IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

STANDING ROCK SIOUX TRIBE AND CHEYENNE RIVER SIOUX TRIBE'S REPLY BRIEF REGARDING REMEDY

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INTRODUCTION

The Corps and Dakota Access response briefs sidestep most of the Tribes' critical arguments at the heart of this motion. Instead, they promote a revisionist reading of the case law that, if accepted, would transform the nearly universal "standard" remedy of vacatur for NEPA violations into one that would be appropriate in only the most unusual situations. Further, they continue to rely on exaggerated and unsupported predictions that vacatur would cause grave economic dislocation, and falsely advance a new theory that vacatur would increase the risk of environmental harm.

Most egregiously, they continue to ignore the context in which this briefing arises. The parties are discussing remedy because this Court found that the Corps violated NEPA, the Nation's cornerstone commitment to environmental quality and transparency, in ways that are critically important to the Tribes. In this Court's words, the Corps "failed to take a hard look" at the environmental consequences of its decision to authorize DAPL to cross the Missouri River at Lake Oahe. The fundamental question is whether there will be any meaningful consequences for that failure, or whether the Tribes will, like so many times in their history, be forced to bear the risks of someone else's bad decisions and pursuit of profits. This Court should not follow that unjust path. The Tribes are not just another stakeholder. The Tribes have undisputed legal rights in the Missouri River, and comprehensively and uniquely rely on its waters, including for subsistence Treaty hunting and fishing that are vital to sustain their people. For these reasons, this Court should not depart from this Circuit's well-established precedent regarding vacatur. It should vacate the easements, Finding of No Significant Impact ("FONSI"), and other authorizations to cross Lake Oahe that were based on the Corps' invalid NEPA analysis. Vacatur will require suspension of pipeline operations until the Corps finalizes a valid NEPA analysis and makes a new decision as to whether to authorize DAPL at Lake Oahe.

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ARGUMENT

I. VACATUR WOULD REQUIRE DAPL TO "CEASE OPERATIONS"

In their reply briefs, both DAPL and the Corps belatedly appear to question whether vacatur would stop the flow of oil. DAPL asserts that the Tribes seek to "go beyond mere vacatur" in asking that pipeline operations be suspended. DAPL Reply at 1 n.1. Similarly, the Corps ponders what consequences the Tribes think that "vacatur would entail." Corps Reply at 9. There should be no doubt on this question. This Court has already stated that vacatur would force DAPL to "cease operations until the Corps" complies with NEPA. Memorandum Opinion (ECF 239) ("Op.") at 66. Of course, the Court was correct, as it would violate the Rivers and Harbors Act, Mineral Leasing Act, and Clean Water Act to continue operations in the absence of these authorizations. 30 U.S.C. § 185(q); Army Reg. 405-80, § 4-1(c) (ECF 78-4) (no use of Army lands without valid "realty instrument"); 33 U.S.C. § 408 (unlawful to occupy federal project without permit); 33 C.F.R. § 322.3 (requirement for permits); 33 C.F.R. § 330.6 (need for nationwide permit verification); *United States v. Diamond*, 512 F.2d 157 (5th Cir. 1975); *United States v. Pozsgai*, 999 F.2d 719 (3rd Cir. 1993). All of the briefing, declarations, and evidence filed to this point have assumed that vacatur means that operations would cease. DAPL and the Corps offer no reason for their belated effort to suggest otherwise.

The Corps confuses the issue by arguing that vacatur would create an unresolvable conflict due to the existence of the pipeline under Lake Oahe, even if it was not operating. Corps Reply at 9. But the Tribes are not asking for removal of the pipeline during the remand, nor would removal be necessary to address the issues that will be further studied on remand, which exclusively involve risks caused by pipeline operations. Courts have the ability to shape vacatur in light of the plaintiffs' requests for relief and the context of the case. *PEER v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016); *supra* § V. In its vacatur order, this Court should make clear

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that vacatur means that DAPL cannot lawfully operate the pipeline without valid authorizations.

II. VACATUR IS THE APPROPRIATE REMEDY FOR THE CORPS' NEPA VIOLATIONS

The Corps and DAPL do not dispute that vacatur is the statutory "standard" remedy when an agency has violated the APA. DAPL Reply at 1. Neither do they dispute that remand without vacatur is, in practice, an "unusual" remedy limited to exigent circumstances. *See* Tribes Br. at 3-10. Finally, they do not meaningfully contest that this Court's duty, in shaping the remedy, is to give effect to the purposes of the underlying statute, which in this case is NEPA. *Id*. at 10-14. Instead, the Corps and DAPL simply proceed as if the reverse is true, arguing that vacatur constitutes extraordinary relief available only in unusual situations, and that this Court should mechanically apply the *Allied-Signal* test without considering the purposes of NEPA.

