8%, to the state general fund, to support state government operations and services to citizens.
- $200 million, or 4%, to the Tax Relief Fund, to support social services programs previously funded by county levied property taxes.
- $75 million, or 2%, to the Budget Stabilization Fund, to build the state rainy day fund and support government services in the event of a revenue shortfall.
- $250 million, or 5%, to county, city, township, and airport infrastructure.

- $518 million, or 11%, to the state Strategic Investment and Improvements Fund to support state government operations and specific one-time projects.

- $65 million, or 1%, to various other funds including lignite coal research, outdoor recreation and conservation, oil well plugging and site reclamation, and energy research.

Id.

North Dakota's 2019-2021 general fund revenues are strongly correlated to oil and gas activity. Id. ¶ 6. Direct allocations of oil taxes represent only 8% of total expected general fund revenues. Id. However, oil taxes accumulated in the Strategic Investment and Improvements Fund are often transferred into the general fund as a budget balancing measure. Id. For the 2019-2021 biennium, transfers of accumulated oil and gas taxes represent 10% of total general fund revenues. Id. Considering the total of oil tax allocations and transfers, nearly one-fifth of all general fund revenues come directly from oil and gas taxes. Id. To support general government operations and essential programs, the state is heavily reliant on sales, use and motor vehicle excise tax revenue, which for 2019-21 is expected to be $2.1 billion, or 44%, of all general fund revenues. Id.

In light of its heavy dependence on taxes generated from the oil and gas industry, an industry prone to fluctuations, North Dakota has taken additional steps to enable it to absorb short-term revenue shortfalls. The North Dakota legislature has established a Budget Stabilization Fund to provide a means to continue essential government services in the event of a revenue shortfall. Id. ¶ 7. The budget stabilization fund receives funding through transfers from excess general fund balances (over $65 million) at the end of a biennium, as well as a biennial transfer of $75 million from oil and gas taxes. Id. The Budget Stabilization Fund balance can be accessed in the event of a revenue shortfall, but only after budget reductions ordered by the governor. Id. The maximum balance in the Budget Stabilization Fund is set at 15% of general fund appropriations. Id. Although the Budget Stabilization Fund positions North Dakota to absorb short-term fluctuations in revenues, the fund is not sufficient to absorb the effect of a significant, ongoing change

in the state's revenue structure. Id.

North Dakota has a biennial budget process and is one of the few states with a biennial legislative session. Id. ¶ 8. The normal legislative session occurs from January to May of odd numbered years and is limited to a maximum of 80 days. Id. Significant reductions to the state's revenue outlook in the interim between regular legislative sessions is primarily addressed through executive authority to reduce spending authority and the ability to offset limited revenue reductions by accessing the Budget Stabilization Fund. Id. In exceptional circumstances, the legislature can convene in a special legislative session. Id.

During the first thirty-two months in which DAPL began operations (June 19, 2017 through February, 2020), based on oil taxes imposed under N.D. Cent. Code chs. 57-51 and 57-51.1, North Dakota realized an estimated $317 million in additional Oil and Gas Gross Production Tax revenue due to the decreased shipping cost associated with oil transported by DAPL, and higher price received for oil on the Gulf Coast. Declaration of Ryan Rauschenberger[5] ("Rauschenberger Decl."), Ex. D, ¶ 10. If DAPL is shut down, these increased oil tax revenues will disappear as production is shut in or diverted to higher-cost modes of transport. Id. North Dakota oil producers deduct transportation costs from the value of oil when determining the taxable basis for the state's oil extraction and gross production taxes. Id. Any increase in transportation costs thus results in a direct reduction in tax revenues. Id.

In addition to impacting the funding of the state government, DAPL and the oil and gas industry provide a substantial source of revenue to counties and Native American Tribes in North Dakota. Certain North Dakota counties assess DAPL with an annual ad

[5]Ryan Rauschenberger is the Tax Commissioner for the State of North Dakota and serves as a member and Secretary of the Board of the State Board of Equalization. Rauschenberger Decl., Ex. D, ¶ 2. Id. ¶¶ 2, 6. The basis of his knowledge as to the matters within his Declaration (Ex. D) are contained in paragraphs 2-6 therein.

valorem property tax based upon the presence of the pipeline within the county. The ad valorem property taxes assessed and collected by North Dakota counties from DAPL for 2018 are as follows: Dunn County $653,673; Emmons County $748,831; McKenzie County $1,520,539; Mercer County $511,720; Morton County $1,264,394; Mountrail County $658,238; and Williams County $2,179,289; for a total of $7,536,684. Id. ¶ 8. Similar amounts were paid by DAPL in 2019. Id. Further, a substantial portion of the oil produced in North Dakota is from development on Fort Berthold Indian Reservation and generates tax and royalty revenue for the Mandan, Hidatsa, and Arikara Nation, also known as the Three Affiliated Tribes and royalty revenue for individual tribal members as follows:

- Daily production of 364,642 barrels of oil (237,134 trust lands and 127,508 fee lands)
- 10 active drilling rigs (5 on trust lands and 5 on fee lands)
- 2,418 active oil and gas wells (1,797 on trust lands and 621 on fee lands)
- 326 approved drilling permits (258 on trust lands and 68 on fee lands)
- 4,134 potential future wells (2,991 on trust lands and 1,143 on fee lands)

Helms Decl., Ex. B, ¶ 7.

D. Disruptive Effects In North Dakota If DAPL Is Shut Down.

A Court ordered shutdown of DAPL, even if only temporary, would be highly disruptive in North Dakota and would have far-reaching consequences. It would severely impact North Dakota's economy, as well as state, local, and Tribal government funding.

Currently, around 300,000 barrels of oil per day are being transported from North Dakota to coastal markets by railroad. Helms Decl., Ex. B, ¶ 10. In 2014, the railroads were able to transport a maximum of about 800,000 barrels per day. Id. Based on historical data it could take two years to divert 500,000 barrels of DAPL's daily flows to rail transport, resulting initially in the shut-in of an estimated 8,700 active oil and gas wells decreasing over time to a final loss of 70,000 barrels per day and an estimated 1,450 oil

wells shut in. Id. Each of those wells represents 1.6 full time jobs. Id. The estimated cost to return each well to production is $25,000 to $50,000 and can be as much as $400,000 in some circumstances. Id. Returning wells to production also requires three to six months planning and scheduling. Id. History shows that 50-80% of the wells that are shut down are permanently abandoned. Id.

In addition, if DAPL is shut down, it is likely that a number of oil and gas operators in North Dakota will refocus their planned drilling activities from North Dakota to other areas, again assuming that the bulk of DAPL's flows can be diverted to rail transport. Id. ¶ 11. Ten of the top twenty operators in North Dakota have significant positions and activity in other unconventional plays that are closer to markets and have more stable pipeline capacity. Id. ¶ 12. Those ten operators currently operate 23 drilling rigs that generate approximately 3,450 full time jobs. Id. In 2012-2014 when pipelines were full and crude oil had to be shipped by rail, North Dakota drilling activity reduced 15% and moved to Texas, Colorado, and Wyoming. Id. In 2017 when DAPL started up, the operators increased North Dakota drilling activity 20%. Id. Shutting down DAPL is expected to result in loss of at least four to five drilling rigs and the associated loss of 600-750 full time jobs. Id. In addition, loss of those drilling rigs will result in seven to nine fewer new wells drilled per month and the associated loss of 11-14 new full-time jobs per month. Id. The job loss estimate was derived from a study done by the North Dakota Department of Mineral Resources in conjunction with North Dakota State University Department of Agribusiness and Applied Economics, and the Vision West project. Id. ¶ 13. This study looked at the average number of jobs per drilling rig and producing well in North Dakota. Id.

It is likely that a significant portion of DAPL's flows could not be diverted to rail due to insufficient rail capacity and low oil prices resulting from the COVID-19 pandemic. Helms Decl., Ex. B, ¶ 14. In that event, oil production in North Dakota would decrease even more sharply, and many more jobs would be lost. Id. North Dakota, however, has

not conducted a study examining the extent to which DAPL's flows can be diverted to rail under current economic conditions or otherwise. Id. Assuming, however, that only 300,000 barrels per day of DAPL's daily flows can be diverted to rail transport, shutting down DAPL could result in the shut in of an estimated 270,000 barrels or 5,600 active oil and gas wells. Id. Using the same study noted above, this would mean the temporary loss of around 8,950 full time jobs and permanent loss of 4,475 to 7,175 full time jobs. Id.

Further, as the second highest volume oil producing state, North Dakota is reliant on continued oil production and the ongoing collection of oil and gas tax revenues to support critical state government programs, including public elementary and secondary education, higher education, and health and human services. Morrissette Decl., Ex. A, ¶ 10. If DAPL was shut down and that shut down resulted in a decrease in oil production equal to the amount currently transported by the pipeline, the reduction in state oil and gas tax revenues would be approximately $2 billion during a two-year budget period, based on the current official revenue forecast. Id. As a state with a part-time citizen legislature that meets on a biennial basis, there are few options available to deal with such a sudden, drastic change in the state's revenue. Id. ¶ 11. An across-the-board budget reduction can be implemented by the executive branch without legislative involvement, but it would have a direct negative impact on state employees, state programs, and services to citizens. Id. The Budget Stabilization Fund provides a mechanism to cushion the budget during a short-term fluctuation in state revenues but would be of little benefit in the event of a long-term change in oil production activity and state revenues. Id. A long-term, ongoing reduction in state revenues from oil and gas taxes would result in the need to significantly reduce state services or significantly increase taxes on citizens. Id. To offset a $2 billion reduction in state revenues, for example, would require a doubling of the state's general sales, use and motor vehicle excise tax rate from 5% to 10%, an unfeasible solution that would give North Dakota the highest sales and use tax rate of any state in the nation by a wide margin. Id.

A scenario forcing DAPL to suddenly stop its oil shipping service would have immediate negative market and production consequences for a very large number of North Dakota stakeholders including, producers, royalty owners, and government entities. Kringstad Decl., Ex. C, ¶ 8. The only feasible alternative transportation solution would include a significant increase in the use of rail tank cars to deliver North Dakota oil to market. Id. An increase in crude by rail volumes sufficient to offset current pipeline deliveries by DAPL would take an unknown amount of time to assemble the required tank cars, engines, and crews, and to ensure market destinations would be prepared for a surge in rail volume. Id. During the unknown length of time required to shift large volumes of oil to rail transportation, likely several months or longer, it can be reasonably assumed that the only option for numerous wells would be to be curtailed or shut-in. Id.

The curtailment or shut-in of wells in North Dakota would have an immediate negative financial and operational impact on third party oil gathering companies and local natural gas gathering, processing, and transmission providers. Id. ¶ 9. Natural gas produced from the Bakken formation is produced together with the crude oil and cannot be produced independently if oil transportation options are constrained. Id. Attracting the necessary infrastructure investments to expand natural gas capture in North Dakota would become increasingly difficult if third party providers had additional uncertainty surrounding the ability of a producer to keep wells operating in the event of DAPL being required to cease operations. Id.

Additionally, a Court ordered shutdown of DAPL would be harmful to North Dakota state government and other stakeholders in the state due to increased transportation costs. North Dakota oil producers deduct transportation costs from the value of oil when determining the taxable basis for the state's oil extraction and gross production taxes. Morrissette Decl., Ex. A, ¶ 9. Any increase in transportation costs results in a direct reduction in tax revenues. Id. North Dakota oil producers typically sell their product at a price that is discounted from key benchmark price indicators in order to account for

transportation costs associated with the great distances to major refining centers. Kringstad Decl., Ex. C, ¶ 10. Price discounts have varied widely since increased oil development of the Bakken formation began in the mid-2000's. Id. ¶ 9. Price discounts in North Dakota are minimized when safe, reliable, low-cost transportation exists to move adequate volumes of oil to key marketing centers around the United States. Id. Pipeline transportation is generally considered to be the most reliable and lowest cost option for oil movement out of North Dakota. Id. If DAPL were to cease shipping service, even for a short duration, any and all incremental transportation expenses associated with the expansion of crude by rail would further reduce the realized price per barrel for North Dakota's royalty owners, producers, and tax revenue calculations. Id. Transportation rates on DAPL and rail vary by destination, shipper status, and contract terms. Id. The North Dakota Industrial Commission Pipeline Authority estimates that direct rail transportation expenses to Gulf Coast markets are generally $1-$3 per barrel higher than using DAPL. Id. Additional costs, such as loading, unloading, and car leasing, will further increase the all-in rail transportation expense. Id. Sales, use, and motor vehicle excise tax revenue has also become increasingly volatile and strongly correlated to oil and gas activity. Morrissette Decl., Ex. A, ¶ 6. During the oil price decline of 2015-2016, state sales tax collections fell by nearly 40%. Id. At the same time, oil and gas tax revenues fell by 50%. Id.

While the potential impacts of the COVID-19 pandemic are impossible to quantify due to rapidly changing oil prices, employment numbers, and capital investment plans, it is certain that a Court ordered shutdown of DAPL will result in greatly increased destabilization now and even more destabilization when oil and gas market recovery begins. Helms Decl., Ex. B, ¶ 15.

CONCLUSION

The State of North Dakota requests the Court proceed without vacatur, in order to avoid serious disruption to North Dakota's economy and a severe decrease in tax revenue to the state, both of which would result from a temporary or permanent shutdown of DAPL.

Respectfully Submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *et al.,*

Plaintiffs,

v.

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

Defendants.

Civil Action No. 16-1534(JEB)

EXHIBIT A:

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

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INTRODUCTION

The American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Institute ("API"), and the Association of Oil Pipe Lines ("AOPL") (collectively "Amici"), representing the interests of pipeline operators, upstream petroleum product manufacturers, and downstream refiners in North America, submit this Amicus Brief in support of Intervenor-Defendant Dakota Access, LLC ("Dakota Access"). Amici agree with Dakota Access that vacatur of the U.S. Army Corps of Engineers' ("Corps") easement for the Dakota Access Pipeline ("DAPL") is not warranted while the Corps completes the Environment Impact Statement ("EIS") required by this Court's March 25, 2020 opinion ("March Opinion"). [ECF No. 496]. Here, application of the two-factor test established by the U.S. Court of Appeals for the D.C. Circuit's opinion in *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) dictates that the Corps' easement for DAPL remain valid and in effect during the EIS remand process. That test requires that this Court assess, first, the "seriousness" of the deficiencies the Court identified in the Corps' decision and, second, the "disruptive consequences of an interim change that may itself be changed." *Id*.

First, while this Court's March Opinion identified issues relating to the Corps' assessment of important pipeline safety matters, these matters are directly addressed by the federal pipeline safety regulations that separately govern DAPL's continuing operations. Moreover, these regulations are administered and enforced by federal agencies other than the Corps. As directed by this Court's March Opinion, the Corps must address in an EIS controversy relating to: DAPL leak detection sensitivity; the extent to which Dakota Access' spill record should be taken into account in assessing DAPL's leak detection system; Dakota Access' ability to respond to a release from DAPL during winter conditions; and the appropriate

methodology for calculating a worst-case discharge from DAPL. Amici submit that the question of the "seriousness" of such matters for *Allied-Signal* purposes should be considered through the lens of existing federal regulation of these very matters by agencies other than the Corps. The critical and undisputable fact is that pipeline operations are exclusively and comprehensively regulated by the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration's ("PHMSA"). *See* 49 C.F.R. Parts 194 and 195. In light of PHMSA's pervasive regulatory framework, DAPL will operate safely while the Corps prepares an EIS on remand required by the Court's March Opinion. The Corps' additional environmental analysis (that will inevitably recognize PHMSA regulatory requirements) can thus be expected to support a Corps' decision to maintain the DAPL easement. Moreover, even if the Corps concludes through its preparation of an EIS that impacts resulting from DAPL are significant, that will not preclude the Corps from proceeding to affirm the DAPL easement.

Second, the severe and far-reaching consequences of a disruption of service on DAPL, including the resulting loss of jobs during a severe economic downturn, weigh heavily against vacatur. Ceasing DAPL operations for any period of time, let alone the year or more that it likely will take the Corps to prepare an EIS and to then make a further permitting decision, would lead to extremely disruptive adverse consequences that are contrary to the public and national interest, both at this time of national emergency and high unemployment and after the COVID-19 emergency abates. *See* Declaration of David Murk in Support of Amicus Brief, at ¶¶ 5-6 (hereinafter "Murk Decl."). As reiterated in federal directives, the nation relies on the critical and essential service provided by DAPL, including a network of companies comprised of producers, other pipeline companies, pipeline shippers, downstream refiners, manufacturers, retailers, and ultimately the general public. Substantial financial loss and uncertainty would

result from any DAPL shutdown, with a primary impact being borne by the employees of these companies who could very well lose their jobs. States and counties would also lose tax revenue, further adversely impacting the public and stifling the nation's economic recovery. *Id*. at ¶ 9. The certain harms resulting from a DAPL closure are made clearer by the fact that no feasible/viable pipelines or transportation modes exist that are capable of displacing the vital transportation function that DAPL is designed to serve by directly and affordably connecting the Bakken region to refinery markets in Illinois and the Gulf Coast. *See id*. at ¶ 11.

The continued operation of DAPL is thus in both the regional and national interest, and paramount to the American workers whose jobs directly and indirectly rely on the pipeline's operations.[1] Accordingly, the court should not vacate the Corps' easement in its remand order.

INTEREST OF THE AMICI

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

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

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

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's more than 600 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading standards-making body for the oil and natural gas industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations. API represents the oil and natural gas industry to the public, Congress, the Executive Branch of the Federal Government, state governments, and to the media.

