IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor.	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases No. 1:16-cv-1796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS OF ENGINEERS' REPLY IN SUPPORT OF ITS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE STANDING ROCK SIOUX TRIBE

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LIST OF EXHIBITS

Exhibit	Description	Reference
R	Nationwide Permit 12 Decision Document	USACE_DAPL0016861-910
S	Memorandum for Record (Mar. 16, 2012)	USACE_DAPL0063839-874
T	Memorandum for Record (July 25, 2016)	USACE_DAPL0067382-91

I. INTRODUCTION

The Standing Rock Sioux Tribe's challenge to the Corps' actions related to the Dakota Access Pipeline crossing at Lake Oahe rest on the flawed assumption that the Corps did not consider the risk of an oil spill. On the contrary, the Corps thoroughly considered the likelihood of a spill and in its expert judgment determined that the risk of a spill was remote given the nature of the Pipeline's construction, its location underground, and its compliance with—indeed its exceeding—applicable regulatory standards imposed by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), North Dakota law, and industry best practices and guidance. The Corps also imposed significant conditions on Dakota Access's easement to further mitigate this already remote risk. And even though the risk could rightly be considered "remote and speculative," the Corps nonetheless examined potential impacts that could result from a catastrophic Pipeline rupture and spill at the Lake Oahe crossing. The Tribe disagrees with the *extent* of the Corps' discussion of risk and impact of a spill, but presents no reason to find the Corps' action arbitrary. The law requires only that this Court ensure that potential impacts are considered and the record makes clear that the Corps took the requisite hard look at the potential for an oil spill under NEPA.

The Tribe also argues that the Corps, in granting the easement, reversed itself without a sufficiently detailed explanation. This claim defies credulity given the Corps' repeated and thorough re-examination and analysis that followed the FONSI, but preceded the granting of the easement. Throughout this process of re-examination and analysis, at higher levels within the organization, the Corps repeatedly re-affirmed that the original Environmental Assessment complied with NEPA and that no EIS was legally required. On this issue there was no "reversal." Instead, the Corps provided a cogent and detailed explanation of its decision-making process in granting the easement.

Finally, just as the Tribe cannot that demonstrate the Corps failed to consider the risk of a spill, the Tribe cannot demonstrate that the Corps violated any substantive trust duty or erred in issuing a verification pursuant to Nationwide Permit 12. The Tribe has failed to identify a single authority that creates a trust duty, or to show a specific breach of such a duty. The Corps acted reasonably and summary judgment should be granted in its favor.

II. EXTRA-RECORD MATERIALS SHOULD NOT BE CONSIDERED

The Tribe argues that post decisional extra-record documents including an expert declaration should be considered because "the agency failed to examine all relevant factors" and "acted in bad faith." ECF No. 195 at 3-4 (citing *IMS, P.C. v. Alvarez*, 129 F. 3d 618, 624 (D.C. Cir. 1997). Neither exception applies.

First, the extra-record evidence does not identify a "relevant factor" that the Corps failed to consider. The expert report critiques treatment of factors such as landslides, and spill risk, which were considered in the EA. ECF No. 195-1; *see supra* Sections III(A)-(B). Nor do the post-decisional documents relating to separate environmental reviews show a factor the Corps should have considered as they related to entirely separate projects. ECF No. 195-3, 4-8. The declaration of Mr. Ward, ECF No. 195-2, relates to post-decisional implementation of emergency plans, not to any factor the Corps should (or could) have considered in its decision-making process.

Second, the Tribe has not made a showing of bad faith. The burden for introducing extra-record evidence based on bad faith is heavy. *See Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S.402, 420 (1971)). A party is not entitled to conduct discovery against an agency "simply because it has raised a question as to the agency's good faith. Rather, a *strong showing* that discovery will reveal bad faith on the part of the agency is required." *Comm. of 100 on the*

Fed. City v. Foxx, 140 F. Supp. 3d 54, 65 (D.D.C. 2015) (citing *Air Transp. Ass'n of Am.*, 663 F.3d at 487). There has been no such strong showing here. The Tribe asserts that it was "improper behavior" for the Corps to "withhold" various documents such as spill response plans from the Tribe. However, as explained in the United States' response to Cheyenne River, the United States held meetings to discuss these various documents and attempted to facilitate a confidentiality agreement that would have allowed the Tribe to retain these documents, but the parties were unable to successfully negotiate such a document. ECF No. 183 at 37-38. This behavior is not improper, and the Tribe has not made the required "strong showing" of bad faith required to introduce extra-record evidence.[1]

III. THE CORPS PROPERLY CONSIDERED—AND DID NOT IGNORE—RISK OF AN OIL SPILL

The Tribe argues that "the Corps cannot ignore oil spills when authorizing a pipeline," ECF No. 195 at 6-7, but the record is clear that the Corps did no such thing. The Corps fully analyzed and documented the remote potential impacts of a spill for the portion of the Pipeline subject to the Corps' jurisdiction. Though the Tribe clearly would have preferred additional discussion, the Corps plainly did not "ignore" the issue of spill risk, for the portion of the pipeline subject to the Corps' jurisdiction. The Corps properly considered the issue of spill risk in full compliance with NEPA.

