ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2020
NO. 20-5197

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE, ROBERT FLYING HAWK; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*

Defendant-Appellant,

DAKOTA ACCESS LLC,

Intervenor for Defendant-Appellant.

On Appeal from United States District Court for the District of Columbia
Case No. 1-16-cv-01534-JEB (Hon. James E. Boasberg)

BRIEF OF APPELLEES STANDING ROCK SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, AND YANKTON SIOUX TRIBE, ET AL.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties appearing before the district court and this Court are:

Dakota Access LLC
Robert Flying Hawk
Oglala Sioux Tribe
Standing Rock Sioux Tribe
United States Army Corps of Engineers
Yankton Sioux Tribe

The intervenors appearing before the district court and this Court are:

Cheyenne River Sioux Tribe
Steve Vance

The amici appearing before the district court and this Court are:

28 Federally Recognized Indian Tribes
34 Federal Recognized Indian Tribes
350.org
Affiliated Tribes of Northwest Indians
Alaska Inter-Tribal Council
American Civil Liberties Union
American Fuel & Petrochemical Manufacturers
American Petroleum Institute
Americans for Indian Opportunity
Association of Oil Pipe Lines
Association of American Indian Affairs
Thomas E. Barber, Sr.
Big Valley Band of Pomo Indians of the Big Valley Rancheria
Bold Alliance
Ladonna Brave Bull Allard
Maxine Brings Him Back-Janis
Center for Biological Diversity
Chamber of Commerce of the United States of America

Crystal Cole
Confederated Tribes of the Umatilla Indian Reservation
Consumer Energy Alliance
Dakota Rural Action
18 Federally Recognized Indian Tribes and Tribal Organizations
Fort Belknap Indian Community
Fred T. Korematsu Center for Law and Equality
Friends of the Earth
Cheyenne Garcia
Tateolowan Garcia
Great Plains Tribal Chairman's Association
Hess Corporation
Honor the Earth
Hoonah Indian Association
Indian Law Resource Center
Inter Tribal Association of Arizona
Sara Jumping Eagle
Lakota People's Law Project
Lakota Peoples Law Office
Law Professors and Practitioners
William Wild Bill Left Hand
Members of Congress
Miccosukee Tribe of Indians of Florida
Midwest Alliance of Sovereign Tribes
National Association of Manufacturers
National Association of Tribal Historic Preservation Officers
National Congress of American Indians
National Indian Education Association
National Indian Gaming Association
National Indigenous Womens Resource Center and Additional Amici
Nez Perce Tribe
North Dakota Farm Bureau
North Dakota Grain Dealers Association
North Dakota Grain Growers Association
North Dakota Petroleum Council
Pascua Yaqui Tribe
Chani Phillips
Pueblo of Pojoaque
Ramapough Lenape Nation
Red Cliff Band of Lake Superior Chippewa Indians

Rosebud Sioux Tribe
San Carlos Apache Tribe
Save Our Illinois Land
Seneca Nation
Sierra Club
South Dakota Corn Growers Association
South Dakota Farm Bureau Federation
South Dakota Soybean Association
State of Alabama
State of Arkansas
State of Indiana
State of Iowa
State of Kansas
Commonwealth of Kentucky
State of Louisiana
State of Mississippi
State of Missouri
State of Montana
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Russell Vazquez
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B. Rulings Under Review

The rulings under review are Second Remand Order, ECF No. 495 (Mar. 25, 2020), Memorandum Opinion on Second Remand Order, ECF No. 496 (Mar. 25, 2020), Order Granting Vacatur, ECF No. 545 (July 6, 2020), and Memorandum Opinion on Order Granting Vacatur, ECF No. 546 (July 6, 2020), Judge Boasberg presiding.

C. Related Cases

This case has been consolidated with case No. 20-5201.

/s/ Jan E. Hasselman
Jan E. Hasselman

Attorney for Plaintiff-Appellee
Standing Rock Sioux Tribe

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GLOSSARY

A.	Appellants' Appendix
APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
Corps	United States Army Corps of Engineers
DAPL	Dakota Access Pipeline
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ETP	Energy Transfer Partners
NEPA	National Environmental Policy Act
S.A.	Supplemental Appendix
WCD	Worst-Case Discharge

INTRODUCTION

This case pits federally recognized Indian Tribes, successors to the Great Sioux Nation, against a federal agency that authorized a major crude oil pipeline across the Tribes' unceded ancestral homelands. In March of 2020, the district court ruled for the second time that appellant U.S. Army Corps of Engineers ("Corps") violated the National Environmental Policy Act ("NEPA") when it issued a permit for the Dakota Access Pipeline ("DAPL") to cross the Missouri River at Lake Oahe, immediately upstream of the Standing Rock Sioux Tribe's Reservation. Applying well-established "arbitrary and capricious" review, the court found that the Corps had ignored extensive, credible evidence in the administrative record that the likelihood and potential impacts of an accident were far more significant than the Corps had ever acknowledged. Having already given the Corps one opportunity to cure these legal defects, the district court directed the Corps to prepare a full environmental impact statement ("EIS") as required by NEPA, and vacated the pipeline's permits.

Appellees Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe (collectively, "Tribes") ask this Court to uphold the district court's summary judgment and vacatur orders in their entirety. Appellants' entire case is built on a tautology: the Corps' conclusion that the risk of a pipeline spill is low must be upheld because the risk of a pipeline spill is low.

But NEPA requires more. The Corps' conclusion that the pipelines risks were too insignificant to warrant an EIS hinged on a technical assessment of the likelihood and consequences of an accident. Both during the original permitting process and again during a court-ordered remand, the Tribes presented detailed, expert evidence that the methods and assumptions embedded in that risk assessment were fatally flawed. In this appeal, as in the case below, the Corps and DAPL simply recite those risk assessment conclusions, without addressing the flaws that render them arbitrary.

The likelihood of an oil spill, like any other potentially catastrophic event, may be low in absolute terms. That fact does not exempt the production or transportation of crude oil from NEPA, nor insulate agency decisions authorizing such activities from judicial review. Instead, NEPA requires the Corps to closely scrutinize the risks of projects like this; assess the magnitude of both the chance of a spill and the impacts should one occur; disclose what resources and people would be affected; and study available alternatives and mitigation to lessen that harm. An agency can only avoid preparing an EIS when it makes a "convincing case" that a project's impacts are "insignificant."

On this record, the Corps fails that test. It failed to consider evidence demonstrating that risks of a catastrophic incident were far higher than it claimed. It was unable to provide "reasoned explanations" for adopting flawed

methodologies in the face of record evidence revealing their deficiencies. It reached conclusions that are implausible in light of conflicting record data. Its insistence that this pipeline had "insignificant" impacts was the epitome of "arbitrary and capricious" decision-making. The district correctly found as much and fashioned an appropriate remedy. The orders below should be upheld.

STATEMENT OF THE CASE

I. THE GOVERNMENT'S HISTORY OF BROKEN TREATIES AND STOLEN LAND.

Since time immemorial, the people of the *Oceti Sakowin* (Great Sioux Nation) have lived, hunted, fished, and engaged in ceremonies adjacent to the Missouri River—*Mni Sose* in Lakota. Starting in the mid-1800s, the Sioux and the U.S. government entered into treaties in which a substantial portion of the Great Plains were permanently reserved for the "absolute and undisturbed use and occupation" of the Sioux. *See* Fort Laramie Treaty of 1851, 11 Stat. 749; Fort Laramie Treaty of 1868, 15 Stat. 635. After gold was discovered in the Black Hills, the government violated the treaties, and Congress enacted statutes that stripped vast areas of land out of the Reservation. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980) ("A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history…").

In the 20th century, the U.S. compounded this legacy of dispossession by building Oahe dam on the Missouri, inundating the best lands on the Standing

Rock and Cheyenne River Reservations and forcing hundreds of families from their homes.[1] Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 887; Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (1954); Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762. Oahe Dam "destroyed more Indian land than any other single public works project in the history of the United States." Supplemental Appendix ("S.A.") 546; S.A.312 (Oahe dam "was, without doubt, the single most destructive act ever perpetuated on any Indian Tribe in the United States"). The taken lands were the most productive lands remaining on the Standing Rock and Cheyenne River Reservations, supplying 90% of the timber, wild berries and plants essential to the Tribe's diet and ceremonies, habitat for animals hunted for subsistence, and fertile lands for growing food. S. Rep. No. 102-267, at 188 (1992); S.A.312-16; S.A.33. These losses devastated the Tribes' economies and culture, and their effects are still felt profoundly. *Id*.