AOPL is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by PHMSA. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and most cost-effective method.

The issue now before the Court is of great importance to Amici and their member companies. In particular, Amici and their members seek to ensure that crude oil produced in the Bakken region and transported on DAPL to refinery destinations in the United States continues without the serious adverse consequences that would be caused by an interruption of service. DAPL provides essential and irreplaceable pipeline capacity that is vital to sustaining regional

and local economies, maintaining large numbers of jobs at a time when the nation desperately needs employment opportunities to grow and not shrink, and furthering national energy security and independence.

BACKGROUND

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

The Federal Government's long-standing regulation of pipelines underscores the national interest in the continued and uninterrupted transportation of crude oil on DAPL. Recognizing the great importance of pipelines and other infrastructure, the current Administration has declared that "it is the policy of the executive branch to streamline and expedite . . . approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as . . . repairing and upgrading critical . . . pipelines," among other infrastructure. Exec. Order No. 13,766 of January 24, 2017, 82 Fed. Reg. 8,657, 8,657 (Jan. 30, 2017), *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*. This is because "America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families." Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 24, 2017), *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (infrastructure includes "pipelines").

The Obama Administration also recognized the importance of pipelines: "rising production is outpacing the capacity of pipelines to deliver the oil to refineries," and the only option is therefore for new pipelines to be constructed or for existing pipelines to be reconfigured to meet that demand and "enhance our Nation's energy security." *See* Memo. of March 22, 2012, *Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects*, 77 Fed. Reg. 18,891, 18,891 (Mar. 28,

2012) ("2012 Presidential Memorandum"). Obama Presidential Policy Directive 21 also identifies the Energy Sector as uniquely critical because it provides an "enabling function" across all critical infrastructure sectors.[2] These findings highlight the fundamental role that crude oil pipelines like DAPL play in satisfying America's energy needs and its economy.

More than 80 percent of the country's critical energy infrastructure is owned by the private sector, supplying fuels to the transportation industry, electricity to households and businesses, and other sources of energy that are integral to growth and production across the nation. In furtherance of national energy policy and security, North America's private sector has funded the establishment of an extensive pipeline system that safely and efficiently carries more than 21 billion barrels of liquid products each year.[3] Pipelines such as DAPL play a vital role in safely and reliably transporting significant volumes of unrefined petroleum products from extraction points to refinery destinations in North America and beyond. Such pipelines enable "the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life."[4] Pipelines are also one of the safest and least costly ways to transport energy products. The more than 218,000 miles of pipelines in the United States safely deliver hundreds of billions of tons of liquid petroleum products per mile each year.[5]

The North American crude oil industry is complex and interrelated. The inability to transport crude oil on one pipeline not only impacts the owner, operator and users of that

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[2] *See* https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.
[3] *See* https://www.aopl.org/documents/en-us/d904059a-c130-41f9-b8da-3ca7e100ad4a/1.
[4] *See* PHMSA, General Pipeline FAQs, *available at* https://www.phmsa.dot.gov/faqs/general-pipeline-faqs.
[5] *See* https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-hazardous-liquid-or-carbon-dioxide-systems.

pipeline, but also: (i) the many upstream producers who extract crude oil and are otherwise unable to transport their crude to market; (ii) the upstream pipeline companies that tie-into downstream pipeline, such as DAPL; (iii) the shippers, independent of the pipeline owner/operator, who pay for the transportation of crude oil on a pipeline and profit from sales of that crude to refinery customers; (iv) the downstream liquid terminal operators who store oil; (v) refiners and manufacturers who produce end-use products; (vi) the retailers who sell the end-use petroleum products to consumers; and (vii) consumers whose jobs rely on the continued and steady operation of all of these companies, who may otherwise face potentially higher prices for gasoline as a result of pipeline outages, and who require such products to support daily life (e.g., fuels for heating homes, running cars, etc.). Every part of this complex web of goods and services would be directly impacted were crude oil service to cease on a major pipeline like DAPL.

Nor can U.S. energy demands be satisfied without a fully-functioning pipeline system. Pipelines provide vital access to secure and reliable supplies of North American crude oil; reduce the nation's reliance on imports from nations that are less stable or unfriendly to U.S. interests; ensure refineries in the U.S. continue to operate at a high utilization rate and receive the type of oil needed to satisfy public demand for petroleum products; generate millions of dollars of tax revenue for communities along the pipeline routes that provide funding for schools, roads and other community needs; and most importantly at this juncture in the nation's history provide jobs to thousands of U.S. workers.

The national importance that such pipelines play is further emphasized by the fact that the vast oil volumes that pipelines safely transport cannot be easily or feasibly replaced by other transportation modes. It would, for example, take a constant line of tanker trucks, about 750 per

day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest-sized pipeline.[6]That is an impossibility, however, because no tanker truck fleet or rail infrastructure exists to displace crude volumes efficiently and safely transported by pipeline directly to refinery destinations throughout North America.

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

Consistent with the broad national interest in energy, the Federal Government has for decades occupied virtually the entire field of regulating pipeline operations. First, the operation and maintenance of a crude oil pipeline are extensively regulated by PHMSA pursuant to the Pipeline Safety Act ("PSA"), 49 U.S.C. §§ 60101, *et seq*. PHMSA's regulations govern all facets of pipeline operations, including design, specifications, construction, operation, and maintenance so as to ensure safety. *See, e.g.*, 49 C.F.R. Part 195. PHMSA regulations, for example, dictate the design and specifications for all segments of a pipeline (49 C.F.R. § 195.200, *et seq*.) and the pressures at which such pipelines may be operated (49 C.F.R. § 195.406). Those regulations further establish the frequency within which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even potential threats must be inspected and repaired (49 C.F.R. § 195.452). PHMSA regulations further address possible releases, establishing the procedures under which an operator is to control a pipeline, including leak detection capabilities (49 C.F.R. § 195.452(i)(3)) and procedures for responding to alarms or triggers that may be indicative of a release (49 C.F.R. § 195.446); the placement of valves that may be remotely shut to minimize a potential release (49 C.F.R. § 195.116); and requirements for alarms to notify a control room in the event of a potential release (49 C.F.R. § 195.446(e)). The PSA preempts any State or local

[6] *See* https://www.phmsa.dot.gov/faqs/general-pipeline-faqs.

government from implementing any such matters concerning pipeline safety. *See* 49 U.S.C. § 60104(c).

Second, to respond to, contain, and minimize a release to the environment (should one occur), the federal government has imposed extensive emergency response planning requirements under the Oil Pollution Act ("OPA"), also administered by PHMSA for pipelines such as DAPL. *See* 33 U.S.C. § 1321. In accordance with OPA, pipeline operators are required to prepare and implement comprehensive emergency response plan documents, which include extensive and detailed tactics and strategies to respond to a release from regulated facilities, including pipelines, storage tanks, and vessels. These robust plans are designed to: (i) ensure that a release of oil is quickly contained; (ii) direct initial clean-up efforts to mitigate adverse consequences to natural resources; and (iii) establish procedures for coordinating with state and federal agencies regarding a long-term response effort. *See* 49 C.F.R. Part 194.

Third, should any release of crude oil into waters of the United States result from a pipeline spill, the Clean Water Act ("CWA") establishes a liability framework under which the Federal Government may seek civil or criminal penalties and impose injunctive measures applicable at any facility from which a release has occurred or is threatened. *See, e.g.*, 33 U.S.C. § 1321. The CWA, as amended by OPA, also sets forth requirements for owners and operators of facilities from which oil has been discharged to clean-up, remediate, and restore natural resources in accordance with administrative orders issued by the U.S. Environmental Protection Agency ("EPA") (for onshore spills) and the U.S. Coast Guard ("Coast Guard") (for offshore spills).

Fourth, the CWA establishes the Oil Spill Liability Trust Fund, which provides local governments and the public with the ability to recover any damages or costs (including natural

resource damages) that may be incurred as a result of an oil release. *See* 33 C.F.R. Part 136. Thus, any individual, community, or resource – including natural or cultural resources of importance to Native American Tribes – that may be harmed by an oil spill will be fully compensated by the Oil Spill Liability Trust Fund for any and all recoverable costs and damages, and those funds will be recovered by the Federal Government from the pipeline owner and/or operator. Accordingly, for any release from a pipeline, it is the pipeline company that is ultimately and solely held financially accountable.

Notably, federal statutes assign the Corps *no role* in regulating pipeline safety, liability for releases, or emergency response. Thus, while the EIS ordered by the Court in this case will assess pipeline spill risks on lands subject to Corps jurisdiction, the reduction of such risks is not primarily the Corps' role, but rather that of other agencies that regulate DAPL and other interstate petroleum pipelines. In other words, by virtue of the ongoing and extensive regulation administered by other agencies, the DAPL pipeline will be no less safe based on whether or when the Corps completes an EIS consistent with this Court's March Opinion. While the Corps could impose mitigation measures identified as part of the EIS process, any such measures would be merely supplemental to the extensive federal regime that already occupies the field of regulating pipeline safety and operation.

In sum, there is a broad and pervasive federal regulatory regime in place to protect against potential releases of crude oil from pipelines. Pipeline companies ensure that their pipelines operate safely and without a threat of release in accordance with PHMSA regulations. Should a release occur, federal law ensures a prompt response and cleanup of any released crude oil at the direction of EPA and/or the U.S. Coast Guard. Any individuals, including tribes,

harmed as a result of a release may immediately be reimbursed by the Federal Government, which in turn collects costs from the pipeline company as the responsible party.

ARGUMENT

Amici address below whether the Court should vacate the Corps' easement for DAPL under the two-factor test articulated in *Allied–Signal, Inc.*, 988 F. 2d at 150-51, which requires the Court to consider: (1) "the seriousness of [an agency's errors]" and (2) "the disruptive consequences [that would result from vacatur]." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). "Neither [*Allied-Signal*] factor is dispositive, as 'there is no rule requiring either the proponent or opponent of vacatur to prevail on both factors.'" *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) (citing *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015). Instead, whether an agency's decision should be vacated "'turns on the Court's assessment of the overall equities and practicality of the alternatives.'" *Id.* (citing *Burwell*, 139 F. Supp. 3d at 270 (remanding without vacatur when the first factor favored vacatur but the second did not)).

Mandatory vacatur in the setting presented before the Court "is simply not the law." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). The Court should conclude that the application of the *Allied-Signal* factors dictates that the Corps' easement for DAPL remain intact throughout the Corps' remand process, as explained in the sections that follow.

I. The Deficiencies Identified by this Court Do Not Rise to the Level of Seriousness Requiring Vacatur Given the Overlay of Existing Federal Regulation

The Corps can conduct a full and fair EIS, including assessment of controversy relating to potential spill and operational issues, while the easement for DAPL remains in place. The "seriousness" of an agency's error under *Allied-Signal* is not measured against some absolute scale according to which any erroneous failure to prepare an EIS is so "egregious" as to preclude remand without vacatur as a matter of law. Instead, seriousness is considered in terms of the likelihood that the agency's decision may be re-affirmed after correcting its error.

The fact that an EIS must now be prepared by the Corps is no reason to vacate the easement for DAPL. Courts have in fact remanded without vacating agency action in similar circumstances while the agency completes an EIS. *See, e.g.*, *Ocean Advocates v. U.S. Corps of Engineers*, No. C00-1971L, 2005 WL 2035053, at *2 (W.D. Wash. Aug. 22, 2005) (remanding to the Corps along with instructions to prepare an EIS to evaluate whether to "revoke the permit or place conditions on the operation of the [project] if necessary to ensure compliance with the law"); *Backcountry Against Dumps v. U.S. Dep't of Energy*, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487 at *6 (S.D. Cal. Aug. 29, 2017) (ECF No. 128) (declining to vacate the permit after finding the agency had prepared a deficient EIS that ignored an alternative and omitted analysis of relevant impacts; but the court found that the errors were capable of being corrected). The Court should reach the same conclusion here for the several reasons discussed below.

A primary question under the first *Allied-Signal* factor is whether the Corps may "reach[ ] the same result" on remand and reaffirm its substantive decision to reissue the DAPL easement when fully informed by an EIS. *Black Oak Energy, LLC v. F.E.R.C.*, 725 F.3d 230, 244 (D.C. Cir. 2013); *see also Williston Basin Interstate Pipeline Co. v. F.E.R.C.*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an

adequate explanation for its actions"). Here, the results of the extensive evaluation and consideration of DAPL previously conducted by the Corps provide sufficient basis to believe that the Corps *may* arrive at the same substantive decision to grant the easement for DAPL to satisfy the first prong under *Allied-Signal*. *Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 97-98 (remanding without vacatur where "it is at least possible" that the agency could come to the same decision on remand).

The controversy-related deficiencies identified in the Court's March Opinion are primarily factual determinations that the Corps can address on remand, but which do not prevent the Corps from arriving at the same decision to issue the easement for DAPL. This is because NEPA is a procedural statute only; it does not "mandate particular results." *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015). Accordingly, the Corps may reaffirm its decision to issue the DAPL easement even if it ultimately concludes that the impacts further assessed in the EIS, including those resulting from any potential leaks or Dakota Access' ability to respond to a release, are significant. *See Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 68 (D.D.C. 2010), *aff'd in part, rev'd in part*, 661 F.3d 1147 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012) (finding project impacts "significant enough to require preparation of an EIS," but stating "[i]t is important to note that the preparation of an EIS does not foreclose the CCTC project; it simply mandates the Corps to follow NEPA's procedures.").

Further, the "seriousness" element of Allied Signal should be measured in this unique case in light of the fact that the four issues requiring more study by the Court's March Opinion relate to issues that are ***exclusively and comprehensively regulated by PHMSA and other federal agencies***. *See, e.g.*, *Sierra Club v. U.S. Forest Service*, 828 F.3d 402 (6th Cir. 2016) (recognizing that PHMSA is the federal agency responsible for regulating the safety of pipelines,

including spill risk, and that the agency granting the right to cross federal lands was not). Specifically, first, PHMSA regulations establish requirements for leak detection on pipelines, including requirements to identify leaks capable of identification at the sensitivity levels possible with available technology. 49 C.F.R. § 195.452(i)(3)(requiring that "[a]n operator must have a means to detect leaks on its pipeline system."). The Corps' EIS will not change the sensitivity at which DAPL operates its leak detection systems in conformance with PHMSA regulations.

Second, PHMSA regulations expressly require that a pipeline operator's leak detection system must account for that pipeline's spill record – specifically, 49 C.F.R. § 195.452(i)(3) provides that "[a]n operator's evaluation [to identify an appropriate leak detection system] must, at least, consider . . . *leak history*," among other factors (emphasis added). Thus, Dakota Access is already required to assess and take into account its spill record in order to develop a PHMSA-compliant leak detection system for DAPL.

Third, PHMSA's regulations governing the preparation of emergency response plans require that the operator identify adequate resources to address a "worst case discharge," 49 C.F.R. § 194.107(a), which is "the largest foreseeable discharge of oil, including a discharge from fire or explosion, in ***adverse weather conditions***." 49 C.F.R. § 194.5 (emphasis added). Under PHMSA's regulations, "adverse weather" includes "ice conditions, temperature ranges, weather-related visibility, significant wave height." *Id*. Accordingly, Dakota Access' emergency response plan approved by PHMSA must already identify personnel, equipment, and strategies to respond to and mitigate a potential release from DAPL in winter (including ice) conditions. In a recent proposed rulemaking PHMSA has reaffirmed the need for operators to take into account adverse weather conditions in identifying adequate equipment, personnel, and strategies in a response plan. *See* 85 Fed. Reg. 21,140, 21,144 (April 16, 2020) (PHMSA is

proposing to "consider adverse weather in § 194.107 when developing" a response plan; adverse weather "is an important consideration for planning the spill response").

Fourth, PHMSA's regulations also establish the precise methodology for calculating the worst-case discharge for a pipeline, which is based on the largest volume that could be released between valve-to-valve segments. 49 C.F.R. § 194.105; *see also Nat'l Wildlife Fed'n v. Sec'y of the Dep't of Transp.,* 374 F. Supp. 3d 634, 650 n.12 (E.D. Mich. 2019) (the PHMSA worst-case discharge "calculation yields a conservative estimate of the worst-case discharge volume regardless of weather conditions") (internal citation omitted). While the Court believes that commenters on the Corps' environmental assessment call into question the validity of the methodology employed to calculate the worst-case discharge from DAPL so as to warrant the preparation of an EIS, the fact remains that the maximum discharge for the pipeline is simply and accurately calculated based on the throughput on the line and valve locations, inclusive of the volume that may be released before the valves are closed.

Further, as discussed above, in the event of a discharge EPA and the Coast Guard would be involved in spill response efforts in their capacities assigned by the OPA. As with pipeline safety matters, Congress has assigned no role to the Corps.

Because DAPL leak detection and spill response is fully regulated by PHMSA and other agencies, vacatur would not advance any legitimate pipeline safety concerns that are to be assessed in the Corps' EIS process; those safety concerns are already the subject of strict federal oversight. *See Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1050 (10th Cir. 2015) (concluding that "the risk of oil spills fell within the domain of other agencies" (*i.e.*, PHMSA), and not the Corps). Unlike, for example, EPA or the Coast Guard, the Corps possesses no authority under the Clean Water Act (33 U.S.C. § 1321) to impose injunctive measures to prevent potential

releases of crude oil into waters of the United States. Nor does the Corps regulate spill preparedness measures under 33 U.S.C. § 1321(j). The Corps' EIS may thus provide information that will be relevant to the permitting decision and could conceivably result in the imposition of mitigation measures over and above federal regulatory requirements. However, while one might speculate about what the Corps might do following an EIS (and notably it has proposed no mitigation measures to date) the DAPL pipeline will operate safely under federal regulation in the interim.