A. The Corps Properly Addressed the Risk of a Spill

In a portion of the Environmental Assessment titled "Reliability and Safety," the Corps reasonably and thoroughly addresses risks associated with the Pipeline crossing that could result

[1] The Tribe also argues that the declarations should be included because they "supplemented the expert's earlier reviews of the EA that are included in the record." ECF No. 195 at 4. This is not a recognized exception to the record review rule.

in a spill. ECF No. 172-1 at 71312 (hereinafter, "EA"). First, the EA notes that PHMSA "is the primary federal regulatory agency responsible for ensuring the safety of America's energy pipelines" and has "established regulatory requirements for the construction, operation, maintenance, monitoring, inspection, and repair of liquid pipeline systems." EA at 71312. The EA notes that "[t]o prevent pipeline failures resulting in inadvertent releases, Dakota Access would construct and maintain the pipeline to meet or exceed industry and governmental requirements and standards." *Id.* These standards include, *inter alia*, 49 C.F.R. parts 194-195 as well as American Society of Mechanical Engineers, National Association of Corrosion Engineers, and American Petroleum Institute standards. *Id.*

The EA additionally relies on guidance in 49 C.F.R. § 194.105 to determine a worst case discharge scenario, which includes many conservative assumptions. EA at 71315. The EA recognizes that "[w]hile the potential risk for a [worst case scenario] is low, such a spill would result in high consequences." *Id.* The EA later discusses how, consistent with recognized methodology, regulation (49 C.F.R. § 195.452), and industry guidance from the American Petroleum Institute and American Society of Mechanical Engineers, the Pipeline was found to be at low risk of rupture in light of nine recognized threat factors. EA at 71315-18. Given the low risk determined from these factors and safety features discussed above, the EA again concluded "[w]hile an oil spill is considered unlikely and a high precaution to minimize the chances has been taken, it is still considered a low risk/high consequence event." EA at 71316. In the event of a Pipeline failure at the crossing, the EA recognizes there could be high consequences to drinking water intake high consequence areas and ecologically sensitive high consequence areas as identified by PHMSA. EA at 71318; *see* 49 C.F.R. § 195.450, 195.6.

The Tribe argues at length that a pipeline rupture and oil spill is not so "remote and speculative" that it need not be considered at all. ECF No. 195 at 7-10. This argument is irrelevant as the Corps clearly *did* address the risk of an oil spill in the EA. The Tribe seeks to rely on *New York v. Nuclear Regulatory Commission*, but in that case the agency "did not undertake to examine the consequences of pool fires *at all*." 681 F.3d 471, 482 (D.C. Cir. 2012) (emphasis added). Though the Tribe takes issue with the extent and manner of the Corps consideration of pipeline safety and oil spill risk, it cannot argue the Corps failed to consider the issue "at all."

New York in fact supports the Corps, as the case reasoned a "finding that the probability of a given harm is nonzero does not, by itself, mandate an EIS: after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI." *Id.* (*citing Carolina Envtl. Study Grp. v. United States*, 510 F.2d 769, 799 (D.C. Cir. 1975)); *see also City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 751–52 (2d Cir. 1983) (deferring to an agency's weighing of a "catastrophic" harm against an "infinitesimal probability"). That is exactly what the Corps did here: examine the consequences of the harm of an oil spill "in proportion to the likelihood of its occurrence" and ultimately conclude that with the required mitigation measures in place, the likelihood was low and there was no significant impact.

The Corps confirmed this conclusion in the months-long, post EA review process. *See* ECF No. 172 at 6-10, 17-20. At the conclusion of this process, in the February 4 Memo, the Corps concluded that there were not significant new circumstances or information relevant to environmental concerns that had come to light since the FONSI. ECF No. 172-9, Feb 3 Memo. at 235. The Corps found that after the EA Standing Rock "raised concerns about risk from oil

spills that could occur during pipeline operations" but had "raised essentially the same concerns about risks from oil spills in its comments on the draft EA, and the Corps addressed those concerns and comments in the Final EA." *Id.* At 236 (citing EA App. J at pp. 8, 9, and 17). The Corps concluded that it "addressed the risks of oil spills in the Final EA and in the October, 20, 2016 Memorandum [as well as] the October 31, 2016 Memorandum." *Id.* The Corps correctly concluded that Standing Rock "has not raised significant new circumstances or presented any new information that would require supplemental NEPA documentation. The Corps and [Army] considered all of these issues." *Id.* at 237.

The Court's role is to ensure "no arguably significant consequences have been ignored." *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 142 (D.D.C. 2012) (Boasberg, J.) (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006)). Here, though Standing Rock would have preferred additional discussion of oil spill risk in the EA, they cannot credibly claim it was "ignored" or that the analysis violated NEPA in any way.

B. The Corps' Scientific Assessment of Oil Spill Risk and Methodology Is Due Deference

The Tribe advances expert reports that post-date the EA critical of the Corps' methodology, arguing this criticism demonstrate an EIS is required. ECF No. 195 at 11. Not so. The law is clear that disagreement among experts is not a reason to find the Corps' expert determinations in the EA to be arbitrary and capricious. The Corps reasonably examined the issues the Tribe critiques, and that is all that is required under NEPA.

In this Circuit, "disagreement between the [agency's] experts and outside experts [does not] create a NEPA controversy, for '[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" *Fund for Animals v.*

Williams, 246 F. Supp. 2d 27, 46 (D.D.C. 2003) (quoting *Sierra Club v. Watkins*, 808 F. Supp. 852, 862 (D.D.C. 1991)); *see also Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 (D.D.C. 1995) (noting that "disagreement [among experts] does not render the agency's action arbitrary and capricious"); *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 33–34 (D.D.C. 2016).