No party can deny that the overwhelming weight of authority supports vacatur in NEPA cases. *Id*. at 6-10. The Corps and DAPL struggle to argue otherwise. For example, challenged to cite even a single case from this Circuit in which a NEPA violation did not result in vacatur, the Corps cites *Flaherty v. Pritzker*, 17 F. Supp. 3d 52 (D.D.C. 2014). But *Flaherty* does not support the Corps' position even remotely. There, plaintiffs moved to enforce a prior court order that directed the agency to revisit a fishing management plan, after finding violations of NEPA and other statutes. The Court denied the motion, finding that the agency had completed the acts that the Court had directed it to perform. The decision neither mentioned vacatur, nor cited to *Allied-Signal*.[1] The fact that this is evidently the Corps' best case speaks volumes.

[1] In an earlier decision, the district court in *Flaherty did* vacate the unlawful action, observing that "[b]oth the Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for this type of violation." *Flaherty v. Pritzer*, No. 11-cv-00660-GK (ECF 41) (Aug. 2, 2012), at 5. At plaintiffs' request, the Court stayed the effectiveness of the vacatur order for one year to give the agency an opportunity to resolve the legal violations. *Id*.

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The Corps and DAPL belatedly identify a handful of cases (all of them district court decisions from outside this Circuit) in which a court found a NEPA violation but chose not to vacate the underlying decision. But these cases do more to undermine their position than support it. For example, in *Pacific Rivers Council v. U.S. Forest Service*, 942 F. Supp. 2d 1014 (E.D. Cal. 2013), the court declined to vacate an overarching planning document governing management of 11 national forests after finding a minor shortcoming in the EIS. The court found that vacatur would be highly disruptive to the management of the forest—requiring suspension of hundreds of individual projects—while providing virtually no environmental benefit. Indeed, since the updated plans were "environmentally preferable" to the previous ones that would be restored in the event of vacatur, it would not serve NEPA's purposes to vacate the plans while the EIS flaw was resolved. *Id*. at 1022; *accord Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1107 (E.D. Cal. 2013) (despite NEPA violation, existing land management framework is "environmentally preferable to returning management" to earlier one).[2] Similarly, the court in *Conservation Congress v. U.S. Forest Serv.*, 2017 U.S. Dist. LEXIS 82440 (E.D. Cal. May 30, 2017), took a pragmatic approach to the question of remedy after finding a NEPA violation for a forest management project. Rather than vacate the entire project, including elements that were unaffected by the NEPA violations, the court left the decision in place while imposing an injunction on cutting the largest trees—a remedy that both addressed the NEPA violation and protected the plaintiff's interests. Neither case supports the unprecedented outcome the parties seek here: allowing a major project to continue operating under a flawed EA, exposing plaintiffs and the public to the very risk that must be studied on

[2] As discussed below, remand without vacatur is not "environmentally preferable" to vacatur in this case. *See supra* at § IV.B.

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remand.

In the other cases where courts remanded without vacatur, plaintiffs did not actually seek it. For example, while DAPL appears to be correct that Westlaw erroneously added the word "vacated" to the original D.C. Circuit order in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), it is notable that the plaintiff did not explicitly request vacatur and the issue was neither briefed by the parties nor addressed by the court. Moreover, contrary to DAPL's description of the case as involving an "already operating" pipeline, the *Delaware Riverkeeper* decision says nothing about the status of the pipeline, which was under construction while the briefing was underway and placed into service before the decision was issued. *Tennessee Gas Pipeline LLC*, 153 FERC P 61215, 2015 WL 7345796 (2015). Similarly, the plaintiffs in *Center for Biological Diversity v. EPA*, 861 F.3d 174, 189 (D.C. Cir. 2017), which is not a NEPA case, never sought vacatur. *Id.* The court declined to grant it because doing so would reduce the "protection of the environmental values" that motivated the case.

While the Tribes cited numerous cases in which courts vacated agency decisions made in violation of NEPA, the Corps seeks to dismiss them as having only "prospective" effect. Corps Reply at 2-3. But the distinction is an illusory one. The Tribes are not seeking retroactive relief, like removing the pipeline at this time. Rather, vacatur would suspend the operation of the pipeline prospectively until the Corps complies with NEPA. Suspending the flow of oil is no less "prospective" than any vacatur order that blocks the ongoing use of federal resources. *See, e.g.*, *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp. 2d 156, 164 (D.D.C. 2002) (vacating grazing permit); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119-120 (D.D.C. 2010) (vacating agreement for Tribe to manage bison range); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37-38 (D.D.C. 2007) (vacating permit for ongoing horse-slaughter facilities despite impacts to

