IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

BRIEF OF DAKOTA ACCESS, LLC REGARDING REMEDY

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INTRODUCTION

To decide on a remedy in a case like this, the Court balances the overall equities and considers the practicality of alternatives. Both underlying factors—whether the deficiencies warranting remand are serious and the disruptive consequences of vacatur—strongly favor allowing the Dakota Access Pipeline ("DAPL") to continue operating during remand.

The D.C. Circuit has explained that the first factor turns on whether the agency's reasoning is "so crippled as to be unlawful" or, instead, that its action "is potentially lawful but insufficiently or inappropriately explained." *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (citation omitted). The only fair reading of this Court's June 14, 2017 Opinion ("Opinion") is that the Corps's action is the latter: a potentially lawful action in need of better explanation. This Court largely affirmed the legality of the Corps's actions in the face of Plaintiffs' many challenges. On the three discrete topics still at issue, the Court concluded that the Corps may well have considered the relevant factors, but that it needed to say so explicitly and more fully. That, alone, is reason to remand without vacating the permissions needed to continue pipeline operations.

As for the second factor, there is no question that stopping the flow of oil would be highly disruptive, not just to Dakota Access, but just as importantly to producers of oil in North Dakota whose oil DAPL carries, the customers who buy the oil and refine it, the employees of those producers and customers, the consumers of the end products which are priced based on significant cost savings from transporting the oil by pipe, and the States and localities that collect substantial tax revenue associated with the pipeline's continued operations. The process of temporarily shutting down a 1200-mile pipeline is itself extremely costly, immensely complicated and burdensome, time-consuming, and ultimately *more* of a risk to the environment than allowing the flow of oil to

continue during remand, due in part to increased risks of corrosion to the pipe and the potential for human error during lengthy shutdown and return-to-service phases. That added environmental risk is even further aggravated by the fact that, mile-for-mile, pipeline transport of oil is substantially safer for the environment than the alternative. AR 71230-31 (Ex. 2) ("From a safety standpoint, railroad transport consistently reports a substantially higher number of transportation accidents than pipelines.").

Further adding to the equities, the unwarranted delay between August 2016 and February 2017 in allowing the pipeline to go forward imposed serious costs and other hardships on Dakota Access and the others (mentioned above) who now benefit from a safer and more economical way to meet our Nation's energy demand. A shutdown while the Corps provides additional explanation for its determinations, under a statute that calls only for a process and not a particular substantive outcome, would add insult to injury. Vacatur is unwarranted.

BACKGROUND

1. The background, both factual and procedural, is set forth in the Court's Opinion. As relevant here, DAPL—which runs 1172 miles through North Dakota, South Dakota, Iowa and Illinois—contributes significant jobs and tax revenues to the local and regional economies of those States. In North Dakota alone, DAPL has the capacity to carry more than half of the current one million barrels a day produced by the Bakken shale to receipt points in Patoka, Illinois and beyond. Ex. 5 ¶ 4 (Hanse Dec.). In other words, roughly half of the oil jobs in the Bakken region, and all of the jobs that in turn rely on those jobs, are dependent in part on the continued operation of DAPL. DAPL generates more than $120 million in tax revenues a year—*i.e.*, more than $10 million per *month*—nurturing jobs and market opportunities across the region. The loss of those taxes

will harm local, regional and state governments and the people that depend on them. Blake Nicholson, *Oil has begun flowing through the Dakota Access pipeline – here's what that means for the key players*, Associated Press (Mar. 28, 2017); Ex. 5 ¶ 6 (Hanse Dec.).

2. Plaintiffs, Standing Rock Sioux Tribe ("SRST") and Cheyenne River Sioux Tribe ("CRST"), have long opposed the pipeline. Their lawsuit challenges the Corps's July 25, 2016 Environmental Assessment ("EA") and Mitigated Finding of No Significant Impact on the environment ("FONSI"), along with the February 8, 2017 grant of an easement to Dakota Access at Lake Oahe. The Tribes brought claims seeking to block construction and operation of the pipeline under multiple statutes, including the National Historic Preservation Act, the Religious Freedom Restoration Act, the Rivers and Harbors Act, the Clean Water Act, the Mineral Leasing Act, and the National Environmental Policy Act ("NEPA"). Only a small portion of their challenge under the last of these statutes has generated a remand.