For the foregoing reasons "it is at least possible" that, upon completing the EIS, the Corps may justify its original decision on remand. This warrants that the DAPL easement not be vacated in the interim and that DAPL be allowed to continue to operate consistent with its existing leak detection and spill response requirements imposed by federal law. *Sugar Cane Growers*, 289 F.3d at 97-98; *see also Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."). The Corps' easement should thus not be vacated under the first *Allied-Signal* factor and the Court thus need not reach the second factor addressed next.

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

The second *Allied-Signal* factor—disruptive consequences resulting from vacatur—also weighs against vacatur of the Corps' easement for DAPL. In other situations where vacatur would cause more harm than maintaining the status quo during the remand period, this Circuit has recognized that remand without vacatur is appropriate. *See Ctr. for Biologic Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1987) (per curiam); *accord Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528

(D.C. Cir. 2009) (per curiam). Other courts have concluded that an agency's decision should not be vacated where doing so prevents use of a much-needed resource. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (declining to vacate approval of an electric power plant where "vacatur would pave the road to legal challenges to . . . construction that could well delay a much needed power plant") (applying *Allied-Signal*).

Here, the significant "disruptive consequences" in terms of job losses, energy supply chain disruptions and other adverse economic consequences of rescinding the Corps' easement far "outstrip the consequences" of allowing DAPL operations to continue. *North Coast Rivers Alliance v. U.S. Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *11 (E.D. Cal. Dec. 16, 2016) (granting the federal defendants' motion for voluntary remand without vacatur of the NEPA documents that applied to water contracts). Vacating the Corps' approvals and ordering DAPL operations to cease would have serious adverse economic impacts throughout the oil industry, hitting local and regional economies harshly due to the unavailability of feasible transportation alternatives in the Bakken region. *See* Murk Decl. ¶¶ 5- 6.

DAPL plays an integral role in the regional economy, transporting over a third of all oil produced in the Bakken. *Id*. ¶ 7. Currently, the Bakken is producing 1.45 million barrels per day, but only has pipeline and local refining takeaway capacity of 1.4 million barrels per day, inclusive of the 570,000 barrels per day transported by DAPL. *Id*. Since the pipeline was placed into service in 2017, DAPL has enhanced market access to regional-produced crude by creating the most cost-effective solution for the transportation of North Dakota crude to sought-after refinery markets. *Id*. at ¶ 10. The June 2017 startup of DAPL, in fact, marked the first time since 2011 that pipeline capacity was made available to not only finally meet existing demand, but to grow production considerably. *See id*. Also, because the Bakken produces high quality,

low-sulfur crude that is considered to possess highly desired characteristics for the production of gasoline, diesel, and jet fuel, Bakken crude costs more on a per-barrel basis and thus must be transported to specific refinery markets that are willing to pay for its higher cost. *See id*. DAPL was the first (and indeed remains the only) pipeline to provide an economic conduit to transport higher-priced Bakken crude directly to refinery markets in Illinois and the Gulf Coast that require and prefer it for production of finished products. *Id*. The vast volume of crude oil that is shipped on DAPL on a daily basis is worth over $6.3 million, or more than $190 million each month that DAPL remains in operation. *Id*. at ¶ 8. If DAPL were to be taken out of service for the year or more that it could take the Corps to prepare an EIS and issue a further permitting decision, the direct financial impact of the stalled crude deliveries would be staggering.

The critical and essential service DAPL performs remains unchanged even in the face of the current economic downturn. Some reduction in Bakken crude oil production is expected in the coming months due to lower crude prices. *Id*. at ¶ 12. However, any such reduction is expected to be far less than the total 570,000 barrels per day transported by DAPL. *Id*. More importantly, to the extent that Bakken production levels are reduced by any level, rail transport of Bakken crude will be the first to see declines because rail transport costs more than pipeline on a barrel-per-mile basis. *Id*. A reduction in Bakken production would result in fewer barrels transported on various existing pipelines; however, no (or only a very slight) reduction on DAPL would be expected because DAPL is the critical infrastructure that makes continued Bakken production economical when crude prices remain so low. *Id*. In other words, DAPL will remain the key outlet for Bakken oil even in a downturn, and its importance relative to other, more costly transportation outlets will only grow.

DAPL's closure would be devastating to regional producers, to refineries and to the persons who depend on it for their employment. That is because DAPL is crucial to providing an efficient, low-cost transportation option for Bakken crude; it was built for exactly that reason, i.e., to fill a transportation void and thus allow Bakken oil to reach its market at a cost that the market demands. *See id*. at ¶¶ 10-11, 13. No existing pipeline system other than DAPL has the ability to efficiently and directly transport Bakken-produced crude oil to the refinery markets that depend on Bakken crude. As a result, the use of other, more circuitous pipelines to reach the refinery markets that are willing to pay for higher-priced Bakken crude would become uneconomical because this would drastically increase transportation costs as compared to DAPL. *See id*. at ¶¶ 11, 13. Further, assuming that Bakken production levels drop due to short-term COVID-related macroeconomic conditions, a DAPL shutdown would cause further reductions in production levels because, as noted, DAPL is the primary transportation mode that makes production economical. *Id*. at ¶ 13. The closure of DAPL, in other words, would result in a downward spiral throughout the region, prompting the closure of even more production wells, and the consequent loss of even more jobs, than may otherwise close in the current economic climate. *See id*.

This is problematic not only for producers, but especially for their employees. The shut-in of existing wells and lack of continued well development in the region due to the unavailability of affordable transportation options would be expected to result in "significant job loss" throughout the North Dakota production region. *Id*. There is also no certainty that such jobs would return – closed (i.e., shut-in) wells may not ever produce at the same level once/if reopened and producers may choose to never reopen the wells at all for other financial reasons,

leaving existing employees stranded indefinitely if a DAPL-like solution is not made immediately available. *See id.*

A drastic reduction in Bakken production would also come at exactly the wrong time for our nation's economy. Not only would thousands of U.S. workers likely lose their jobs, but continued Bakken production is needed in order to meet the rapid increase in demand for gasoline, diesel, and jet fuel that is expected once the current COVID-19 crisis has abated. While oil prices in the region remain historically low right now, volumes continue to ship on DAPL and the volumes transported will increase once COVID-19-related restrictions begin to be lifted throughout the country. *Id*. ¶ 14. As discussed above, DAPL must be in place to allow North Dakota production to remain economical; if DAPL were taken out of service, a significant production shortfall in the Bakken region would develop. *Id*. That could only be avoided if existing production wells that are DAPL-dependent continue to operate during the current slowdown and new investment/development occurs. *See id*. On the other hand, it could take the Bakken region several years to recover if DAPL were shutdown, and only then if DAPL were placed back into service or a pipeline functionally identical to DAPL were constructed and placed into operation. *Id*.

Downstream refineries, which include Amici members, will obviously also be significantly and adversely impacted by any DAPL shutdown. *Id*. ¶ 15. As noted above, refiners in Illinois and the Gulf Coast rely on the transport of Bakken crude for its specific, and highly desirable, characteristics. *Id*. at ¶¶ 10-11. Each refinery is currently optimized to refine a particular type of crude oil. *Id*. at ¶ 15. Crude oils have different properties, including API gravity (heavy, medium, light crudes), sulfur (sweet/sour), total acid number, paraffins, and a host of other characteristics. *Id*. Each refinery that receives DAPL volumes is thus configured to

refine the specific properties of that delivered crude oil, which includes a very low sulfur content. *Id*. Changes to a different crude may cause the refineries to incur adjustment costs during reconfiguration. *Id*. Also, the purchase of a substitute crude may be more expensive and of a lower quality than Bakken crude, in turn leading to higher refining costs to produce a similar product. *Id*. As a result, employees at such refineries "could lose their jobs." *Id*.

Further, Dakota Access is not the only pipeline company that would be adversely impacted by a DAPL shutdown. *Id*. ¶ 16. Pipeline companies have constructed and developed gathering lines that collect Bakken crude from production sites and feed that crude directly into the DAPL pipeline. *Id*. To the extent that DAPL were shutdown, the existing pipeline infrastructure operated by these companies would have no utility – *i.e*., they would transport oil to a dead-end where DAPL previously operated to transport their volumes onward to refinery destinations. *See id*. The only option would be for these companies to construct new infrastructure to connect their pipelines to interstate pipelines. *Id.* However, it is highly doubtful that the necessary investment in pipeline expansion would be made in this economic climate and with potential Bakken contraction. *See id*. Some existing gathering lines may not be able to be reconfigured at all, thereby causing their shutdown as a result of any order by this Court requiring the shutdown of DAPL. *Id*. Their shutdown would consequently lead to job losses in a time where our country's unemployment levels are already staggering. *Id*.

There is also no doubt that DAPL operations benefit local and regional economies up and down the supply chain. *Id*. at ¶ 9. In 2018, DAPL paid taxes of $7.6 million to North Dakota and $22.5 million to Iowa, which does not account for taxes and other revenue generated for states by producers and other third parties that use DAPL. *Id*. This revenue, which is so critical during the country's economic downturn, would thus be lost. Aside from increased tax revenue,

the operation of DAPL also supports additional annual economic activity for surrounding states. *Id*. DAPL thus both directly and indirectly creates jobs throughout the region, and its closure would have a domino effect, lessening revenue and annual sales, thereby leading to "higher unemployment in these states." *Id*.

Nor is rail a viable alternative to ship all of the DAPL volumes. *Id*. at ¶ 17. The usage of rail to transport Bakken-produced crude occurs at times when the price per barrel for Bakken-produced crude has made the use of higher-priced rail transport economical. Now, however, with the drastic lowering of crude prices, rail is not an economic option for Bakken producers to move DAPL quantities, and (as noted above) significant declines in rail usage out of the Bakken are expected. Namely, if faced with a choice of continuing or not to transport oil on rail following a DAPL closure, it is possible that many producers will choose to shut-in their wells, deciding that continued transportation in the face of increased rail transportation costs is uneconomic. *See id*.

In addition, even if rail were an economically viable alternative to pipeline transport (which it is not), new rail infrastructure would first be needed. *Id*. at ¶ 18. Namely, new rail terminals and pipelines connecting to those terminals would need to be constructed to link Bakken-produced oil to existing rail infrastructure. *Id*. This would require significant financial investment, not only in new rail loading facilities, but also in additional rail tank cars; and it is almost certain that this mandatory investment will not occur in the current economic climate. *Id*. Even if such investment were to be made, there is no certainty that existing rail lines could reach refineries that demand DAPL crude on a per-mile dollar basis that producers/shippers are willing to pay. *Id*.

CONCLUSION

A closure of DAPL would be devastating to our nation's economy, the petroleum industry, and its many employees. The positive economic benefits resulting from DAPL would come to an abrupt end if this Court were to order the pipeline's operations to cease. These extensive adverse impacts at a local, regional, and industry-wide level are reason alone for this Court to order DAPL operations to continue while the Corps prepares its EIS. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 98 (2019) (declining to vacate while agency prepared EIS under second *Allied-Signal* factor); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (despite the flaws in the agency's NEPA process, the court reasoned that the "delay and trouble vacatur would cause [were] severe" and the potential job losses and electricity blackouts would be "economically disastrous" resulting from delay in the "much needed power plant."); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1290 (11th Cir. 2015) (declining to invalidate a national Clean Water Act permit on the grounds that "vacatur could suspend a substantial amount of surface mining in the state of Alabama"); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1232 (D. Colo. 2015) (delaying entry of vacatur order despite NEPA defects on grounds that immediate vacating of mining permit would result in layoffs and disruption of power plant operations), *order vacated on other grounds, appeal dismissed*, 652 F. App'x 717 (10th Cir. 2016); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1116 (E.D. Cal. 2013) (declining to vacate national forest plan despite NEPA defects due to harm vacatur would cause to timber and forest products industry in Sierra Nevada region).

For the foregoing reasons this Court should allow DAPL operations to continue while the Corps prepares the EIS required by the Court's March Opinion.

RESPECTFULLY SUBMITTED this 29th day of April 2020.

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CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on April 29, 2020, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGALALA SIOUX TRIBE; Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE; SARA JUMPING EAGLE, ET AL., Plaintiff-Intervenors, 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 *AMICUS CURIAE* CONSUMER ENERGY ALLIANCE
IN OPPOSITION TO VACATUR ON REMAND

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Consumer Energy Alliance ("CEA") is a national trade association with membership comprised of a diverse group representing families, businesses and various industries, including labor, manufacturing, agriculture, small business and conservation organizations. Its mission is to work alongside dedicated citizens and community leaders nationwide, advocating for sensible energy and environmental policies for all consumers.

Since its inception in 2006, CEA has helped advance the needs of individuals, families, and businesses, both large and small, who have been forgotten in the energy debate. These groups include those who can least afford to pay more for fuel and utility bills or who are struggling to meet payroll and stay open.

CEA's individual members are those, like each of its friends and neighbors, who each and every day, are trying to make a living, provide for their families and employees, and contribute to society. Its organizational members include a collection of companies from across the U.S. that employ people, grow and raise the food we eat, and produce and sell the goods that all Americans use and rely on daily. They are farmers, academia, conservation groups, truck drivers, laborers, trades-people, energy producers, manufacturers, and small business owners.

As an organization advocating for consumers across this nation, CEA continues to stand by its commitment to ensuring families – especially low-income individuals and those on fixed incomes or living paycheck-to-paycheck – and businesses trying to meet budgets and payrolls are able to access the energy they need.

CEA submits its *amicus curiae* brief out of concern that shutting down energy infrastructure projects such as the Dakota Access Pipeline ("DAPL") threatens the future of America's energy reliability and supply, thereby increasing costs of energy for consumers and

creating significant economic hardship; and leveling disproportionate harm to those in poverty, on fixed incomes and in society's margins, especially as the nation deals with the tremendous economic uncertainty created by the COVID-19 pandemic.

SUMMARY OF ARGUMENT

CEA addresses the Court's request to consider the appropriate remedy on remand in light of the *Allied-Signal* factors[1] by supporting Defendants' position that vacatur on remand is unwarranted. First, the U.S. Army Corps of Engineers (the "Corps") utilized its discretion in following the procedural requirements of the National Environmental Policy Act ("NEPA") when it issued an environmental assessment ("EA") finding that no environmental impact statement ("EIS") was required, so its deficiency is not serious. Second, and most significantly, vacating the Dakota Access Pipeline ("DAPL") easement will result in substantial, disruptive, and far-reaching consequences. As such, vacatur on remand is an inequitable and untenable remedy.

As to the first *Allied-Signal* factor, the Corps exercised its discretion to analyze the environmental impacts from the DAPL and determine that no EIS was appropriate, so any deficiency in compliance with NEPA (paired with its ability to remedy any deficiency on remand) is not serious enough to warrant vacating the easement. Moreover, even if the Court would deem the deficiency as extremely serious, the severe, disruptive consequences under the second *Allied-Signal* factor still warrant remand without vacatur.

Under the second *Allied-Signal* factor, CEA submits that vacating the DAPL's easement will cause significant economic, security, and social harm. CEA's arguments will primarily cite to the organization's 2017 report titled "*Families, Communities and Finances: The Consequences of Denying Critical Pipeline Infrastructure.*" This report examines the very real impacts to everyday Americans under a scenario where judges, lawmakers, or regulators block or interrupt the operations of pipeline infrastructure. CEA's arguments will highlight the role pipelines play in the

[1] *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993).

American economy, their role in national security, and the socially regressive impact that disturbing pipeline infrastructure causes Americans who can least afford increased costs of energy.

CEA's position emphasizes that vacating the DAPL easement during the remand has the potential to increase energy costs to families and businesses, disrupt fuel supplies, impede manufacturing and industrial projects, reduce high-paying labor jobs, and deprive mineral rights owners of their ability to realize their property rights. Application of the *Allied-Signal* factors should not result in vacatur of the DAPL easement on remand. This result is necessary as a matter of sound public policy to ensure that America's energy and economic future is secure.

ARGUMENT

This Court has determined that the Corps failed to comply with NEPA when it determined in its Final EA that no EIS was required. While the standard remedy for violating the procedural dictates of NEPA is vacating the agency's action, *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007), courts have discretion to forgo vacatur. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101, 147 (D.D.C. 2017). Indeed, remand ***without*** vacatur affords the flexibility to equitably serve the best interests of the litigants, regulated entities and the public at large. In this case, where vacatur would result in disruption of an operational pipeline easement resulting in significant, far-reaching consequences, vacatur on remand is unwarranted.

Courts may refrain from vacating an agency action if "[s]uch a move" would "carry serious consequences that a court should not lightly impose." *Standing Rock III*, 255 F. Supp. 3d at 147. To determine whether to vacate agency action on remand, courts consider: (1) the seriousness of the deficiencies in the agency's decision, and (2) the disruptive consequences that would result

from vacatur. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

Applying these two *Allied-Signal* factors, CEA's *amicus curiae* brief supports remand without vacatur. In support of this conclusion, CEA details the irreparable, devastating and disruptive economic, security, and social consequences of vacating the easement.

I. First *Allied-Signal* Factor: Any Deficiency in the Corps' Compliance with NEPA is Not Serious Enough to Vacate the Easement.