Despite this law, the Tribe re-iterates the conclusions of its experts which "criticiz[e] the Corps' methodology" and allege omissions and errors. ECF No. 195 at 11. But that the Tribe's experts' methodology differs from the Corps' experts' does not mean the Corps "failed to address" the issues the experts critique. Crucially, the Tribe does not show that the EA "ignored" landslides, leaks, water quality or any of the other issues the Tribe enumerates—only that the Tribe's experts disagree with the Corps' treatment of them. That is not sufficient to show a NEPA violation. *See, e.g.*, *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 23 (D.D.C. 2001) ("NEPA does not require that we decide whether [a NEPA document] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.") (quoting *Or. Envt'l Council v. Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987)); *Beyond Nuclear v. U.S. Dep't of Energy*, No. 16-CV-1641 (TSC), 2017 WL 456422, at *7 (D.D.C. Feb. 2, 2017).

Landslides: The Tribe is critical of the EA's treatment of landslides, incorrectly claiming that "the EA never analyzes information about landslide risks in pipeline segments around Oahe." ECF No. 195 at 12. In fact, the EA has an entire section titled "Landslides" where risk of landslides is discussed, including connected actions "outside of the federal lands at the Lake Oahe crossing." EA at 71250-51. Additionally, the Corps notes that landslide risk is mitigated as

the Pipeline is "designed and constructed to meet or exceed industry specifications, which would effectively mitigate the effects of fault movement, landslides and subsidence." EA at 71341.

Spill detection and volume: The Tribe's experts also try to find fault with the Corps' spill detection and volume analysis but the EA addresses spill detection at numerous points throughout the EA, noting the Pipeline's compliance with industry and PHMSA standards. Consistent with these standards Dakota Access conducted a worst case scenario discharge analysis. EA at 71270. However, the EA notes that examination of a PHMSA dataset from 2002 to 2015 "indicates that the majority of actual pipeline spills are relatively small and fifty percent of the spills consist of 4 [barrels] or less." EA at 71270. The EA then notes various factors that would affect the volume of any release from the Pipeline at this crossing including the fact that it is buried over 90 feet below the lakebed and thus overburden and anti-siphoning effects would restrict oil volume released. EA at 71315.

The EA considers and discusses the Pipeline's system to detect such spills, including a "real-time transient model that is based on pipeline pressure, flow, and temperature data, which is polled from various field instruments every 6 seconds." EA at 71314. This system "is capable of detecting leaks down to 1 percent or better of the pipeline flow rate within a time span of approximately 1 hour or less and capable of providing rupture detection within 1 to 3 minutes." *Id.*; ECF No. 172 at 5.

Oil spill response: The EA contains many portions dedicated to oil spill response. *See, e.g.*, EA at 71312-18, 71341-49, ECF No. 172-4 at 1765-66, 71774; ECF No. 172-2. In particular, the EA notes that Dakota Access's response plan complies with the Oil Pollution Act and was prepared in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan and Mid-Missouri sub-Area Plan. EA at 71262-63. The plan was prepared to satisfy

applicable laws and regulations from PHMSA, the States of North and South Dakota, and industry recommended practices. *Id.*

Water quality: The EA contains an entire section entitled "Water resources" which discusses reasonably foreseeable impacts to water quality. EA at 71259. *See also* EA at 71324-35. The Tribe alleges the Corps water quality analysis is flawed but does not dispute that it relies on accepted science. *See* EA at 71270 (citing, numerous peer reviewed publications).

Winter conditions: The EA notes that winter conditions "could impede" the usefulness of certain oil spill response techniques such as "traditional containment booms." But the EA then discusses alternate means of responding to a spill in winter, and recognizes this is accounted for in Dakota Access's response plan. EA at 71263.

In sum, though the Tribe's experts disagree with either the Corps methodology' or the extent to which the Corps analyzed these issues, they cannot credibly argue they were "ignored."

However, despite the EA's fulsome and scientific consideration of these issues, the Tribe argues that the Court should second guess the agency's conclusions as "deference is unwarranted where the agency merely parrots the proponent's conclusory statements without any exercise of expertise." ECF No 195. at 10. That is not what occurred here. Far from "parroting" the proponent's analysis, Corps personnel—including geotechnical engineers, environmental scientists, environmental resources specialists, and other experts—were heavily involved in the preparation of the EA and critiqued and improved Dakota Access's analysis. *See* EA at 71350 (list of Corps reviewers); ProjNet: DAPL Review, Environmental Analysis Comments & Responses ("ProjNet Report"), ECF No 183-6 at 72161-270 (report tracking 178 Corps comments on drafts of the EA, responses, and follow-up confirmations that the comments were adequately addressed through revisions and/or additional analysis); EA Comment Matrix, ECF

No 183-7 at 73611-20 (spreadsheet of Corps comments on draft EA and Dakota Access responses). Following this review, in July 2016, the Corps "independently evaluated and verified the information and analysis" in the EA and took "full responsibility for its scope and content." EA at 71228.

The Corps plainly exercised its scientific judgment in drafting the EA, and the law is clear that "[i]n cases involving expert scientific judgment, courts employ a particularly high level of deference." *Oceana, Inc. v. Pritzker*, 26 F. Supp. 3d 33, 41 (D.D.C. 2014) (Boasberg, J.). The Corps' scientific judgments are reasonable and due deference.

C. The Corps Was Reasonable to Find Mitigation Measures Rendered an EIS Unnecessary

The Corps was also reasonable to conclude that potential impacts from the crossing would not be so significant as to require an EIS given the mitigation measures in place and the Pipeline's compliance with PHMSA's guidelines regarding pipeline safety and construction.