NEPA requires federal agencies to evaluate the environmental effects of major federal actions. If an action will "significantly" affect the "quality of the human environment," the agency must prepare a detailed Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). An agency need not prepare an EIS, though, if it determines—in a shorter EA—that there will be no significant environmental impact. *Winter v. NRDC*, 555 U.S. 7, 16 (2008); *see also* 40 C.F.R. §§ 1508.9(a), 1508.13. NEPA does not "mandate particular results," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); it "imposes only procedural requirements." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).

To decide a NEPA claim, the reviewing court "determine[s] whether the agency: (1) has 'accurately identified the relevant environmental concern,' (2) has taken a 'hard look' at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant

impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because 'changes or safeguards in the project sufficiently reduce the impact to a minimum.'" *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (quoting *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003)). Ultimately, therefore, the "scope of review is in fact the usual one"—whether the decision is "arbitrary, capricious, or an abuse of discretion." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011).

3. In its June 14, 2017 Opinion, this Court rejected the great bulk of Plaintiffs' challenges to the Corps's determinations that (i) the pipeline would not significantly affect the environment and (ii) Dakota Access qualifies for a right-of-way to proceed beneath federal land. The Court held, relevant to NEPA, that the Corps adequately explained that the risk of a spill was sufficiently low not to require an EIS: "[I]n setting out the specific factors that undergirded its risk analysis and explaining their application to [the pipeline], the EA reasonably gives the necessary content to its top-line conclusion that the risk of a spill is low." Op. 30. The Court also held that the Corps adequately addressed the cumulative impact of the pipeline, since "[t]he EA devotes eleven pages to a discussion of cumulative impacts on eleven types of resources." Op. 35. With respect to "reasonable alternatives" to the pipeline, including its route, the Court concluded that, "by identifying and comparing several features of the two [potential] routes … the EA easily clears NEPA's hurdle requiring 'brief discussion' of reasonable alternatives." Op. 46. And the Court further rejected the Tribes' arguments under the Mineral Leasing Act, the Rivers and Harbors Act, and the Clean Water Act, among other statutes. Op. 63-80.

Thus, after this Court's ruling, only three steps remain in the Corps's NEPA analysis:

First, the Court held that the Corps must address "the degree to which the project's effects are likely to be highly controversial." Op. 34. The Court recognized that when the Corps issued

its Final EA on July 25, 2016, nothing "suggested substantial methodological or data flaws in the Corps' analysis" that would serve as evidence of controversy. Op. 33. Rather, the Court held, it is only "expert reports submitted to the Corps after the Final EA was published but before the Corps again decided in February 2017 that an EIS was not required," that warrant further discussion. Op. 33-34 (citing Accufacts and EarthFax reports submitted by Tribes).

Second, the Court explained that although the Corps "adequately discussed the impacts" of a spill on *drinking* water from Lake Oahe, it was "not similarly attentive … to the impacts of a spill on fish or game," which are the resources "implicated by the Tribe's fishing and hunting rights." Op. 41-42 (distinguishing between construction effects and spill effects). Thus, the Court concluded, the EA needed more "in this limited respect." Op. 43.

Third, the Court concluded that the EA's analysis of "effects from a spill [on the SRST Reservation] (as distinct from the risk of a spill occurring)" was "not enough to discharge the Corps' environmental-justice responsibilities under NEPA." Op. 53. Here, the Court expressed doubt that "the Corps' selection of a 0.5-mile buffer was reasonable." Op. 50. And although a "separate section" of the EA was "devoted … to environmental-justice impacts" on SRST beyond half a mile, that "d[id] not yield the Corps a full reprieve," mainly because the "analysis covers only construction impacts, not spill impacts." Op. 52-53.

This Court ordered the parties "to submit briefing on whether remand with or without vacatur is appropriate in light of the deficiencies herein identified and any disruptive consequences that would result given the current stage of the pipeline's operation," citing the factors set forth in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). Op. 67.