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plant owners); *High Country Conserv. Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014) (vacating leases for coal mines on federal land). It is also no less prospective than vacatur that has the effect of blocking construction of private projects. *Sierra Club v. Antwerp*, 719 F. Supp. 77, 79-80 (D.D.C. 2010) (vacating Corps permits for shopping mall project); *Nat'l Wildlife Fed. v. Norton*, 332 F. Supp. 2d 170, 175 (D.D.C. 2004) (vacating permit for limestone mine); *Diné CARE v. U.S. Office of Surface Mining Recl. and Enforcement*, 2015 WL 1593995 (D. Colo. April 6, 2015) (vacating permit for coal mining operations despite "sizeable" costs to private parties).[3] The Corps offers no support for its distinction between vacatur of a project for which construction is complete, and one in which it is not.

For its part, DAPL engages in a strenuous effort to parse the many NEPA cases resulting in vacatur to reach the unsurprising conclusion that no case is identical to this one. DAPL Reply at 3-4. The distinctions it draws, however, are both self-serving and beg the very question before this court: whether the violations were "serious," and whether vacatur would be unduly disruptive. The fact remains that DAPL, like the Corps, struggles to identify cases in which ongoing actions were allowed to continue in the wake of a NEPA violation.

Perhaps the most telling feature of the Corps and DAPL briefs is that they offer no response to the Tribes' core argument that the remedy here must be shaped by the purposes of NEPA—to promote open-minded and transparent decisions fully informed by an understanding of risks and costs. Tribe's Br. at 10-14 (vacatur and injunctions are favored in NEPA cases to "preserve the decisionmakers' opportunity to choose" among options). The Corps argues that this is not explicitly part of the *Allied-Signal* test, but it is always a court's duty to give meaning

[3] On appeal, the district court decision in *Diné CARE* was vacated as moot because the agency finalized a new NEPA analysis.

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to Congress's will and the purposes of a statute in crafting a remedy for a statutory violation. DAPL implicitly concedes this point, but argues that vacatur is unnecessary to preserve the "opportunity to choose" here since the project is already complete. DAPL Reply at 3. This argument is belied by their own contentions in this case. Only a few weeks after oil started flowing, DAPL claimed that the oil industry is already dependent on its continued operation, and that the market could not adapt to a suspension without great cost. Hanse Decl., ¶¶ 4-7. While the Tribes dispute these claims, one can only imagine the arguments that DAPL would try to make if operations continued for an extended period. Months down the road, presumably DAPL would claim that even more contracts had been signed, additional infrastructure developed in reliance on DAPL, and alternative route options rendered more remote. Goodman Decl., ¶ 25 (describing how reliance on new pipeline is often phased in over time). If denial of the easement and rerouting DAPL away from Lake Oahe—as contemplated by the last Administration via the EIS process—is to remain a viable option, the only appropriate path forward is to prevent any further reliance on DAPL pending completion of a valid NEPA analysis and new decision.[4]

Last week, the D.C. Circuit affirmed again that vacatur is the appropriate remedy for a violation of NEPA. In *Sierra Club v. FERC*, No. 16-1329 (Aug. 22, 2017), the court reviewed an EIS for a Federal Energy Regulatory Commission certificate for a 515-mile, $3.5 billion natural gas pipeline. Construction was underway as the litigation progressed, and the pipeline

[4] Vacatur is also important because it creates an incentive for the Corps to complete the remand. In *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 875 (9th Cir. 2005), the Ninth Circuit found that the Army Corps had violated NEPA by failing to prepare an EIS for a dock at an oil refinery. By the time of the court's decision, however, the project was built and operating. (Plaintiff did not seek vacatur or an injunction.) It took the Corps nine years to issue a draft EIS for the project, and it still has not issued a final EIS. *See also In re Core Communications*, 531 F.3d 849, 861 (D.C. Cir. 2008) (discussing how non-vacatur resulted in lengthy delays of agency action). Thus, vacatur in this case would help keep the Corps on an appropriate schedule for the remand.

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began operating before the Court issued its decision. While upholding parts of the EIS, the Court found that FERC erred by failing to consider the pipeline's indirect effects in generating greenhouse gasses. Without even weighing the *Allied-Signal* factors, the Court vacated the FERC certificate and remanded to the agency for a revised EIS. Without a valid FERC certificate, the pipeline can no longer lawfully operate. 15 U.S.C. § 717f. Thus, while the Corps cites an unpublished district court case from California that disparages the "legal chestnut" that vacating decisions made in violation of NEPA is the standard remedy, Corps Reply at 3 n. 2, that "chestnut" remains the law in this Circuit.

