UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST, GULF RESTORATION NETWORK, WATERKEEPER ALLIANCE, and SIERRA CLUB and its DELTA CHAPTER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS

Defendant,

and

BAYOU BRIDGE PIPELINE, LLC, and STUPP BROS. d/b/a STUP CORPORATION

Intervenor Defendants.

Civ. No. 3:18-cv-00023-SDD-EWD

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Atchafalaya Basinkeeper et al. ("Basinkeeper") move for partial summary judgment on their National Environmental Policy Act ("NEPA") and Clean Water Act ("CWA") claims regarding the Army Corps of Engineers' ("Corps") evaluation of the risks and impacts of oil spills from the Bayou Bridge pipeline. During the first phase of this case, this Court preliminarily upheld the Corps' analysis of spill risk. In this motion, plaintiffs do not renew their challenge to the Corps' ability to tier from one environmental analysis to another. However, now that the administrative record has been produced, it is apparent that the Corps never took a "hard look" at spills in the remote and uniquely aquatic environment of the Atchafalaya Basin that it claimed, and that the law requires. Instead, the record reveals that the Corps rubber-stamped an environmental assessment provided by the proponent with no independent analysis, no oversight, and no engagement from other expert agencies. The Corps also ignored extensive evidence that the proponent-supplied spill analysis was deeply flawed. The analysis, written by Bayou Bridge, gravely underestimates the risk of an incident, as well as its potential size. It overstates the company's ability to detect a spill, as well as its ability to respond to one in the remote Atchafalaya Basin. Additionally, it ignores critical issues like the proponent's worst-in-the-industry safety record, and the special risks posed by tar sands crude.

Concerns about spills were the focus of countless public comments, and the Corps received extensive information about spill risks and impacts. The Corps ignored this material, based on a misunderstanding of the regulatory regime attendant to pipelines, and allowed an obviously self-interested proponent to dismiss the risks and impacts of spills without an adequate basis. NEPA and the CWA require more. Because the Corps' permits and underlying environmental reviews are arbitrary, capricious, and contrary to law, this Court should grant summary judgment on the issue of spills to Basinkeeper and vacate the permits.

FACTUAL BACKGROUND

I. THE ATCHAFALAYA BASIN IS ONE OF AMERICA'S CULTURAL AND ECOLOGICAL CROWN JEWELS

The Atchafalaya Basin is the largest contiguous wetland in the United States and the largest river swamp in North America. AR 6515; AR 1317. Its unique cypress-tupelo swamp habitat supports half of the nation's migratory waterfowl, more than 300 bird species, and provides the most important habitat for neo-tropical migratory birds in the Mississippi Flyway. AR 6515; AR 11664. The Basin also provides the largest harvest of wild crawfish in the world, and is the last bastion of a unique Cajun culture. AR 14367; AR 1622. It contributes greatly to the state's economy through tourism, hunting, and fishing. AR 1627 (Louisiana provides highest fishery landings in lower 48 states, and 75% of the harvestable fish and shellfish species "are dependent on wetlands"); AR 1628-29 (recreational fishermen pursuing "wetland-dependent species" contribute hundreds of millions of dollars to Louisiana economy); AR 1632 (Atchafalaya Basin produces $123 million annually in "recreational activities").

The Atchafalaya Basin is also critically important for flood control in the Mississippi Basin. *La. Crawfish Producers Ass'n-West v Rowan*, 463 F.3d 352, 355 (5th Cir. 2006); AR 1307; AR 1626; AR 1630 (wetlands reduce storm and flood damages); AR 1644 ("Healthy Cypress swamps can attenuate flooding and 'hold back' flood waters."). However, it has been filling with sediment due to the loss of its forested wetlands and alterations to the Basin's hydrology. AR 11652; AR 1307. To date, there has been a net accretion of 2.5 billion cubic meters of sediment in the Basin's floodway, converting swamps to hardwoods and diminishing their ability to store floodwaters. Communities in south-central Louisiana have borne the brunt of this ecological degradation during punishing floods. AR 1644. Oil and gas pipelines have played a key role in degrading extensive portions of the Basin. AR 1625 (basin is "ecologically

stressed" due to "a number of pipelines and associated disturbances …"); AR 1634 (studies link pipeline canals to numerous adverse effects, including "alterations in salinity, flooding and drainage patterns, direct loss of marsh by conversion to open water, and increases in marsh erosion rates"); AR 1644 ("Any project that enhances the deposition of sediment in the Basin to the detriment of the expanding wetland deltas … could have long-term cumulative impacts.").

II. THE BAYOU BRIDGE PIPELINE PROPOSAL TRIGGERED CONCERNS ABOUT OIL SPILLS IN THE UNIQUE AQUATIC ENVIRONMENT OF THE BASIN.

On October 3, 2016, the Corps announced it received an application to permit the Bayou Bridge pipeline across the Basin and other parts of Louisiana. AR 14409. Although not disclosed in the public notice, the 24-inch pipeline would carry nearly half a million barrels of oil a day through the aquatic habitats of the Basin. During the comment process that followed, the risk of spills and leaks in this unique environment played a pivotal role. Commenters provided information that spills and leaks from crude oil pipelines were both commonplace and devastating to humans and the environment. One analysis of federal government spill data of "significant" spills over 20 years revealed an average of around 300 incidents a year, with a total of 310 fatalities and nearly $8 billion in costs. AR 1348; ABK 1189 (documenting spills by year). Several massive crude oil pipeline spills have occurred recently, like the Enbridge pipeline that emptied over a million gallons of oil into the Kalamazoo River in 2010. ABK 432; ABK 951; ABK 1182 (documenting recent major pipeline spills). Similarly, the 2010 Keystone 1 pipeline, using many of the same "state of the art" technologies as BBP claims here, leaked 35 times in its first year of operation. ABK 955. In Louisiana, over the past 20 years, nearly 800 pipeline incidents have caused 14 fatalities and $1.2 billion in cleanup costs. ABK 3695; ABK 3350 (2.7 reported oil spills in Louisiana per week in 2016).

Other evidence before the Corps explained why the regulatory system for crude oil pipelines remained glaringly inadequate. A 2016 Congressional Research Service report cited "persistent understaffing" at Pipeline and Hazardous Materials Safety Administration ("PHMSA") and found that the agency had yet to comply with regulatory mandates imposed by Congress in 2011. ABK 1215. The report further found an *increasing* trend in significant accidents. *Id*. at 4. After the catastrophic Kalamazoo River spill, a National Transportation Safety Board analysis blamed "pervasive organizational failures" at the company, and "weak regulation," and "ineffective oversight" by PHMSA. ABK 2947. The NTSB recommended numerous regulatory changes to reduce risks of future spills. *Id*. In 2015, citing NTSB's recommendations, PHMSA published a proposal to strengthen pipeline regulations. 80 Fed. Reg. 61610 (Oct. 13, 2015). That effort was subsequently abandoned. The picture at the state level is no better, as a 2011 U.S. EPA national study found Louisiana ranked last among states in enforcement of environmental standards. ABK 3353.