This Court has directly held that "[e]ven if an agency determines that there would be an environmental impact of significance, an EIS will not be necessary where the agency has shown that "'safeguards in the project sufficiently reduce the impact to a minimum.'" *Ctr. for Food Safety*, 898 F. Supp. 2d at 150 (citing *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C. Cir. 2008); *see also Mich. Gambling Opposition (MichGO) v. Norton*, 477 F.Supp.2d 1, 11 (D.D.C. 2007) (FONSI properly issued where mitigation measures reduced environmental impact of proposed action).

Here, the "safeguards" include those put in place by applicable federal regulations promulgated by PHMSA as well as additional mitigation measures in excess of these

requirements. EA at 71266.[2] Specifically the EA notes that mitigation measures intended "to minimize the risk of a pipeline leak" include pipe specifications; pipe coatings; pipeline inspection and testing programs (to ensure the pipeline is built in accordance with these standards); hydrostatic testing to ensure the pipeline can meet 125% of the maximum operating pressure; continuous pipeline monitoring of pressure and volume; a leak detection system including ultrasonic meters at each pump to continuously verify and compare flowrates along the pipeline in real time; pipeline integrity inspection programs; and other mitigation measures. EA at 71266-67.

Thus, the EA correctly observed that "Operational risks are being mitigated by DAPL Project design to meet or exceed the applicable federal regulations." EA at 71325. It was reasonable for the Corps—which does not have jurisdiction to regulate pipeline operations—to defer to PHMSA's regulations governing pipeline safety. *See, e.g.*, *EarthReports, Inc. v. FERC*, 828 F.3d 949, 957 (D.C. Cir. 2016) (agency properly evaluated ballast water impacts, including by noting requirements of applicable regulatory agencies, the Coast Guard and State of Maryland).

The Tribe claims that the Corps "dismisses risks by claiming that the pipeline will 'meet or exceed' all regulatory standards" and this is "irrelevant to the question of significance under NEPA." ECF No. 195 at 10. But consideration of regulatory standards that are in place to mitigate a risk cannot be rightly called "dismissing" such a risk. Rather, examining the regulatory environment in place to mitigate a given risk is a means of examining this risk and how likely it is to be significant under NEPA. *See, e.g.*, *Sierra Club v. Clinton*, 746 F. Supp. 2d

[2] And after the EA the Corps imposed additional mitigation measures. *See* ECF No. 172 at 9; 172-11 at 37-42 (conditions 1-36).

1025, 1047 (D. Minn. 2010) (Agency properly considered impacts of pipeline abandonment by referencing PHMSA regulations); *Sierra Club v. U.S. Forest Serv.*, No. 15-CV-10154, 2015 WL 5729091, at *7 (E.D. Mich. Sept. 30, 2015), *aff'd*, 828 F.3d 402 (6th Cir. 2016).

This principle is illustrated by *Center for Food Safety*, 898 F. Supp. 2d at 15. In that case, plaintiffs challenged an EA regarding a decision to allow genetically modified crops. In part, the plaintiffs alleged the existing regulatory and agency policy framework surrounding pesticide use was not sufficient and thus the agency was incorrect to rely on this as a mitigation measure. This Court rejected the argument and held that with regard to mitigation, "Plaintiffs may think more should be done, but they have not shown that the Agency's reliance on existing procedures to minimize risks associated with herbicides was arbitrary or capricious." *Id.* The same result should be found here. The Corps was reasonable to rely on the existing regulatory and policy framework as a mitigation measure.

D. The Corps Properly Considered Environmental Justice and Impacts on the Tribe

The Corps' environmental justice analysis followed CEQ guidance and more than satisfied the Corps' NEPA obligations. The Tribe's arguments fixate on the Corps' reliance on a half mile analysis area for the immediate impacts of the relevant section of the Pipeline, but simply pretend that the Corps' analysis stopped at the half-mile distance from the Pipeline. It did not. The Corps analyzed the potential impacts of a spill on the Tribe including the water, fishing, and wildlife resources that the Tribe lays claim to. The Corps' analysis of the potential implications for environmental justice was sound and should be upheld.

First, the Corps' initial assessment of environmental justice impacts relied on a *mile wide corridor* (a half mile on either side of the Pipeline) for a 30-inch pipe being installed approximately 92 feet underground. EA at 71260. As discussed in the EA, that sort of analysis

area is appropriate for a project of this type. EA at 71308.[3] Dakota Access is not conducting any surface-disturbing activities in the Oahe easement area. The construction took place entirely underground for the entire length of the easement across Corps land, with the only surface-disturbing activities occurring on private lands outside the Corps-owned land bordering Lake Oahe. EA at 71380. The Corps did not "gerrymander" its analysis, and its selection of the geographic area for the environmental justice analysis was reasonable and entitled to deference. *Powder River Basin Res. Council v. U.S. Bureau of Land Mgmt.*, 37 F. Supp. 3d 59, 75 (D.D.C. 2014) ("The 'identification of the geographic area' within which a project's impacts on the environmental resources may occur 'is a task assigned to the special competency of the appropriate agencies.'") (quoting *Tri–Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1127 (9th Cir. 2012)).