The Corps' deficiency in compliance with NEPA is not serious enough to vacate the easement. The NEPA implementing regulations lay out two factors to determine whether actions may result in "significant" environmental impacts. *See* 40 C.F.R. § 1508.27. The two factors are "context" and "intensity." *Id*. Section 1508.27(b) puts forth ten (10) factors that agencies should consider to determine the "intensity" of a proposed action. Of these ten factors to determine the intensity of proposed action, "[i]mplicating any one of the[se] factors ***may*** be sufficient to require development of an EIS." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (emphasis supplied). This is a permissive standard, calling for interpretation and discretion. *See id.*

Here, the Corps exercised its statutory authority in reviewing the potential environmental impact of the DAPL easement. The Corps interpreted NEPA and the NEPA implementing regulations to support a reasoned determination to prepare an EA finding that no EIS was required. Further, the Corps explained its rationale and responded to numerous comments that were critical of its position on tunneling under Lake Oahe. While this Court did not agree with the Corps' reasoned determination, the inherent discretion involved in the determination reduces the seriousness of the deficiency. The deficiency is further likely to be rehabilitated after remand and preparation of an EIS.

Accordingly, any deficiency in compliance with NEPA is not serious enough to vacate the easement; and to the extent the Court does deem it serious, then the extreme disruptive consequences, detailed more fully *infra*, still warrant remand without vacatur. *See Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 271 (D.D.C. 2015) (concluding that the remand should be without vacatur where the second *Allied-Signal* factor indicated significant disruption); *see also North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (remanding without vacatur, despite serious flaws in rule, where vacatur would be disruptive).

II. Second *Allied-Signal* Factor: The Disruptive Consequences of Vacatur

The second *Allied-Signal* factor considers the disruptive consequences that would result from vacatur. Pipeline infrastructure is critical to America's continued access to affordable, reliable, and environmentally sound energy. Vacating the DAPL's easement, when it is likely to be reissued after the Corps' EIS is completed, will cause significant economic, security, and social harm. To that end, CEA issued a report in 2017 titled "*Families, Communities and Finances: The Consequences of Denying Critical Pipeline Infrastructure*." This report examines the very real impacts to everyday Americans under a scenario where judges, lawmakers, and regulators block critical pipeline infrastructure. CEA's arguments under the second *Allied-Signal* factor highlight the role pipelines play in the American economy, their role in national security, and the socially regressive impact that disturbing pipeline infrastructure causes to the Americans who can least afford increased energy costs.

A. The Dakota Access Pipeline Is Significant to the National Economy.

The DAPL is a 1,172-mile underground 30" pipeline transporting light sweet crude oil from the Bakken/Three Forks production area in North Dakota to Patoka, Illinois. Since its operation began in 2017, DAPL has been safely transporting 570,000 barrels of oil per day, and it employs anywhere between 8,000

to 12,000 people during construction. "The pipeline is the safest and most efficient means to transport crude oil from the geographically constrained region, providing better access to Gulf Coast and Midwest refineries and other downstream markets."[2]

DAPL has helped bolster production in the Bakken production area, currently moving approximately 40% of the Bakken's oil output per day. It also helped to improve the region's drilling economics by lowering transportation costs for operators and increasing domestic crude oil production, which translates into greater energy security, lower trade deficit, and boosted economic growth. Further, the significant expansion of pipeline capacity has helped to reduce flaring associated with oil and natural gas production in the Bakken region, thus providing improved environmental conditions. Pipelines enable the crude oil to safely reach refining and manufacturing markets where it can be used to make all of the products that Americans use every day.

Since DAPL began operations, it has not impacted groundwater in any of the four states in which it operates; does not encroach or touch on land owned by the Standing Rock Sioux Tribe; crosses under Lake Oahe at least 95 feet below water level; was studied by the Corps for an additional year beyond what was required; and surpasses all federal safety requirements.[3]

Vacating DAPL's easement, even temporarily, will have enormous economic consequences on the United States in the form of higher costs for goods Americans need for their everyday lives – such as fuel, food, medicine, and clothes – because pipelines are the lowest cost means for transporting fuels. If the cost of fuel goes up, so does the cost of everything else.

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[2] *Moving America's Energy, The Dakota Access Pipeline,* ENERGY TRANSFER, *available at* https://daplpipelinefacts.com.

[3] *See Addressing Misconceptions About The Dakota Access Pipeline, available at* https://daplpipelinefacts.com/The-Facts.html.

Virtually nothing within the current American economy reaches a consumer without being produced from or transported by a fossil fuel source. Taking DAPL offline by vacating the easement during remand is likely to raise the cost of an untold amount of goods and services in the Midwest and Mid-Continent portion of the country, and it will put economic pressure on fuel markets nation-wide.

B. Current Reports and Statistics Illustrate that Vacatur on Remand Will Result in Significant Disruptive Consequences.

1. America Relies on Pipeline Infrastructure.

America's national pipeline grid is a critical part of the nation's energy lifeline, much like blood vessels and arteries are vital to the functioning of the human body. As the continued retirement of coal-fired generation facilities occurs, domestically produced natural gas is expected to play a larger role in meeting our future energy needs through electricity generation and other critical uses.

U.S. Energy Information Administration ("EIA") data forecasts that natural gas will meet 37% of U.S. electricity needs by 2030. [4] This reliance on natural gas will help reduce our nation's vulnerability to imports, clean our air and help meet greenhouse gas emission reduction targets.[5] However, in order to deliver the necessary volume of natural gas to power plants, factories, homes, and farms, as well as fuel to our refineries, transportation industries, and consumers, our pipeline delivery infrastructure must be upgraded and expanded.[6] Real energy security is not just the

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[4] *Annual Energy Outlook 2020*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 29, 2020), *available at* https://www.eia.gov/outlooks/aeo/pdr/AEO2020%20Gas.pdf.

[5] *Annual Energy Outlook 2016*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 2016), DOE/EIA-0383, *available at* http://www.eia.gov/forecasts/aeo/pdf/0383(2016).pdf.

[6] *See, e.g.*, John Krohn & Katie Teller, *New Pipeline project increase Northeast natural gas takeaway capacity*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 28, 2016), http://www.eia.gov/todayinenergy/detail.php?id=24732.

presence of abundant natural resources – it is the ability to readily access and deliver those resources at an affordable price.[7] Thus, advancing new projects, preventing disruptions and upgrading existing natural gas pipeline networks will enhance the nation's energy security, with the energy revolution that produces those fuels continuing to provide enormous benefits to families and businesses.

Blocking or disrupting midstream and pipeline infrastructure denies American families, households, and industries the energy benefits of over 3.1 million barrels per day of domestic petroleum products and feedstocks, as well as 44.5 billion cubic feet of natural gas supplies that are vital to keeping our economy moving and that provide the building blocks for a myriad of consumer staples: critical medicines, food packaging, fertilizers, jet fuel, chemical feedstocks for computers and smartphones, and more. It would also deny jobs to hard-working, high-wage earners in fields such as construction and the building trades, as well as other high-wage earners such as electricians, welders and steel fabricators. At the same time, it would significantly raise fuel prices, increase foreign oil import dependency and forfeit hundreds of millions of state and local tax dollars as well as billions in capital expenditures.

In recent years, projects that enable the development and delivery of fossil fuels have become highly vulnerable to delay efforts and disruptions via litigation, disputes, complex and often lengthy federal permitting processes[8] and anti-development protests premised on curtailing energy development and delivery projects, all of which present obstacles to the benefits of expanded pipeline capacity and energy supply. Coal-fired power generation and mining, natural gas development, natural gas and petroleum transportation through pipelines, natural gas-fired

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7 *Energy Security,* IEA, http://www.iea.org/topics/energysecurity.

8 *See* Paul W. Parfomak, *Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review* (Jan. 2015), http://www.fas.org/sgp/crs/misc/R43138.pdf.

power generation, and emissions-free nuclear power facilities have been and will continue to be susceptible to such ill-conceived protests in the months and years ahead.

At the same time, virtually all independent analyses and studies predict that baseload power and energy provided by fossil fuels and nuclear power will form the backbone of electricity generation for decades to come.[9] While promising options like wind and solar continue to expand at a very significant rate, they alone will not be able to meet future demand.[10] Even so, the reality of the current environmental landscape reflects that carbon emissions, the target of many activist organizations, are down to their lowest levels since 1991 even with increased U.S. natural gas production and pipeline development.[11]

2. U.S. Poverty and Economic Data.

The sheer number of Americans living on the margins of society is an often overlooked component of the energy policy discussion. For far too many, paying for the basic necessities of food, clothing, shelter and monthly utility bills is a continual challenge. Disrupting energy infrastructure projects that bring more abundant supplies of low-cost energy places additional burdens and difficulties on those with the least amount of resources.[12]

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9 *World Energy Outlook 2016*, IEA, Paris (Nov. 2016), available at http://www.iea.org/reports/world-energy-outlook-2016.html.

10 *See, e.g.,* Robert Lyman, *Why Renewable Energy Cannot Replace Fossil Fuels By 2050*, FRIENDS OF SCIENCE (May 30, 2016), *available at* https://www.heartland.org/_template-assets/documents/publications/why-renewable-energy-cannot-replace-fossil-fuels-by-2050-may-30-2016-final-w-comparison.pdf.

11 Allen McFarland, *Energy-related CO2 emissions for first six months of 2016 are lowest since 1991*, U.S. ENERGY INFORMATION ADMINISTRATION (Oct. 12, 2016) http://www.eia.gov/todayinenergy/detail.php?id=28312http://www.eia.gov/todayinenergy/detail.php?id=28312.

12 *See, e.g.,* http://www.forbes.com/sites/judeclemente/2016/06/26/ new-englands-known-need-for-more-natural-gas- pipelines/#6be1a66c7d6f.

The official U.S. poverty rate in 2015 was 13.5%, down 1.2 percentage points from 14.8% in 2014.[13] In 2015, there were 43.1 million people living in poverty, 38% of whom are children and seniors 65 and older.[14] Real median household income in the United States was $56,516 in 2015 - this is the first annual increase in median household income since 2007 according to the U.S. Census Bureau.[15] In 2014, median household income was $53,657.[16]

Regional poverty data (at or below poverty) in 2015 was as follows:[17]

- Northeast – 6.89 million people
- Midwest – 7.84 million people
- South – 18.3 million people
- West – 10.07 million people

The U.S. Department of Agriculture Food and Nutrition Service reports that as of October 2016, there were approximately 43.3 million individual (over 21 million households) food stamp recipients.[18] For a family of four, those earning $31,596 per year are eligible for assistance.[19] Across the five regions selected for this study, the breakdown of food stamp recipients was as follows:[20]

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13 *Income and Poverty in the United States*, U.S. CENSUS BUREAU, *available at* http://www.census.gov/newsroom/press-releases/2016/cb16-158.html.

14 *See Income and Poverty in the United States*, U.S. CENSUS BUREAU, *available at* http://www.census.gov/programs-surveys/demo/visualizations/ p60/256/figure7.pdf.

15 *See* U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf, Figure 1.

16 *Income and Poverty in the United States*, U.S. CENSUS BUREAU, *available at* http://www.census.gov/library/publications/2015/demo/p60-252.html.

17 *See Income and Poverty in the United States*, U.S. CENSUS BUREAU, *available at* http://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf (Table 3, p. 13).

18 *See* http://frac.org/wp-content/uploads/2011/01/snapdata2016-jul.pdf

19 *See Program Information Report*, U.S. DEPARTMENT OF AGRICULTURE, FOOD AND NUTRITION SERVICE (Oct. 2016), available at http://www.fns.usda.gov/snap/eligibility, Table 1.

20 *See* http://www.fns.usda.gov/sites/default/files/pd/30SNAPcurrHH.pdf.

- New England – over 1.7 million people
- Mid-Atlantic – over 7.8 million people
- Southeast – over 10.2 million people
- Midwest – over 6.8 million people
- Mid-Continent – over 8.4 million people

3. After-Tax Dollars on Energy.

Several studies and federal data highlight the disparate impact that higher energy prices have on the working poor in the United States. According to Bureau of Labor Statistics data, in April 2016 the bottom quintile of U.S. households spent 22% of their after–tax income on residential utility bills and gasoline compared to just 5% by the top quintile.[21]

Renewable energy advocacy group Groundswell conducted an analysis which found that the bottom 20% of earners spend almost 10% of their income solely on electricity, more than seven times the portion of income that the top quintile pays, with 50% of all families that spend 10% of income on power bills being African-American. In addition, the report found that more than half of those energy-insecure households are below the federal poverty level.[22]

Many of these individuals live in older, less energy efficient multifamily housing in more urban areas of the country or in manufactured housing in rural areas that can also see tremendously expensive energy bills relative to overall take-home pay compared to other demographics living in single-family housing. The U.S. Department of Housing and Urban Development found that 88% of multifamily households are renters with an average annual income ($31,000) that is just over half that of average homeowners ($61,000). In other words, the burden of those living in older and less energy-efficient multifamily housing is being borne by families with the fewest financial

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[21] Eugene M. Trisko, *Energy Expenditures by American Families* (June 2016), http://www.americaspower.org/wp-content/uploads/2016/06/Family-Energy-Costs-2016.pdf.

[22] Patrick Sabol, *From Power To Empowerment*, GROUNDSWELL, *available at* https://s3.amazonaws.com/groundswell-web-assets/documents/frompower_to_empowerment.pdf (last visited March 22, 2020).

resources. Consequently, renters typically pay a higher percentage of their income for energy use and utilities, with the resulting reduction in discretionary income making them much more vulnerable to harsh swings in energy prices. In fact, energy prices increased faster than housing costs between 2001 and 2009, with renters in multifamily units experiencing an average rent increase of 7.6% and a 22.7% increase in energy costs.[23]

The problem of high energy bills disproportionately hitting the poor has been acute and lingering for many years, so much so that the federal government has a dedicated funding stream that is appropriated to states through the Low Income Home Energy Assistance Program ("LIHEAP").[24] In 2016, Congress spent well over $3 billion to provide LIHEAP assistance to families to help pay energy and heating bills.[25] To be eligible for assistance, families must have incomes at or below 150% of the federal poverty level (about $30,000 annually for a family of three), or 60% of the state's median income level. As recently as 2011, roughly 9 million households, or 23 million people, received LIHEAP assistance.[26] Currently, nearly 7 million households depend on LIHEAP to help pay high home heating and cooling bills.[27] According to a

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[23] Josh Geyer, *Evidence Matters*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 4 (Summer 2011), *available at* https://www.huduser.gov/portal/periodicals/em/summer11/highlight.html.

[24] *About LIHEAP*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES ADMINISTRATION FOR CHILDREN & FAMILIES OFFICE OF COMMUNITY SERVICES, *available at* http://www.acf.hhs.gov/ocs/programs/liheap/about (last visited Mar. 29, 2017)

[25] *LIHEAP and WAP Funding*, LIHEAP CLEARINGHOUSE, https://liheapch.acf.hhs.gov/Funding/funding.htm (last visited Mar. 22, 2020).

[26] *National Energy Assistance Survey*, NATIONAL ENERGY ASSISTANCE DIRECTORS' ASSOCIATION (Nov. 2011), *available at* http://neada.org/wp-content/uploads/2013/10/press-release-2011nea-survey.pdf.

[27] Olivia Wein, *The Low income Home Energy Assistance Program (LIHEAP)*, NATIONAL LOW INCOME HOUSING COALITION 5-27 (2016), *available at* http://nlihc.org/sites/default/files/2016AG_Chapter_5-8.pdf.

coalition of groups supporting increased programmatic LIHEAP funding, at least 90% of all LIHEAP recipients have at least one household member who is a child, elderly or disabled.[28]

4. Expected Future Pipeline Needs and Development.

In April 2016, the consulting firm ICF International prepared an analysis of future North American pipeline infrastructure construction needs through 2035. The study examined two market scenarios (high and low case), and concluded the following:

- U.S. and Canadian natural gas transportation capacity addition by 2035 is projected at 44 to 58 billion cubic feet (Bcf) per day for both scenarios, with a midpoint value of 51 Bcf per day
    - To put these numbers in perspective, 1 Bcf of gas can power over 27,100 homes for an entire year. One company in the Marcellus Shale in Pennsylvania can produce that much every single day.[29] Thus, the midpoint value in the study estimates that enough gas capacity could come online to power over 1.2 million homes in Canada and the U.S.
- U.S. and Canadian natural gas liquids ("NGL") transportation capacity addition is projected to be 1.1 to 2.3 million barrels per day ("BPD") for both scenarios, with a midpoint of 1.7 million BPD.
- U.S. and Canadian oil pipeline capacity addition is projected at 4.5 to 6.9 million BPD, with a midpoint value of 5.7 million BPD.
- Capital expenditure ("CAPEX") for new midstream infrastructure will range from $471 billion to $621 billion over the next 20 years (or an average $22.5 to $30 billion per year), with a midpoint expenditure of $546 billion.

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[28] *National Energy Assistance Survey*, NATIONAL ENERGY ASSISTANCE DIRECTORS ASSOCIATION (Nov. 2011), *available at* http://neada.org/wp-content/uploads/2013/05/NEA_Survey_Nov11.pdf.