An oil spill in the remote, aquatic environment of the Atchafalaya Basin "would be catastrophic." AR 1637-40 ("Wetlands ecosystems are most sensitive to oil spills"). Crude oil, and the constituents into which it degrades, is highly toxic to the environment and human health. *Id*. (ingesting or inhaling oil "leads to reproductive problems, trouble digesting, and damage to the central nervous system, liver and lungs."). Even a small amount of oil in contact with a bird's feathers can kill it. *Id*. An environmental impact statement ("EIS") for another major pipeline revealed that almost any size spill would result in benzene concentrations that violate federal drinking water standards. ABK 33. A spill also could have devastating economic impacts, as fishing areas would be closed until cleared for human consumption. AR 1640. Tourism, an economic mainstay of the Basin, would also be impacted. *Id*.

Comments also focused on the abysmal safety record of the project's corporate sponsors, Energy Transfer Partners ("ETP") and Sunoco. The Corps received extensive detail on the multiple pipelines operated by ETP that leaked, ruptured, or exploded in recent years. AR 11653. One comment, by former U.S. Army General Russel Honore, highlighted other recent pipelines constructed in a substandard manner that subsequently leaked. AR 4258 (noting "extreme environmental sensitivity of the Atchafalaya Basin" and other areas). The ranking member of the U.S. House Natural Resource Committee called out ETP's safety record and asked the Corps' to complete an EIS to carefully examine this risk. ECF 15-29. In light of all the many concerns about spill risk and impacts in the unique wetland environment of the Basin, countless commenters asked the Corps to fully prepare a EIS evaluating these concerns.

III. THE CORPS ISSUES PERMITS FOR THE PIPELINE WITHOUT AN EIS, TRIGGERING THIS LITIGATION

On December 14, 2017, the Corps issued a § 404 permit authorizing the project, AR 93, accompanied by a "memorandum" constituting its environmental review. ECF 15-31 ("§ 404 EA"). Despite overwhelming evidence that the project's effects were "significant" enough to warrant an EIS, the Corps concluded otherwise. *Id*. at 91. As this Court already knows, the § 404 EA said virtually nothing about oil spills, except to disavow that the Corps had any responsibility for considering those risks at all. *Id*. at 30. The Corps also issued a separate EA for the pipeline's Rivers and Harbors Act § 408 permits, which covered crossings of federal projects along the pipeline route. 33 U.S.C. § 408; ECF 37-7 ("§ 408 EA"). Unlike the § 404 EA, the § 408 EA contained a limited discussion of the risk of pipeline spills and their impacts. However, that analysis also deemed those risks too

insignificant to warrant an EIS.[1] *Id*. The § 408 EA cites to and relies on a technical analysis which, the Corps claimed, assessed a "conservative" worst-case spill scenario. *Id*. at 17.

Plaintiffs filed this action on January 11, 2018, raising claims under NEPA and the CWA, and moved for a temporary restraining order and preliminary injunction halting construction within the Basin. The Court denied the TRO but ordered additional briefing and convened an evidentiary hearing. ECF 24 (Jan. 30, 2018). Following that hearing, the Court entered a preliminary injunction blocking further construction of the pipeline within the Basin. ECF 86 (Feb. 27, 2018) ("PI Order"). Bayou Bridge appealed the decision, and asked the Fifth Circuit Court of Appeals for a stay pending appeal. A divided motions panel granted the stay. On July 6, 2018, after briefing and argument on the merits, a 2-1 majority of the appeals court overturned the preliminary injunction. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs,* 894 F.3d 692 (5th Cir. 2018). Plaintiffs subsequently moved for leave to amend their complaint to include a challenge to the Army Corps' mitigation policy, which provided the basis for the Fifth Circuit's decision. ECF 127. That motion is pending. Construction of the pipeline has since resumed and appears to be nearing completion.

LEGAL AND REGULATORY OVERVIEW

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a); 42 U.S.C. §§ 4321–4370f. It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas and Elec. Co. v.*

[1] The § 408 EA is limited to 8 federal projects and a small number of easements along the pipeline route, while the § 404 EA covers the entire pipeline. PI Order, at 21; AR 155 (justifying separate EAs for § 404 and § 408 "given the distinct differences in project scope being evaluated under these separate authorities").

Natural Resources Defense Council, 462 U.S. 87, 97 (1983). One of NEPA's purposes is to ensure that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts[.]" *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).

If an agency action has adverse effects that are "significant," they need to be analyzed in a full EIS. 40 C.F.R. § 1501.4; *State of Louisiana v. Lee,* 758 F.2d 1081, 1085 (5th Cir. 1985) (agency action that "*may* cause a significant degradation of some human environmental factor" requires an EIS); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) ("If *any* significant environmental impacts *might* result from the proposed agency action, then an EIS must be prepared…]") (emphasis added). NEPA regulations define "significance" to "require considerations of both context and intensity." 40 C.F.R. § 1508.27. With respect to context, the regulations direct that significance "must be analyzed in several contexts such as the society as a whole… the affected region, the affected interests and the locality." *Id.* With respect to "intensity," the regulations articulate multiple factors that must be considered, for example, "unique characteristics of the geographic area such as…wetlands…or ecologically critical areas"; the degree to which the effects on the environment are "highly uncertain" or "involve unique or unknown risks"; and "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* A key factor in determining whether a project's impacts are "significant" enough to require an EIS is if it is "highly controversial." 40 C.F.R. § 1508.27(b)(4); *Coliseum Square Ass'n, Inc. v. Jackson,* 465 F.3d 215, 234 (5th Cir. 2006) ("'controversial' is usually taken to mean more than some public opposition to a particular use—rather it requires 'a substantial dispute ... as to the size, nature, or effect of the major federal action'"); *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212

(9th Cir. 1998) (action "controversial" where parties submit evidence that "cast[s] serious doubt" on agency conclusions). In another case challenging Corps' permits for an ETP crude oil pipeline, a court found that the Corps' failure to address substantial expert critiques of its dismissal of oil spill risks rendered the project "controversial" for purposes of NEPA, requiring a remand for a new environmental review. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 129 (D.D.C. 2017)

If the agency determines that the impacts of a decision are not significant, it must document this conclusion in an environmental assessment ("EA") and finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a) (EA must "provide sufficient evidence and analysis for determining whether to prepare an" EIS). The justification for such a conclusion must be clearly demonstrated: "simple, conclusory statements of 'no impact' are not enough." *Foundations on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985); *Hill v. Boy*, 144 F.3d 1446, 1451 (5th Cir. 1998) (where agency declines to prepare EIS, it must "identify the relevant environmental concern, take a 'hard look' at the problem in preparing the EA, and make a *convincing case* in support of a [FONSI]") (emphasis added).