Nevertheless, the Corps analyzed potential spill risk in detail and looked at potential downstream impacts from a spill, including specific analysis of the impacts to the Tribe in the EA's environmental justice analysis. EA at 71309-17. The Tribe refuses to acknowledge this additional analysis, arguing that it is simply "a separate portion of the EA . . ." that discusses the Tribe. ECF No. 195 at 26. That analysis, however, is exactly the environmental justice analysis

[3] Without any support, Standing Rock argues that a half mile buffer "may or may not make sense for a highway, bridge or natural gas pipeline" but that it is clearly inappropriate for an oil pipeline crossing a river system where a spill could travel more than half a mile. ECF No. 195 at 25. The Tribe fails to recognize that a bridge that carries rail cars or truck traffic transporting oil or hazardous substances which could just as easily suffer low probability accidents resulting in releases to the waterways underneath the bridges. Plaintiffs have failed to identify any meaningful distinction between the pipeline at issue here and other similar types of infrastructure projects where courts have upheld precisely the sort of environmental justice analysis that the Corps undertook here. *See Bitters v. Fed. Highway Admin.*, No. 1:14-CV-01646, 2016 WL 159216, at *14 (E.D. Cal. Jan. 13, 2016); *Coal. for Healthy Ports v. U.S. Coast Guard*, No. 13-CV-5347 (RA), 2015 WL 7460018, at *25 (S.D.N.Y. Nov. 24, 2015); *see also* ECF No. 172-1, EA at 71229-30 (discussing relative risks of rail and trucking alternatives to the Pipeline.).

the Tribe argues is missing. The Corps analyzed impacts to the Tribe's water resources from a potential spill. EA at 71311. The Corps analyzed in detail how Dakota Access would respond to any potential spill including the number of minutes required to shut off the flow of oil, as well as an outline of response measures from the FRP. EA at 71314-15. Finally, the Corps analyzed the numerous steps taken to minimize the risk of a spill and protect downstream water intakes like the Tribe's in the event of a spill. EA at 71316-18. For purposes of the environmental justice analysis, the Corps notes that although a spill has the potential to impact the Tribe's water resources, there is no indication that the Tribe would bear a disproportionately high and adverse impact from the Pipeline. That conclusion is supported by the extensive analysis of the potential impacts to water, wildlife, and aquatic resources in the vicinity of the Pipeline. EA at 71247-303 (analyzing impacts of the Pipeline and noting potential impacts from an inadvertent release to each category of resources); *see also supra* Sections III(A)-(B) (discussing spill risk analysis of impacts).

Finally, Standing Rock once again points to the elimination of the Bismarck route alternative as evidence that the Corps employed a double standard, alleging that the Corps failed to analyze impacts of a potential oil spill on the Tribe to the same extent it analyzed impacts associated with the alternate Bismarck route. ECF No. 195 at 26. As discussed in Defendant's response brief, the Bismarck alternative was dismissed for numerous reasons. EA at 71232 (detailing reasons). Moreover, as discussed above, the Corps included detailed analysis of potential impacts of an oil spill on the Tribe. *See supra* Sections III (A)-(B), (discussing spill risk analysis); EA at 71247-303, 71309-17.

The Tribe also attacks the Cooper Memo and the February 3 Memorandum, arguing that those documents cannot "cure the failings of the EA." ECF No. 195 at 28-29.[4] But these documents were not to cure a deficiency, rather they confirmed there were no deficiencies. As explained in detail in Defendant's Response and Cross Motion for Summary Judgment, the EA complies fully with NEPA. ECF No. 172. That conclusion is borne out by the Cooper Memo and the February 3 Memorandum which concluded that "[t]he Final EA fully informed decision makers and the public of the environmental effects of the proposed crossing and those of reasonable alternatives, including informing the decision on whether to grant an easement under the Mineral Leasing Act." ECF No. 172-9 at 234. In the Cooper Memorandum and the February 3 Memorandum, the Corps undertook a detailed review of the process and substance of the July 2016 EA and FONSI, including considering new allegations raised by the Tribe after July 2016, and concluded that the EA and FONSI were sound and that no additional NEPA analysis was required. ECF No. 172-9 at 235-37 (detailing new information provided by the Tribe from September 2016 through December 2016, and concluding that "there are no new significant circumstances or information relevant to environmental concerns."). In short, these reviews

[4] Standing Rock also inexplicably attacks the thirty-six easement conditions, arguing that they cannot support the FONSI because the EA failed to properly analyze the risks of an oil spill. ECF No. 195 at 28. This argument misses the mark because, as discussed above, the EA fully analyzed the risks and impacts of a potential oil spill, and the addition of specific easement conditions is contemplated by, and fully consistent with, the Mineral Leasing Act. *See* Sections III(A)-(B); ECF No. 172 at 11-17. The Tribe cites no authority for this proposition, and it is mistaken. Court have long held that an agency can consider easement conditions in determining whether impacts are expected to be significant under NEPA. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (If an agency modifies a project "by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts . . ., the statutory threshold of significant environmental effects is not crossed and an EIS is not required."); *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) (holding that it was proper to consider restrictions placed on dredging permits in reviewing the agency's decision not to produce an EIS).

were not post-hoc rationalization, but are clear evidence that, after a years-long consultation process, the Corps still bent over backwards to accommodate the Tribe's requests for review and to consider their complaints after the NEPA analysis was complete. Through these exhaustive reviews, in each instance, the Corps concluded that there were no "deficiencies" to "cure" but that its prior analyses addressed the Tribe's concerns and complied fully with NEPA.