ARGUMENT

"The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal,* 988 F.2d at 150-51 (citation omitted). Both factors weigh against vacatur here. First, this Court remanded for the Corps to offer better explanations for conduct that is at least potentially lawful, and there is a serious possibility that the Corps can substantiate the same decision on remand. Second, an indefinite halt in the means for delivering more than 400,000 barrels of oil per day will impose severe hardship on private and public stakeholders alike. Either is reason enough to reject vacatur.

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

"When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). The Court does not ask whether a cure on remand is certain; rather, there need only be "a serious possibility that" the agency "will be able to substantiate its decision." *Allied-Signal*, 988 F.2d at 151. Given the procedural nature of NEPA, the substantial work the Corps has already done, and the specifics of this Court's rulings, this standard is satisfied.

The D.C. Circuit has explained that the relevant, albeit not always clear, distinction on this first prong is between (i) agency reasoning that is "so crippled as to be unlawful" and (ii) action that "is potentially lawful but insufficiently or inappropriately explained." *Radio-Television News Dirs.*, 184 F.3d at 888 (observing that a "fine line" separates the two). Where, as here, courts conclude that potentially lawful agency action is "inappropriately explained," those "court[s] frequently reman[d] for further explanation" without vacating. *Id.*; *see also, e.g.*, *Am. Farm Bureau*

Fed'n v. EPA, 559 F.3d 512, 528 (D.C. Cir. 2009) ("[T]he EPA's failure adequately to explain itself is in principle a curable defect."); *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (vacatur inappropriate where the agency's "only error was its failure to explain what seems to be a policy difference with the plaintiffs"); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) ("We find it plausible that FERC can redress its failure of explanation on remand."). As was true in *Black Oak*, it is *at least* "plausible" as to each of the three topics in this Court's opinion that the Corps "can redress its failure of explanation on remand." *Id*.

Highly Controversial. This Court held that the Corps must address "scientific critiques" newly asserted in the Tribes' *post*-July 25, 2016 expert reports to satisfy the Corps's duty to consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." Op. 33 & 31 (quoting 40 C.F.R. § 1508.27(b)(4)). The Court did not intimate that these critiques were scientifically valid, much less insurmountable. To the contrary, the Court stated: "It may well be the case that the Corps reasonably concluded that these expert reports were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects." Op. 34. The problem, instead, is that the Corps "never said as much." *Id*. Because the Corps "may well" be able to adequately explain its conclusion, remand without vacatur is warranted. *See*, *e.g.*, *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (remanding without vacatur where "the FDA may well be able to explain" its conclusion).

The "serious possibility" that the Corps will be able to explain and support its earlier determination on remand is confirmed by the fact that this Court has considered and rejected attacks on Corps determinations that cover some of the same topics raised in the post-July 25 criticisms. Plaintiffs' reports take aim, for instance, at the Corps's analysis of spill risks and impact. But this

Court concluded that the Corps adequately explained its conclusion that the risk of a spill is sufficiently low. Op. 30-31. Similarly, the Accufacts report criticizes the Corps's discussion of landslide risks. AR ESMT 1075-76. Again, this Court has upheld the Corps's assessment of landslide risks based on pre-July 25 comments. Op. 30-31 & 70-71.

It might be a different story had there been only a few comments in the record for the Corps to consider when it made its July 25, 2016 determinations, or if the post-July 25 reports had been based on information that was both significant and newly available. But neither of those things is true. *See, e.g.*, Op. 58 (noting that the Corps, after receiving further input from SRST, including its expert report, "concluded that no new significant circumstances or information relevant to environmental concerns … had emerged since the EA was finalized"). That leaves the prospect of a battle of the experts—"a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746 (D.C. Cir. 2001) (citation omitted).[1]

Moreover, as the Court has already stated, the EA extensively reviewed relevant data and factors to conclude that the likelihood of a spill is low. Op. 28-30. And analysis of industry-