III. THE CORPS' NEPA VIOLATIONS ARE SERIOUS

In their opening brief, the Tribes explained how the errors identified by this Court were not only serious, but foundational to the threat posed by the pipeline to the Tribes' culture, Treaty rights, and the well-being of their citizens. Tribes Br. at 17-25; Holmstrom Decl., ¶ 18. These errors implicate the core question at the heart of this litigation: whether the risks and impacts of the Oahe crossing are "significant" enough to compel preparation of an EIS. The Corps and DAPL ignore the vast majority of this discussion, seeking instead to reframe the legal standard and misdirect the Court as to the facts. That effort should fail.

Both the Corps and DAPL urge this Court to turn the *Allied-Signal* test on its head. *Allied-Signal* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Specifically, DAPL argues that vacatur is inappropriate wherever there is a "non-trivial" chance that the agency will reach the same result on remand. DAPL Reply at 4, *citing In re Core Communications*, 531 F.3d at 849. That is not the test under *Allied-Signal* and it is not the way courts have approached the question. If vacatur could be avoided wherever there was *some* possibility of reaching the same result, then it would virtually never be imposed. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("we have not hesitated to vacate a rule when the agency

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has not responded to empirical data or to an argument inconsistent with its conclusion"). Particularly in NEPA cases, there is virtually always some possibility that a decision made in reliance on an invalid NEPA analysis will be affirmed after remand. Even so, vacatur is nearly always the outcome when an agency had failed to take the "hard look" required by NEPA. *See, e.g.*, *Reed*, 744 F. Supp. 2d at 119-120; *infra* § II.

Contrary to DAPL's arguments, *Allied-Signal* did not set up a binary framework under which vacatur would be avoided wherever there was a chance that an original decision could be sustained. 988 F.2d at 150-151. Instead, it opened the door to a balancing that looked at both "the seriousness of the order's deficiencies" as well as the "disruptive consequences of an interim change that may itself be changed." *Id*. In evaluating the first prong, *Allied-Signal* invites courts to consider the "extent of doubt" that the agency "chose correctly." *Allied Signal*, 988 F.2d at 150. Here, there is considerable "doubt" that the Corps chose correctly in determining that the risks presented to the Tribes were so insignificant that they could be dismissed without a full environmental review. As the Tribes discussed, the failure to consider expert critiques of its spill risk analysis, potential spill impacts on treaty resources, and environmental justice cut to the heart of the "significance" question. In the Tribes' view, the only credible outcome of a valid review is that the Corps would conclude that the project's significance triggers a full EIS, or, alternatively, that other routes should be considered or additional mitigation and oversight imposed. Holmstrom Decl., ¶ 27.

Similarly, the Tribes explain how the potential impacts of an oil spill (and associated clean-up) to Treaty-protected Tribal hunting and fishing are so grave that they call into question the Corps' finding of non-significance. Tribes Br. at 20-21. Neither DAPL nor the Corps has any response, beyond repeating the refrain that the risk of an oil spill is low. Finally, the Tribes

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provided an extensive discussion as to why an adequate environmental justice analysis must come to the conclusion that the Tribes are disproportionately impacted by the chosen site alternative. *Id*. at 21-24.[5] Again, defendants decline to respond. In short, each of the flaws identified by the Court cast considerable "doubt" on the Corps' conclusion that the project is so insignificant that a full EIS could be avoided.

Instead, the Corps turns to side issues. It accuses the Tribes of focusing only on the effects of a spill rather than the likelihood that one would occur. Corps Reply at 5. But the Tribes did exactly the opposite, and pointed to expert evidence challenging the Corps' conclusion that the risk of a spill was low—evidence that is explicitly part of the Corps' duty to assess on remand. Tribes Br. at 23 n. 12; 18-20. The Corps claims that landslides are the only concern for assessing spill risk, when in fact landslides are just one of numerous issues that have been raised. Corps Reply at 5.[6] Finally, it pivots back to its newfound concern that oil transported via rail would present greater risks than the pipeline, even though that has no bearing on the "seriousness" of the NEPA violations.

This Court engaged in a highly deferential review of the Corps' NEPA documentation,

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[5] The D.C. Circuit's recent pipeline opinion on environmental justice analysis under NEPA is instructive. *Sierra Club v. FERC, supra*, at 18. There, the plaintiffs challenged a gas pipeline EIS for failing to adequately consider the environmental justice implications of the route. While the D.C. Circuit rejected the claim, it delved deeply over many pages into the EIS's environmental justice analysis, ultimately concluding that the EIS disclosed the impacts, laid out "a variety of alternative approaches" to address these concerns, and explained a conclusion why these alternatives "would do more harm than good." Here, it is hard to fathom how the Corps could avoid a similarly rich discussion of environmental justice issues in a full EIS.