IV. THE EASEMENT WAS GRANTED IN COMPLIANCE WITH LAW

Standing Rock next argues that the Corps' decision to grant the Lake Oahe easement was arbitrary and capricious because the Corps "reversed itself" and did not provide a detailed justification for that reversal. ECF No. 195 at 30-32. Additionally, Standing Rock alleges that the Corps did not address the "failings" of the EA, but instead relied on "*post-hoc* rationalizations" and the special easement conditions to make up for the EA's supposed failings. *Id.* at 27-28. As discussed below, the Corps complied with applicable law, including NEPA, in granting the Lake Oahe easement by conducting a thorough analysis, which was explained in detail in the February 3 Memo.

A. The Corps Provided a "Detailed Justification" for Granting the Easement

Standing Rock contends that the Lake Oahe easement does not comply with law because the Corps "ignored" the Army's December 4 Memo and did not provide a detailed justification for doing so or for granting the easement. ECF No. 195 at 30-33. To begin, the detailed justification standard outlined in *FCC v. Fox Television*, 556 U.S. 502, 514-15 (2009) only applies "where a policy change rests on factual findings that contradict the facts undergirding the prior policy." *Ark Initiative v. Tidwell*, 816 F.3d 119, 129 (D.C. Cir. 2016). Those circumstances are not present here. The February 3 Memo confirmed that there were not significant new circumstances or information relevant to environmental concerns that had come

to light since the FONSI. ECF No. 172-9 at 235. Nor was there a change in the Corps' ultimate legal position as the decision to grant the easement was based in part on a Corps determination that the EA and FONSI satisfied NEPA. ECF No. 172-9 at 237. This determination aligns with the December 4 Memo, which explicitly states that it "does not alter the Army' position that the Corps' prior reviews and actions have comported with legal requirements."[5] ECF No. 172-7, at 605. Thus, there has not been any change in the Corps' ultimate position that the EA satisfied NEPA, nor were there any contradictory factual findings that would warrant *Fox*'s enhanced justification.

However, even if *Fox* applied, the Corps satisfied the heightened standard for detailed justification. In the D.C. Circuit, the detailed justification standard is met when an agency explains how certain information informs its conclusion and when the agency describes in detail the reason for its conduct. *Compare Mingo Logan Coal Comp.*, 829 F.3d at 726-27 (EPA's explanation that new information regarding adverse effects, and assessment of the effects, justified revoking a CWA section 404 permit) *with Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 235 n.14 (D.D.C. 2016) (Agency "never compared two policies; it evidenced no 'conscious change of course.'" (citation omitted)), *appeal docketed* No. 16-5086 (D.C. Cir. Apr. 20, 2016); *see also Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 42 (D.D.C.), *aff'd*, 773 F.3d 257 (D.C. Cir. 2014).

[5] The December 4 Memo was not, and did not result in, a final agency action. ECF No. 172-9 at 238. Rather, it was a discretionary memorandum that did not alter the Corps' position. ECF No. 172-7 at 605. Thus because there was no reversal of a prior final agency action, *Fox* does not apply. *See* ECF No. 172 at 34 n.17; *cf. Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 726-727 (D.C. Cir. 2016) (revocation of a permit).

Here, the February 3 Memo detailed what informed the Corps' conclusion that the EA and FONSI satisfied NEPA requirements for the Lake Oahe easement. The February 3 Memo states that the Corps looked at "the record in its entirety and [gave] further consideration to the input received over the past four months, including additional review and analyses of the subjects identified by the [Assistant Secretary of the Army for Civil Works], other federal executive offices, and the [Standing Rock Sioux Tribe.]" ECF No. 172-9 at 235. Based on this information, the Corps confirmed that the EA was sufficient for the Pipeline crossing at Lake Oahe and no further supplementation was needed. *Id.*

The February 3 Memo directly addressed the December 4 Memo and its underlying factors. ECF No. 172-9 at 233-34. Similarly, the Corps also explained how Standing Rock and other Federal agencies did not provide any information that had not already been considered in the EA. Indeed, the February 3 Memo notes that Standing Rock raised the same concerns in their comments about the draft EA and that the Corps addressed the comments in the final EA. ECF No. 172-9 at 236. The Corps came to a similar conclusion with respect to Department of Interior's M-Opinion. *Id.*

In sum, Standing Rock's claim that the Corps did not provide a sufficiently detailed justification for its grant of the easement fails. ECF No. 195 at 30. Granting the easement did not represent a change in policy, and even if the Corps had to justify its position through a heightened standard (which it does not), the February 3 Memo's detailed analysis more than satisfies that standard.

B. The Easement Was Granted in Compliance with NEPA

Standing Rock also asserts that the post-EA analysis does not cure "the failings" of the EA. ECF No. 195 at 27. This argument is misguided. As discussed above, the EA does not have any "failings." The EA complies with NEPA. *See supra* Section II. Contrary to the "*post-*

hoc rationalization" that the Tribe suggests, ECF 195 at 27, the post-EA analysis is a measured and reasonable determination of whether the Lake Oahe easement warranted supplemental NEPA analysis. Rather than rationalize the Corps' previous work, the post-EA analysis insured the Lake Oahe easement would be issued in compliance with NEPA regulations.

NEPA regulations require an agency to supplement an EA when there are "substantial changes in the proposed action that are relevant to environmental concerns" or when "significant new circumstances or information relevant to environmental concerns" come to light after the EA is final. 40 C.F.R. § 1502.9(c)(1)(i) and (ii). "Determining whether information is either new or significant requires a high level of technical expertise, and courts therefore will defer to the informed decision of the agency." *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 117 (D.D.C.) (internal citations, alterations, and quotation marks omitted), *judgment amended*, 203 F. Supp. 3d 31 (D.D.C.) and *appeal dismissed by Sierra Club. v. Jewell*, No. 16-5145 (D.C. Cir. Aug. 26, 2016). (internal citations and quotation marks omitted). Here, the Corps, after careful, multiple reviews, deemed supplementation unnecessary.