[1] This Court also knows from the summary judgment briefing that Plaintiffs' reports are, in fact, susceptible to serious criticism. *See, e.g.*, Op. 34 (noting that Dakota Access "offer[ed] a scathing assessment of the reports' 'material flaws'"). For one thing, the reports mischaracterize the EA. *Compare* AR ESMT 632 (Ex. 3) (report accuses EA of stating that emergency block valves on either side of the Lake Oahe and Lake Sakakawea crossings will "close instantaneously upon the occurrence of a leak"), *with* AR 71318 (Ex. 2) (EA actually states that the valves "can be actuated to close as soon as a leak is detected") *and* AR 71314 (Ex. 2) (EA states that "[t]hese valves have a closure time of no greater than three (3) minutes"). The reports also misapply scientific standards, such as invoking *chronic* benzene exposure limits when the issue is potential exposure from an *acute* event (*i.e.*, an oil spill). AR ESMT 627-29 (Ex. 3). These reports also misuse and misapply geographic data. AR ESMT 1075-76 (Ex. 1) (landslides); AR ESMT 938 (Ex. 4) (same). And, despite Accufacts' assertion that the worst-case discharge values are understated, the values used are actually quite conservative and likely overstate the actual release volume in the unlikely event of a spill. AR ESMT 627 (Ex. 3); AR ESMT 941 (Ex. 4). These are just some of the flaws that the Corps will be able to include in its explanation on remand.

recognized pipeline integrity threat categories repeatedly shows why this particular crossing poses an even lower risk than other pipeline segments. Op. 29-30.[2] Thus, criticisms directed at potential *effects*, even if credited, would be unlikely to change the Corps's overall conclusion of no significant impact. *See New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012) ("[A]fter 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." (emphasis added)).

Fishing and Hunting Rights. This Court concluded that, in one "limited respect," the Corps needed to examine and discuss the effects (as distinct from likelihood) of a spill on certain water resources. Op. 43. The task is only a "limited" one, *id.*, because the Corps adequately assessed possible effects of construction on fish and game. Op. 39. And it adequately assessed how a spill would affect the Tribes' drinking water. Op. 41-42. What remains, then, is for the Corps to address *effects* of *a spill* on *fish and game*. Op. 43.

The Corps can complete that task with existing data. To assess the effects of construction on fish and game, the Corps already looked into tribal hunting and fishing rights. *E.g.*, AR 71293 (Ex. 2) (discussing potential impacts on "fish eggs, juvenile fish survival, benthic community diversity and health, and spawning habitat" as a result of inadvertent releases of drilling mud);

[2] Plaintiffs have been vocal about reported releases of oil from the pipeline. But these reports do not alter the conclusion that it is extremely unlikely a spill will occur that affects Plaintiffs in any way. The two reported releases did not occur during operation of the pipeline; rather they occurred during the commissioning and testing process, when minor releases are not unheard of. The first release, of one-half of a barrel of crude oil on March 5th, 2017, resulted from a manufacturing defect in an O-ring to a valve. *See* Pipeline and Hazardous Materials Safety Administration Report Number 20170111-22237. The second release, two barrels of crude oil on April 4, 2017, resulted from potential mechanical failure of a pump rotor (for which testing on the pump assembly continues). *See* Pipeline and Hazardous Materials Safety Administration Report Number 20170146-22306. Both releases were contained, cleaned, and remediated. Neither was closer than 70 miles to the Lake Oahe crossing. There is no reason to believe that either cause of release during the commissioning phase is relevant to operations at that crossing.

AR 71282 (Ex. 2) (considering the possibility of "impacts to treaty fishing and hunting rights" from construction). And as part of determining a spill's possible effects on drinking water, the Corps developed an ample record for such variables as the distance oil might travel on Lake Oahe and containment methods. *E.g.*, AR 71311 (Ex. 2) ("In the unlikely event of a release, sufficient time exists to close the nearest intake valve to avoid human impact."). The Corps can therefore complete this second task on remand largely through use of its spill-effects data (which it already has used to determine how a spill would affect drinking water supplies) and its data on fish and game resources that the Tribes use (data the Corps already has examined to assess possible effects from construction).