Whereas NEPA is primarily aimed at *procedures* to improve consideration of environmental values, the CWA puts strict *substantive* limits on actions that degrade water quality or harm aquatic uses. The CWA prohibits the discharge of soil or other materials into wetlands unless authorized by a permit issued by the Corps. 33 U.S.C. § 1344(a); 33 C.F.R. § 322.3; Parts 323, 325. Standards for issuance of § 404 permits are strict. Permits must be denied if there is any "practicable alternative" with less impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The Corps is prohibited from granting a permit "unless it can be demonstrated that such a discharge [from the project] will not have an unacceptable adverse

impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern," *id*. § 230.1(c), or if the discharge will result in significant adverse effects to water quality. *Id*. § 230.10(c)(3); *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982) (CWA regulations create a "very strong" presumption "that the unnecessary alteration or destruction of (wetlands) should be discouraged as contrary to the public interest"). These strict standards are intended to achieve the law's sweeping goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also* 33 U.S.C. § 2317(a) (establishing goals of no net loss of wetlands and long-term goal "to increase the quality and quantity of the Nation's wetlands"). The Corps also is required to conduct a "public interest" review, and permits that are not in the public interest must be denied. 33 C.F.R. § 320.4(a); 40 C.F.R. § 230.1. The Corps must consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations. *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*.

STANDARD OF REVIEW

Challenges to decisions under NEPA and CWA are reviewed under the Administrative Procedure Act ("APA"), to determine whether the decision was "arbitrary, capricious," or "not in accordance with law." 5 U.S.C. § 706; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"). A reviewing court must "studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River Auth. v U.S. Dept. of Interior*, 951 F.2d 669, 678 (5th Cir. 1992). "[T]his restriction does not turn judicial review into a rubber stamp. In conducting our NEPA inquiry, we must make a

searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment." *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 230 (5th Cir. 2007).

ARGUMENT

The idea that the Corps could permit a massive crude oil pipeline, carrying half a million barrels of crude oil a day, to cross one of the most iconic and sensitive landscapes in the nation, destroying hundreds of acres of wetlands in the process, *without* an EIS can only be described as astonishing. The entire purpose of NEPA is to give close scrutiny to projects like this one. As the material provided to the Corps reveals, EISs for major oil and gas pipelines are common. *See, e.g.*, ABK 13 (Keystone XL); ABK 1327 (Sandpiper). These in-depth analyses closely examine the risks of spills and leaks, as well as their impacts in various types of environments. *Id.* An EIS can also look at alternative routes that do not put special aquatic sites at risk. ABK 2650. An EIS allows input from other federal and state agencies, and others with relevant expertise, ensuring that the proponent's claims are closely scrutinized. ABK 432 (critique of spill risk analysis for Keystone pipeline EIS). Most important, an EIS ensures that the agency fully considered and disclosed all of the risks and benefits of a given project before making a final decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.21 (1976).[2]

Courts have set aside agency decisions to sidestep an EIS on projects with far less impact than this one. *See, e.g., O'Reilly*, 477 F.3d at 229 (residential development allowing dredging and filling in 39.54 acres of wetlands); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339 (D.C. Cir.

[2] Defendants may claim that EAs for pipelines are the norm, *see, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015), but these cases involve the Corps' authorization of projects under the CWA's Nationwide Permit system, which is not subject to NEPA. Here, no Nationwide Permit is involved, and the § 404 permit covers the *entire* 162-mile pipeline. § 404 EA at 4.

2002) (airport expansion); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) (gas pipeline upgrade); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. 2010) (decision to allow jet-skis in park); *Friends of the Earth v. U.S. Army Corps*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000) (permit for riverboat casinos). This Court should follow suit. As discussed below, the Corps rubber-stamped BBP's inaccurate information on spill with zero independent review or oversight. *See infra* § II.1. It ignored critical information related to spill risk and impacts. *See infra* § II.2. These same flaws infected the § 404 CWA analysis. *See infra* § III. Because the Corps' failure to meaningfully grapple with the risks and impacts of oil spills renders its permits arbitrary and unlawful, the Court should vacate them. *See infra* § IV.

I. THIS COURT SHOULD CONSIDER "EXTRA-RECORD" EVIDENCE

Under the APA, challenges to final agency action generally are limited to the documents that were directly or indirectly considered by the agency in reaching its decision. 5 U.S.C. § 706. However, a court may supplement an administrative record where:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010). The Fifth Circuit applies this exception particularly broadly in NEPA cases. *Sierra Club v. Peterson*, 185 F.3d 349, 369–70 (5th Cir. 1999), *on reh'g*, 228 F.3d 559 (5th Cir. 2000). ("[A] district court may review evidence in addition to the administrative record to determine whether an agency adequately considered the environmental impact under NEPA of a particular project."); *Sabine River Auth.*, 951 F.2d at 678. Accordingly, consideration of extra-record evidence in NEPA cases in this Circuit is common. *See, e.g., Holy Cross v. U.S. Army Corps of Eng'rs*, 55

F. Supp. 2d 532, 538 (E.D. La. 2006) (extra record evidence "exposed the inadequacy of the Corps' planning and analysis" in NEPA case).