[6] Moreover, its citation to a DAPL-generated document dismissing landslide risk continues to suffer from the same flaw as many of the Corps' analyses here: it looks only at the drilling "workspace" and pipeline segment under Corps-owned lands, and not elsewhere. ESMT 00938. As Tribal experts have complained from the beginning, the Corps needs to look at the possibility of landslides in areas that could result in oil spilling into Lake Oahe, even if they are not in the tiny "workspace" created for the drilling under the river. 1st Kuprewicz Decl.. ¶ 20(a); Accufacts Rep. (ESMT 1073) at 4.

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one that explicitly refused to "flyspeck" compliance. Op. at 22. It nonetheless found violations of law that it labeled "substantial," *id*. at 66, and ordered a new analysis. On remand, the Corps must consider anew whether the project requires a full EIS. This is not the kind of situation where some minor failure to explain an agency's reasoning, or engage in a minor procedural step, can be readily rectified. Instead, it implicates the core question at the heart of this dispute and calls into question the Corps' decision not to prepare an EIS. Accordingly, this is not the unusual case where the standard remedy of vacatur can be avoided.

IV. WHATEVER "DISRUPTION" MIGHT OCCUR DOES NOT WEIGH AGAINST VACATUR

A. DAPL Cannot Avoid Vacatur with Exaggerated Claims of Economic Harm

As the Tribes explained, the economic impacts to DAPL of a temporary suspension of operations are not the kind of impacts that carry significant weight in NEPA cases. Tribes Br. at 25-27. The Corps does not disagree. For its part, DAPL ignores the relevant caselaw, and instead tries to resurrect a nearly 40-year-old case that does not involve vacatur. DAPL Reply at 8, *citing NRDC v. NRC*, 606 F.2d 1261 (D.C. Cir. 1979).[7] Simply put, the potential economic harm to DAPL (as well as third parties who have failed to prepare for the possibility of shutdown despite the precarious status of the pipeline) should not be determinative in the vacatur analysis. *PEER v. U.S. Fish and Wildlife Serv*., 189 F. Supp. 2d 1, 3-4 (D.D.C. 2016)

DAPL's claims about the impacts of vacatur on its operations appear to be exaggerated. For example, the Tribes discussed "reliable" evidence that DAPL appeared to be operating only at partial capacity. Goodman Decl., ¶¶ 19-25. DAPL does not directly deny the claim. Instead, it submits a carefully worded declaration asserting that it is operating at a given percentage of

[7] In *NRDC v. NRC*, even the plaintiffs agreed that no injunction should issue preventing construction of new tanks for storage of nuclear waste, despite the NEPA violation.

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"committed volumes," but without disclosing what those committed volumes are. 2nd Hanse Decl., ¶ 4. DAPL may have inadvertently conceded the issue in its brief when it cites a figure of 300,000 barrels a day, DAPL Reply at 6, roughly consistent with the Tribes' estimate, and considerably less than the volumes identified in its opening submissions. DAPL Br. at 13; 1st Hanse Decl. at ¶ 4 (claiming that DAPL carries half of North Dakota's entire production, which is about 500,000 barrels a day). Nor does DAPL expressly disagree with the Tribes' expert that DAPL appears to have considerably overstated the amount of revenues that would be lost if DAPL was suspended. *Compare* Goodman Decl., ¶¶ 28, 37 ("actual revenues may be less than half the revenues claimed by DAPL and Hanse."), 41, *with* 2nd Hanse Decl., ¶ 4 (discussing only "anticipated" revenues).

DAPL's effort to invoke potential economic harm to others fares no better. While DAPL identifies potential economic harms to other parties, the only evidence it submitted consisted of self-interested speculation by DAPL executives. The Tribes refuted this speculation in an expert declaration explaining how third parties who currently rely on DAPL could accommodate a temporary suspension without unreasonable costs or delays. *See, e.g.,* Goodman Decl., ¶¶ 66, 80. In response, DAPL does not provide declarations from the third parties whose interests it claims to have at heart, or other actual evidence; it just doubles down on more speculation from the same DAPL executives. 2nd Hanse Decl., ¶ 8. DAPL also fails to defend its own hyperbole regarding impacts to the crude oil market, consumers, and the economy. *See, e.g.,* 1st Hanse Decl., ¶ 4-7 (predicting "havoc" on oil producers, "devastating impacts" on "ordinary Americans," "catastrophic" impacts to "producers, shippers, refiners, and ultimate consumers," and "increased prices" for multiple goods and services, harming "the national economy for all

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Americans").[8] The Corps never joined in these unsupported predictions, and the Tribes' expert reached the opposite conclusion, stating that any impacts to energy systems and markets from vacatur will likely range "from small to very small." Goodman Decl., ¶¶ 43-48, 75. Mr. Goodman further specifically refutes the claim that marginally higher crude oil transportation costs would be passed on to consumers. *Id*. at ¶ 82.