As an example, the EA sets forth a number of hypothetical spill scenarios. AR 71269-72 (Ex. 2). Under the most extreme scenario, projected benzene levels are well below the acute toxicity levels for aquatic organisms. AR 71271 (Ex. 2). That data point is also relevant to assessing the impact of a spill on fish and fishing rights. And it informs possible impacts on game and related hunting rights, which (due to the typical size and habitat of terrestrial wildlife) are even less likely than fish to be affected. The Corps also has already determined, as part of its drinking water analysis, that mitigation measures will help limit both the location and duration of a spill's effects—in the highly unlikely event one occurs. This is not the type of issue that warrants vacatur. *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009) (vacatur unnecessary when agency "has reasonably explained … two of the three cost categories" but "has failed to provide such an explanation for the [third].").

Environmental Justice. This Court remanded for the Corps to conduct further environmental-justice analysis, primarily consideration of potential impacts more than half a mile from the crossing. Op. 47-54. The Corps can do so using census tract data already in the public domain.

SRST argues that this would yield a population with a greater proportion of minorities and low-income individuals. D.E. 117-1 at 29. But that would not compel the conclusion that the pipeline will have disproportionate negative effects on those persons. The Corps will be entitled to consider a number of factors, including that (1) the risk of any spill is exceedingly low; (2) mitigation measures significantly increase the chances that oil will be contained promptly; (3) the greatest risk is to drinking water intakes located on the opposite side of the Lake, which service non-minorities; and (4) the alternative location (North of Bismarck) would have entailed multiple more severe potential impacts, including many more affected persons, to balance against potential environmental-justice considerations. There is a serious possibility that, whether considered together or separately, these factors would still give the Corps a legitimate basis for adhering to its earlier determination. And that is all the more plausible given that (i) NEPA is a procedural statute, *see* Op. 4 (NEPA "merely prohibits uniformed" agency action (quoting *Robertson*, 490 U.S. at 351)), and (ii) this Court did not require the Corps to address any particular issue; rather, the Corps simply "needed to offer more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill." Op. 54.

* * *

In sum, the Court does not have to predict with certainty the result on remand for it to find it more than plausible that the Corps can substantiate its earlier determinations. This Court upheld some of the most significant parts of the Corps's analysis, including the overall likelihood of a spill and many of the possible effects. On remand, the Corps will have the means to make explicit certain determinations that are now implicit.

Cases in which courts have recognized "the primacy of vacatur to remedy NEPA violations" do not change the result, because the circumstances here differ greatly from those in other

NEPA cases where vacatur was ordered. *See Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016). In *Public Employees*, for example, the Court remanded with vacatur the Fish and Wildlife Service's reissuance of authorizations to kill double-crested cormorants after discussing the "hard look" required under NEPA and concluding that "[i]t is hard to imagine a 'softer' look" than that conducted by FWS. *See Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 153 (D.D.C. 2016). Similarly, in *Reed v. Salazar*, 744 F. Supp. 2d 98, 102 (D.D.C. 2010), the Court vacated and remanded an FWS funding agreement after noting that FWS's reliance on an inapplicable categorical exclusion misled it into conducting *no* environmental analysis. *See also Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77 (D.D.C. 2010) (remanding and partially vacating Clean Water Act permit issued by Corps after finding that Corps should have prepared an EIS, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 66 (D.D.C. 2010), *aff'd in part, rev'd in part*, 661 F.3d 1147 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012)); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156 (D.D.C. 2002) (vacating reissuance of cattle grazing permit after finding that National Forest Service improperly reissued permit without conducting any NEPA analysis).

These cases, where the agency's compliance with NEPA was so deeply flawed, are readily distinguishable from this case, where the Corps "substantially complied with NEPA in many areas." Op. 2. Vacatur is inappropriate under these circumstances.

II. Vacating The Permits Would Have Severe Disruptive Consequences To Markets And Consumers And Would Unnecessarily Increase Environmental Risks.