The Corps' post-EA analysis included meetings with the Tribes and consideration of internal analytical documents as well as analyses by other federal offices. ECF No. 172-9 at 232-34. In the end, the Corps found no new circumstances requiring supplemental NEPA documentation. *Id.* at 236. The Corps also determined that the EA and FONSI were consistent with the Corps' NEPA documentation policy for an easement under the MLA. *Id.* at 234.

Standing Rock further alleges the Corps relies on the thirty-six easement conditions to cure the alleged "failings of the EA." ECF No. 195 at 27-28. Indeed, the Tribe implies that the conditions were created to avoid a finding of significance. *Id.* at 28. This is incorrect. The easement conditions represent the Corps' extra effort to address the Tribe's concerns, which is

consistent with the application of the MLA. ECF No. 183 at 26-28. Indeed, the easement conditions add to and clarify nine special conditions described in the FONSI. ECF No. 172-9 at 237. They were adopted specifically to further lessen or mitigate any risk of an oil spill, but the Corps rightly concluded that even without these conditions, the potential impacts were not significant under NEPA. ECF No. 172-2, FONSI.

In short, the Corps' grant of the Lake Oahe easement complied with NEPA. The Corps granted the easement only after reasonably concluding that its prior reviews and determinations, including the EA and FONSI, satisfied the applicable NEPA requirements. However, the Corps did not stop there. Instead, it imposed thirty-six special conditions on the easement to add even greater protection. The Tribe has not shown that the granting of this easement was arbitrary or capricious.

C. The Easement Did Not Breach Any Substantive Trust Duty

The Tribe argues that the Corps "acted contrary to its trust responsibility in granting the easement…without considering impacts on treaty rights." ECF No. 195 at 34. But the Tribe never identifies a substantive "trust responsibility" that required the Corps to take any specific action. Though the Tribe may wish it otherwise, the law is clear that a "trust responsibility can only arise from a statute, treaty, or executive order." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014) (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir.1980)); *United States v. Navajo Nation*, 537 U.S. 488, 490 (2003). Because the Tribe has not identified such a specific duty, its breach of trust claim fails.

First, the Tribe is simply incorrect that "the Tucker Act line of cases [such as *Navajo Nation*] has no bearing on the existence of a claim here, where the Tribe is challenging final agency action and the APA establishes both the cause of action and waiver of sovereign

immunity."[6] This statement is entirely contradicted by recent precedent in this circuit which has "consistently relied on principles announced in Indian Tucker Act cases in trust cases not arising under the Act." *El Paso Nat. Gas Co.*, 750 F.3dat 895–96 (citations omitted); *see also id.* at 895 ("These principles control here, even though the claim is for equitable relief (not money damages) and even though sovereign immunity is waived under § 702 of the APA (and not the Indian Tucker Act).").

Thus, pursuant to binding Supreme Court and D.C. Circuit precedent, the Tribe is required to identify specific authority to support the existence of a trust duty. But the only specific statutory authority the Tribe cites is the Minerals Leasing Act (MLA), which provides for the Corps to include, *inter alia*, stipulations to protect individuals who rely on fish, wildlife and biotic resources. ECF No. 195 at 37 n.30. First, the Corps complied with this by imposing such conditions. ECF No. 172-11. Second, the MLA does not create a fiduciary duty to the Tribe and is addressed at length in the Corps' response to Cheyenne River Sioux Tribe's brief and the Corps incorporates that response here. ECF No. 183 at 22-28, 29-33.

The Tribe asserts or implies that treaties impose a specific duty on the Corps, but as in its opening brief, the Tribe does not cite a specific treaty provision or indicate how this specific provision was allegedly violated. ECF No. 195 at 37-38. The Tribe cites Ninth Circuit cases that predate *Navajo Nation*, but even if these cases were good law or binding precedent, they only serve to highlight the difference between the specific treaty provisions at issue in those cases and

[6] The Tribe cites an amicus brief prepared by the Association of American Indian Affairs, ECF No. 125-1. This brief presents a woefully out of date conception of the law. The brief cites six cases from the 1800s and another nine that predate 1925 but not a single Supreme Court case after 1983. *Id.* at i-vi. The brief does not cite *Navajo Nation* or any other Supreme Court or D.C. Circuit case that represents the current state of the law. Nor does the brief in any way attempt to reconcile its outdated authority with current precedent.

the instant case. For instance, in *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1509 (W.D. Wash. 1988) the specific treaty provision at issue was article V of the Treaty of Point Elliott, 12 Stat. 927 (1855), which provides: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians…" The EIS in Muckleshoot concluded that the proposed project would "eliminate a portion" of one the Muckleshoot Tribes' usual and accustomed fishing areas. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. at 1509. The Tribe has cited to no such specific treaty provision, nor indicated its breach. Nor has the Tribe cited to any portion of the withdrawn M-Opinion that identified such a provision. Even if there were such a specific provision, the Tribe has not identified a breach. The EA here did not conclude that the Pipeline would "eliminate" the Tribe's fishing rights. Rather, it found there would be no effect on Tribal fishing, hunting, or water rights.