Plaintiffs primarily rely on the administrative record, but also ask the Court to consider two sources of extra-record evidence. First, pipeline expert Richard Kuprewicz provides background information which will aid the Court in determining whether the Corps failed to consider important factors in its review. *Peterson*, 185 F.3d at 370 ("The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention.") This is a commonplace use of extra record evidence in a case challenging the lack of a full environmental review. *Davis Mountains Trans-Pecos Heritage Ass'n. v. Fed. Aviation Admin.*, 116 F. App'x 3, 12–13 (5th Cir. 2004).[3]

Second, this Court should consider information related to spills that Basinkeeper submitted to the Corps, but that the agency either discarded or lost. Hasselman Decl., ¶ 6. A July 18, 2017 comment letter from plaintiffs focuses on the issue of spills, and explicitly references a set of enclosed references that provide extensive technical detail on spill risks and impacts. AR 2197. The letter asks that the references "be included in the administrative record and given close consideration by the Corps." *Id*. The Corps acknowledged receipt of the letter and promised that it was "currently assessing all information relevant to this project." Hasselman Decl., Ex. 4. Once this litigation began, however, the Corps determined that these references were never "directly or indirectly considered" by the Corps and would not be included in the record. *Id*., Ex. 5. Whether deliberate or negligent, the Corps' casual disregard for its

[3] It is even more pivotal here because the Corps never provided opportunities for comment on a draft EA or accompanying risk analysis, meaning the record contains no critiques of this important material. *Oceana, Inc. v. Pritzker*, 126 F. Supp. 3d 110, 113 (D.D.C. 2015) (lack of opportunity for comment on agency decision merited consideration of extra record evidence and "demonstrates the value in having commenters offer informed challenges to agency action").

obligations to carefully consider these comments is deeply concerning. The Corps is obligated to consider these materials. *See* 33 C.F.R. § 325.2(a)(3) ("The district engineer will consider all comments received in response to the public notice. . . . [Public comments] will be made a part of the administrative record of the application."). Extra-record materials should be considered where an agency "deliberately or negligently excluded documents" from the record. *Medina*, 602 F.3d at 706. This is such a case.

II. THE CORPS' FINDING OF "INSIGNIFICANCE" UNDER NEPA UNDERSTATES THE RISKS AND IMPACTS OF OIL SPILLS

This motion focuses on the Corps' failure to assess the risks and impacts of oil spills. Previously, this Court rejected plaintiffs' challenge to the Corps' failure to analyze oil spill risk in the § 404 EA. PI Order at 19.[4] The Court reasoned that the Corps could incorporate the findings of the § 408 EA—which, unlike the § 404 EA, provided some discussion of spills—into the § 404 EA. *Id*. at 20-22. Now that the administrative record is available, however, it is apparent that the § 408 EA itself is inadequate with respect to spills, and the Corps' conclusion that the risks and impacts of spills were "insignificant" for NEPA purposes is unsupported. Many commenters brought these issues to the Corps' attention during the administrative process, but they form no part of the Corps' NEPA analysis or decision. Thus, while the § 408 EA acknowledges some impacts from oil spills, the Corps' ultimate conclusion that risks were so low and impacts so minor that an EIS was unnecessary is arbitrary and capricious.[5]

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[4] The Court correctly observed that Corps must consider the risks and impacts of oil spills when it permits pipelines, PI Order at 18, nor has anyone has ever argued otherwise. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 869 (9th Cir. 2005) (increased risk of oil spills of tanker dock); *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983) (Corps "may not hide behind its ignorance of the worst case consequences" of oil spills).

[5] Plaintiffs do not challenge the Corps' ability to incorporate the § 408 EA analysis into the § 404 EA for NEPA purposes. As explained below, *both* the § 408 and § 404 analyses are insufficient with respect to spills for purposes of complying with NEPA. CWA issues are addressed in § III.

1. The Corps Failed to Undertake Any Independent Review of the Proponent's Analysis of Spill Risks and Impacts

The Corps previously told this Court that its conclusions with respect to oil spills were "based on the application of its expertise to the evidence." ECF 37-2 at 15. This statement was false. The Corps never applied *any* expertise to the question nor conducted *any* independent analysis of the EA that BBP wrote or the supporting information it provided. Instead, it accepted, without question or oversight, whatever it was given, even though BBP's self-interest in downplaying the risks is self-evident. The Corps played virtually no role on the issue of spills, allowing BBP to draft the § 408 EA itself with little input. As far as information supporting the EA, there was little. BBP provided the Corps with some raw data regarding historic incident frequencies, using a PHMSA database but with no analysis or context. AR 1440. BBP also supplied a "worst case spill" analysis from a third party consultant, and some local spill response plans. Hasselman Decl., Ex. 7. The record contains little else related to spills, except the materials that plaintiffs sent to the Corps that were ignored.[6]

This violates NEPA. While a project proponent can share information for use in NEPA assessments, the Corps must "independently evaluate the information submitted and shall be responsible for its accuracy." 40 C.F.R. § 1506.5(a); *Andrus v. Sierra Club*, 442 U.S. 347, 356-58 (1979) (CEQ's regulations are binding on all federal agencies). Similarly, while an applicant can provide a draft of an EA, the Corps must "make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment." 40

[6] For example, in evaluating "alternatives" to the pipeline, both EAs explicitly stated that "BBP cannot speculate" on the available capacity in other pipelines, and abandoned those alternatives. § 404 EA at 42; § 408 EA at 7. In other words, the Corps did not even bother to change BBP's first person narrative—in a document signed by the Corps—into its own, let alone actually investigate the availability of alternative pipeline capacity.

C.F.R. § 1506.5(b); 33 C.F.R. Part 325, App. B(8)(f) (Corps NEPA regulations) ("In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy…"). Accordingly, the "rubber stamping of a consultant-prepared" NEPA document by the Corps is "illegal." *Sigler*, 695 F.2d at 962 n.3 ("an agency may not delegate its public duties to private entities…particularly private entities whose objectivity may be questioned on grounds of conflict of interest").

Courts enforce this requirement rigorously, setting aside EAs where agencies fail to undertake a sufficient independent review of proponent-provided information. In *Sierra Club v. Van Antwerp*, 709 F. Supp.2d 1254 (S.D. Fla. 2009), a district court held that the Corps violated NEPA by accepting a proponent's report about the lack of alternatives for potential mining sites without any review or verification. As the Court found, the Corps "made no effort, or at least the record is silent as to any such effort, to independently evaluate any of the claims" in the report. *Id.* at 1266. The court stated that 40 C.F.R. § 1506.5(a) requires that the Corps "document in the record the … independent evaluation of the information [submitted by the applicant for the EIS] and its accuracy." Finding that "the Corps has not articulated a reasoned explanation for its adoption of the report and its conclusions," the Court held the § 404 permit invalid. *Id*.; *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (Corps' "wholesale acceptance of [the permit applicant's] definition of purpose" did not comply with NEPA).