The second *Allied-Signal* factor requires the Court to consider "the disruptive consequences of an interim change that may itself be changed." 988 F.2d at 151. This factor *alone* can render vacatur inappropriate. *North Carolina v. EPA*, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008) (no vacatur due to disruptive consequences, despite "more than several fatal flaws in the rule");

Shands Jacksonville Med. Ctr. v. Burwell, 139 F. Supp. 3d 240, 270-71 (D.D.C. 2015) ("the deficiencies in the rule [we]re serious," and the first factor therefore supported vacatur, but the disruptive consequences outweighed that factor; no vacatur).

The disruptive consequences here are significant. In the few weeks that the pipeline has been in operation, it has already carried more than 18 million barrels of crude oil to market safely and efficiently. Indeed, the pipeline carries *nearly half* of the crude oil currently produced in North Dakota. Ex. 5 ¶ 4 (Hanse Dec.). Halting the pipeline's operation would cause significant economic harm, not only to Dakota Access but also to the oil producers and refiners that rely on the pipeline. The cost differences alone for shippers are substantial: an estimated savings of between $5.00 and $7.00 per barrel compared to transportation by rail or truck. Ex. 5 ¶¶ 4, 8 (Hanse Dec.). The pipeline is also environmentally *safer* that the alternatives it is replacing. Ex. 7 ¶ 7 (McCown Dec.).

The end result of a shutdown would thus be less revenue for producers, forcing them to cut jobs and production levels, which ultimately leads to higher oil prices that burden members of the general public who bear that cost. Ex. 5 ¶ 7 (Hanse Dec.). And it would come at the added cost of a *greater* potential for environmental harm compared to continuing operations. Ex. 7 ¶ 11 (McCown Dec.). By any measure, vacatur would prove immensely disruptive.

Disruption to Oil Producers. Oil producers in North Dakota would suffer significant hardship from a shutdown of the pipeline during remand. It would require substantial lead time—potentially *months*—to arrange for new transportation of the quantities of oil at issue here. Alternative means, such as railcars, must be reserved under long-term contracts. When producers switched over to DAPL for transportation of their oil, they needed to release the railcars they previously used. Those railcars are now in service for, and under contract to, other customers for

other needs. North Dakota oil producers would therefore face significant delay and severe new costs to secure railcars to replace the volume of daily transportation now served by the pipeline. Ex. 5 ¶¶ 5, 10 (Hanse Dec.).

These producers would also be at a loss in negotiating the duration for the newly required rail transport contracts. Inevitably, they would guess wrong due to multiple unknown variables, such as how long the Corps will take on remand, what the result of that process will be, what new claims might flow from the various potential results, how long it would take to brief motions for claims that challenge the unknown result, how long it will take for this Court to rule definitively on those unknown claims, and how long an appeal on unknown issues will take if the shutdown continues in the meantime. Worse still, because there is limited capacity to store crude oil in North Dakota, these delays would force many producers to slow or cease drilling entirely until alternative shipment modes can be found. Ex. 5 ¶¶ 5, 6 (Hanse Dec.).

Disruption to Pipelines, Refineries, and Other Downstream Users. Other pipelines, refineries, and downstream users of the oil transported by DAPL would also suffer greatly if operation of the pipeline is stopped. Sixteen active oil pipelines (including the Energy Transfer Crude Oil Pipeline) already aggregate and transport produced crude to and from the DAPL system, and seven more are planned or under construction. Ex. 5 ¶ 4 (Hanse Dec.). Each of those pipelines would necessarily be affected by a shutdown of DAPL, some to the point where they may need to shut down themselves due to either a lack of oil to move, or nowhere to move the oil they carry. Similarly, the downstream refineries relying on both DAPL and those other pipelines would be deprived of a significant source of oil as producers slowly transition back to rail or truck transport. And to avoid lying idle, those refiners would be forced into emergency arrangements—at increased cost—to secure other sources of oil. Ex. 5 ¶¶ 5, 6 (Hanse Dec.).