Today, the Standing Rock Sioux Reservation encompasses roughly 3,500 square miles in North and South Dakota; the similarly sized Cheyenne River Sioux Reservation is directly south, with Lake Oahe running along the eastern boundary of both Reservations. The Yankton Sioux Reservation is situated on the east bank

[1] DAPL opens its brief by oddly referring to Lake Oahe as "a small, man-made reservoir." DAPL Br. at 1. Lake Oahe is 230 miles long, the fourth largest reservoir in the United States, and the ninth largest lake overall.

of the Missouri River, farther downstream from the Lake Oahe crossing. The Pine Ridge Reservation, home of the Oglala Sioux, is west of Lake Oahe, from which it receives its drinking water. The Tribes hold senior water rights in the Missouri River. *Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 460 U.S. 605, 616 (1983). Reserved *Winters* water rights are a property right that entails both a sufficient quantity and quality of water to meet the beneficial purposes for which the right to water was reserved. *See, e.g.*, *United States v. Gila River Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996), *aff'd* 117 F.3d 425 (9th Cir. 1997). The Tribes rely upon the waters of Lake Oahe for fishing, hunting, and gathering, for homes, hospitals, clinics, schools, businesses, and government buildings throughout their Reservations, for agriculture (both farming and grazing), for drinking water, and for industrial purposes. The waters of the Missouri are also sacred to the Tribes and are central to their members' cultural and spiritual practices. S.A.3-4; S.A.10, 16-17; S.A.32-33.

II. THE CORPS' APPROVAL OF A PIPELINE ON UNCEDED AND CULTURALLY SIGNIFICANT LANDS.

The debate over permitting the Dakota Access crude oil pipeline played out against this backdrop. DAPL proposed to traverse the Missouri River just a half mile upstream of the Standing Rock Reservation, crossing lands stolen from the Sioux by the U.S. government. The Oahe crossing site is rich in cultural significance, and placing a massive crude oil pipeline along and beneath the River

posed a grave threat to ceremonies essential to Tribal identity as well as to Tribal health, fishing, hunting, and drinking water. S.A.10-11, 21; S.A.547 ("Water is part of who we are…. We cannot survive without it."). The proposal to build the pipeline in that location triggered an unprecedented indigenous-led opposition movement that garnered global attention.

The Mineral Leasing Act, 30 U.S.C. § 185, required DAPL to obtain an easement from the Corps in order to build its pipeline across federally owned land at the Oahe crossing site. The Clean Water Act and Rivers and Harbors Act required DAPL to secure additional authorizations. Issuance of these authorizations, in turn, triggered the environmental review provisions of NEPA. Appellants' Appendix ("A.")100. In November, 2015, the Corps released a draft environmental assessment ("EA") that made no mention of the pipeline's implications for the Tribes' Treaty rights, the unceded Treaty lands, the waters that sustain the Tribes, or their subsistence hunting, fishing and gathering rights. S.A.549. Indeed, the Draft EA's maps failed even to identify the Standing Rock Reservation, literally erasing them from the analysis. S.A.659-74. The EA also revealed that the company had considered an alternative route north of Bismarck, North Dakota, a mostly white and comparatively wealthy community, but abandoned that route because of the risks of an oil spill to downstream municipal water supplies, people, and the environment. S.A.559.

The Tribes submitted multiple rounds of technical, legal, and cultural comments on the draft. So did other federal agencies, including the Environmental Protection Agency, U.S. Department of the Interior, and the Advisory Council on Historic Preservation, pointedly questioning the scope of the environmental and cultural review. A.11, 17; A.194. The comments pressed the case that the risks of the pipeline at this important location were sufficiently "significant" that an EIS should be performed.

Undeterred by these critiques, the Corps finalized the EA, confirming that no EIS would be prepared, and on July 25, 2016, approved two of the three authorizations needed to build the pipeline across Lake Oahe. A.100-01. The Standing Rock Sioux Tribe immediately filed this case. The Cheyenne River Sioux Tribe intervened; the Oglala and Yankton Sioux Tribes filed their own lawsuits, which were later consolidated. A.101. In the fall of 2016, the district court denied two motions for preliminary injunctions seeking to block construction of the pipeline on grounds other than NEPA. A.164, 279.

In September of 2016, however, the government shifted its position, finding that the Tribes had raised "important issues" regarding the pipeline's permitting, and delaying issuance of the easement needed to cross Lake Oahe pending further review. S.A.25. As part of that review, the Solicitor of the U.S. Department of Interior issued a binding legal opinion finding "ample legal justification to decline

to issue the proposed Lake Oahe easement," or, alternatively, to develop an EIS to "adequately evaluate the existence of and potential impacts to tribal rights and interests," "consider a broader range of alternative pipeline routes," and undertake "a catastrophic spill analysis prepared by an independent expert." A.17; S.A.1355. *Id*. at 1374 ("These circumstances warrant a more searching consideration of the effects of a federal project on Tribal treaty rights."). The Solicitor's Memo pointedly questioned how the Corps could have rejected the Bismarck alternative due to risks to water supplies, "yet the threat to Tribal water was considered mitigated by the same pipeline technology that the Corps found would not protect Bismarck residents." S.A.1381; *see also* S.A.360 (Bismarck route "summarily rejected with little justification, especially given the presence of similar facts and potential for higher risks associated with the Lake Oahe route"). The Solicitor also critiqued the Corps' spill model: "it does not correlate with the vast majority of actual releases," nor were the Tribes "afforded the opportunity to consider and independently analyze" the Corps' technical information. S.A.1382.

In December 2016, after an extensive review and following the Solicitor's recommendations, the Army declined to issue the Mineral Leasing Act easement and directed the preparation of a comprehensive EIS to inform whether it was appropriate to grant one. S.A.28. The Corps initiated the EIS process shortly thereafter, and announced that it would focus on the risks of an oil spill, impacts on

the Tribes' Treaty rights to hunt and fish, and "route alternatives" to the Oahe crossing site. 82 Fed. Reg. 5543 (Jan. 18, 2017).

Immediately upon assuming office, however, President Trump issued a "Presidential Memorandum" about the pipeline that resulted in the cancellation of the EIS process, withdrawal of the Solicitor's opinion, and issuance of the Mineral Leasing Act easement. A.18. The Tribes immediately challenged the easement. As briefing on cross motions for summary judgment proceeded, DAPL completed construction of the pipeline, and the flow of oil commenced in June 2017.

III. THE FIRST SUMMARY JUDGMENT DECISION, VACATUR ORDER, AND REMAND.

A few weeks later, the district court granted summary judgment for the Tribes, in part. A.3. While the court found that the Corps had in some respects complied with NEPA, there were "substantial exceptions." A.68. In concluding that the pipeline's risks were not significant enough to warrant an EIS, the district court held that the Corps failed to consider expert critiques, raising questions about whether the project's effect on the environment was "highly controversial"—one of the criteria that triggers a full EIS. *Id*.; *see infra* § I.A. The court also faulted the Corps' environmental justice analysis for ignoring impacts on Tribes immediately downstream of the crossing, and the Corps' failure to assess the impacts of an oil spill on the Tribes' Treaty rights. A.49-56. Characterizing these

flaws as "substantial," the court remanded the matter to the Corps for additional analysis. A.1.

After obtaining additional briefing and evidence, the district court declined to vacate the easement, finding a "substantial possibility" that the Corps would be able to substantiate its decision not to prepare an EIS on remand. A.429. However, the court rejected the argument that the "disruptive consequences" of shutting down the pipeline weighed against vacatur. A.439 ("vacatur would be, at most, an invitation to substantial inconvenience"). Later, the court affirmed that it had the authority to impose conditions on the pipeline during remand, and found conditions warranted in light of the risk of an oil spill that could "wreak havoc on nearby communities and ecosystems." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 280 F. Supp. 3d 187, 191 (D.D.C. 2017).

The Tribes participated in good faith in the remand process, repeatedly seeking formal consultation as required under federal law and asking for key technical information for review and comment. *See, e.g.*, S.A.73; S.A.396. But the Corps stonewalled their efforts, forcing the Tribes to ask the court to require the Corps' full participation. ECF 336. Despite the lack of cooperation, the Standing Rock Sioux Tribe submitted an extensive body of technical information critiquing the assumptions built into the Corps environmental analysis and disputing the Corps' conclusion that the risks of spills were too insignificant to

merit full NEPA review. S.A.279. Those comments highlighted a range of major technical flaws, faulty assumptions, and overlooked issues. *Id*.