In contrast, the Fifth Circuit upheld the Corps' review of proponent-supplied materials in *Save our Wetlands, Inc., v. Sands*, 711 F.2d 634 (5th Cir. 1983), because the Corps provided a rigorous review of proponent materials. The permittee for a transmission line corridor submitted a draft EA when it submitted its application. *Id*. at 637. The Corps began its "independent and thorough review" with the presumption that applicant's report would be "biased." *Id*. at 643. An

agency expert reviewed the application for three weeks, analyzed aerial and infrared photographs, and consulted with other internal experts as well as other agencies with expertise. *Id*. The Corps further supplemented this review with its own investigation into the project's impacts. The Court concluded that the Corps had satisfied its NEPA obligations. *Id.*

Here, the Corps' review of the risk of spills looks far more like its assessment in *Van Antwerp* than the one in *Sands*. One searches the record in vain for *any* indication that the Corps "independently and carefully reviewed and verified" BBP's spill risk data, technical review, or draft EA. *Id*. at 643. The Corps does not appear to have any relevant expertise on staff, nor did it turn to outside agencies like PHMSA that may be apply to supply it. *Compare* S*top the Pipeline v. White* 233 F. Supp.2d 957 (S.D. Ohio 2002) (upholding EA where Corps "relied on the expertise of another federal agency with superior expertise"). BBP wrote the § 408 EA and its "analysis" of spill risk itself: the Corps had all but zero meaningful input on that discussion. This is not a case where the Corps grappled with conflicting sources of technical information and used its expertise to make a reasoned determination. *Sabine River,* 951 F.2d at 678. This is a case where the Corps uncritically relied on complex technical information submitted by a self-interested proponent, and rubber-stamped permits with no attempt to verify the proponent's claims. NEPA requires much more. *Save the Bay v. U.S. Army Corps of Eng'rs,* 610 F.2d 322, 325 (5th Cir. 1980) ("Perhaps the most basic requirement of NEPA is that all federal agencies make an Independent environmental assessment of the proposed action.").

The Corps may claim other agencies played this oversight role, but that is false too. As this Court knows, the § 404 EA disclaimed any responsibility for considering spills, observing that they were not within its "defined purview." § 404 EA at 30. The Corps also stated it relied on PHMSA, as the agency with appropriate technical expertise, to address these risks. *Id*.; PI

Order at 28 (upholding spill risk analysis due to Corps' "reliance and deference" on PHMSA). However, a review of the record reveals that the Corps neither sought nor received *any* input on the project from PHMSA (or any other agency) on the spill issue—not a single email, comment letter, or other correspondence exists revealing that the Corps was relying on another expert agency's evaluation of risks or review of BBP's claims. To the contrary, the § 404 EA is replete with misrepresentations of the governing regulatory regime. For example, the Corps claims that PHMSA "has the primary responsibility for the issuance of [U.S. Department of Transportation] special permits and approvals for the operation" of crude oil pipelines. § 404 EA at 3. This is simply wrong, as no PHMSA permit was either required or obtained for this project. *Sierra Club*, 803 F.3d at 55 n.8 ("Pipelines transporting oil within the United States are not subject to any general requirement of federal governmental evaluation and approval.") The Corps also claims PHMSA "approval" of spill response plans is required "prior to the start of operations." § 404 EA at 54; AR 1055 (BBP claiming that spill response plan will be sent to PHMSA for "review and approval" before operations commence); AR 2201 (relying on facility response plan to address impacts). This too is incorrect: PHMSA collects spill response plans but no "approval" is required to start operations. 49 C.F.R. § 194.121 (response plan must be submitted "within 30 days" of changes in operations).

When an agency weighs competing technical information, it is entitled to "accept or reject" from various sources of evidence and rely on its own experts as long as they "are qualified and their opinions reasonable." PI Order at 6-7. The Corps did not rely on its own experts, and did not ask other agencies with expertise for input. Instead, it uncritically accepted the proponent's technical information. It incorrectly assumed that these issues would be subject

to other permits and reviews, leaving a deep regulatory void on a critical issue. Its failure to provide any independent review of the § 408 EA and accompanying materials violates NEPA.

2. The Corps Failed to Consider Critical Issues Contradicting Its "Insignificance" Conclusion.

The Corps' failure to conduct any review of BBP's EA is not the only problem. The Corps was provided with abundant evidence that the risks were far more serious than BBP claimed, and that the impacts of a spill in the unique aquatic environment of the Atchafalaya would be far more grave. The Corps ignored that material. The Corps' finding that the risks of spills were so low and its impacts so manageable that the project did not need an EIS cannot survive arbitrary and capricious review.

a. The Corps Underestimated Both the Likelihood and Potential Size of a Spill

The § 408 EA dismisses the risk of a leak or major spill as remote and unworthy of further analysis. That dismissal suffers from three fatal flaws: a) it calculates risk based on national averages that shed little light on the risk of *this* pipeline, especially in light of ETP's worst-in-the-industry safety record; b) it relies on a "worst case" analysis that is fundamentally flawed, for example, by incorporating hopelessly optimistic detection and response times; and c) it fails to account for smaller leaks that cannot be detected with the proposed remote sensing technology. The record reveals that there were "substantial disputes" as to the "size, nature, or effect" of the Corps' decision. *Coliseum Square Ass'n*, 465 F.3d at 234; *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 129 (Corps FONSI unlawful because record shows "controversy" over its dismissal of spill risk). The controversy over these facts weighed strongly in favor of an EIS.

First, the primary data that the § 408 EA relies on to calculate the risk of an oil spill is a national database of spill incidents compiled by PHMSA. § 408 EA at 84, 106.[7] But this national average reveals little or nothing about the risk from any particular pipeline. Declaration of Richard Kuprewicz, ¶¶ 6-9. It is well documented that the data on which these averages are based, which is limited to industry self-reporting, suffers from serious shortcomings. *Id*.; ABK 435 (2009 PHMSA data quality assessment found "serious problems" with data, including "many deficiencies" and a "serious problem with underreporting of incidents"); ABK 575 ("Risk assessment or risk management approaches that overly rely on historical databases do not reflect the future operational risk of a specific pipeline in a specific place."). The data is limited to "significant" spills (spills involving certain size, cost, and consequence thresholds), ignoring more pervasive smaller spills. ABK 1189. Moreover, the database covers *all* crude oil pipelines of any size, and hence is useless for anticipating the size of a spill from a massive pipeline like this one. *Compare* § 408 EA at 84 ("it is likely that the total release volume of a spill would be 4 bbls or less based on historical spill volumes") *and* 106 ("most pipeline spills are small"); *with* ABK 2679 ("The above information makes it clear that a spill volume of 4 bbl should not be considered typical."); Kuprewicz Decl., ¶ 8.[8]

[7] Even if these statistics told the complete picture, which they do not, they demonstrate that the risk of a spill is significant. They show that the chance of a spill *is 100%* over 50 years, while the probability of a large spill (100 barrels, or 4,200 gallons) is 16%, and the probability of a major spill (1000 barrels, or 42,000 gallons) is 5%. AR 1440. Calculating risk at the level of individual census block groups, some sites face a higher than 25% chance of a consequential spill. AR 1442. This is consistent with information showing that even using PHMSA data, risks of pipelines spills from major pipelines are considerable. ABK 434 (finding likelihood of 1.9 spills per year from Keystone pipeline, and over one "large" spill over 1000 barrels every eight years). No analysis or discussion is provided to explain why these consequential spill risks supported the Corps' findings that the risk was "insignificant."