The Tribes do not dispute that temporary suspension would involve some costs and inconveniences, both for DAPL and for third parties. But DAPL's claims that the market would not be able to accommodate the shift, or that there would be cascading chaos throughout the national economy, are unsupported. Contrary to DAPL's accusation, the Tribes have provided "real world precedent" that pipelines shut down frequently for both planned and unplanned events. 3rd Kuprewicz Decl., ¶ 4. The evidence before the Court indicates that the oil market can adapt to a suspension of DAPL and that overall economic impacts will be modest.

B. Vacatur Will Not Increase the Risk of Oil Spills

The Corps seeks to boil the issue before the Court down to a single question: whether rail or pipeline transportation of crude oil is more dangerous. In so doing, it both focuses on the wrong issue and misrepresents the Tribes' position. The Tribes do not believe that "transporting crude oil by rail is safer than transporting it by pipeline" as a general matter, as the Corps accuses. Corps Reply at 8. The Tribes acknowledge that either mode of transportation can result in "catastrophic" incidents, but dispute the Corps' "simplistic analysis" that pipelines are

[8] It is not the first time DAPL undermined its credibility with unsupported predictions of catastrophe. During the preliminary injunction briefing, DAPL warned that the project could be cancelled if it failed to meet a contractual deadline to start delivering oil by January 1, 2017. Mahmoud Decl. (ECF 22-1), ¶¶ 69-70. However, the project didn't start operating until June, and the missed deadline appears to have been inconsequential. 2nd Hanse Decl., ¶ 4 ("no contracts have been renegotiated or terminated").

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universally safer in all situations, including this one. Goodman Decl., ¶¶ 84-85.

First, the Tribes questioned whether a DAPL closure would have any significant impact on the amount of crude being transported by rail at all, given the availability of alternatives and the higher cost of rail transportation. *See, e.g., id*. at ¶¶ 64-65 ("the main potential impact of a DAPL shutdown is to shift crude back onto other pipelines"). The Tribes' expert estimated that, *at most*, a DAPL closure would mean an extra 1.5 to 2.5 trains a day, compared to a peak of 12 per day. *Id*. at 70; *see also id*. at ¶ 117 ("Whether DAPL is operating or not will likely have some impact [on the amount of crude being transported via rail], but any such impact is within the range that has occurred and will continue to occur owing to a variety of market conditions."). Moreover, this estimate assumes that DAPL is operating at full capacity: if not, it is even less likely that much oil would be shifted onto trains. Goodman Decl., ¶¶ 19-25. Neither the Corps nor DAPL offers evidence that disputes these expert opinions, falling back on an unsupported generalization that all of the oil currently being transported on DAPL would shift to trains, if pipeline operations are suspended.

Second, looking closely at the specifics here, the Tribes explained how a major spill from DAPL "could result in a substantially larger spill" than either the Lac Mégantic disaster or any conceivable crude-by-rail incident affecting Lake Oahe. *Id*. at ¶ 88. Assessing the many factors that impact risk, including the relative locations of both the pipeline and the rail corridors, the Tribes' expert concludes that the risk to the Tribes would be *reduced* by suspending operations at DAPL, and that impacts outside the Reservations are unclear, but likely "quite small." *Id*. at ¶¶ 118-120. For example, Mr. Goodman explains why he expects very little additional oil to travel via rail near the Standing Rock Reservation, where the rail line crosses the Missouri River at Mobridge, South Dakota. *Id*., ¶¶ 97-119; *see also id. at* ¶ 64 (most Bakken crude travelling by

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rail is supplying West Coast markets, *i.e.*, travelling away from the Missouri River). Rather than disputing this analysis, the Corps and DAPL continue to baselessly claim that closing DAPL presents great risks. Corps Reply at 6.[9]

Finally, DAPL cites statistics, evidently derived by counsel, to minimize the risk of a major spill during the remand period. DAPL Reply at 9-10. Leaving aside their dubious provenance, DAPL misses the point. The risk to the Tribes from *this pipeline* in *this place* remains unassessed due to the Corps' NEPA violations, after the Corps failed to grapple with a number of serious critiques from expert reviewers, and casually dismissed impacts to Treaty rights and environmental justice issues. Op. at 31-54; Tribes Br. at 18-20; 3rd Kuprewicz Decl., ¶ 8 ("it is a virtual certainty that DAPL will suffer multiple leaks and spills during its lifetime… there have already been three such spills before operations even commenced"). Moreover, even if an event is relatively unlikely, its consequences may be so grave that the risk simply should not be undertaken. ******Cf. New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 478 (D.C. Cir. 2012); Holmstrom Decl., ¶ 16. Such a case is presented here: a major oil spill affecting Lake Oahe would constitute such an existential threat to the Tribes that DAPL—not the Tribes—must bear the burden of suspension until the threats are lawfully assessed under NEPA. 3rd