The Corps completed the remand in 2019. Despite the extensive evidence demonstrating pervasive problems, the Corps affirmed the decision not to prepare an EIS. A.1818.[2] The Tribes challenged this decision anew, moving for summary judgment on their claim that the remand analysis violated NEPA. In a March 2020 decision, the district court granted summary judgment to the Tribes, finding that the Corps failed to address multiple expert critiques of its flawed analysis of oil spill risks, and that the pipeline has "significant" environmental impacts requiring a full EIS. A.96. After considering extensive additional briefing and evidence, the district court vacated the easement and ordered pipeline operations suspended until the Corps completed the EIS and made a new easement decision. A.138. This appeal followed.

SUMMARY OF ARGUMENT

1. The district court correctly applied well-established "arbitrary and capricious" review to find that the Corps failed to address the detailed technical critiques of its methods and assumptions that underpinned its conclusions regarding the risk of oil spills. The Corps ignored pivotal issues, such as DAPL's

[2] During this time frame, DAPL began seeking state approvals for a major expansion that would double the amount of oil carried by the pipeline. S.A.524-25

abysmal safety record, deficiencies in its remote leak detection system, and how harsh winter conditions complicate oil spill response. It built a fundamentally flawed estimate for a catastrophic potential spill scenario—over four times lower than the Environmental Protection Agency's ("EPA's") estimate—into every part of its analysis. Applying Circuit precedent, the court below found that these critiques demonstrated that the project's impacts were significant enough to trigger an EIS under NEPA.

The Corps defends its decision by asserting, over and over, that the risks of an oil spill are low. However, that conclusion depends on the very assumptions and methodologies that were consistently called into question. The Corps and DAPL disparage the expert critiques because they came from the Tribes, ignoring the Tribes' sovereign status and their role as first responders for any accident affecting Treaty-protected resources. They also ignore detailed comments from EPA, the Solicitor of Interior, and other governmental agencies that reinforce Tribal critiques. And the accusation that the district court gave the Tribes a "heckler's veto" is sharply at odds with the court's careful analysis of how the Corps failed to respond meaningfully to fundamental flaws in its assessment.

2. As to the remedy, the district court carefully weighed the seriousness of the Corps' NEPA violations, its inability to correct its errors after a year-long remand, the impacts of shutting down (or not shutting down) the pipeline, this

Circuit's vacatur precedent, and the mandate that it craft relief to further the statute's purpose and design. The district court's decision to order an EIS and vacate the underlying easement carefully considered the evidence and balanced the relevant factors. It was not an abuse of discretion.

3. The district court did not err by making it clear that its vacatur order required suspending pipeline operations that risk a spill. The vacatur analysis, by definition, assumes that the action authorized by a vacated government authorization would cease, as did the parties in the evidence and arguments they presented below. While appellants now claim that the district court had to issue a separate injunction, they forfeited this argument by failing to raise it below. Moreover, establishing such a requirement cannot be reconciled with the vacatur analysis long required by this Circuit's precedent.

STANDARD OF REVIEW

The Court's role in a NEPA challenge is to determine whether the agency is "able to make a convincing case" for its finding of no significant impact. *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). Courts review an agency's NEPA decisions under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA") 5 U.S.C. § 706. Agency action is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs Ass'n v. State Farm Mut. Auto. Ins Co.*, 463 U.S. 29, 43 (1983).

This Court reviews the district court's grant of summary judgment in a NEPA case *de novo*. The district court's remedial orders requiring an EIS, vacating the pipeline easement, and directing pipeline operations to be suspended are reviewed under a deferential abuse of discretion standard. *Neb. Dep't of Health and Human Servs. v. Dep't. of Health and Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE CORPS VIOLATED NEPA.

A. NEPA Requires an EIS for Actions with Significant Environmental Impacts.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[3] It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1). The cornerstone of NEPA is its requirement that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas & Elec. Co. v. Natural*

[3] CEQ recently finalized new rules implementing NEPA. 85 Fed. Reg. 43304 (July 16, 2020). The revised rules apply only to NEPA processes begun after September 14, 2020, *id*. at 43339. Citations in this brief are to the applicable former rules.

Resources Def. Council, 462 U.S 89, 97 (1983) (internal citation omitted). A key purpose of this mandate 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); *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.") (internal quotations omitted).

Another key purpose of NEPA review is to ensure full and effective public participation in agency decision-making. 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 349 (NEPA "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that may also play a role in the decisionmaking process and the implementation of the decision."). "Federal agencies shall to the fullest extent possible: . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d); *see also id.* § 1506.6(a) ("Agencies shall . . . [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."). Accordingly, this Circuit has confirmed that "[t]he NEPA duty is more than a technicality; it is an extremely

important statutory requirement to serve the public and the agency *before* major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original).

Federal agencies are required to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1153 (D.C. Cir. 2011). "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original); *see also Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2nd Cir. 1997) ("When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared."). An EA is a tool that can be used to determine whether a project's impacts are significant enough to warrant an EIS; if not, that conclusion is to be documented in a "finding of no significant impact." 40 C.F.R. § 1501.4. As with any other NEPA analysis, agencies must use accurate information and ensure the integrity of these findings. 40 C.F.R. §§ 1500.1(b), 1502.24.

Whether a project has "significant" environmental impacts, triggering an EIS, depends on a weighing of both "context" and "intensity." 40 C.F.R. § 1508.27. "Considering context is critical because the significance of an action

can vary based on the setting and surrounding circumstances." *American Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018). As to intensity, binding Council on Environmental Quality ("CEQ") regulations list several factors that can trigger a finding of significance, including: "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources," the degree to which the effects are "likely to be highly controversial;" and the degree to which the effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b). The "highly controversial" intensity factor refers to "a substantial dispute . . . as to the size, nature, or *effect* of the major federal action," rather that simple public opposition. *Town of Cave Creek v. F.A.A.*, 325 F.3d 320, 331 (D.C. Cir. 2003) (emphasis in original); *Semonite*, 916 F.3d at 1083 (impacts are highly controversial where the agency fails to address "scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions"). "Implicating any one of the factors may be sufficient to require development of an EIS." *Semonite*, 916 F.3d at 1082; *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

With respect to accidents and emergencies, "an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass." *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012). CEQ regulations require consideration of "reasonably foreseeable"

impacts "which have catastrophic consequences even if their probability of occurrence is low." 40 C.F.R. §§ 1508.8; 1502.22. While "remote and speculative" effects do not necessarily warrant close review, NEPA requires consideration of a potential impact where it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016). Numerous courts have held that agencies have violated NEPA by not considering oil spills and other relatively low-likelihood accidents that could have catastrophic impacts. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 871 (9th Cir. 2005). (Corps violated NEPA by approving an oil dock expansion without considering increased risk of oil spills resulting from increased tanker traffic); *Gov't Province of Manitoba v. Norton*, 398 F. Supp.2d 41, 64 (D.D.C. 2005) (rejecting EA for drinking water pipeline for not considering low-risk mishap); *Sierra Club v. Watkins*, 808 F. Supp. 852, 867-68 (D.D.C. 1991) (rejecting EA for failing to consider accidents that are "possible" even if "extremely unlikely").

B. The District Court Applied the Correct Legal Standard.

Courts review an agency's NEPA decisions under the familiar "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706. In *Semonite*, this Circuit applied this standard to an agency's failure to prepare an EIS when the record revealed significant technical disputes about the agency's methods and conclusions. As the

Court explained, an agency need not follow technical recommendations "slavishly," but it does have to "take them seriously." 916 F.3d at 1082*; id*. at 1085 (agency must give entities with expertise "special attention"). The Court rejected as insufficient the Corps' attempts to "address" technical concerns: "The question is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id*. at 1085-86. That was because the agency's decisions "never even reference[d]" and "sa[id] little" about the actual criticisms leveled by technical experts. *Id*. at 1085.