Disruption to the Public. Ultimately, transport by pipeline costs about $5.00 to $7.00 per barrel less than shipment by rail, Ex. 5 ¶¶ 4, 8 (Hanse Dec.), especially in the scenario of a pipeline shutdown during remand. Those savings ultimately benefit consumers. They also encourage oil production—and hence employment—by North Dakota producers. Ex. 5 ¶ 6 (Hanse Dec.). These benefits would disappear with a switch to rail transport. Moreover, refineries would face increased costs, which would ultimately be passed on to the consumers who buy gasoline, diesel, plastics, or other petroleum products from refined Bakken crude. These disruptive market effects would reach far beyond North Dakota, because the pipeline carries approximately *half* of all oil produced in the nation's second largest oil-producing state—which equates to nearly 5% of national oil production. Ex. 5 ¶ 4 (Hanse Dec.). These market shocks would also have significant ripple effects. For example, the new spike in demand for railcars would harm other shippers in the Midwest, such as farmers, who rely on that mode of transport. D.E. 22-34 (Ex. 9) (rail congestion caused by oil rail shipments cost farmers $600 million in 2014 alone).

Environmental Harm. The ultimate irony is that transitioning back to rail during a remand would actually be worse for the environment—with *increased* air pollution and *increased* risks of an oil release—because shipment by pipeline is undeniably safer than shipment by rail. AR 71231 (Ex. 2) ("[i]ncreases in rail traffic" to replace the pipeline "would increase the emissions of combustion products" from diesel engines that could adversely affect air quality; "pipelines are a more reliable, safer, and more economical alternative" to rail); Ex. 7 ¶¶ 5, 8, 10 (McCown Dec.) ("[I]t is … undisputed that pipelines represent the safest way to transport large volumes of energy products."). In fact, the average pipeline used for crude oil shipment is 99.9999% safe, and that figure covers pipelines with an average age of fifty years. Ex. 7 ¶ 8 (McCown Dec.). DAPL, newly

constructed with state-of-the-art technology, is even safer. *Id*. Not only is DAPL safer than rail, rail lines (but *not* DAPL) run through Plaintiffs' reservations and the reservations of other tribes.

There are additional environmental risks specific to vacatur. Discontinuing operations during remand could increase the overall risk of accidental releases and environmental damage. First, turning off a major pipeline is a substantial undertaking. Ex. 8 ¶¶ 6-8 (Stamm Dec.). Plaintiffs have expressed concern that human error is a significant factor in accidental pipeline releases. AR ESMT 1070 (Ex. 1); AR ESMT 631 (Ex. 3). The complexity of a shutdown introduces greater opportunities for those types of errors.

Second, discontinuing operations for a period of time increases the risk of harm to the structural integrity of the pipeline, which in turn increases the overall risk of release. As Plaintiffs' own experts have argued, corrosion is one risk factor for pipelines because it can affect structural integrity. AR ESMT 625, 631 (Ex. 3). Constant operation of the pipeline is the simplest and most effective means of preventing pipeline corrosion. During normal operation, the movement of the oil holds in suspension trace amounts of water (a corrosive element), thus preventing water from pooling in the pipeline where it can cause corrosion.[3] If operation were to stop, however, the liquids within will eventually separate, allowing water and other corrosive liquids to gather in layers within the pipeline. Corrosive bacteria will grow in the stagnant water pooling inside the pipeline. That is of particular concern in this case. The Lake Oahe crossing is the pipeline's lowest point, and water sinks below oil, meaning that the point where water is most likely to collect is directly beneath the Lake. Ex. 6 ¶ 6 (Vieth Dec.). The greatest threat of structural damage on

[3] The pipeline features a number of "coupon monitoring stations" and other design features that safely minimize corrosion to the interior of the pipeline during normal operations. Ex. 6 ¶ 5 (Vieth Dec.); Ex. 8 ¶ 9 (Stamm Dec.).

account of an extended halt to operations would exist precisely where the Tribes have expressed the most concern about a release.