[8] Although the § 408 EA references few technical sources, it does rely on a 1993 report from the California Fire Marshall. § 408 EA at 18. The study had been heavily criticized. ABK 2826 ("At the time of the State Fire Marshall Study, California had very few miles of large diameter

Moreover, use of a national "average" is inappropriate because BBP is not an "average" company. BBP's parent companies, ETP and Sunoco, have a worst-in-the-industry record for spills and other compliance problems. This was well documented in the record. ABK 3403; AR 4575; *supra* at 4-5. In a November 2016 comment letter, plaintiffs documented a number of unusually serious spills and incidents at pipelines managed by BBP's corporate parents, including one that spilled 117,000 gallons of gasoline in Ohio, and a 33,000 gallon spill in Texas from a crude oil pipeline installed just a year earlier. AR 11653. ETP's abysmal safety and compliance record was a key theme during the contentious public hearing. *See, e.g.,* AR 9536 (proponents "have some of the worst safety and environment records in the oil industry"); 9564 (Sunoco has second worst record in industry); AR 9547 (ETP has "awful" record of "under-reported" incidents). Another report goes into even greater detail, cataloguing 329 pipeline incidents in 12 years—a rate of over two a month. ABK 3403. These incidents caused over $64 million in property damage and spilled over a million gallons of hazardous liquids. *Id*.

Simply put, the risk of a spill at an ETP-managed pipeline is higher than for other pipelines due to a well-documented history of accidents. Consideration of an operator's historic compliance record is a mandatory consideration under federal law in determining a "worst case discharge," 49 C.F.R. § 194.105(b)(1), and obligatory when evaluating risk. However, one searches the final decision and the administrative record in vain for even the slightest indication that the Corps considered this issue. Even a BBP-provided "draft" of responses to comments failed to mention it. AR 9664.

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liquid transmission pipelines.") Reliance on this study, which predated extensive pipeline construction and accidents over the past 25 years, is inappropriate. Kuprewicz Decl., ¶ 9.

Second, the § 408 EA reaches its insignificance finding based on a "worst case" spill analysis provided by BBP that it claims was "conservative," i.e., estimated a worse spill than could actually occur. § 408 EA at 17. That is flatly false, for a number of reasons, and the BBP "worst case" discharge analysis is grossly lacking. Kuprewicz Decl., ¶ 10. It is missing most of the critical information needed to demonstrate a worst case discharge, and instead relies on "absent data, unsupported assumptions, and flatly incorrect conclusions" to arrive at a flawed discharge estimate. *Id.* For example, the § 408 EA states that pipeline ruptures can be detected within one to three minutes, and valves closed within another three minutes. § 408 EA, at 112-13. The technical analysis uses a "worst case" estimate of nine minutes to detect ruptures. Ex. 7 at 8. These are wildly optimistic and unsupported estimates. Kuprewicz Decl., ¶ 11; ABK 576; *see also* ABK 2821 (true response time is "many multiples" of estimated 13-minute detection and closure time at DAPL). The Marshall, Michigan pipeline (which employed similar spill detection technology as Bayou Bridge) spilled crude oil for 17 hours before the company detected the leak and shut it down. ABK 576; ABK 951; *see also* ABK 2863 (57 minutes to shut down Yellowstone spill, resulting in 70 miles of pipeline draining into river). Contrary to the claims made in the EA, the remote sensing technology touted by BBP is, in fact, notoriously ineffective. Kuprewicz Decl., ¶ 13. One study found that only 5% of leaks and spills between 2002 and 2012 were discovered via remote sensing, rather than the visual observation of staff or passers-by. ABK 946. Another study put the figure at 17%. ABK 2833.

The Dakota Access pipeline case involved a similar spill model, and was harshly critiqued. *Standing Rock*, 255 F. Supp. 3d at 129; ABK 2834. The U.S. Department of the Interior observed that this model "does not correlate with the majority of actual releases that occur during operation of an oil pipeline." ABK 2653. One expert observed the report suffered

from "numerous misleading, false statements, and unsupported critical assumptions" and concluded it "seriously understates the risks and worst case oil release" evaluated. ABK 2819; ABK 576. Another expert review noted "misleading and false statements," and unrealistic detection times. ABK 2866; *see also* ABK 2677 (critiquing spill analysis and conclusions regarding pollutant concentrations); ABK 2875 (critiquing Corps' claims that easement conditions mitigated risk). The court in that case held that the Corps' failure to address these critiques was arbitrary and capricious, and ordered a remand to the Corps for reconsideration. *Standing Rock Sioux*, 255 F. Supp. 3d at 129. Here, much of the same information was provided to the Corps. But the Corps ignored this history and the technical information it was given.

Third, the EA relies heavily on "leak detection" technology to dismiss the risk and impacts of spills. Specifically, the EA claims that the pipeline's remote detection systems can detect leaks down to "1% or better" of pipeline volume. § 408 EA at 108. That claim is unsupported by *any* factual data, and flatly contradicted by the record. Leaks of 2-3% of pipeline volume are undetectable by these technologies, and even much larger leaks are very difficult to detect in practice. ABK 945; Kuprewicz Decl., ¶ 13. The pipeline industry assumes some level of "acceptable" losses of product—i.e. leaks and spills—and builds this into its financial models. ABK 2866; ABK 1223 (report referencing failure of existing systems to "quickly and effectively identify uncontrolled releases in a number of recent pipeline accidents"). Given that most pipeline leaks are detected by observation rather than remote sensing technology, a leak in the uniquely inaccessible Atchafalaya merits particularly close attention.