Here, the district court accurately described this standard, A.105-07, and carefully applied it throughout its decision. As discussed below, the record contained extensive evidence of formidable technical disputes that the Corps ignored altogether, or nominally addressed with a non-response. To provide just one illustration, the Tribes provided extensive evidence that the claimed "worst-case discharge" failed to include any time to actually detect a spill or leak, which is one of the most important contributors to the size of a pipeline accident. *See infra* § I.C.4. The Corps ignored these concerns during the bulk of the remand, and at the eleventh hour responded that spills would be detected in under a minute—a claim unmoored from the evidence in the record, which revealed spills usually taking hours or days to detect. *Id*. Citing *Semonite*, the district court found the Corps' responses to the critiques to be unsupported and unreasoned, and hence did

not "resolve" the controversy raised by the Tribes. A.115. There was no error, just the application of well-established APA review.

Appellants claim erroneously that the district court gave the Tribes a "heckler's veto" over the pipeline, under which the "mere existence" of disagreement would trigger an EIS. Corps Br. at 15-17. That is a grave mischaracterization.[4] The court did not reject the Corps' "reasoning and conclusions" as "irrelevant," *id.*, it applied arbitrary and capricious review to the Corps' decision and found it wanting. The Tribes understand that the "mere existence" of a disagreement among experts does not mechanically trigger an EIS. Corps Br. at 16. But the agency must actually apply its expertise and provide a reasoned justification for its choices, not just brush them off or offer conclusory disagreement at odds with the record. That is what both the *Semonite* court and the district court meant by "resolving" technical disputes. The district court properly found that the Corps failed that test.

Appellants next attempt to distinguish *Semonite*. This effort fails too.[5] For example, appellants argue that the expert critiques here carry no weight because

[4] The district court acknowledged *on three separate occasions* that "controversy" under the NEPA regulations did not mean mere opposition to the project, no matter how strenuous. A.33; A.143; A.108.

[5] The Corps incorrectly claims that the court saw *Semonite* as a "sea change in the law." Corps Br. at 13. *Semonite* is not a "sea change" in the law, nor did the district court view it as such. It is, however, a case closely on point because it

they are made by Tribes, rather than federal agencies. The district court rightfully rejected this offensive argument. First, it misreads *Semonite*, which credited critiques from private consultants and non-profit conservation groups as well as federal agencies. *Id*. at 1084-85. Second, it ignores the fact that the Tribes are sovereign governments that bear responsibility for responding to an oil spill in Lake Oahe and for protecting their Treaty rights and the well-being of their members. Like the experts credited in *Semonite*, the Tribes are "stewards of the exact resources at issue," 916 F.3d at 1085, and are well positioned to offer technical input. A.111; S.A.538 (Tribal emergency response manager). Finally, the argument sidesteps the robust federal agency critiques of the Corps' review, including the searing analysis from the Interior Solicitor urging an EIS, as well as critiques from the EPA and other agencies with pertinent expertise. A.17; S.A.1355. While the new Administration abandoned the EIS and withdrew the Solicitor Memorandum, this reversal only "reinforces its controversial nature." *Semonite*, 916 F.3d at 1085; A.111.

Finally, the Corps seeks refuge in a predicable plea for "extreme deference" to its technical judgments. Corps Br. at 19-20. But deference is only appropriate

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involves expert disputes over the Army Corps' conclusions that a permit for private action would have significant impacts under NEPA, and hence offered important guidance. A.97. It would have been error for the district court not to consider *Semonite*.

where agencies are "evaluating scientific data within [their] technical expertise." *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004). While the Corps has expertise in water resources and wetlands, it has no technical expertise in pipeline engineering, risk, safety management, or spill response—all of which are within the purview of other agencies. No deference, let alone "extreme" deference, is appropriate in such circumstances. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (an "agency's interpretation must in some way implicate its substantive expertise, as the basis for deference ebbs when the subject matter of a dispute is distant from the agency's ordinary duties").[6]

In any event, "deference extends only so far as the [agency's] decision is not arbitrary or capricious." *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1022 (D.C. Cir. 2016). "An agency is not entitled to deference simply because it is an agency. . . . [F]or courts to defer to them, agencies must do more than announce the fact of their comparative advantage; they must actually use it." *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 367 (6th Cir. 2010); *Or. Natural Desert Ass'n v. Rose*, 921 F.3d 1185, 1190-91 (9th Cir. 2019) ("We cannot defer to a void"). What the Corps really wants is not deference, but abdication of the

[6] Relatedly, the Corps' interpretations of NEPA are not entitled to any deference either. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Comms. Comm'n*, 933 F.3d 728, 738 (D.C. Cir. 2019).

court's duty to perform a "thorough, probing in-depth review" of agency action under the APA. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). That is not the law. *Natural Resources Def. Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000) ("[W]e do not hear cases merely to rubber stamp agency actions… The [agency] cannot rely on reminders that its scientific determinations are entitled to deference in the absence of reasoned analysis to cogently explain why its additional recommended measures satisfied the [statute's] requirements.").

The Tribes agree with the Corps that while it does not need to "convince" outside technical experts, it must "analyze the issue and reach a rational conclusion on whether a controversy existed" and provide a "well-reasoned explanation" for its finding of non-significance. Corps Br. at 17-19. That is the standard that the district court applied, and the standard that the Corps failed to meet. On issue after issue, the Corps either ignored substantive technical critiques altogether, or offered responses that were neither "rational" nor "well-reasoned" in light of the evidence in the record.

C. The Corps Failed to Consider Key Evidence Demonstrating that the Impacts of the Pipeline Were "Highly Controversial."

Although the Tribes identified several context and intensity factors that should have triggered an EIS, the district court focused on the question of "highly controversial." With "many topics to choose from," the district court highlighted four illustrative problems to demonstrate the extent of "unresolved scientific

controversy." A.113 ("even this non-extensive selection suffices to show the necessity of an EIS."). The district court did not reach several other issues, because the remedy it ordered, preparation of an EIS, would be the same. A.131; *see infra* § I.C.5.

The Corps challenges this finding primarily by simply restating its conclusions about the risks of leaks and spills. Corps Br. at 8-13. Virtually every one of these conclusions has been contested throughout the litigation, and the district court found many of them to be unsupported. S.A.83 (Corps "gravely underestimates the risk of leaks and spills"). The fact that the Corps' risk assessments may have been "detailed" sidesteps the flawed assumptions permeating them. *See supra* § I.C.2. The claim that leaks would be instantly detected and the pipeline shut down within minutes has been undercut repeatedly. *Id*. § 1.C.4. The finding that a spill's impacts would be "temporary and limited" collides with detailed evidence in the record, as well as real world experience involving environmental disasters involving crude oil. A.2437 (DAPL spill analysis) (effects of spill would be "both significant and adverse, on time scales that range from days to years"); S.A.348-49 (Corps fails to assess "lingering toxic contamination" from spill, noting that the majority of oil spilled from pipelines was "never recovered"); S.A.88 (discussing challenges of mitigating benzene contamination); S.A.542 (oil in water column difficult to remediate). Merely

restating that the risk of a spill is "low" does little to illuminate the question before this Court: whether the Corps arbitrarily and capriciously ignored key evidence in the record, which revealed that the potential for an incident was greater, and its consequences more serious, than ever admitted or analyzed.[7] The record supports the Tribes.

1. Leak detection

The Corps has consistently relied on assertions about the effectiveness of the pipeline's leak detection systems in determining that risks were so low as to be discountable. *See, e.g.*, A.542; A.1944. Concerns about the accuracy of such systems were a key issue early in the permitting process, *see, e.g.*, S.A.220-26, and were cited by the district court in its first remand order. A.36 (citing need for better analysis of "critical leak detection monitoring devices"). During the remand process, the Tribes highlighted this issue with even greater technical documentation. *See, e.g.*, S.A.331 (remote detection systems in place at DAPL detect leaks between 20% and 28% of the time); S.A.42 (spill model "overstates the capabilities of remote detection systems to reliably identify a possible release"); S.A.223 (discussing challenges of remote detection on large pipelines);

[7] The concept of "risk" encompasses both the probability of an oil spill, as well as the consequences of one. S.A.513 ("high consequence is an element of the risk equation").

S.A.234-36 (documenting failure of remote systems); S.A.1491 (discussing numerous spills).

On its review post-remand, the district court found that the Corps had made little headway in addressing these concerns. A.114-17. As the court found, the Corps' remand report did not actually respond to the Tribes' concerns, but simply pivoted to other issues. A.115. Similarly, the Corps never meaningfully grappled with the possibility of a leak below detection limits which, on a pipeline of this size, could reach 6,000 barrels of crude per day. A.116; S.A.47 ("DAPL claims that it can detect to 1%, which I believe to be wildly over-optimistic—but even if the claimed threshold is correct, those systems are effectively blind to leaks below that level."). This is no "remote and speculative" concern: a brand-new pipeline operated by Sunoco leaked 8,600 barrels over 12 days before being detected. A.116.