The Tribe also argues that "under the Treaties, the trust responsibility, and the MLA, the Corps was required to consider the impact an oil spill would have on the Tribe."[7] ECF No. 195 at 39. But the Tribe never identifies what specific provisions of these authorities provide the alleged duty. Without such a specific duty, the Corps complies with its general trust duty to the Tribe by complying with generally applicable laws such as NEPA. *El Paso Nat. Gas Co.*, 750 F.3d at 895. As the Corps demonstrated in its opening brief, the EA discusses impacts to water, game, and fish and as such has complied with its NEPA obligations to assess impacts to treaty-protected resources. The Tribe has offered no legally supportable argument to the contrary.

[7] Similarly, the Tribe cites no treaty, statute, or executive order requiring the Corps to provide the spill response plan to the Tribe. This argument is addressed in the Corps' response to Cheyenne River's brief and the Corps hereby incorporates that response. ECF No. 183 at 29-41.

V. THE NATIONWIDE PERMIT 12 VERIFICATION COMPLIED WITH LAW

Finally, Standing Rock argues that the Corps has an affirmative obligation to deny a Nationwide Permit 12 verification where the permitted activity might someday violate a General Condition, ECF No. 195 at 43, but cites no authority requiring the Corps to conduct such an analysis at the verification stage. As the Corps noted in its Cross-Motion for Partial Summary Judgment, courts have explicitly said that the Corps does not have to analyze all 31 General Conditions[8] before verifying that a particular activity would qualify for a Nationwide Permit. ECF No. 172 at 45 (citing *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1164 (9th Cir. 2012); *Mobil Baykeeper Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M, 2014 U.S. Dist. LEXIS 147568, at *51-65 (S.D. Ala. Oct. 16, 2014)). To hold otherwise "would be contrary to the regulatory scheme, which devised the system of general nationwide permits to streamline the process, reduce redundancy, and conserve agency resources." *Snoqualmie Valley Pres. All.*, 683 F.3d at 1164 (citing 33 C.F.R. § 330.1(b)). Moreover, General Condition 14 requires that "[a]ny authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization." Nationwide Permit 12, ECF No. 172-17 at 67355. Thus, if at any time Dakota

[8] The only General Conditions that impose obligations on the Corps before verifying that an activity is covered by a Nationwide Permit are General Condition 18 (requiring consultation with the Department of the Interior or Department of Commerce under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536) and General Condition 21 (requiring tribal consultation under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108).

Access maintained the Pipeline in a way that resulted in non-compliance with any General Condition, the Pipeline crossing could lose its Nationwide Permit 12 verification.[9]

Standing Rock's suggestion that the Corps' regulations concerning a public interest review in the permitting context require the Corps to evaluate the General Conditions before issuing a verification is misplaced. ECF No. 195 at 42 (citing 33 C.F.R. §§ 320.1, 320.4, 330.1(d)). If anything, the fact that the Corps considers the public interest at three stages before issuing a Nationwide Permit 12 verification demonstrates why the Corps' decision at Lake Oahe was reasonable and why separate consideration of each General Condition was unnecessary. First, the Corps conducted a public interest review before reissuing Nationwide Permit 12. *See, e.g.,* Nationwide Permit 12 Decision Document, Ex. R at 16888-95. Second, the Division Engineer considered the public interest before establishing regional conditions on the 2012 Nationwide Permits. *See, e.g.*, Mem. for Record (Mar. 16, 2012), Ex. S at 63839 (citing 33 C.F.R. §§ 330.4(e)(1), 330.5(c)); *id.* at 63859-62 (conditions for North Dakota). Third, with respect to the Lake Oahe crossing, the Omaha District concluded that "[t]he proposed activity would result in only minor individual and cumulative adverse environmental effects and would not be contrary to the public interest." Mem. for Record (July 25, 2016), Ex. T at 67390; *see also* 33 C.F.R. § 330.5(d)(1) (stating District Engineer should consider public interest in determining whether to issue—or suspend or revoke—a verification).[10] In sum, the Corps

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[9] Notwithstanding that the Corps had no legal obligation to evaluate compliance with General Conditions 7 and 17, the administrative record shows that the Corps did consider both impacts to drinking water intakes and tribal treaty rights before issuing the July 25, 2016 verification letter. *See, e.g.*, ECF No. 183 at 7-10, 30-32; EA at 71272. Moreover, the Corps imposed twenty-two special conditions on the Lake Oahe crossing, including compliance with spill prevention plans. ECF No. 172-17 at 67342-45.

[10] The Corps also conducted a public interest review in connection with its analysis of the Section 408 permission. *See* ECF No. 183 at 7-10, 20-22.

reasonably concluded that the Lake Oahe crossing satisfied Nationwide Permit 12. ECF No. 172-18 at 67390.

VI. CONCLUSION

"'The NEPA process involves an almost endless series of judgment calls,' and 'the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts.'" *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) (quoting *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) (alterations omitted)).

Here, the Tribe disagrees with the Corps' "judgement calls" regarding how to analyze and discuss risk of an oil spill. But the Tribe fundamentally has not shown that this risk was "ignored" or that the Corps has otherwise failed to consider the potential impacts as required by NEPA. Nor has the Tribe shown that the Corps violated a substantive trust duty, violated the Clean Water Act, or reversed itself without a detailed explanation of any changed circumstances. Standing Rock's Partial Motion for Summary Judgment should be denied and summary judgment should be entered in favor of the Corps.

Dated: April 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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