[29] *What Can 1 BCF of Natural Gas Power?*, CABOT OIL & GAS CORPORATION, *available at* http://www.cabotog.com/community/what-can-1-bcf-of-natural-gas-power/http://www.cabotog.com/community/what-can-1-bcf-of-natural-gas- power/

- Investment in pipelines (including both transmission and gathering lines and compression and pumping) will range from $183 billion to $282 billion, with a midpoint CAPEX of $232 billion.[30]

5. Pipelines Completed and Underway – Benefits.

IHS Economics and the National Association of Manufacturers developed a study examining the macroeconomic impacts that increased energy production will have for job creation and growth for the country. It found:

- Expanded energy access created 1.9 million jobs economy-wide in 2015.
- Shale gas production put an extra $1,337 in the wallets of an average American family.
- New pipeline construction meant more than 347,000 jobs, with 60,000 alone for manufacturing.
- Total natural gas demand was poised to increase by 40% over the next decade, and our domestic production is expected to increase by 48% over the next decade to meet new demand.
- In 2015 and 2016, 13,252 miles of new crude oil transmission pipelines would be constructed in the U.S. at a cost of $25.6 billion.
- From both construction and maintenance in 2016, crude oil pipelines would contribute 243,167 jobs, including 28,438 manufacturing jobs.
- U.S. economic output was estimated to grow by $91.7 billion from combined economic output between 2015 and 2016 - considering direct spending and indirect and induced multipliers.
- From 2015 to 2016, construction and operation of crude oil pipelines contributed a combined $46.9 billion to gross domestic product (GDP), including $7.6 billion in manufacturing.
- $31.8 billion in combined domestic labor income in 2015 and 2016.[31]

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30 *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds*, THE INGAA FOUNDATION INC. (Apr. 12, 2016), http://www.ingaa.org/File.aspx?id=27961&v=db4fb0ca.

31 *See* http://www.nam.org/Issues/Energy-and-Environment/Crude-Oil- Pipeline-One-Pager.pdf.

As these statistics above clearly show, disrupting the construction or operation of pipelines would have an immediate impact on consumers, families, manufacturers and energy-intensive industries. If all pending and planned projects were canceled, the ripple effects would be enormous.

6. Recent Trends in Pipeline Safety.

Transporting energy over long distance pipelines in the United States is remarkably safe. Federal data continues to show that pipelines are the safest and most environmentally favorable way to move oil and natural gas across the country.[32] A recent analysis for the petroleum pipeline found that 99.999% of all crude oil and refined products reached their destination safely in 2015.[33] Interstate natural gas pipelines have similar and impressive safety numbers with 99.999997% of the gas moved nationwide reaching its destination safely in 2014.

In addition, pipeline leaks on natural gas lines are down 94% from 1984-2012 according to the Interstate Natural Gas Association of America.[34] Release statistics for the liquids pipeline industry are also trending downward significantly with reportable incidents (anything over five barrels) to the Pipeline and Hazardous Materials Safety Administration declining 52% since 1999.[35]

These statistics are all the more impressive as safety has improved while volumes and miles have increased. Total pipeline mileage and barrels of crude oil and petroleum products have increased by 13% and 20% respectively since 2011.[36] During the initial stages of the significant

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32 *See* http://www.phmsa.dot.gov/pipeline/library/data-stats

33 *See* http://www.aopl.org/wp-content/uploads/2016/08/2016-API-AOPL- Annual-Pipeline-Safety-Excellence-Performance-Report-Strategic- Plan.pdf, p. 13.

34 *See* http://www.ingaa.org/Safety.aspx.

35 *See* http://www.aopl.org/wp-content/uploads/2016/08/2016-API-AOPL- Annual-Pipeline-Safety-Excellence-Performance-Report-Strategic- plan.pdf, p. 14.

36 Ibid, p. 4-5.

expansion of oil and natural gas production in areas like the Bakken Shale, there was very limited pipeline capacity and storage in the region. The result was a major increase in rail and truck traffic – often on rural roads – to get oil to markets and refineries. While current crude by rail volumes are down significantly, as late as October 2014, volume was roughly 1 million barrels per day according to EIA data.[37] As a consequence of denying additional pipeline infrastructure, communities may face the impacts from increased rail, barge, and truck traffic. An August 2015 study by the Fraser Institute found that rail is 4.5 times more likely to experience a release or spill compared to pipeline transportation.[38]

7. The Reality.

The rapid development of renewables has been a welcome sign of growth and expansion for the economy and the trajectory of its rise is truly impressive (although renewable energy is not immune from protests and permitting obstacles).[39] According to the Solar Energy Industries Association, there are now 32 gigawatts of installed solar with enough capacity to power 6.2 million homes.[40] Similar strong growth patterns have been occurring for wind as well, with the American Wind Energy Association estimating enough wind capacity to power 20 million homes. Installed wind capacity has nearly tripled since 2008, from 25,000 megawatts to over 75,000 megawatts.[41]

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37 *See* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=ESM_ EPC0_RAIL_ZAMN-ZAMN_MBBL&f=M EIA Crude by Rail Volumes from 2010-September 2016.

38 *Safety in the Transportation of Oil and Gas: Pipelines or Rail*? FRASER INSTITUTE, (August 2015), p.1, *available at* https://www.fraserinstitute.org/sites/ default/files/safety-in-the-transportation-of-oil-and-gas-pipelines-or- rail-rev2.pdf.

39 *See* http://abcnews.go.com/Technology/story?id=97849&page=1.

40 *See* http://www.seia.org/research-resources/solar-industry-data.

41 *See* http://www.awea.org/MediaCenter/pressreleasev2. aspx?ItemNumber=9329.

These are important and positive developments, but the hard truths remain: America will depend on baseload electricity and fossil fuels to meet its energy for many years and decades to come. EIA notes that coal, natural gas and nuclear power made up 86 percent of our nation's electricity in 2015, with just 5.3 percent supplied by wind and solar.[42] Could a $16 trillion a year economy be powered solely on intermittent sources of energy that need to be available, affordable, and easily dispatched 24 hours a day, seven days a week?

For the sake of argument, CEA investigated beyond the headlines and rhetoric to examine the practical implications for the American power delivery system of shutting down pipelines projects and removing fossil fuels and baseload electricity. Every demand made by anti-development groups was extrapolated and compared to data from the 2016 EIA Energy Outlook, using its baseline assumptions for expanded renewable energy generation premised on implementation of the Obama Administration's Clean Power Plan, as well as assumptions that favorable tax treatment would remain in place. The scenario removes the existing coal fleet, excludes the use of petroleum for electric generation, assumes no new or relicensed nuclear power plants, and no new additional natural gas capacity additions by 2030.

8. Regional Impacts.

i. Midwest

Consumers and families in the Midwest are seeing significant changes now in their electricity generation fleet. Large-scale coal retirements are creating a tremendous need for additional new pipeline capacity to bring natural gas into markets to meet existing and future

[42] *Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source?* U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 (last visited Mar. 22, 2020).

demand. The state of Michigan alone is expected to retire 25 coal plants by 2020 – largely to meet EPA regulatory requirements and market requirements. Two utilities predicted the possibility of an electricity shortage starting in 2016 and the loss of enough generating capacity to power Detroit, Grand Rapids and Lansing.[43] The region is also home to many large nuclear power plants that are under threat of closure, and activists have been very vocal in opposition to nuclear power.[44]

Without bringing in more natural gas for electricity deliveries, it will be virtually impossible to maintain the reliability of the electric grid. Here are the consequences, and those affected most, by the disruptions to pipeline infrastructure and the premature removal of large amounts of baseload electric generation for the region:

- U.S. Census Bureau data estimates that over 7.8 million people in the Midwest live at or below the poverty line.[45]
- Of the 43.3 million people on food stamps nationwide, over 6.8 million reside in the Midwest (IL-1,924,612, IN-714,806, MI-1,445,487, OH-1,556,937, MN-476,536, and WI-713,065).[46]
- In Illinois, 15% of residents depend on food stamps to make ends meet.[47]
- Reliability gap of 44.8% that the poor, young people, seniors and hard-working families in the Midwest simply can't afford.

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43 Ibid.

44 EIA Outlook Assessment has portions of Southeast states divided into the Southern Plains. For this assessment, the states of LA and MS are assumed to be in the Southeast. No plants up for relicense in LA and MS were included in the CEA Southern Plains assessment http://www.eia.gov/outlooks/aeo/cpp.cfm.

45 *See, e.g.,* http://www.utilitydive.com/news/a-rough-day-for-coal- midwest-utilities-retire-2000-mw/417570/

46 *See* http://www.freep.com/story/money/business/ michigan/2015/10/10/25-michigan-coal-plants-set- retire-2020/73335550/

47 *Consumer Energy Warns of Looming* (Apr. 8, 2015), *available at* Electricityhttp://www.mlive.com/news/jackson/index.ssf/2015/04/a_shot_in_ the_dark_michigan_ut.html.

- The region's residential electricity prices are 13% higher than the national average, according to EIA data.[48]

- Based on information from EIA, the Midwest/Mid-Atlantic region would be two of the most impacted by the shortfall scenario, with a 46%+ energy shortfall by 2030 due to prematurely retiring nuclear units, zeroing out coal and prohibiting the use of new natural gas.

- The region has several proposed NGL pipeline projects that could bring over 215,000 barrels per day in feedstocks for uses such as industrial applications and propane, with the Utopia project alone injecting over $1 billion in state and local economic activity.[49]

- There are at least five major projects totaling 3,200 MMcf/day awaiting final consideration at FERC that could help consumers, families and small businesses deal with energy shortfalls.[50]

ii. Mid-Continent

Energy production has greatly expanded in the nation's Mid-Continent region – especially in regions like the Bakken, Eagle Ford and Permian Basin in West Texas and Eastern New Mexico. For example, production in North Dakota has more than tripled from 2010 to 2014, with over 1 million barrels per day of production.[51] One of the major challenges these regions are facing is a dearth of pipeline infrastructure and storage required to bring this surge in American energy production to our nation's refinery centers where families, businesses and industries can utilize more of our domestic resources to displace foreign imports.[52] The result is that much of this crude

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48 *See* http://midwestenergynews.com/2016/08/16/whats-the-future-of- nuclear-in-the-midwest-a-state-by-state-look/

49 *Income and Poverty in the United States*, U.S. CENSUS BUREAU, *available at* http://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf, Table 3.

50 *See* http://frac.org/wp-content/uploads/2011/01/snapdata2016-jul.pdf.

51 *See, e.g.*, http://www.census.gov/quickfacts/table/PST045215/17; http:// frac.org/wp-content/uploads/2011/01/snapdata2016-jul.pdf.

52 *EIA October 2016 Electricity Report*, https://www.eia.gov/electricity/ monthly/epm_table_grapher.cfm?t=epmt_5_6_a

oil must be placed on trucks and railcars, which can add a layer of transportation cost and stress to infrastructure. A lack of storage and pipelines can also cause increased emissions from venting and flaring of methane at the wellhead.[53]

Further, the Midcontinent Independent System Operator (the independent grid manager for 15 states) stated in June 2016 that the region could have a power generation shortfall starting in 2018 due to significant power plant retirements.[54] While reserve margins were adequate in Texas in summer 2016, Electric Reliability Council of Texas ("ERCOT") set a record demand for electricity use in August 2016.[55] Here are the consequences, and those affected most, by the denial of new pipeline infrastructure and the premature removal of large amounts of baseload electric generation for the region:

- Of the 43.3 million people on food stamps nationwide, over 8.4 million reside in the Mid-Continent (AR-401,980, CO-469,090, IA-377,379, KS-247,976, LA – 925,861, MO-778,698, OK-614,993, NE-176,130, NM-486,098, ND-54,330, SD-95,654, TX-3,796,484).[56]

- As of October 2016, New Mexico has the highest percentage of residents in the nation (23.3%) reliant on food stamps.[57]

- Reliability gap of 46% in some areas of the Mid-Continent that the poor, young people, seniors and hardworking families in the simply can't afford.

- The 12 state region has a residential electricity rate that is roughly 9% lower than the national average of 12.90 kwh; however, it is home to high residential

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53 *See* https://www.ferc.gov/industries/gas/indus-act/pipelines/ pending-projects.asp

54 Ibid.

55 *See, e.g.,* http://www.eia.gov/todayinenergy/detail.php?id=16931

56 *See* https://www.eia.gov/pub/oil_gas/natural_gas/analysis_ publications/ngpipeline/ undrgrnd_storage.html

57 *Methane's Role in Promoting Sustainable Development in the Oil and Natural Gas Industry*, available at https://www.epa.gov/sites/production/files/2016-09/documents/ best_paper_award.pdf.

use states like Texas, where the average monthly bill ($136.00) is 17% higher than the national average ($114.03).[58]

- Several major petroleum pipelines are proposed to transport crude oil from this region to help meet consumer demands in refineries across the country.

- The Obama Administration denied the Northern Leg of the Keystone XL Project that would have brought an additional 100,000 barrels per day of oil from the Bakken region in Montana and North Dakota to domestic refineries and would have displaced crude oil imported by the U.S. from unfriendly regimes like Venezuela.[59]

- The Obama Administration supported allowing the Southern Leg of the Keystone XL Pipeline to move forward, which provided:

    - Over $5.7 billion into the local economies of Oklahoma and Texas, as well as $72 million in new local tax revenues;

    - More than 11 million hours of labor completed by 4,844 workers in the United States - heavy equipment operators, welders, laborers, transportation operators and supervisory personnel (including environment, safety and quality control inspectors); and

    - Initial delivery of over 700,000 barrels per day of crude oil from storage in Cushing, OK to the Gulf Coast to be refined for consumers across the country.[60]

- Disturbing pipelines in the Mid-Continent would prevent more than 2.4 million barrels per day of American energy from filling our tanks, planes and trains, and from assisting manufacturers with developing products and reducing our trade deficit.[61]

- There are at least 11 major projects at FERC waiting final consideration totaling 12,718 MMcf/day in natural gas that could help consumers, families and small businesses deal with energy shortfalls.[62]

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58 *See* https://www. misoenergy.org/Library/Repository/Meeting%20 Material/Stakeholder/Workshops%20and%20Special%20 Meetings/2016/OMS-MISO%20Survey/2016OMS-MISOSurveyResults.pdf.

59 *See* http://www.reuters.com/article/us-usa-texas-power-heatwave- idUSKCN10F202.

60 *See* http://frac.org/wp-content/uploads/2011/01/snapdata2016-jul.pdf

61 *See* http://www.eia.gov/electricity/sales_revenue_price/pdf/table5_a.pdf

62 *See* http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/; *see also* http://www.energyxxi.org/benefits- keystone-xl.

Based on the facts and statistics highlighted above, it is apparent that pipeline infrastructure is good for the American economy, national security, the environment, and those living in poverty. Vacating DAPL's easement will harm each.

CONCLUSION

The *Allied-Signal* factors do not support vacating DAPL's easement while the Corps prepares an EIS.

Dated: April 29, 2020

Respectfully submitted,

CONSUMER ENERGY ALLIANCE

By Counsel,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2020, a true and correct copy of the foregoing *Brief of Amicus Curiae Consumer Energy Alliance in Opposition to Vacatur on Remand* was today served via the Court's CM/ECF system on all counsel of record.

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EXHIBIT 2

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; SARA JUMPING EAGLE ET AL., Plaintiff-Intervenors, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-01534-JEB (and Consolidated Case Nos. 1:16-cv-01796 and 1:17-cv-00267)

BRIEF OF *AMICUS CURIAE* HESS CORPORATION IN SUPPORT OF A NON-VACATUR REMEDY ON REMAND

CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), Hess Corporation states that it is the ultimate parent corporation of all of its members. Hess Corporation is publicly traded on the New York Stock Exchange.

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STATEMENT OF INTEREST AND INTRODUCTION

Amicus curiae, Hess Corporation ("Hess"),[1] is a major producer of crude oil and natural gas from the Bakken formation in North Dakota. As described below and in Exhibit 3, the Declaration of Brent Lohnes, Hess has a compelling interest in whether the Dakota Access Pipeline ("DAPL") should be shut down while the U.S. Army Corps of Engineers (the "Corps") prepares an Environmental Impact Statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. That is because Hess transports 55,000 barrels of crude oil per day on DAPL, and does not have other practical options to transport or market those volumes. If DAPL is shut down while the Corps prepares an EIS, Hess would likely need to shut in a portion of its production in the Bakken, which would have significant and far-reaching consequences for Hess, its counterparties, and its employees. Hess is therefore interested in continued access to DAPL during remand.

Accordingly, Hess submits this *amicus* brief to address the second factor that courts consider in deciding whether an agency rule should be vacated during remand: the "disruptive consequences" of a DAPL shutdown while the Corps conducts its EIS. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

This brief was authored in whole by counsel for Hess and is filed pursuant to LCvR 7(o). No other party, party's counsel, or any person other than Hess contributed money to fund the preparation or submission of this brief.

[1] For ease of reference, Hess refers to both Hess Corporation and its affiliates.

ARGUMENT

Shutting down DAPL, even temporarily, would fundamentally and detrimentally impact Hess's operations in North Dakota. Today, Hess is one of the three biggest producers in the Bakken: Hess operates more than 1,600 wells that produce approximately 145,000 barrels of crude oil per day. Ex. 3 ¶ 5. Hess transports more than one-third of its Bakken production—55,000 barrels per day—on DAPL. *Id.* ¶ 9.

DAPL has significantly advanced Hess's operations in North Dakota, and Hess has taken numerous steps in reliance on it. As described in greater detail below and in the attached declaration of Brent Lohnes, Hess has:

- Increased its production by nearly 50 percent since DAPL became available, and utilized DAPL to transport that increased production;
- Designed its transportation and marketing strategy around DAPL's availability; and
- Invested tens of millions of dollars in infrastructure to be able to connect the oil that Hess produces in North Dakota to DAPL, while simultaneously divesting alternative transportation assets like railcars.

As a practical matter, if DAPL is shut down while the Corps prepares its EIS, Hess would need to shut in wells because there simply is no way to refine, sell, or transport the volume of oil that is currently being produced by Hess in the Bakken without DAPL. Shutting in wells, in turn, would impose significant direct and indirect costs on Hess, its counterparties, and its employees—including lost revenues, lost jobs, and potentially lost leasehold interests. And bringing wells back online after an extended shut-in will likely result in tens of millions of dollars in additional costs. Thus, vacatur during remand would have serious "disruptive consequences" for Hess under *Allied-Signal*, and this Court should not vacate the Lake Oahe easement and shut down DAPL while the Corps prepares its EIS.