Appellants' attempts to recast the record in a more favorable light are unconvincing. There is no dispute that the remote systems touted by the Corps rarely identify leaks and spills—which normally are discovered when company personnel, landowners, or passers-by notice them. S.A.48 ("The vast majority of leaks are discovered by visual observation, not remote sensing systems."); S.A.33; S.A.1401; S.A.235 (CPM and SCADA remote detection systems correctly identify releases 17% of the time). The Corps complains that this should not be called a

"failure rate," Corps Br. at 22, but this quibbling misses the point—that the system touted by the company to identify pipeline failures has been documented to be notoriously ineffective. As to smaller leaks below the detection limit, the notion that a "meter imbalance will develop over a period of time" and that slow leaks will "eventually" be detected, Corps Br. at 23, is hardly reassuring for a pipeline of this size. The Tribes pointed to numerous examples of pipelines that leaked for hours or days after similar detection systems failed. S.A.958; S.A.921; S.A.1186; S.A.971-73. As the district court found, the Corps never meaningfully addressed this concern, but instead just parroted the company's unsubstantiated claims that leaks would be discovered instantly. A.116.

Simply restating generic statistics about the frequency of pipeline incidents (as the Corps does at 22-23) does little to undermine the district court's conclusions that: a) the Corps failed to grapple with credible evidence, and b) that the Corps' unquestioning reliance on DAPL's leak detection system was arbitrary and capricious. And defending its failure to consider the issue by asserting that the "risk of any spill is low," *id*., is circular, since the Corps relied on the claimed effectiveness of the leak detection technology to reach that conclusion in the first place. S.A.49.

2. DAPL's safety record

During the remand process, the Tribes repeatedly drew attention to the abysmal safety and compliance of DAPL's corporate parents, Energy Transfer Partners ("ETP") and Sunoco. A.117. As the Tribes' explained on several occasions, the Corps' conclusory statements about the low risk of an accident failed to account for the company's broken safety culture, and cavalier approach to regulatory compliance. The district court concluded that the Corps had arbitrarily failed to address this information. *Id*. at 118 (ETP safety record "did not inspire confidence").

DAPL's claim that "nothing in the administrative record suggests Sunoco's record for any spill size differs materially from that of other operators" is untethered to reality. DAPL Br. at 22. The Standing Rock Tribe's remand report explained in detail how the risk of an incident was much higher for ETP/Sunoco pipelines than national averages indicate. S.A.332-37. The Report documented how ETP/Sunoco pipelines experienced 421 spills between 2006 and 2017, a rate of three a month, "the most of any pipeline operator for that period." *Id*. It revealed how Sunoco pipeline projects had been shut down four times in three states recently, an "unprecedented" level of enforcement. S.A.335.[8] The Tribe

[8] Ignoring an operator's safety record is not just arbitrary, it is contrary to law. PHMSA regulations require consideration of "historic discharges," *i.e*., the operators' record, in calculating a pipeline's WCD. S.A.329; 49 C.F.R. §

shared a comprehensive report that "reveals widespread noncompliance" by ETP, noting that "noncompliance is systemic" at the company's pipelines. S.A.838. That report observed one reportable incident at ETP/Sunoco pipelines every 11 days over 15 years, releasing 87,000 barrels of oil and other hazardous liquids. S.A.842. A Pennsylvania legislative hearing described Sunoco as "bad apple" and "rogue company," with "wanton disregard for the safety" of communities. S.A.1031. The Pennsylvania Public Utilities Commission shut down one ETP pipeline and stopped construction at another, finding that the company's deliberate mismanagement created "an imminent risk" to the public. S.A.877 (ordering shutdown "before a potential catastrophic event occurs"). The Corps had all this information before it but failed to even acknowledge it. At a meeting with Standing Rock leaders, "Corps officials appeared unfamiliar with the concerns regarding unevaluated risks" associated with the company's history. S.A.838. The Corps' chief legal counsel summarily dismissed this critical information, as "[n]othing that was new information or changes the remand decision." S.A.832.

The district court agreed that the Corps had arbitrarily ignored this troubling safety record. A.117. But rather than identify any error in this conclusions, appellants merely repeat the Corps' non-responsive statements. For example, the

194.105(b)(1). Industry "best practices" also require consideration of past spill incidents in assessing risk and developing safety plans. S.A.336.

Corps observes that 70% of the hundreds of ETP/Sunoco pipeline incidents in recent years were confined to the operators' property. Corps Br. at 31. As the district court found, however, that response ignores the other 30% of the spills that were not—to say nothing of the numerous permit violations and enforcement actions. A.118. Moreover, it reveals little about the problematic frequency and severity of those spills. The district court also properly rejected the Corps' "form language" faulting the Tribe for not providing it with a "specific alternative methodology." A.115.

In sum, the Corps did not weigh the evidence in the record, apply its expertise, and rationally explain its conclusions in light of ETP's poor safety record. Instead, it ignored the issue altogether and then provided excuses for failing to consider it. The Corps' decision was arbitrary and capricious.

3. Winter conditions

Tribal experts documented how North Dakota's harsh winter conditions could exacerbate the extent of a spill, make detection more challenging, and hinder response efforts. S.A.272; S.A.115; S.A.85. For example, a winter pipeline spill on the Yellowstone River, when frozen conditions inhibited response, fouled 60 miles of river. S.A.300.[9] The district court agreed that the Corps had failed to

[9] Winter conditions could result in a loss of power to the emergency flow-control valves, which would mean a catastrophic loss of oil into Lake Oahe in the event of a spill. *See infra* § I.C.4.

explain its decision in light of this evidence. A.119-21. The court showed how DAPL's own spill study—which revealed that ice conditions would result in more oil suspended in the water column, complicating clean-up efforts—contradicted the Corps' assertion that ice would reduce the extent of spills. *Id*. 120-21. The court agreed that the "controversy" over the unique challenges of avoiding and responding to spills in winter supported an EIS.

The Corps falls back on its standby response invoked during the remand: that because the Tribes had failed to offer any "alternative" methodology to consider the issue, the Corps could dismiss it. Corps Br. at 30. The court rightly rejected this response as a "non sequitur." A.115. The Tribes' "alternative" was clear: stop dismissing the unique risks of spills in a challenging environment as insignificant, and prepare a full EIS to fully assess it. Moreover, the Tribes are under no obligation to do the Corps' work for them. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS"); *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1291 (1st Cir. 1996) (rejecting argument that plaintiffs need to provide specific data when commenting: "Such 'specifics' are not required."). As this Circuit has

emphasized, "an agency must fulfill its duties to the fullest extent possible." *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (internal citations omitted). The Corps also asserts that the district court's decision would mean that the Corps "must develop a quantitative model that predicts 'how exactly winter conditions would delay response efforts.'" Corps Br. at 30. The district court said no such thing, nor did the Tribes so argue. Instead, the court merely observed that practicing winter response tactics does not address the failure of the Corps to fully address concerns over winter spills. In short, the potential impacts of a spill during winter were "highly controversial" and supported a finding of significance. The district court had it right.

4. Worst-case discharge

The Corps predicated its analysis of oil spill risks on its estimate of the worst-case discharge ("WCD"), but it deviated from established methodologies, low-balled key elements, and built a fundamentally flawed WCD estimate into every other analysis examining the consequences of spills. This error permeated the remand, EA, and finding of no significant impact in fundamental ways.

Federal law requires pipeline operators to develop a "worst case discharge" analysis as part of their oil spill response planning. 33 U.S.C. § 1321(j)(5)(A)(i). Regulations define WCD to be

> the *largest* volume, in barrels (cubic meters), of the following: (1) The pipeline's *maximum* release time *in hours*, plus the *maximum* shutdown

> response time *in hours* (based on historic discharge data or in the absence of such historic data, the operator's best estimate), multiplied by the *maximum* flow rate expressed in barrels per hour (based on the *maximum* daily capacity of the pipeline), plus the largest line drainage volume after shutdown of the line section(s) in the response zone expressed in barrels[.]