A shutdown now would present particularly relevant corrosion risks because the pipeline likely retains trace water left behind from the hydrostatic testing completed to ensure its structural integrity before operation began. Ex. 6 ¶¶ 5, 6 (Vieth Dec.). These remnants of water would normally exit the pipeline with continued operation. The only two options under a shutdown are extremely expensive and time-consuming. One is to inject oil laced with biocide (an anti-microbial additive used to prevent bacterial blooms) to reduce corrosion. The other is to drain the entire pipeline and fill it with an inert gas, such as nitrogen. The first, treating the oil and leaving it in the pipeline, would require 5.2 million barrels of new "line fill," which Dakota Access may not be able to get from customers who no longer can use the pipeline. If Dakota Access had to purchase that oil, it would cost approximately $234 million at $45 dollars per barrel.[4] Option two—purging the pipeline and filling it with an inert gas such as nitrogen—would cost $20 million for that process alone. Ex. 8 ¶¶ 7-8 (Stamm Dec.). Under either scenario, DAPL would need to continue operating for between thirty and ninety days to implement an anti-corrosion displacement activity. *Id*.

To be absolutely clear, the likelihood of a spill or other release from this pipeline is exceptionally low regardless of whether the pipeline is allowed to continue operations during remand. The point here instead is a *relative* one: it is environmentally safer—for more than just Plaintiffs—to continue operations during remand.

[4] As of Sunday, July 16, 2017, crude oil was trading at approximately $46.50 per barrel. *See, e.g.*, *End of day Commodity Futures Price Quotes for Crude Oil WTI (NYMEX)*, http://www.nasdaq.com/markets/crude-oil.aspx.

Jobs. DAPL ships roughly half of the oil produced in the Bakken region. Unless and until alternative transport for that oil is available, shutting down DAPL will place all of the jobs producing that oil—and all of the jobs that rely on those oil production jobs—at risk. The longer the shutdown, the more likely that wells will be "shut in," workers will be laid off, and the local and regional economies will suffer.

State and Local Governments. State and local governments—many of which have been saddled with millions of dollars in costs to respond to illegal protest activities—stand to lose as much as $110 million in tax revenue and an additional $10 million in property taxes for each year that the pipeline remains inactive.[5] That means $10 million in lost state and local revenue for *each month* that the pipeline is unable to operate. Other states would lose significant income too. Ex. 5 ¶ 6 (Hanse Dec.) (North Dakota to lose more than $13 million; Louisiana to lose $5 million; Mississippi, Texas, Tennessee, Kentucky, and Arkansas to lose $9 million, collectively); D.E. 22-33 (Ex. 10) (operation of DAPL provides $75 million in annual tax revenue to Iowa).

Dakota Access. Finally, a shutdown would once again prevent Dakota Access from being able to perform the contracts it has entered into with producers. Dakota Access would lose almost $90 million in revenue for *each month* that the pipeline lies idle. Ex. 5 ¶ 3 (Hanse Dec.). These new losses would compound the tens of millions of dollars in lost revenue suffered by Dakota Access as a result of the government's unreasonable delay in issuing the easement to cross Lake Oahe. D.E. 22-1 at 23 (Ex. 11) (pipeline delay will cause $430 million in damages plus $83.3 million for each additional month of delay).

[5] Blake Nicholson, *Oil has begun flowing through the Dakota Access pipeline – here's what that means for the key players*, Associated Press (Mar. 28, 2017).

The mere *possibility* of unrecoverable financial loss is enough to satisfy the "disruptive consequence" prong of *Allied-Signal* and warrant remand rather than vacatur. *Shands*, 139 F. Supp. 3d at 269-70 (rejecting vacatur, despite agency deficiencies so "serious" that "the first *Allied-Signal* factor favors Plaintiffs," because vacating a rule would have subjected the government to the *possibility* of being unable to recoup its payments to hospitals). Here, losses to many different parties are certain, and they would be substantial. Moreover, a *greater* risk of environmental harm would ensue, especially burdening those who live near rail lines carrying more oil, at a greater cost to boot.

CONCLUSION

Dakota Access, oil producers, customers of those producers, multiple States, and the general public all incurred serious costs and other burdens from the lengthy and unwarranted delay in completing the pipeline. Now that the pipeline is safely operating, and with only a few remaining tasks for the Corps to complete on remand, the equitable result is to remand *without* vacatur.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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