A. Hess Has Structured Its North Dakota Operations Based On The Availability Of DAPL.

Hess or its predecessors have been operating in the Bakken since 1951. Ex. 3 ¶ 4. Today, Hess holds more than 500,000 net acres in the Bakken (both north and south of the Missouri River), with more than 1,600 active wells producing approximately 145,000 barrels of crude oil a day. *Id.* ¶ 5. To operate at this scale, Hess has invested more than $8.2 billion since 2014 in North Dakota, and is one of the largest private employers in the state. *Id.* ¶ 6. Hess has also invested tens of millions of dollars in North Dakota community initiatives in the past 5 years. *Id.*

The availability of DAPL beginning in 2017 significantly affected Hess's operations in North Dakota. Hess made numerous operational changes based on the availability of DAPL, including (1) increasing production; (2) investing in and building out infrastructure; (3) divesting alternative assets used to transport crude oil out of the basin; and (4) entering into contracts that depend on DAPL's ability to transport certain volumes of oil production. *Id.* ¶¶ 8–12.

First, Hess has increased its Bakken production by nearly 50 percent since DAPL became available in 2017, and Hess uses DAPL to transport that increased production out of the Bakken region. *Id.* ¶ 9. Since the second quarter of 2017, Hess has shipped between 50,000 and 55,000 barrels or more per day on DAPL, and Hess plans to continue shipping 55,000 barrels or more per day on DAPL for the foreseeable future. *Id.*

Second, Hess has made significant investments to be able to use DAPL. For example, to be able to access DAPL, Hess entered into a multi-party agreement to build the Johnson's Corner Header System (which receives crude oil by pipeline and delivers it to interstate pipeline systems) to tie into DAPL, which was accompanied by a seven-year crude oil sale and purchase agreement (with two extensions available up to 20 years). *Id.* ¶ 10. Hess has invested approximately $11 million in developing that project, which took more than a year from start to finish. *Id.* Hess has

also invested more than $10 million to reverse the flow of its Keene Oil Gathering pipeline and connect it to the Johnson's Corner Header System. *Id.* Hess also made pipeline, storage, and terminal investments to connect its Tioga Rail Terminal and Rambert Terminal Facility to DAPL. *Id.* In total, Hess has invested more than $40 million in infrastructure projects in reliance on DAPL's operation. *Id.*

Hess has also built additional infrastructure to manage the increase in production based on the availability of DAPL. When oil production increases, the production of other hydrocarbons—particularly natural gas and natural gas liquids—is increased as well. *Id.* ¶ 24. To handle the increased quantities of natural gas and natural gas liquids being produced as a result of DAPL's availability, Hess's Midstream affiliate also formed a 50-50 joint venture with Targa Resources in 2018 to build a gas processing plant called Little Missouri Four ("LM4") south of the Missouri River in North Dakota. *Id.* ¶ 10. LM4 was built at a net cost to Hess of about $120 million. *Id.*

Third, Hess has also divested assets based on DAPL's availability. Before DAPL, Hess transported a significant portion of its Bakken production by rail. *Id.* ¶ 11. But once DAPL became available, Hess no longer needed to rely as heavily on railcar transportation, and accordingly divested approximately two-thirds of its railcar assets. *Id.*

Fourth, Hess has made marketing and transportation arrangements based on its ability to access and transport oil on DAPL. *Id.* ¶ 12. These arrangements include commitments to terminals, tanks, and docks that are connected to and supplied by DAPL, such as agreements to lease tanks and commit to volume throughput over the terminal's dock. The commitments exceed $50 million. *Id.*

B. Shutting Down DAPL Would Significantly Disrupt Hess's Operations And Require Wells To Be Shut In.

Shutting down DAPL while the Corps prepares an EIS would fundamentally and detrimentally impact Hess's operations in North Dakota. Hess would face substantial operational challenges because there is no practical alternative or efficient way to transport the volume of oil that Hess currently ships on DAPL if the pipeline is shut down. *Id.* ¶ 13. Rather, producers like Hess would be required to shut in a portion of their North Dakota wells, which would have both direct and indirect disruptive consequences. *Id.*

To begin, Hess would not be able to use existing alternative transportation methods to transport the 55,000 barrels of crude oil that Hess ships on DAPL per day in a way that allows Hess to maintain its volume commitments and marketing arrangements. *See id.* ¶ 9. The transportation challenges are exacerbated by the local geography. The Bakken formation is naturally divided by the Missouri River and Lake Sakakawea, which has limited pipeline crossings. *Id.* ¶ 15. About half of Hess's production is from north of the river, with the other half to the south. *Id.* If DAPL were unavailable, Hess would likely be required to attempt to ship by rail the 55,000 barrels per day that are currently shipped on DAPL. But Hess's rail terminal (the Tioga Rail Terminal) and terminal facility (the Ramberg Terminal Facility) are north of the river. *Id.* And while Hess currently has some capacity to transport crude oil by pipeline across the river, that capacity is temporary, *see id.*, and when it is no longer available, Hess would need to transport its south-of-the-river production to Tioga by tanker truck. *Id.* A tanker truck can transport less than 200 barrels of oil at a time, and a round trip from Hess's production fields south of the river to Tioga takes approximately eight hours. *Id.* Thus, at the current pace of production, hundreds of trucks a day would be required to transport crude oil from the south Bakken fields to Tioga. *Id.* That is logistically impossible and cost-prohibitive while also increasing safety and environmental

concerns. Practically speaking, Hess's production fields south of the river would be partially or totally stranded while DAPL is shut down. *Id*.

Nor could Hess simply make alternative transportation or marketing arrangements to manage the 55,000 barrels of oil per day that would be displaced by a shutdown of DAPL. Not only would such arrangements take time to develop, but they would not replace all of the displaced volumes, and they would be at a lower price (and at a higher cost) in any event. *See id.* ¶ 14. That is in part because in-basin supply of crude oil far exceeds in-basin demand, *id.* ¶ 18, and in part because the cost of shipping via DAPL is significantly lower (on a per barrel basis) than shipping via railcar or other alternative means. And, of course, if DAPL is shut down, it is not just Hess's 55,000 barrels that would be displaced: the total displaced volumes would be ten times that given how much oil is transported on DAPL on a daily basis.

Hess also could not simply build new infrastructure, like a new pipeline to transport crude oil from south of the river to Tioga or out of the basin, or like a new rail terminal south of the river. *Id*. ¶ 16. Such infrastructure would take well over a year—and tens of millions of dollars—to develop. *Id*. Moreover, because Hess already divested two-thirds of its railcars based on the availability of DAPL, Hess would need to acquire substantial new rail assets at a time when demand for rail assets would be abnormally high given the basin-wide need to transport millions of barrels of oil by rail that had previously been transported on DAPL. *Id*. And unless DAPL is shut down permanently, it would make no economic sense to invest tens of millions of dollars in building out new, temporary infrastructure. *Id*. ¶ 17. Assuming an EIS takes even as long as two to three years but that DAPL thereafter resumes operations, it would be difficult to justify expending capital to develop, build, and install expensive parallel infrastructure that will be uneconomic as soon as DAPL comes back online. *Id*.

Finally, Hess also could not store the crude oil locally or in a nearby field. *Id.* ¶ 19. Storage capacity in the region is already at maximum capacity, and there is no practical way to build storage facilities capable of storing the millions of barrels of crude oil that are being transported on DAPL. *Id.*

The bottom line is that because Hess would be unable to transport, market, or store the oil that it produces in the Bakken and ships on DAPL at the current rate of production, it would be required to shut in wells soon thereafter, particularly south of the Missouri River. *Id.* ¶¶ 14, 20. As discussed below, that, in turn, would have significant disruptive consequences.

C. Shutting In Wells Would Have Significant Disruptive Consequences.

Shutting in wells has substantial costs and disruptive consequences, particularly if wells are shut-in for an extended period of time—such as the length of time needed for the Corps to conduct an EIS. *Id.* ¶ 21.

First, shutting in wells has direct economic effects. If Hess cannot produce oil and sell it, that deprives Hess (and working interest owners) of revenues. *Id.* ¶ 22. Moreover, if Hess cannot earn revenues from production, that deprives royalty interest owners (typically landowners in North Dakota who have leased their land to Hess for purposes of developing mineral assets) of revenues as well. *Id.* The royalties that Hess pays in any given year are substantial. For example, in 2019, Hess made more than $340 million in royalty payments based on its North Dakota production.

Second, if wells are shut-in for a prolonged period of time (*i.e.*, a year or more), Hess could lose some of the leasehold interests that it has spent decades acquiring, depending on the terms of the lease at issue. *Id.* ¶ 23. In most oil and gas leases, the primary term of a lease can be extended if a well is producing in paying quantities—that is, the lease remains in effect so long as there is production. *Id.* While the precise language varies from lease to lease, if Hess is unable to produce

hydrocarbons for a period that is longer than a lease allows, there is a risk that it would lose at least some of its leasehold interests and be forced to buy back those leasehold interests in the future at significant cost (if it could do so at all). *Id*.

Third, if Hess is not able to maintain its current production based on shut-ins, it would not be able to satisfy natural gas and natural gas liquids volume commitments. *Id*. ¶ 24. As discussed above, natural gas and natural gas liquids are produced with crude oil and are valuable commodities that are gathered and processed, and then often transported to downstream markets. *Id*. Hess's midstream affiliate operates a field gathering system and the Tioga Gas Plant to gather and process most of the natural gas and natural gas liquids Hess produces in the Bakken. *Id*. Hess also operates the LM4 gas plant with Targa Resources. *Id*. If crude oil production is curtailed south of the river, the LM4 plant could be underutilized as a result of the decline in the production of associated natural gas and natural gas liquids. *Id*.

Moreover, as is typical in the industry, numerous of Hess's midstream and downstream natural gas and natural gas liquids contracts contain volume commitments—*i.e.*, Hess contractually agrees to move a certain quantity of hydrocarbons on these gathering and interstate pipelines. *Id*. ¶ 25. For example, Hess's contracts with interstate pipelines such as Alliance, Northern Border, ONEOK, and Vantage all contain volume commitments. *Id*. Hess must pay its contractual counterparties based on those volume commitments whether or not it can supply those volumes. *Id*. Thus, Hess would be required to pay to move more hydrocarbons than it is actually able to supply given the shut-ins. *Id*.

Fourth, bringing a well back online after it has been shut in for an extended period (approximately a year, but sometimes less) involves significant operational costs. *Id*. ¶ 26. Because water produced in conjunction with drilling activities is typically corrosive, a well that is

shut-in suffers downhole corrosion during extended periods of inactivity. *Id.* It can easily cost $200,000 per well or more to perform the workover, re-stimulation, and other maintenance activities required to restart production from these shut-in wells. *Id.* Given that Hess operates more than 1,600 wells in the Bakken, shutting in even a relatively small percentage of wells would quickly result in large costs in bringing wells back online. *Id.* For example, if Hess were to shut in just 10 percent of its wells, the costs of bringing them back online could easily exceed $30 million. *Id.*

Fifth, if a significant portion of Hess's operations are shut in for an extended period, it would not be able to maintain its full workforce of employees and contractors. *Id.* ¶ 27. Hess utilizes a workforce of approximately 1,500 people to service its North Dakota operations. *Id.* Hess will likely not be able to maintain a workforce of this size if its operations are significantly reduced, and it thus would be required to furlough or lay-off workers in the event of an extended shut-in. *Id.*

Thus, the disruptive effects of vacatur on Hess's distribution operations would have cascading effects on Hess's production operations.

D. Shutting Down DAPL Would Have Significant Disruptive Consequences For Hess's Partners, The State Of North Dakota, And The Energy Industry.

The "disruptive consequences" under *Allied-Signal* of even a temporary DAPL shutdown would be significant and widespread, with millions of dollars in costs and lost revenues and material harm not just to Hess's employees and contractors, but also to the contractors' employees, the State of North Dakota, and the U.S. energy industry. Shutting down DAPL would require shutting in wells and reducing production, which would force both Hess and the contractors that service its operations to reduce their staffing. Diminished production would lead to fewer jobs, which would have "disruptive consequences" for the State of North Dakota's economy, which has

already realized hundreds of millions of dollars in tax revenue because of DAPL. *See What's on Your Mind?*, WZFG (Nov. 7, 2019), https://www.am1100theflag.com/news/12220-11719-dapl-20-pipeline-ryan-rauschenberger-nd-tax-commissioner (interview by Scott Hennen with Ryan Rauschenberger, North Dakota Tax Commissioner, noting that North Dakota realized about $250 million in new tax revenues in the two years after DAPL became operational). Shutting down DAPL would result in economic hardship for the thousands of people who rely on oil production in the Bakken for their livelihoods, and would also reduce the state severance taxes that Hess pays based on its North Dakota production. Moreover, Hess makes substantial royalty payments to landowners (including both North Dakota private landowners and the federal government) based on its North Dakota production—royalty payments that would be curtailed as a result of a shutdown of DAPL. *See* Ex. 3 ¶ 22.

Reducing production in the Bakken would also have significant implications for U.S. energy security, as it would increase reliance on foreign oil. Both the Trump Administration and the Obama Administration have recognized the vital national importance of crude oil pipelines. *See* Exec. Order No. 13,766, 82 Fed. Reg. 8,657, 8,657 (Jan. 24, 2017); Memorandum on Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, 77 Fed. Reg. 18,891, 18,891 (Mar. 22, 2012). Pipelines like DAPL helped the U.S. reduce its 2019 reliance on imported oil to its lowest levels since the 1950s. *See* U.S. Energy Information Administration, *April 2020 Monthly Energy Review* at 59 (Table 3.1 Petroleum Overview, March 2020), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf (last accessed Apr. 28, 2020). But a DAPL shutdown would require producers like Hess to reduce their production in the Bakken, inevitably forcing American industries and households to rely more heavily on imported oil.

DAPL is a critical component of the U.S. energy infrastructure and the "disruptive consequences" of even a temporary shutdown would extend far beyond Hess.

Hess therefore asks this Court, in light of *Allied-Signal* and the significant disruptive consequences to Hess's operations, employees, and contractors, as well as the disruptive consequences for the State of North Dakota and the U.S. energy sector more broadly, to not vacate the Lake Oahe easement and shut down DAPL while the Corps prepares its EIS.

CONCLUSION

For the above reasons, Hess respectfully requests that the Court order that the remand proceed without vacatur.

Dated: April 29, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), I hereby certify that the foregoing Brief of *Amicus Curiae* Hess Corporation in Support of a Non-Vacatur Remedy, filed on April 29, 2020, complies with LCvR 7(o)(4) because it does not exceed 25 pages.

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I hereby certify that on this 29th day of April 2020, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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EXHIBIT A

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; SARA JUMPING EAGLE ET AL., Plaintiff-Intervenors, 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)

AMICI BRIEF OF NORTH DAKOTA FARM BUREAU, NORTH DAKOTA GRAIN DEALERS ASSOCIATION, NORTH DAKOTA GRAIN GROWERS ASSOCIATION, SOUTH DAKOTA CORN GROWERS ASSOCIATION, SOUTH DAKOTA FARM BUREAU FEDERATION, AND SOUTH DAKOTA SOYBEAN ASSOCIATION IN SUPPORT OF DEFENDANT-INTERVENOR-CROSS CLAIMANT DAKOTA ACCESS, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to LCvR 7(o)(5), counsel for Amici hereby affirms that Amici do not have a parent corporation and no publicly held companies own 10% or more of Amici's stock.

Dated: April 29, 2020.

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INTRODUCTION

The issue before the Court is whether to vacate the easement issued by the U.S. Army Corps of Engineers (the "Corps") following the Court's decision to remand to the Corps to complete an Environmental Impact Statement ("EIS"). Under this Circuit's decision in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), the question of whether to vacate must be answered by considering the seriousness of the deficiencies in the agency's order and the disruptive consequences that may flow from vacatur. The North Dakota Farm Bureau, North Dakota Grain Dealers Association, North Dakota Grain Growers Association, South Dakota Corn Growers Association, South Dakota Farm Bureau Federation, and South Dakota Soybean Association (collectively "Amici") submit this Amici Brief to address the disruptive consequences that would impact farmers, grain elevators, and others in the agriculture industry if the Court vacated the easement and ordered a shutdown of the Dakota Access Pipeline ("DAPL"). Based on these disruptive consequences, Amici respectfully submit the Court should remand this matter without vacatur.

STATEMENT OF INTEREST OF AMICI CURIAE

The North Dakota Farm Bureau is a grassroots, member-driven general farm organization representing farmers, ranchers, and landowners throughout the state. The North Dakota Farm Bureau was organized in 1942 and has grown to more than 27,000 members today. The North Dakota Farm Bureau advocates through lobbying and community outreach to support agricultural interests throughout the state.

The North Dakota Grain Dealers Association is a 109-year-old voluntary membership trade organization representing the interests of country grain elevators in North Dakota. These elevators are the primary point of sale for grain raised by North Dakota farmers. The elevators receive, clean, condition, segregate by quality, and ship these grains to domestic and international markets.

The North Dakota Grain Growers Association has represented North Dakota wheat and barley farmers in domestic policy issues on the local, state and national levels for more than 50 years. The North Dakota Grain Growers Association's mission is to serve North Dakota wheat and barley producers with education, leadership, information, and representation to increase profitability and enhance value added opportunities.

The South Dakota Corn Growers Association is comprised of 1,060 dues-paying members and represents more than 12,000 corn farmers. The association works to promote corn, improve producer profitability, and increase corn use through livestock feeding, production of ethanol and byproducts, and other uses.