49 C.F.R. § 194.105(b)(1) (emphasis added). The regulations also require calculation of the WCD in light of "adverse weather conditions." *Id*. § 194.5. DAPL developed, and the Corps utilized, a WCD of roughly 12,000 barrels: this estimate underlay all of the Corps' assessment and findings. The Corps itself concedes that its decision not to prepare an EIS was "based in part on its analysis of how a catastrophic pipeline spill would affect the environment," Corps Br. at 25, with the WCD serving as the surrogate for such a spill. Not surprisingly, it was a key focus of the litigation below.

The district court found that the WCD constituted the "largest area of scientific controversy" in the remand, with experts raising "myriad concerns." A.121-23. With "many axes on which the WCD was challenged," the court highlighted three of them, finding them "sufficient to illustrate the unresolved controversy." *Id*. Focusing on these three issues—detection time, valve closures, and adverse weather—the court conducted a detailed analysis of the ways in which the WCD failed to account for sustained expert critiques.

Appellants make no effort to meaningfully respond to this analysis. They do not say a word about the court's finding that the WCD fails to include any

reasonable time to detect a spill, which is often the major variable in serious accidents. A.123-24; S.A.331 ("reasonable detection times that are measured from the initiation of the leak until discovery should be estimated in hours rather than minutes"). They are silent about the Corps' failure to account for potential valve failures, a serious risk in light of the documented absence of backup power to close the valves. A.126-28. They make no effort to refute the district court's finding that the WCD fails to account for the fact that adverse weather conditions would hinder effective implementation of emergency procedures. A.129. Instead, they denigrate the court's careful analysis as "quibbling" and "flyspecking." DAPL Br. at 24. This tactic is unpersuasive given how fundamental each of these factors can be for the severity of an oil spill. The district court provided extensive support for its finding that the WCD was in key respects a "best case" scenario in which all safety systems work perfectly and no errors occur, in violation of legal standards and abundant record evidence that such optimism plays no role in any legitimate "worst case" estimate. A.128.

The Corps attempt to rehabilitate the WCD by pointing to other conservative assumptions. For example, although not a focus below, the notion that the pipeline's depth under the lake eliminates the risk of an incident has been refuted repeatedly. S.A.323 (leak detection is *more* difficult on deeply buried pipeline); S.A.346 (urging modelling of movement of crude through formations in lake bed

and groundwater contamination); S.A.228 (backfill on pipe "is not going to prevent the pipeline from releasing oil at these pressures should the pipe lose integrity"). The over-the-top assertion that a spill is "physically impossible," Corps Br. at 21, is belied by the Corps' own spill analysis, which shows major spills in the river coming from shallower portions of the pipeline adjacent the lake. A.2339. A brand new segment of pipeline buried 45 feet below a river, just a few miles away from DAPL, failed in 2016, resulting in spill of over half a million gallons. S.A.708. The pipeline's depth does not render other portions of its analysis non-arbitrary. S.A.1382-84 (Solicitor Memo) (pipeline spill easily met the "reasonably foreseeable" standard under NEPA).

The Corps argues that the district court should not have reviewed the WCD because "worst case" analyses are not required under NEPA. Corps Br. at 27-28. The district court properly rejected this argument too. A.122. The WCD lay the foundation for all of the Corps' other findings in the remand, including its conclusion that the impacts of a spill would be limited. *Id*. (WCD "formed the basis for other conclusions about the effects of a spill"). Even if not mandated under NEPA, once the Corps chose this methodology for assessing oil spill risks and making a significance determination, it could not do so arbitrarily. *Sierra Club v. Sigler*, 695 F.2d 957, 965 (5th Cir. 1983); 40 C.F.R. § 1500.1 (information used for NEPA compliance "must be of high quality"); *id*. § 1502.24 (agencies must

"insure the professional integrity, including scientific integrity" of analysis). Insulating this analysis from review because it is not specifically required by law would "immunize vast swaths of the Court's analysis from judicial or expert review." A.122.[10]

Next, the Corps selectively cites unrelated data points to argue that the WCD is "highly conservative." Corps Br. at 25. But characterizing the WCD as conservative is meaningless in light of the numerous ways expert critiques showed that it was not nearly conservative enough. *See, e.g.*, A.126 (failure of valves would "cause the discharge amount to skyrocket"). Nor does it account for the fact that EPA's own estimate for a spill from a pipeline of DAPL's size was over four times as large as the Corps' estimate. A.111. But the Corps never said a word about this issue either before or after the remand. Accordingly, the assertion that the Corps "closely analyzed" critiques like this is demonstrably false. Its remand analysis barely mentions the Tribes' and other agencies' persistent criticism of the WCD, either ignoring them or offering responses with no basis in the evidence. The district court was correct to find this failure arbitrary.

[10] The Corps implies that PHMSA "approved" the WCD, Corps Br. at 27, but this claim too has been refuted. S.A.523 ("Any claim that PHMSA reviewed the FRP and approved the methodology and calculation of the Lake Oahe WCD is inaccurate.").

The Corps denigrates the district court as requiring it to "assume that a series of improbable malfunctions will cause an unprecedented disaster of epic proportions." Corps Br. at 27. That is obviously not what the order does. What the court held—consistent with black letter law under the APA—is that the agency must rationally explain its choices in the face of the conflicting evidence in the record. Its decision to adopt a WCD at odds with numerous, detailed expert critiques and real-world evidence failed that test. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (setting aside agency decision that ignored key issues "without any consideration whatsoever").

5. Other deficiencies not reached below further support the need for an EIS

The Tribes documented additional problems in support of their summary judgment motions that the court found no need to reach once it decided that an EIS is required. For example, the Standing Rock Sioux Tribe extensively briefed how the Corps' insignificance decision was premised on a false promise that the pipeline would apply industry best practices—when it does not. ECF 433-2; S.A.336; S.A.497-515. It also documented how the Corps' decision failed to account for the uniquely dangerous attributes of Bakken crude, which is both highly toxic and unusually flammable. S.A.319 ("Bakken crude is a deadly mix of highly toxic industrial chemicals . . . [with] significant chronic and acute adverse health effects."); S.A.86. It provided an extensive technical critique of the Corps'

refusal to acknowledge the environmental justice implications of siting a pipeline at the doorstep of a Tribal Reservation, where poverty imposes severe hardships. S.A.215. And all of the Tribes briefed the Corps' failure to comply with its own Tribal consultation policies in conducting the remand. *See*, e.g, ECF 433-2 at 39-45.

The court did not reach all of these issues because "the remedy for them would be the same"—to wit, an EIS. A.131; *id*. 113; *see also* A.123 (experts raised "myriad concerns" about WCD, but court discusses three as "sufficient to illustrate the unresolved scientific criticisms"). Appellants' efforts to diminish the significance of the four illustrative issues addressed by the court miss this crucial point: the Corps' NEPA process was so fundamentally broken that there was no need for the district court to go further. Should this Court disagree with the district court's analysis of these issues, it can sustain the ruling below based on other issues developed in the record. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

* * *

After years of litigation and the careful review of a lengthy administrative record, the district court identified "serious gaps in crucial parts of the Corps' analysis," gaps that that the agency "was not able to fill" despite repeated opportunities. A.130. Appellants fail to demonstrate that the district court got it wrong. Instead, they either mischaracterize the court's ruling, or fall back to

reiterating assertions that have been consistently repudiated. The district court's finding that the Corps violated NEPA should be upheld.

D. The District Court Correctly Ordered an EIS, Rather than a Second Remand.

The Tribes' advocacy in this matter has long been focused on securing a full EIS for the pipeline, consistent with the requirements of NEPA. S.A.353; S.A.1099. Initially, the Tribes were successful, and the Corps pledged to perform one that would focus on the risks of an oil spill, its impacts on Treaty rights, and an analysis of alternatives to the Oahe crossing. After a new administration reversed course, the district court agreed that the Corps' made "significant" errors. In that instance, the district court did not order an EIS, but gave the Corps an opportunity to provide further explanation for its assessment of oil spill risks, impacts to Treaty hunting and fishing rights, and environmental justice concerns. Only after the Corps' further explanation fell short did the district court order the Corps to prepare an EIS. As a component of the court's remedial order, this choice is subject to "abuse of discretion" review.

The district court applied directly controlling Circuit precedent. In *Semonite*, this Circuit similarly ordered an EIS where "[t]he Corps … failed to make a 'convincing case' that an EIS is unnecessary." 916 F.3d at 1087-88.