Moreover, given the massive size of *this* pipeline, a 1% leak—which even BBP admits would be undetectable—would be extraordinarily consequential. A 1% leak of the Bayou Bridge pipeline at maximum capacity would constitute 4,800 barrels of crude oil—over 200,0000

gallons—*every day*. ABK 1191. (BBP's claimed "worst case" spill is roughly that size. Hasselman Decl., Ex. 7.) Given the remoteness of the Basin, such a leak could go undiscovered for a lengthy time. ABK 2866 (noting difficulty of locating leaks from buried pipelines). This is not some fanciful scenario: in 2016, a small leak at another Sunoco/ETP pipeline leaked for twelve days before the pipeline was shut down, releasing 8,600 barrels of oil. Kuprewicz Decl., ¶ 16. That pipeline was only a year old. But the §408 EA is totally silent on the risk of smaller but still consequential leaks that are undetectable by remote sensing, ignoring risks to the Basin.

In sum, the record confirms that the issue of spill risk was intensely "controversial," and involved "unique or unknown risks." 40 C.F.R. § 1508.27(b). The Corps also provided no analysis of how the "cumulative" risk of spills increased given the existence of other pipelines in the basin. *Id*. It is precisely the kind of record that should have triggered a significance finding.

b. The Corps Underestimated the Potential Impacts of a Spill

The § 408 is similarly dismissive of the impacts of an oil spill on the unique and ecologically critical wetlands of the Atchafalaya. 40 C.F.R. § 1508.27(b)(3) ("significance" determination turns in part on "unique characteristics" of affected area, including "wetlands" and "ecologically critical areas"). It concludes that even if there was a worst case release, it would only affect relatively "minor" amounts of wetlands within the Basin or a "small portion" of the affected rivers. § 408 EA at 58 (51 acres of wetlands affected), 65 (between 3 and 14 river miles damaged). It is hard to know what to say about this astonishing dismissal of a catastrophic environmental impact. There is no explanation for how scores of destroyed acres of wetlands, or miles of ruined rivers, can be so casually dismissed. 40 C.F.R. § 1508.27(a) ("in the case of a site specific action, significance would usually depend upon the effects in the locale…."); *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1035-37 (9th Cir. 2001) (agency's broad scale of analysis ignored local impacts). Moreover, it wildly underestimates the area of

potential impact. It is based on a "worst case" discharge that is completely inaccurate. *Supra* at 20-22. It is based on a model run that has the oil stop moving after six hours, an assumption that is not tethered to reality. Kuprewicz Decl., ¶ 22. It is further based on the BBP's nonsensical claim that it could mount a response between 15 and 90 minutes once a spill was detected, and that spills could be fully contained within six hours. § 408 EA at 62-63. The Atchafalaya Basin is one of the most inaccessible areas in the continental United States. The notion that a response team could be mobilized, equipment transported to the site, and response activities commence that quickly in this remote area is not supported by any evidence in the record, and is "patently absurd" on its face. Kuprewicz Decl., ¶ 24.

There was abundant information in the record that oil spills in Louisiana wetlands are a significant issue, with ample reason for concern. *See, e.g.*, ABK 3869. As one article observed, "It could take years, if not decades, to assess wetlands damage because of the oil's tendency to slowly degrade in some marsh areas." ABK 3412. Scientists have documented the relationship between big oil spills and coastal land loss. ABK 3911. While the EA cites a document saying crawfish survive high exposures to the contaminants in oil, § 408 EA at 66, missing from the discussion is even a mention of whether these oil-contaminated crawfish could actually be marketed, and how this could affect a unique generations-old way of life in the Basin. AR 2193; AR 1639; 40 C.F.R. § 1508.27(b)(8) ("significance" determination must weigh whether action could adversely affect "significant scientific, cultural, or historical resources"). Yet again, the Corps allowed BBP to cherry-pick selective information to support its case but ignored any evidence that undermines it. *Sigler*, 695 F.2d at 976 ("The Corps cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs. . . There can be no 'hard look' at costs and benefits unless all costs are disclosed.")

Similarly, credible information was provided to the Corps that the pipeline could be used not just for Bakken crude—on which both spill risk and response plans are based—but also diluted bitumen from Canadian tar sands. AR 1457. Plaintiffs carefully documented the recent purchase of a significant interest in the pipeline system by the company that ships the majority of Canadian tar sands. *Id*. That company made explicit statements, backed up by market analysts, that the purpose of this purchase was to enable it to move tar sands to Gulf refineries and export terminals through the Bayou Bridge pipeline. *Id*. The distinction between conventional crude and tar sands bitumen is highly consequential both in terms of the risks of pipeline spills, as well as the impacts. Tar sands-derived crude "is composed of sand, petroleum, and mineral salts; a highly toxic class of chemicals are also added to aid transport." AR 1639. Tar sands spills can result in life-threatening toxic emergencies and can "defy standard spill responses." *Id*.; ABK 2931 ("Effective oil spill removal strategies largely depend on the crude oil mixture's density and its tendency to float or sink in fresh water."); Kuprewicz Decl., ¶ 29. Tar sands, when spilled into water, degrades into toxic components that sink and mix with aquatic sediments, presenting long-term toxicity and major clean up challenges. *Id*.; AR 1458. Many commenters brought these issues to the Corps' attention. AR 1643 ("The spill plan needs to be product specific recognizing that Tar Sands are especially hard to deal with."); AR 4433 ("there is a great difference in response and impact for oil sands spills than for light, Bakken crude"); 40 C.F.R. § 1508.27(b)(2) (significance for NEPA purposes must consider "public health or safety").[9]

The Corps never grappled with this information. It did not refute or even mention the evidence that the pipeline would be used for this riskier type of crude. It relied on spill statistics

[9] Transportation of tar sands bitumen also increases the risk of spills because it takes place at higher temperatures and pressures that have been linked to increased corrosion. AR 1639; AR 1458. Tar sands pipelines spill 3.6 more oil per mile than the U.S. average. AR 1639.

that are not appropriate for evaluating the unique risks of tar sands. It incorporated BBP's assurances that spills would be quickly cleaned up without impact, even though nothing in the record addresses the special challenges posed by tar sands spills—especially in the unique aquatic environment of the Atchafalaya.[10] Instead, the Corps concluded that the impacts of the project were too insignificant to warrant an EIS without mentioning the issue at all.

As this Court has correctly recognized, NEPA prohibits "uninformed" agency action rather than "unwise" agency action. PI Order at 6. Under NEPA, the Corps can authorize action with adverse environmental impacts, but only if it has fully disclosed and considered those impacts. *Id*. When it came to the risk of oil spills, however, the Corps fell far short of that obligation. The Corps' truncated and incomplete analysis of oil spill risk failed to consider important aspects of the problem, and cannot be squared with the information that was in front of it. It is the epitome of "arbitrary and capricious" conduct.