The South Dakota Farm Bureau Federation is a grassroots general agriculture organization with nearly 16,000 member families across the state. Formed in 1917, the South Dakota Farm Bureau Federation represents farming and ranching interests by focusing on advocacy, education and policy development. The organization's vision is to create a robust agriculture industry in South Dakota, which contributes to a strong economy, healthy environment, thriving communities and nutritious food. The South Dakota Farm Bureau Federation participates in state and federal policy and regulatory efforts relating to the protection of private property rights and enhancing its members' livelihoods.

The South Dakota Soybean Association is a 501(c)(5) membership organization that was organized in 1982. The mission of the organization is to improve the competitiveness and profitability for South Dakota soybean farmers through education and policies.

Amici have an interest in the outcome of the Court's decision because a ruling from this Court to vacate the easement could have far-reaching implications threatening the entire agricultural industry of the Dakotas. Remanding with vacatur would unduly burden the

agricultural industry with increased transportation costs by forcing the agricultural industry to compete with the oil industry for railroad transportation to transport its commodities. In a time when farmers and ranchers are already facing financial stress, such increased transportation costs could have a crippling effect on the agricultural industry. The Court's decision on this issue will directly affect the industry of Amici.

Counsel for Amici hereby certifies that no person or entity other than Amici and their counsel authored this brief in whole or in part, and no other person or entity other than Amici funded the preparation of this brief.

BACKGROUND

Today, just as in generations past, "agriculture remains an essential part of the fabric of American life" and the economies of North Dakota and South Dakota. Renee Jean, "North Dakota agriculture continues to play essential role amid coronavirus outbreak," WILLISTON HERALD, Mar. 25, 2020, https://www.willistonherald.com/news/farm_and_ranch/north-dakota-agriculture-continues-to-play-essential-role-amid-coronavirus-outbreak/article_6068edfe-6eb8-11ea-baa7-0ff43aad1f15. html. More than 26,000 farms call North Dakota home, while production agriculture and related industries support almost a quarter of the State's workforce. *Id.* Together, these farms produce more than 50 different commodities, and North Dakota is the top producer in 10 of those commodities. *Id.*

Similarly, agriculture is the number one industry in South Dakota, generating more than 30 percent of the State's economic activity. "National Ag Week Being Celebrated in South Dakota," RAPID CITY JOURNAL, Mar. 20, 2017, https://rapidcityjournal.com/news/local/communities/sturgis/national-ag-week-being-celebrated-in-south-dakota/article_075f2bc1-9240-5653-8cce-3a23bdb35629.html. More than twenty

percent of South Dakotans work on South Dakota's 31,000 farms and agriculture-related industries. *Id.*

A thriving agriculture industry is vital to the economies of North Dakota and South Dakota, and the agriculture industry's success relies heavily on the availability of rail service. "The competitive cost of rail transport for long-distance high-volume shipments makes rail transportation attractive for the movement of North Dakota grain to the ports and domestic markets." 2040 North Dakota State Rail Plan, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION, Nov. 2017, https://www.dot.nd.gov/divisions/planning/railplan/FINALNorth%20Dakota%20State%20Rail%20Plan%20December%202017.pdf at 1-5. "Railroads have long been the backbone of North Dakota's transportation system and the most dependable way for farmers to move crops – to ports in Portland, Ore., Seattle and Vancouver, from which the bulk of the grain is shipped across the Pacific to Asia; and to East Coast ports like Albany, from which it is shipped to Europe." Ron Nixon, "Grain Piles Up, Waiting for a Ride, as Trains Move North Dakota Oil," THE NEW YORK TIMES, Aug. 25, 2014, https://www.nytimes.com/2014/08/26/us/grain-piles-up-waiting-for-a-ride-as-trains-move-north-dakota-oil.html. In a typical year, railroads transport 72 to 82 percent of North Dakota's crop output. 2040 North Dakota State Rail Plan, *supra* at 2-89. The total amount of crop rail shipments has vastly increased in recent history; overall agricultural shipments by rail doubled between 2000 and 2014. *Id.*

"In South Dakota, farmers are dependent on trains to move their corn, soybeans, wheat and other commodities hundreds of miles to coastal ports such as Seattle and New Orleans or livestock operations in the Southwest at a greater cost than farmers in neighboring states who are closer to rivers or have more rail options." "Ag bracing for railroad delays as record harvest looms," ARGUS

LEADER, Sept. 15, 2014, https://www.argusleader.com/story/news/2014/09/15/ag-bracing-railroad-delays-record-harvest-looms/15653623/. "Unlike Iowa, for example, where the state's burgeoning ethanol industry and livestock producers consume millions of bushels of corn that don't need to be moved long distances, South Dakota grows more than it needs," as about 50 percent of grain is transported out of the State. *Id.*

Given the interdependence of the agricultural and railroad industries, "[t]he farmers and grain elevator operators are at the mercy of the railroads." "Food or Fuel? The Rail Car Shortage Conundrum," NBC NEWS, May 9, 2014, https://www.nbcnews.com/business/ economy/food-or-fuel-rail-car-shortage-conundrum-n209781. As a result, the continued operation of DAPL is essential to the agriculture industry because DAPL eases transportation shortages by freeing up rail cars to move grain and other agricultural products. Amici thus respectfully request the Court remand the matter to the Corps without ordering the termination of DAPL operations.

ARGUMENT

I. The Court should remand without vacating because a DAPL shutdown would cause disruptive consequences to the agricultural industry.

A. Legal Standard for Vacatur

Although vacating a rule or action in violation of the National Environmental Policy Act (NEPA) is the standard remedy under the case law of this Circuit, district courts maintain discretion to leave the agency action in place pending a remand. *Humane Soc. of U.S. v. Johanns*, 520 F.Supp.2d 8, 37 (D.D.C. 2007). In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), the Court stated that two factors guide the district court's decision of whether to vacate. First, the district court should analyze "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)[.]" *Id.* Second, the district court should consider "the disruptive consequences" of vacatur. *Id.* "Neither factor is

dispositive, as 'there is no rule requiring either the proponent or opponent of vacatur to prevail on both factors.'" *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F.Supp.3d 92, 99 (D.D.C. 2019) (quoting *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F.Supp.3d 240, 270 (D.D.C. 2015)). "Instead, resolution of the question turns on the Court's assessment of the overall equities and practicality of the alternatives." *Id.* (internal quotation marks and citation omitted).

B. The equities weigh in favor of denying vacatur because of the disruptive consequences that would be faced by the agriculture industry if the Court ordered a DAPL shutdown.

In this case, the overall equities and practicality of the alternatives weigh in favor of denying vacatur. As an initial matter, vacatur would pose disruption because DAPL is currently in operation. This Circuit recently refused to vacate a FERC natural gas pipeline approval because of the disruptive effects of shutting down an operational pipeline. *See, e.g., City of Oberlin, Ohio v. Fed. Energy Reg. Comm'n*, 937 F.3d 599, 611 (D.C. Cir. 2019) (remanding without vacatur because vacatur "would be quite disruptive, as the [natural gas] pipeline is currently operational").

If the Court rules DAPL can no longer operate, the crude oil currently transported by DAPL would need to be shipped through alternate means. As the North Dakota Department of Transportation explained in its 2040 North Dakota State Rail Plan, there is a direct correlation between pipeline capacity and rail shipments of crude oil. *See* 2040 North Dakota State Rail Plan, *supra*. As pipeline capacity increases, crude oil shipments by rail generally decline, since pipelines are a less expensive option for moving oil. *Id.* at 1-5, 2-84. Conversely, when pipeline capacity decreases, which would occur if the Court orders a shutdown of DAPL, there would be a corresponding increase in the need for rail service to transport crude oil.

Under these circumstances, a sudden shutdown of DAPL would drastically decrease the available pipeline capacity, thereby increasing the demand on rail service for transporting oil. *Id.* at 2-83; *see also* Doc. #279-1 (discussing the impact of a loss of DAPL capacity). Many farmers

view pipelines such as DAPL as the long-term solution to ease rail congestion for the agriculture industry, and a shutdown of an active pipeline would give rise to the very problems the pipeline was meant to address. Tom Meersman, "Farmers seek more rail capacity for grain," Star Tribune, April 8, 2014, https://www.startribune.com/farmers-seek-more-rail-capacity-for-grain/254467091/?refresh=true; Liz Hampton, "With Dakota Access in limbo, more Bakken crude to move on trains," REUTERS, Dec. 22, 2016, https://www.reuters.com/article/us-north-dakota-pipeline-rail/with-dakota-access-in-limbo-more-bakken-crude-to-move-on-trains-idUSKBN14B240 (noting energy companies would turn to rail to ship crude after the Corps denied an easement in December 2016). Accordingly, multiple industries have reasonably relied upon the continued operation of DAPL, including not just the energy industry, but also the railroad industry and the agriculture industry. *See Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018) (noting vacatur would pose disruptive consequences to an entity who "reasonably relied on the [agency's] ruling and settled practice" and it would suffer economic consequences if the court vacated the license).

Ultimately, the agriculture industry is already facing challenging times because of the current low crop prices. A DAPL shutdown would worsen the outlook for farmers because it is likely to increase the costs of transporting grain due to the enhanced demand it would place on rail service. These consequences to the uninvolved market participants in the agriculture industry warrant a remand without vacatur. *See Black Oak Energy, LLC v. F.E.R.C.*, 725 F.3d 230, 244 (D.C. Cir. 2013) (concluding vacatur would be disruptive because of the increased costs it would impose on "uninvolved market participants").

C. The Court's decision in *Semonite* favors a remand without vacatur.

The recent decision in *National Parks Conservation Association v. Semonite* (*Semonite II*), 422 F.Supp.3d 92 (D.D.C. 2019), is particularly instructive to the question pending before the

Court. In the first *Semonite* ruling, the court found the Corps violated NEPA by failing to conduct an EIS before issuing a permit. *Nat'l Parks Conservation Ass'n v. Semonite* (*Semonite I*), 916 F.3d 1075, 1082 (D.C. Cir. 2019). In reaching this decision, the court analyzed three factors indicating there would be serious environmental impacts as a result of the project: the degree to which the effects on the quality of the human environment were likely to be "highly controversial," the unique characteristics of the geographic area, and the degree to which the action may adversely affect sites listed in the National Register of Historic Places. *Id.* at 1083-88.

This Court emphasized in its March 25, 2020 decision that it "received significant guidance" from *Semonite I* in deciding to remand this matter for preparation of an EIS. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2020 WL 1441923, at *1 (D.D.C. Mar. 25, 2020). Given what this Court viewed as similar issues between the cases, it relied heavily on *Semonite I* in deciding to remand this matter for preparation of an Environmental Impact Statement. *Id.*

Just as *Semonite I* guided this Court's March 25, 2020 Order, the decision in *Semonite II* analyzing whether to vacate or remand "lights the way" on the same question now pending before the Court. *Id.* at *8. In *Semonite II*, the court determined the deficiency was serious under the first *Allied-Signal* factor. *Semonite II*, 422 F.Supp.3d at 99. According to the court, "[i]f the first *Allied-Signal* factor were the only consideration, the standard remedy would likely apply." *Id.* at 99-100. However, the court concluded the second *Allied-Signal* factor was "critical to the ultimate determination that vacatur is not appropriate in this instance." *Id.*

At the outset, the court recognized "the simple fact that if vacatur were ordered, that decision would have serious impacts beyond the mere procedural step of saying that the permit is revoked." *Id.* at 100. "By revoking the permit, this Court would set in motion a chain of events

that could lead to the type of serious, disruptive consequences with which the second *Allied-Signal* factor is concerned." *Id.* Namely, the inability to continue with the electrical infrastructure project in question would result in serious "real-world consequences," including the threat of rolling blackouts in the region. *Id.* at 101. The project was constructed to resolve a power emergency in the region, and it became "a crucial source of electricity in the area" since the time of its installation. *Id.* Before the project became operational, the region encountered numerous power shortages that were likely to return if the project were not allowed to continue. *Id.* at 101-102. These consequences would be felt directly by "the hundreds of thousands of people in the region relying on this project as their power source," and it "would be unjust to force all of those people to bear the brunt of the harm when they are not responsible for its cause." *Id.* at 102.

Moreover, the court noted the Corps might ultimately decide to reissue the permit after conducting an EIS, in which case it would result in an extreme amount of waste and significant costs if vacatur were ordered. *Id.* at 103. Under these circumstances, the court held that "the second *Allied-Signal* factor forces the Court to conclude that vacating the permit would be inappropriate." *Id.*

Like *Semonite II*, a decision to vacate and cease operation of DAPL in this case would have serious impacts beyond simply revoking the easement.[1] Similar to the electrical infrastructure project in *Semonite II*, DAPL was constructed to alleviate an ongoing infrastructure demand, in this case concerning the infrastructure to transport crude oil. Since coming online, DAPL carries

[1] The first time the question of vacatur was before this Court, it found both factors weighed in favor of remand without vacatur. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F.Supp.3d 91, 108 (D.D.C. 2017). But the Court placed more emphasis on the first factor, as it found the second prong only slightly tipped in favor of the Defendants. *Id.* Even if the Court were to reach the opposite conclusion from its earlier decision with respect to the first factor, the recent decision in *Semonite II* still favors remand without vacatur because of its emphasis on the disruptive consequences posed under the second factor.

in excess of 550,000 barrels of oil per day out of North Dakota. Thus, DAPL has become a crucial component of the transportation infrastructure utilized by the State's energy industry. As discussed above, if DAPL were forced to cease operation, the crude oil currently transported by pipeline would necessarily need to be shipped through alternate means, including through the increased use of rail cars. This directly affects the agriculture industry because, as more rail cars are allocated to transport crude oil, less rail cars are available to move agricultural products in a timely and affordable manner.

Amici respectfully submit this scenario is not mere conjecture, but a real-world consequence the agriculture industry was forced to confront just a few years ago. In 2014, rail shipments of crude oil surged as there were few existing pipelines available to ship oil. Nixon, *supra*. Given the finite amount of rail cars available, the increased demand for oil shipments resulted in a shortage of cars that could be allocated for agricultural purposes. *Id.* Consequently, grain elevators reached capacity, but they could not ship crops to market due to a shortage of rail cars. "Food or Fuel? The Rail Car Shortage Conundrum," *supra*. This, in turn, meant the elevators could not make room for new grains. *Id.* Without a viable means for transporting their product, farmers were faced with arranging for alternate, more expensive means of transportation or, even worse, simply letting their crop rot. Nixon, *supra*.

On the other end of the transaction, food processors reluctantly halted production when they could not obtain their shipments. *Id.* For instance, breakfast cereal giant General Mills lost dozens of days of production due to logistics problems, including rail car congestion. *Id.* While some producers obtained product from other sources to fulfill their needs, this meant the original farmer was unable to sell his or her product to complete the transaction as had been originally intended. *Id.*

Making matters worse, there are often financial penalties imposed for late or nondeliveries to processors. "Food or Fuel? The Rail Car Shortage Conundrum," *supra*. On top of the late fees imposed when shipments fail to arrive on time, grain companies often pay less for commodities because of the higher transportation costs, the risks involved, and the delays factored into the price. "Ag bracing for railroad delays as record harvest looms," *supra*. "Ultimately, that means farmers receive a lower price for their crop." *Id.*

In sum, like *Semonite II*, a decision to shut down DAPL may trigger a chain reaction of events causing immense disruption within the agriculture industry and beyond. The rail car shortages encountered in the years prior to DAPL's operation may still return if DAPL operations cease, similar to the power shortages in *Semonite II*. Moreover, the disruption posed by a DAPL shut down would be felt not just by the energy industry, but also by thousands in the agriculture industry who depend on having affordable, available rail cars to transport and receive grain, ethanol, fertilizer, and other agricultural products.

In addition, the Corps may ultimately decide to grant an easement after conducting an EIS, like the court in *Semonite II* hypothesized, in which case it would result in an extreme amount of waste and unnecessary costs if vacatur had been ordered in the interim. If DAPL operations cease, agricultural suppliers and producers will likely face increased costs and delays. If the Corps ultimately grants an easement again after the EIS is complete, these costs and delays would have been unnecessary and wasteful.

Under these circumstances, the holding in *Semonite II* applies with equal force in this matter as *Semonite I* did in this Court's initial decision. Consequently, the Court should conclude that vacatur and ordering the cessation of DAPL is inappropriate under the second *Allied-Signal* factor.

CONCLUSION

Farmers are in the midst of challenging times, as the agricultural economy has been depressed for the past couple of years, commodity prices are low, and the COVID-19 pandemic is making the situation worse. Additional pressures on rail transportation and availability would be devastating to North Dakota and South Dakota farmers.

Under this Circuit's guiding precedent, and the recent decision in *Semonite II*, vacatur is inappropriate if disruptive consequences may result. If the Court were to order a shutdown of DAPL, farmers, grain elevators, and others in the agriculture industry and beyond would face serious disruptive consequences. As a result, the Court should exercise its discretion to remand without vacating the easement.