> Three intensity factors demonstrate not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS. Indeed, Congress created the EIS process to provide robust information

> in situations precisely like this one, where, following an environmental assessment, the scope of a project's impacts remain both uncertain and controversial.

Id. The *Semonite* order was no outlier. While some cases have remanded for additional analysis, they did so upon finding "the record is insufficient for the court to determine whether an EIS is required." *Grand Canyon Trust*, 290 F.3d at 347. In other cases, where the record demonstrates significant environmental impacts, courts have ordered the agency to prepare an EIS. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) ("The orders under review are vacated and remanded to FERC for the preparation of an environmental impact statement that is consistent with this opinion"); *Ocean Advocates*, 402 F.3d at 875 (remanding to Corps with instructions to prepare EIS); *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 590 (4th Cir. 2012) (same).

The Corps next complains that the "highly controversial" intensity factor does not, by itself, trigger an EIS. But neither the Tribes nor the district court viewed this factor in isolation. Instead, the Tribes repeatedly demonstrated how multiple "significance" factors were implicated by this pipeline permit. For example, "significance varies with the setting of the proposed action," 40 C.F.R. § 1508.28, and hence context is critical. The district court understood that the "context" for the Corps' decision is a place of extraordinary importance to the Tribes, a landscape of profound cultural importance, and the water supply for the

Tribes and millions of others. It takes place on land reserved by the Sioux, which the U.S. government promised to safeguard in perpetuity, only to steal a few years later, and then inundated by construction of Oahe Dam. The Missouri River is also a designated "high consequence area" under federal law, which requires heightened protections from crude oil pipelines. 49 C.F.R. § 192.905.

The pipeline implicates other intensity factors deemed pivotal in the NEPA regulations. For example, the persistent critiques of the Corps' analysis highlight how both spill likelihood and impacts are "uncertain" and involve "unknown" risks—precisely the kind of risks that should be scrutinized in a full EIS. 40 C.F.R. § 1508.27(b). The presence of cultural and historic resources affected by the pipeline triggers another intensity factor. *Id.*; S.A.14-17, 20; *see also* S.A.721 ("Our tribal nations have always held the Missouri River with the highest of reverence and for that reason, the Missouri River Basin has one of the largest concentrations of Tribal Cultural Properties."). While "implicating any one of these factors may be sufficient to require development of an EIS," *Semonite*, 916 F.3d at 1082, many factors were implicated. Agencies make the determination as to whether an EIS is required in the first instance, but they may not do so arbitrarily. The district court found the Corps violated this standard of rational decision-making, not once but twice. There was no abuse of discretion in finding that the threshold for requiring an EIS has been crossed.

DAPL argues that the Corps should have been given an additional remand opportunity because *Semonite* was decided after the last remand. DAPL Br. at 30. But *Semonite* broke no new ground. *See, e.g.*, *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006) (court must ensure that "no arguably significant consequences have been ignored"). It applied decades-old regulations prescribing the intensity factors that dictate preparation of an EIS, 40 C.F.R. § 1508.27(b), and restated long-standing Circuit precedent. *Grand Canyon Trust*, 290 F.3d at 347. Indeed, well before this Court's decision in *Semonite*, the district court held that the Corps had not adequately addressed the "highly controversial" intensity factor. It provided a roadmap for the remand, specifically directing the Corps to respond to unaddressed evidence on the severity of oil spill risks. And under bedrock administrative law, the Corps must conduct its analysis and make its decision in a manner that is tethered to the record. Given the district court's clear direction for the remand, DAPL's complaint that "the Corps cannot be faulted for failing to anticipate the court's specific concerns" is baffling. DAPL Br. at 30.

In light of the history of the case and the extensive administrative record revealing major deficiencies in the Corps' EA, the district court did not abuse its discretion in ordering an EIS. *Found. on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985) ("[T]hat courts must play a cardinal role in the

realization of NEPA's mandate is beyond dispute."). Such an order was well within its authority.

II. VACATUR OF THE PIPELINE EASEMENT WAS NOT AN ABUSE OF DISCRETION.

The Corps devotes a single conclusory paragraph to challenging the district court's order vacating the pipeline easement, effectively waiving its position. Corps Br. at 33-34; *Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008); *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). DAPL makes more of an effort, but falls far short of showing that the district court abused its discretion. To the contrary, vacatur of the easement in light of the Corps' repeated inability to comply with NEPA was a straightforward application of this Court's precedent to the facts of the case.

A. Vacatur was Appropriate Under the *Allied-Signal* Factors.

The APA commands that a court "shall . . . hold unlawful and set aside" agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) ("in all cases agency action must be set aside" if inconsistent with APA). Under *Allied Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), a narrow exception to this rule can be made, based on consideration of: a) the "seriousness" of the decision's deficiencies; and b) the "disruptive consequences" of vacatur. Such an exception remains appropriate only in the "rare case." *United Steel v. Mine Safety*

& Health Admin., 925 F.3d 1279, 1287 (D.C. Cir. 2019); *American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (remand without vacatur is an "exceptional remedy"). Defendants, not plaintiffs, bear the burden of showing that they are entitled to it. *Semonite*, 422 F. Supp. 3d at 99.

The case for vacatur is particularly strong where an agency's "reasoning lack[s] support in the record." *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019). "The court *must vacate* a decision that 'entirely failed to consider an important aspect of the problem.'" *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 867 F.3d 180, 185 (D.C. Cir. 2017) (emphasis added); *see also Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("In the past we have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion.").

Vacatur is also particularly appropriate where an agency acts without following proper procedures. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (failure to provide required notice and comment is a "fundamental flaw" requiring vacatur); *Allina Health Serv. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (deficient notice "almost always requires vacatur"). The D.C. Circuit affirmed this principle anew when it vacated a regulation weakening air quality standards that was issued without proper procedures. *Natural Resources Def. Council v. Wheeler*, 955 F.3d 68, 84-85 (D.C. Cir. 2020).

Rejecting the argument that the lack of comment was harmless, the Court observed that "the entire premise of notice-and-comment requirements is that an agency's decisionmaking may be affected by concerns aired by interested parties through those procedures." *Id*.

Unsurprisingly, vacatur is virtually always the remedy for agency actions taken in violation of NEPA. *Humane Soc'y v. Johanns*, 520 F. Supp.2d 8, 37 (D.D.C. 2007) (D.C. Circuit has "consistently affirmed" that "vacating a rule or action promulgated in violation of NEPA is the standard remedy"); *Pub. Emps. for Envtl. Responsibility ("PEER") v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations."); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating management plan for wild horses after agency failed to prepare EIS); *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 483 (D.C. Cir. 2012) (vacating rule governing storage of nuclear waste due to invalid EA/FONSI); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) *reh'g en banc denied* (vacating gas pipeline permits due to inadequate EIS).

Application of the *Allied-Signal* factors—which involves equitable balancing based on the facts of each case—is within the special province of the district court. *See Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 502

(D.C. Cir. 2019) ("*Semonite II*") (district court "best positioned to order additional briefing, gather evidence, make factual findings, and determine the remedies necessary to protect the purpose and integrity of the EIS process."). Here, after finding the Corps in violation of NEPA a second time, the district court invited additional briefing and evidence. Appellants and their amici availed themselves of the opportunity with thousands of pages of briefing, declarations, reports, and other evidence. The district court weighed this material, as well as extensive evidence submitted by the Tribes and their amici, before applying the "default" remedy of vacatur. A.149. This choice was no abuse of discretion.

B. The Corps' Repeated NEPA Violations Are "Serious".

Applying the first part of the *Allied-Signal* test, the district court ruled that the failure to prepare the EIS for the pipeline was a "very serious deficiency" weighing in favor of vacatur. A.151. The court carefully walked through the history of the case and the Corps' repeated failure to address criticisms of its conclusions. It analyzed governing precedent, which it found "overwhelmingly dictate[d]" vacatur. A.149. This careful analysis should be upheld.

DAPL primarily complains that the district court discounted the possibility that the Corps would be able to affirm its easement decision once an EIS is complete. DAPL Br. at 32. But the district court understood that allowing agency action to proceed while an agency brings itself into compliance with NEPA turns

the statute on its head. "[T]he point of NEPA is to require an adequate EIS *before a project goes forward*, so that construction does not begin without knowledge of" impacts. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018). As the Supreme Court pointed out in *Natural Resources Defense Council v. Winter*, "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about *prospective* environmental harms and potential mitigating measures." 555 U.S. 7, 23 (2007) (emphasis added). NEPA's implementing regulations specifically prohibit actions from proceeding while an EIS is underway, absent circumstances inapplicable here. 40 C.F.R. § 1506.1. Allowing the pipeline to operate despite a NEPA violation would be inconsistent with this structure and precedent.