[9] The Corps' contention that the Tribes have failed to support their claim that pipeline spills involve more serious worst case incidents than rail is puzzling, Corps Reply at 7, since the Tribes' expert says exactly that. Goodman Decl., ¶¶ 87-88 ("A rupture from a 30" pipeline is capable of putting a far larger volume of oil into the environment than any CBR train."). Moreover, an earlier report by Mr. Goodman cited by the Corps is consistent with his declaration in this case. Corps Br. Ex. 3. That report compares a major crude-by-rail incident (the Lac Mégantic disaster) to a major pipeline spill (the Marshall, Michigan Enbridge pipeline spill, which released 840,000 of diluted tar sands bitumen into the Kalamazoo River), and estimates that both incidents resulted in damages of greater than a billion dollars. How this report supports the Corps' position is unexplained. Finally, the Corps relies on an unauthenticated map that is riddled with inaccuracies. *See* Corps Br. Ex. 4. Neither the agricultural water intake immediately downstream of the DAPL crossing site, nor the municipal water intake at Fort Yates has been decommissioned. 3rd Archambault Decl., ¶ 10.

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Archambault Decl., ¶¶ 23-24.

Until recently, the Bakken region of North Dakota transported to market substantially greater volumes than are produced today, without DAPL. Goodman Decl., ¶ 6 (peak production was over 1.2 million bbl/day, compared to current levels of around 1 million bbl/day). There is no legitimate basis for arguing that suspending DAPL will cause havoc. Crude oil markets are adaptable and will adjust to a suspension of DAPL. *Id*., ¶¶ 42-48. It is not seriously contested that "there are no technical or physical barriers to shutting down DAPL for a relatively short period to accommodate a revised environmental analysis." 3rd Kuprewicz Decl., ¶ 11. Suspension of DAPL undoubtedly will have some impacts, but they will be more modest and manageable than DAPL contends. The evidence does not support the Corps' claim that vacatur will increase the risk of an oil spill. To the contrary, suspending DAPL will alleviate the risk to the Tribes presented by the pipeline pending a lawful NEPA analysis.

C. DAPL Bears Responsibility for the Impacts of a Suspension of Operations

DAPL knowingly embraced a risk of a shutdown by continuing to construct a pipeline despite the express request of the federal government, and even after the Corps announced that it would prepare a full EIS looking at route alternatives. Tribes Br. at 31-33.[10] Even its own supporters acknowledge that the claimed impacts of vacatur would not be severe "had DAPL not begun operations in June 2017." Murk Decl., ¶ 8 (ECF 259-2). The Corps is silent on this issue, tacitly conceding that DAPL bears responsibility for the situation it finds itself in now.

In a surprising pivot, DAPL tries to shift the blame onto the Tribes for not asserting its

[10] DAPL's citation to a case in which vacatur would "punish" an intervenor for "following the Agency's directions" is surprising, given that DAPL *rejected* the Corps' express request that it halt construction around Lake Oahe, and continued to build even after the Corps announced last December that DAPL would not get the requested easement at Oahe. DAPL Reply at 7, *citing Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 118 (D.D.C. 2011).

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NEPA claims at an earlier point in the case. DAPL Reply at 7. But DAPL has the facts wrong: the Tribes' concerns with the EA and interest in a full EIS were addressed outside of this litigation when the federal government refused to grant the easement until it performed a full EIS considering Treaty rights and route alternatives. There was no NEPA claim to assert in this case, nor any final agency action to challenge, until the new President ordered the Corps to abandon the EIS and issue the easement. The Tribe moved for summary judgment on the NEPA claims less than a week after the easement was issued, an extraordinary feat in light of the complexity of the case. It was DAPL that chose to proceed with construction, and initiate operations, while that motion was pending. The Tribes bear no responsibility for the impacts of vacatur.

In evaluating remedies for environmental violations, courts should not countenance complaints of economic harm when the complaining party openly embraced the risk. *See Sierra Club v. U.S. Army Corps*, 645 F.3d 978, 998 (8th Cir. 2011) (enjoining power plant permit where proponent "repeatedly ignor[ed] administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk"). DAPL complains that projects should not need to await resolution of every possible legal threat, but the circumstances of this case—including DAPL's decision to continue construction despite the effective *denial* of the key authorization—belie that complaint. It made reckless choices, and it must accept the consequences.