Dated: April 29, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with LCvR 7(o)(4) because it does not exceed 25 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2020, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE,	)	Civil No: 1:16-cv-01534-JEB (Consolidated with 1:16-cv-01796 and 1:17-cv-00267)
Plaintiffs,	)	
and	)	
CHEYENNE RIVER SIOUX TRIBE; SARA JUMPING EAGLE ET AL.,	)	
Plaintiff-Intervenors,	)	
v.	)	
U.S. ARMY CORPS OF ENGINEERS,	)	
Defendant-Cross-Defendant	)	
and	)	
DAKOTA ACCESS, LLC,	)	
Defendant-Intervenor-Cross-Claimant.	)	

BRIEF OF *AMICUS CURIAE* NORTH DAKOTA PETROLEUM COUNCIL IN OPPOSITION TO VACATUR ON REMAND

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STATEMENT OF INTEREST AND INTRODUCTION

Amicus Curiae, North Dakota Petroleum Council ("NDPC"), is a trade association representing more than 500 companies involved in all aspects of the oil and gas industry in North Dakota, South Dakota, and the Rocky Mountain Region.[1] North Dakota ranks second nationally in oil production, and NDPC members produce approximately 98 percent of the oil in North Dakota. Established in 1952, the NDPC's mission includes promoting and enhancing the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas; promoting opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; and accumulating and disseminating information concerning the petroleum industry to foster the best interests of the public and industry.

This brief was authored in whole by counsel for the NDPC and is filed pursuant to LCvR 7(o). No other party, party's counsel, or any person other than the NDPC contributed money to fund the preparation or submission of this brief.

The Court requested that the litigants in this matter submit briefing on whether to vacate the easement held by Dakota Access, LLC during the remand ordered by this Court. ECF No. 496, Mem. Op. at 42. "The decision whether to vacate depends on '[1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

[1] Energy Transfer Partners, L.P. is a member of the NDPC, but was not involved in the drafting of this brief or any associated pleadings.

This Court has recognized that vacatur of the easement "would carry serious consequences that a court should not lightly impose." ECF No. 496, Mem. Op. at 42. The NDPC submits this brief as *Amicus Curiae* to specifically address the second *Allied-Signal* factor, and to provide the Court with additional information on the disruptive consequences that will directly impact North Dakota oil producers should the Court order vacatur and shut down the Dakota Access Pipeline ("DAPL").

ARGUMENT

I. This Court should decline to vacate the easement, because serious disruptive consequences will result from shutting down DAPL.

A. DAPL has become a crucial component of North Dakota's oil industry and the state's economy.

DAPL began transporting oil on June 1, 2017. North Dakotans, state officials, and the state's oil industry have widely recognized that the pipeline was a game-changer for the industry and the state's economy. *See generally What's on Your Mind?* Interview by Scott Hennen with Justin Kringstad, Executive Director, North Dakota Pipeline Authority (KFYR radio broadcast Nov. 5, 2019), *available at* https://www.am1100theflag.com/news/12214-11519-dapl-20-pipeline-justin-kringstad-nd-pipeline-authority-executive-director; Renée Jean, *2017's top 10 stories — No. 4: Dakota Access, technology bring oil through downturn*, Williston Herald (Dec 29, 2017), *available at* https://www.willistonherald.com/news/s-top-stories-no-dakota-access-technology-bring-oil-through/article_40ac36dc-ec3e-11e7-be15-d746d97e0bd5.html.

The completion of DAPL marked the first time that North Dakota has enjoyed adequate pipeline capacity, and it enabled much of the state's oil production to move from high-cost rail to low-cost pipeline transportation. In one month, rail plummeted from 24% to 7% of North Dakota's oil transportation, comparing North Dakota Pipeline Authority figures for the month before and the month after DAPL commenced operations. *Compare* Justin Kringstad, *July 2017*

Monthly Update, North Dakota Pipeline Authority, p. 3 (July 14, 2017), *available at* https://ndpipelines.files.wordpress.com/2012/04/ndpa-july-14-2017-update.pdf *with* Justin Kringstad, *August 2017 Month Update*, North Dakota Pipeline Authority, p. 3 (August 11, 2017), *available at* https://ndpipelines.files.wordpress.com/2012/04/ndpa-august-11-2017-update.pdf.

In the almost three years since it began operating, DAPL has become a fully integrated and essential element of the state's oil industry and the state's economy. As this Court has noted, the pipeline transports about 600,000 barrels of oil per day. ECF No. 496, Mem. Op. at 20. DAPL's capacity, as a single pipeline, represents approximately 41% of North Dakota's 1,451,029 barrels per day in oil production, as of the most recent statewide production data. *See Director's Cut, February 2020 Production*, North Dakota Department of Mineral Resources (April 14, 2020), https://www.dmr.nd.gov/oilgas/directorscut/directorscut-2020-04-14.pdf.

DAPL's impacts reverberate through all corners of North Dakota's economy. North Dakota's Tax Commissioner, Ryan Rauschenberger, has noted North Dakota realized approximately $250,000,000 in additional tax revenues in the first two years after DAPL became operational. *What's on Your Mind?* Interview by Scott Hennen with Ryan Rauschenberger, North Dakota Tax Commissioner (KFYR radio broadcast Nov. 7, 2019), *available at* https://www.am1100theflag.com/news/12220-11719-dapl-20-pipeline-ryan-rauschenberger-nd-tax-commissioner; *see also* Editorial Board, *North Dakota's Pipeline Payoff: Six months later, the Dakota Access Pipeline proves its value*, Wall Street Journal (Dec. 29, 2017), *available at* https://www.wsj.com/articles/north-dakotas-pipeline-payoff-1514591716 (noting "solely because of the Dakota Access Pipeline, the state is on track for $210 million to $250 million in additional tax revenue by the end of this biennial budget period."). These revenues are largely used to fund education and human services. *See* Interview with Ryan Rauschenberger, *supra*.

Shutting down the pipeline at this point would not only wipe out these benefits but would result in dislocations that are difficult to overstate, as explained below.

B. It would be physically impossible to arrange alternate transportation for much of DAPL's volumes in the near-term.

It is widely acknowledged that at recent production levels, or even 2017 production levels, a shutdown of DAPL would mean that producers would need to attempt to shift most of DAPL's volumes to rail transportation if they wished to maintain the production. Certainly, this is the prediction of the NDPC's membership, given their daily experience marketing and transporting North Dakota's oil production. Other existing pipeline systems have limited capacity and do not deliver oil to the same destinations as DAPL.

However, North Dakota presently lacks the rail capacity to transport more than a fraction of DAPL's volumes. At its peak, North Dakota rail export volumes reached 850,000 barrels per day. *Estimated ND Rail Export Volumes*, North Dakota Pipeline Authority, *available at* https://ndpipelines.files.wordpress.com/2020/04/17.jpg. This capacity no longer exists. A shutdown of DAPL, even if temporary, would strand most of the oil that DAPL moves. The industry lacks the necessary infrastructure to transport these volumes by rail. Specifically, it lacks sufficient rail terminals (some of which have been retired or repurposed since DAPL began operating), trucks to haul oil to the terminals, locomotives, and tank cars.

Take the example of available tank cars. Over the 2013 to 2018 period, the overall fleet of rail cars carrying oil has plummeted. During that time, "The number of rail tank cars carrying crude oil decreased by 63 percent, from nearly 29,000 tank cars to just under 13,000 tank cars." *Fleet Composition of Rail Tank Cars Carrying Flammable Liquids: 2019 Report*, United States Department of Transportation, p. 7 (Oct. 4, 2019) ("USDOT Fleet Report"), *available at* https://doi.org/10.21949/1504519. Moreover, at the time that DAPL began operating, the

nation's rail fleet was in the process of upgrading or decommissioning oil tank cars to meet new federal safety regulations. Specifically, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Federal Railroad Administration issued a rule entitled *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*. 49 C.F.R. Parts 171-180. After revisions in response to legislation, the rule resulted in mandatory phase-outs of various car types allowed to carry crude oil from January 1, 2018 through May 1, 2025. USDOT Fleet Report at p. 3 and Table 1. These phase-outs prohibited 6,514 cars in existing oil car fleets from carrying crude oil as of a 2019 U.S. Department of Transportation fleet report, with another 2,098 in-service cars to be phased out from crude oil transportation by April 1, 2020.[2] USDOT Fleet Report at Table 1. Other types of flammable liquids, such as ethanol, refined fuel products, and chemicals, have later phase out dates, meaning the classes of cars phased out for crude oil continue to transport other types of flammable liquids. *See id.*

Thus, it is questionable that the country possesses a rail fleet capable of transporting DAPL's volumes in addition to existing demands. To illustrate the impact of a DAPL shutdown on rail car needs, assume that the nation still possesses a fleet of approximately 13,000 rail cars dedicated to transporting crude oil, as was the case in USDOT's 2019 report, even though this number included 2,098 cars that were phased out as of April 1, 2020. *See id.* at p. 3, Table 1 and p. 7. Each car can carry about 600 barrels of oil; for instance, DAPL would replace approximately 750 rail cars per day at an assumed volume of 450,000 barrels per day. *Dakota Access, LLC: United States Fish and Wildlife Service Environmental Assessment of Grassland*

[2] For cars dedicated to carrying crude oil, Table 1 in the USDOT Fleet Report reflects a phase-out of 276 non-jacketed DOT-111 cars; 90 jacketed DOT-111 cars; and 6,148 non-jacketed CPC-1232 cars, with another 2,098 non-jacketed CPC-1232 cars remaining in service as of 2018 but required to be phased out by April 1, 2020.

and Wetland Easement Crossings, p. 16 (May 2016), *available at* https://www.fws.gov/uploadedFiles/DAPL%20EA.pdf. Applying the same math to the nearly 600,000 barrels per day of flow identified in this Court's recent Memorandum Opinion (ECF No. 496 at 20) means that moving DAPL's volumes would require about 1,000 rail cars per day.

Though individual times vary by destination, a rail car can make on average 1.75 roundtrips per month transporting North Dakota crude oil to market, or one round trip every 17 days (30 / 1.75 = 17.14). Thomas Covert & Ryan Kellogg, *Crude by Rail, Option, Value, and Pipeline Investment*, p. A-9 (2018), *available at* https://www.nber.org/papers/w23855. At this rate, railroads would need to dedicate 17,000 rail cars (1,000 rail cars per day x 17 days) to carry DAPL's daily flows as estimated by this Court. Even if only 450,000 barrels per day needed to move to rail, such a move would require about 12,750 rail cars.[3] This total approaches or exceeds the total number of rail cars already dedicated to transporting crude oil in all fifty states as of the USDOT's most recent statistics. *See* USDOT Fleet Report, *supra*, at 7. Even assuming some availability of railcars currently serving other liquid classes, these fleets include many cars that have been phased out of service for crude oil. *See id.* at 3, Table 1.

As a result, additional manufacturing or retrofitting of rail cars would be required to accommodate the volumes currently carried by DAPL. This would entail significant costs. For instance, one study estimates costs of $155,000 or more to manufacture each car compliant with the new regulations. *The Economic Impacts of Changes to the Specifications for the North American Rail Tank Car Fleet*, ICF International, p. 22 (2014), *available at* https://energyinfrastructure.org/~/media/energyinfrastructure/images/rail/related-documents/economic-impact-of-changes-to-the-specif.pdf. The same study estimates retrofit

[3] 450,000 barrels per day / 600 barrels per rail car x 17 days = 12,750 rail cars.

costs of one common car type at $47,200 to $54,200, while PHMSA estimated between $26,230 and $32,900 for the same car type. *Id.* As for timing, USDOT recently projected 6,700 new builds and 8,410 retrofits of rail cars to the new regulatory standards for the entire year of 2019. USDOT Fleet Report, *supra*, at 12. In other words, USDOT projected that the rail industry would require an entire year to manufacture and retrofit a volume of cars approaching the number necessary to transport DAPL's current volumes. This is to say nothing of the delay and substantial switching and transportation costs that would be required to move additional cars and locomotives to the appropriate rail systems, or the delays and costs of hiring and training or relocating sufficient employees to operate a massive influx of trains. It would most likely also mean a return to congested traffic on the rail lines serving North Dakota, harming not only oil producers but also farmers attempting to bring their products to market. *See, e.g.*, Ron Nixon, *Grain Piles Up, Waiting for a Ride, as Trains Move North Dakota Oil*, N.Y. Times (Aug. 25, 2014), *available at* https://www.nytimes.com/2014/08/26/us/grain-piles-up-waiting-for-a-ride-as-trains-move-north-dakota-oil.html.

Moreover, NDPC members have entered into marketing contracts and built substantial gathering infrastructure premised on delivering oil to DAPL and selling it in the markets to which DAPL delivers its volumes. A shutdown of DAPL would leave many members of North Dakota's oil industry unable to honor contractual commitments and out the substantial capital costs of building oil gathering systems designed to deliver production to DAPL. The investment in gathering infrastructure for delivering oil to DAPL effectively idled or phased out certain rail terminals in addition to the trucking fleet necessary to deliver oil to the terminals. Suddenly shutting down DAPL would also require producers to reestablish both idled rail terminals and an enormous trucking fleet. The time and costs necessary for such a transition is difficult to predict.

In sum, the dramatic logistical changes needed to shift the majority of DAPL's flows to rail are not physically possible any time soon. A sudden shutdown of DAPL would necessitate widescale shut-ins of North Dakota production.

C. The cost differential of shifting transportation to rail is not economically feasible for much of North Dakota's production, especially in present market conditions.

The above analysis illustrates some of the problems that a shutdown of DAPL would entail in normal economic conditions. In recent weeks, of course, the coronavirus pandemic has turned the nation's economy and the oil industry upside down. Nevertheless, NDPC continues to hope and expect that our country's economy and the industry will recover in coming months. Therefore, the Court should consider the impacts that a DAPL shutdown would have under normal conditions, because any shutdown of the pipeline is likely to outlast the acute but temporary market dislocations caused by the pandemic. At the same time, the Court should also consider the impacts that a shutdown of DAPL would have under present conditions, especially in the event that the Court rules before the economy and oil markets have stabilized.

The high cost differential between transport on DAPL and transport on rail would cost North Dakota producers and citizens millions of dollars in the best of times. Under current conditions, the cost differential would mean even more lost production and lost jobs beyond those already lost due to the pandemic, and would likely extend the losses for a longer term.

After almost three years of operation, it is well-documented that price differentials between DAPL and rail transportation range from $5.00–$10.00 per barrel. For instance, a recent study comparing pipeline to rail transportation in the Bakken noted that "'Railroad transport reportedly costs in the neighborhood of $10 to $15 per barrel compared with $5 per barrel for pipeline.' This is consistent with information from Genscape's *Petrorail Report* (various dates) and with the prices reported in Covert and Kellogg (2017)." K. Clay, A. Jha, N.

Z. Muller, R. Walsh, *The external costs of shipping petroleum products by pipeline and rail: Evidence of shipments of crude oil from North Dakota*. 40 Energy J. 55, 58 (2019), *available at* https://www.iaee.org/en/publications/ejarticle.aspx?id=3277&id=3277 (citation omitted).[4] The Congressional Research Service has quoted these same numbers. *U.S. Rail Transportation of Crude Oil: Background and Issues for Congress*, Congressional Research Service, p. 4 (Dec. 4, 2014), https://fas.org/sgp/crs/misc/R43390.pdf. Concerning DAPL specifically, another recent study noted that DAPL has a published "tariff of $5.50–$6.25/bbl for 10-year committed shippers," and estimated North Dakota rail options at "minimum reported costs" as follows: "$13.00/bbl for shipments to the East Coast, $10.94 for the Gulf Coast, $9.23 for the West Coast, and $8.54 for within-Midwest shipments to Cushing, OK." Covert, *supra*, at 5, 20 (emphasis added). Rates published by DAPL effective July 1, 2019 state tariff rates of $5.84 to $6.63 for North Dakota to Nederland, Texas for 10-year committed shippers. *F.E.R.C. I.C.A. Oil Tariff*, Dakota Access, LLC (May 31, 2019), *available at* https://cms.energytransfer.com/wp-content/uploads/2019/08/DAPL_ETCO_Joint_Rates_Tariff_4_5_0.pdf.

In the best of times, the high cost differential between DAPL and rail would harm North Dakota producers to the tune of tens or hundreds of millions of dollars per month. Applying a $5.00 to $10.00 per barrel cost differential, each 100,000 barrels per day on rail instead of DAPL would equate to North Dakota producers paying $15,000,000 to $30,000,000 per month in additional interstate transportation costs. Such costs could not quickly be undone, because they would be tied to fixed-term rail contracts.

[4] As relevant to the potential environmental consequences of shutting down DAPL, this study examines North Dakota production and concludes that "total air pollution and greenhouse gas costs are substantially larger for rail than for pipelines." Clay, *supra*, at 69.

In the presently depressed market conditions, an additional $5.00 to $10.00 per barrel of transportation costs will likely mean that producers opt to shut in the majority of DAPL's volumes if the pipeline is shuttered. Some of North Dakota's oil production is already being temporarily shut in due to low prices caused by the pandemic. If this Court orders DAPL to shut down in such an environment, oil producers will likely choose to shut in most of their production that was travelling on the pipeline, rather than seek new transportation arrangements that would be uneconomic at current prices. Put differently, shutting down DAPL at the present time would result in another wave of shut-in production on top of whatever volumes producers have already curtailed due to low prices.

In sum, shutting down DAPL after three years of operation and under the current market conditions would undermine the substantial commitments North Dakota's oil producers have made over the past three years. It would further harm the North Dakota oil and gas industry in a time when it is already down due to the coronavirus pandemic. It would also delay any recovery from the pandemic. The loss of oil production would harm not only the companies who produce the oil, but also royalty owners and the state and local governments who rely on royalties and taxes from the production, both during the pandemic and long afterward. It would also harm the service industries and employees who supported the lost production. Ultimately, a shutdown of DAPL in the currently distressed environment likely would cause companies to fail who otherwise might have survived, and jobs to be lost that otherwise might have been saved.

CONCLUSION

The NDPC urges the Court to avoid the highly disruptive effects of a DAPL shutdown, and respectfully requests that the Court order that the remand proceed without vacatur.

Dated this 29th day of April, 2020.

Respectfully Submitted,

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