III. THE CORPS' FAILURE TO CONSIDER OIL SPILL RISK AND IMPACT RENDERS ITS CWA § 404 PUBLIC INTEREST EVALUATION INVALID

All of the flaws of the Corps' NEPA analysis also infect its CWA § 404 analysis. Under the CWA, the Corps must closely analyze the impacts of a permit on a number of water quality and other parameters. 40 C.F.R. § 230.11. The regulations prohibit issuance of a permit where it would violate a water quality standard or toxic effluent standard, or jeopardize the survival of a protected species, among other things. 40 C.F.R. § 230.10(b),(c). The Corps must deny a permit if it finds that it is not in the "public interest." 33 C.F.R. § 320.4(a). These determinations must be made only after a "careful weighing of all those factors that may be relevant in each particular

[10] The company provided the Corps with proposed "responses to comments" in early January of 2017. AR 9663. Not only does it appear that nothing was ever done with these company-provided draft responses, but they do not mention the issue of tar sands at all.

case." *Id*. The Corps closely consider "secondary" effects, defined as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. §230.11(h). The impacts on wetlands—which, of course, § 404 is designed to protect—lay at the heart of this inquiry. 33 C.F.R. § 320.4(b).

Nothing in the § 404 EA or its supporting documentation demonstrates that the Corps gave so much as a moment's thought to the risks and impacts of spills on these important criteria. Instead, the § 404 EA—which constitutes the entirety of the Corps CWA analysis—sidesteps the consideration of spills as outside its "purview" and focuses almost completely on the impacts of constructing the pipeline. Accordingly, the Corps' conclusion that the project complies with CWA criteria and is in the "public interest" is arbitrary and capricious for the same reasons as its NEPA "insignificance" conclusion.

During the preliminary injunction phase, the Court upheld the § 404 EA's failure to assess spill risk by relying on a single sentence stating that the deciding official had also considered the § 408 EA in deciding that no EIS was necessary. PI Order at 22; § 404 EA at 91. That statement cannot salvage the Corps' CWA compliance, because it only pertained to NEPA; the Corps did not incorporate any findings from the § 408 into its CWA analysis. On the issue of spills and leaks, it disclaimed any role and explained that regulation of spill risk lay with PHMSA. *Id*. at 30. As discussed above, however, it neither sought nor received any input from PHMSA, and misconstrued PHMSA's regulatory role. *See supra* § II.1. Thus, while the Corps' NEPA defense rests on the extremely slender reed of a statement incorporating the § 408 EA into the § 404 FONSI, that defense is unavailable with respect to its CWA analysis. The record and the decision itself make clear that the Corps gave zero consideration to the risks of spills and

leaks in its CWA § 404 public interest analysis. In so doing, the Corps failed to consider an "important aspect of the problem," rendering its decision arbitrary and capricious. *Motor Vehicles*, 463 U.S. at 43.

IV. THE COURT SHOULD VACATE THE § 404 AND § 408 PERMITS

As to the remedy, this Court should vacate the permits pending full compliance with the CWA and NEPA. The APA, which provides the cause of action for Basinkeeper's claims, explicitly directs that a reviewing court "*shall* . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The U.S. Supreme Court has described this remedy as mandatory. *Fed. Commc'n Comm'n v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law'"). When a plaintiff prevails on a APA claim, "it is entitled to relief under that statute, which normally will be a vacatur of the agency's order." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001).

Some courts have recognized a limited exception to this statutory directive, usually in the context of rulemaking. *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Vacatur may not be required where there is "at least a serious possibility" the agency could substantiate its reasoning on remand with additional "explanation," and where vacatur would be highly disruptive. *Id*. The remedy of remand without vacatur has been applied sparingly, and only in a handful of specific situations. The most common use of remand without vacatur is where an agency rule is found inadequate for being *insufficiently rigorous* in light of the purposes of the underlying statute. *See, e.g., Davis County Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997) (inadequately protective air

emissions standard); *Envtl. Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990). Remand without vacatur also has been found appropriate in situations where extensive agency implementation of a rule has already occurred in a way that cannot be "undone" through vacatur, *i.e.*, where "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante." *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002); *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (declining to vacate rules governing mutual funds because most companies had already come into compliance with new rules and vacatur would "sow confusion in the investing public").

Vacatur is virtually always the appropriate remedy where an agency has violated NEPA. Courts find that vacatur is necessary to satisfy NEPA's goals by ensuring that the agency has unfettered discretion to make a different decision once a remand is complete. *Van Antwerp,* 719 F. Supp. 2d at 78-80 (finding that "[b]ecause interveners intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place."). As the D.C. Circuit affirmed recently, "the point of NEPA is to require an adequate EIS *before* a project goes forward, so that construction does not begin without knowledge of" relevant issues. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 896 F.3d 520, 536 (D.C. Cir. 2018). There are only a tiny handful of cases that found a violation of NEPA but nonetheless declined to vacate the underlying permit.[11]

Under these standards, this Court must vacate the underlying § 404 and 408 permits. The violations of the NEPA and CWA described herein are not minor nor will they be resolved just

[11] One of those decisions arose in the *Standing Rock* litigation, where the Court found a likelihood that the Corps could remedy its defects on remand with additional explanation, and hence declined to vacate. *Standing Rock Sioux Tribe v. U.S. Army Corps*, 2017 WL 4564714 (D.D.C. Oct. 11, 2017). This Court should not follow that analysis, since that case remains ongoing and the decision was not subject to appeal.

with additional agency "explanation." Rather they get to the heart of the issue of whether the Corps adequately considered and disclosed one of the most consequential risks presented by this Project. The whole purpose of these statutes is to consider such risks *before* issuance of the permits, while remand without vacatur would turn that process on its head and allow a review after the project is already in operation. The Corps should have prepared a full EIS that truly examined all of the risks, consequences, and alternatives to the pipeline, including the most effective leak detection and response options, before issuing a permit. Going through that process for a pipeline that is already built and operating all but guarantees that the Corps will treat it as an after-the-fact paperwork formality. As to the "disruptive consequences" to the Corps, there are simply none. While vacatur would represent an inconvenience to the proponent, it has no entitlement to commence construction under unlawfully-issued permits, and a long record of "crying wolf" as to the consequences of delay. *Standing Rock*, 2017 WL 4564714 at * 9 ("some cause for skepticism regarding…predictions of economic devastation"); PI Order at 56 ("claimed financial losses are not supported by specific details or analysis justifying the vast amounts presented"). This is not the rare case in which remand without vacatur is an appropriate remedy.

CONCLUSION

For the foregoing reasons, Basinkeeper respectfully asks this Court to grant its motion for partial summary judgment and vacate the underlying §408 and § 404 permits.

Respectfully submitted this 11th day of September, 2018.

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