In sum, remedies in NEPA cases virtually always involve some level of "disruption" to someone—either the government agency administering a program or a third party seeking government permits. Even so, vacatur and injunctions remain the norm where an agency violates NEPA. Moreover, as the Tribes' expert opines without rebuttal, "contingency planning for a possible shutdown has presumably already been initiated." Goodman Decl., ¶ 59. The facts here do not support an exception to the standard rule of vacatur.

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V. IF THIS COURT REMANDS WITHOUT VACATUR, IT SHOULD IMPOSE THE TRIBES' PROPOSED LESSER REMEDY

The Tribes "reluctantly" proposed an alternative lesser remedy if this Court remands without vacatur. Tribes Br. at 35-40. That remedy consisted of two elements: 1) directing DAPL and the Corps to coordinate and finalize, in consultation with the Tribes, emergency response planning at Lake Oahe; and 2) implementing PHMSA recommendations to provide a third-party compliance audit and public reporting. To be clear, the Tribes do not believe that this lesser remedy substitutes for vacatur, and do not offer it as a compromise outcome. However, if the Court declines to vacate, the Tribes ask that the Court impose these alternative conditions.

The Corps and DAPL barely mention this alternative remedy. Both argue that the Corps can study these options as part of the remand, missing the point that these measures are intended to be implemented while the remand is underway. Corps Reply at 10; DAPL Reply at 10. The Corps incorrectly accuses the Tribes of "generally declining to engage in discussions about easement conditions," an accusation that is at odds with facts established in their own exhibit. Corps Reply Ex. 6 (documenting meeting with SRST representatives to discuss easement conditions). While these conditions could be part of a revised authorization, if one is ultimately granted, the Court can and should impose them in the interim.

DAPL claims that there is no need for the alternative remedy because response plans and equipment are already in place. Stamm Decl., ¶ 2. But if there is a final Geographic Response Plan ("GRP") for an oil spill at the Oahe crossing, it has never been shared with the Tribes, which are sovereign governments with emergency response capabilities and responsibilities. Nor have the Tribes ever had the opportunity to discuss or share opinions regarding staging of response equipment or mitigation measures. The original draft of the Oahe GRP highlighted the problems that arise without consultation with the Tribes. Ward Decl. (ECF 195-2), ¶¶ 6-10.

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Moreover, the only response plan that has ever been shared with the Tribe is a redacted draft of a Facility Response Plan ("FRP"). AR 71779-71983 (dated April 2016). Unlike the GRP, which addresses response scenarios specific to the Oahe crossing, the FRP on a more general level addresses planning for the pipeline as a whole. Moreover, the redactions to the draft FRP conceal important information, such as DAPL's emergency contact information, AR 71791-92, and the location of response equipment. AR 71806. Finally, DAPL's claim that it will work with the Tribes "voluntarily" on response planning is belied by the fact that the Standing Rock Tribe asked them to do so months ago, but this request has been met with silence, underscoring the need for direction from this Court.

This Court has the power to craft equitable remedies in light of the circumstances, which includes a remedy substantially more modest than vacatur. "[W]hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); *Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944); *see also PEER v. Hopper*, 827 F. 3d 1077, 1084 (D.C. Cir. 2016) (vacating EIS and requiring supplementation before construction can begin but not vacating lease). The proposed alternative relief will not cause any adverse impact to DAPL, the Corps, or the public, nor do they so argue. It would provide modest benefits to the Tribes and the general public by reducing the risks and impacts of spills and increasing transparency over this controversial project.

Courts have shaped flexible vacatur remedies where appropriate, including one on which DAPL relies. In *Conservation Congress v. U.S. Forest Service*, 2017 U.S. Dist. LEXIS 82440 (May 30, 2017), a District Court rejected a total vacatur of a timber sale project when the legal

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error pertained to only a narrow issue. Instead of vacatur, the court imposed a narrowly tailored injunction preventing removal of larger trees during the pendency of the remand. As to the injunction factors, even though the plaintiffs had not established that cutting those large trees would result in irreparable harm, "the Court is satisfied that the irreparable harm prong is met by the procedural harm Plaintiff suffered coupled with the permanent removal of trees that may be unnecessary to meet the project's purpose and need." *Id*. at *6. If vacatur is denied, this Court similarly has the authority to shape a remedy short of vacatur that nonetheless provides some limited protection of the Tribes' interests during remand.

CONCLUSION

For the foregoing reasons, the plaintiff Tribes respectfully request that this Court issue an order vacating the easement, authorizations, and FONSI for the Lake Oahe crossing, which will have the effect of forcing the suspension of DAPL operations during the pendency of the remand.

Dated: August 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
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