Moreover, the district court already gave the Corps one opportunity to provide an adequate explanation for its decision not to prepare an EIS. ER386. This second effort "has been weighed, it has been measured, and it has been found wanting." A.149-50. Vacatur is even more appropriate under these circumstances. A.108 (the "magnitude of [the] shortcomings is even clearer here, where the Court has the benefit of a second round" of litigation); *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (agency decision is "particularly egregious" where it failed to resolve problems identified by the court); *In re Core Commc'ns*, 531 F.3d 849, 861

(D.C. Cir. 2008); *Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1364 (D.C. Cir. 1981).

DAPL next minimizes what it will take for the Corps to prepare a valid EIS, suggesting that it is only a matter of filling a few gaps in the existing EA. That argument fails as a matter of law, as an EIS and EA differ in scope and purpose. A.152 (EIS "is a separate regulatory beast, with its own requirements"). "No matter how thorough, an EA can never substitute for preparation of an EIS" where significant effects are present. *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004). An EA is used to determine whether an action's impacts are "significant." Once that binary threshold is crossed, an EIS is a comprehensive assessment of the risks and benefits of projects with multiple levels of agency and public review. 40 C.F.R. § Pt. 1502. An EIS "attract[s] the time and attention of both policymakers and the public" via comment opportunities, hearings, and increased visibility. *Anderson*, 371 F.3d at 494. It focuses attention on the key issues and provides greater transparency, scrutiny, and independence of the claims made. *Id*. An agency cannot avoid an EIS by beefing up an inadequate EA; if impacts are "significant," the full EIS is mandatory.

DAPL's argument also overlooks a key element of the EIS process—to develop alternatives that could achieve the agency's goals with lesser, or different, impacts. Examining alternatives forms the "heart" of the EIS. 40 C.F.R. §

1502.14; *id*. § 1500.2(e); *Union Neighbors United v. Jewell*, 831 F.3d 564, 576 (D.C. Cir. 2016) (faulting agency for EIS that "failed to consider any economically feasible alternatives" with less environmental impact). An EIS must explore alternatives in terms of routing, mitigation, or spill detection and response. 40 C.F.R. § 1502.22(a) (agencies must supplement incomplete information in an EIS if "essential to a reasoned choice among alternatives"); *id*. § 1502.14(f) (requiring the inclusion of "appropriate mitigation measures"). Such analysis can inform the Corps' decision to authorize the pipeline in a different place, with different operating conditions, or with additional mitigation. Of course, one alternative that must be considered is the option of denying the permits. 40 C.F.R. § 1502.14(d).

DAPL's argument fails for another reason. The district court found that the specific problems it catalogued were representative, and that the Corps' analysis in the EIS would have to resolve a number of additional concerns raised by the Tribes but not reached by the Court. A.47; *supra* § I.D. While DAPL dismissively asserts that the Corps can "easily" sustain its decision by revisiting the four representative issues, the argument ignores the district court's comprehensive findings that there were yawning gaps in the Corps' analysis that rendered it seriously deficient. DAPL's belief that it will be "easy" to finalize an EIS is pointedly not joined by the Corps, which took nearly six months to even initiate the EIS process, and estimates it will take more than a year to complete. 85 Fed. Reg.

55,843 (Sept. 10, 2020) (EIS scoping notice). The Corps was unable to "easily" resolve the issues in its first year-long remand.[11]

DAPL fixates on the fact that the district court's vacatur analysis weighed the likelihood that the Corps could sustain its decision not to prepare an EIS, rather than the likelihood that it would reissue the easement. DAPL Br. at 34. But that was no error. *Semonite*, 422 F. Supp. 3d at 99 ("the Court does not address the deficiency of the ultimate decision itself—the choice to issue the permit—but rather the deficiency of the determination that an EIS was not warranted."). This was precisely the framework that all of the parties endorsed, and the court applied, in the first vacatur decision. A.420. The decision being challenged—the decision not to prepare an EIS—was the one disputed by the parties and found wanting by the court, and appropriately the focus of the vacatur analysis.

Regardless, even if the court had focused on the easement, the result would have been the same. As this Court has made plain, the mere *possibility* that agency action would go forward the same way once NEPA compliance is complete cannot

[11] Additionally, as noted above, DAPL is proposing to double the capacity of the pipeline, which would require starting over in any assessment of spill likelihood, response, and impacts. S.A.524 ("The claim made by DAPL that they have already done all of the work required for an EIS is wrong in any event, but is completely unsupportable in light of the expansion proposal"); *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (vacatur mandatory where agency "must redo its analysis from the ground up").

possibly be sufficient to avoid vacatur. Because NEPA is a procedural statute, "taking such an approach would vitiate it." *Oglala Sioux Tribe*, 896 F.3d at 523, 536 (a "purely procedural" violation of NEPA is a "serious" deficiency weighing in favor of vacatur "because the point of NEPA is to require an adequate EIS before a project goes forward"). If remand without vacatur was appropriate whenever an agency might be able to affirm its original decision after complying with NEPA, vacatur would literally never be the outcome. Instead, it is the "default" remedy in virtually all NEPA cases.

The "seriousness" of the Corps' NEPA violation was enhanced because it threatens Tribal Treaty and trust resources. U.S. Const. art. VI; *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *Sioux Nation*, 448 U.S. at 415. The Corps' failure to analyze the impacts of a spill on the Standing Rock Tribe's Treaty-protected hunting and fishing resources was a key element of the district court's first summary judgment order. A.99 ("NEPA additionally requires an agency to determine how a project will affect a tribe's treaty rights."). The Tribes challenged the Corps' findings in this regard after the remand, but the court did not reach the issue, assuming that it would be addressed in the forthcoming EIS. Because tribal Treaty rights impose special obligations upon the United States, they necessarily enhance the seriousness of the Corps' NEPA violations, supporting vacatur.

In sum, the district court's conclusion that the Corps' failure to complete an EIS on the pipeline was a "serious" deficiency weighing in favor of vacatur was consistent with Circuit precedent and a proper exercise of discretion.

C. The District Court Carefully Balanced the "Disruptive Impact" of Vacatur.

DAPL's claim that the district court "dismissed" and "categorically discount[ed]" evidence of the economic impacts of vacatur is unfathomable. DAPL Br. at 37. The Court's order explicitly concluded that the potential for economic harm was the company's "strongest argument" against vacatur, agreed that there would be some "immediate harm" to third parties, and did "not take lightly the serious effects" that a DAPL shutdown could have. A.158. It decided to order vacatur nonetheless in light of several competing factors: serious questions about whether the company exaggerated the potential impacts; the exposure of the Tribes to unexamined risk and ongoing trauma; the company's own decisions to proceed in the face of known risks; and the policies and requirements of NEPA. DAPL cannot show that this careful balancing of competing factors was an abuse of discretion either.

The evidence below indicated that the economic harms from suspending the pipeline—variously depicted by DAPL as "staggering," "devastating," and

"catastrophic"—were gravely exaggerated.[12] Appellants' core premise is that closing the pipeline will cause thousands of North Dakota oil wells to be "shut in," with billions of dollars in impacts, because there will be no way to transport the oil they produce. DAPL Br., at 36. The claim is baseless, undercutting every other argument that follows. Oil production in North Dakota had plummeted for reasons having nothing to do with this case. A.155 (7,000 of state's 16,000 wells shut in prior to vacatur order). Bakken crude production has declined by roughly the same amount carried by DAPL. S.A.400 (production has dropped 500,000 barrels/day). Industry economists opined that shutting down DAPL would have no "noticeable" impact on production. S.A.401. Similarly, because production had fallen so sharply, the claim that producers would need to shift the pipeline's entire volume onto rail also failed. *Id*. ("it is possible that there would be no additional need to transport crude by rail or other means").[13] The claim that rail would increase transportation costs by $5-$10/barrel was also debunked. S.A.465-67.

[12] This was not the Court's first foray into these questions. In its 2017 decision regarding vacatur, the district court found that impacts of vacatur would be far more limited than presented. Indeed, the Court found that DAPL lacked credibility, finding "cause for skepticism" about its "predictions of economic devastation." A.433.

[13] The two arguments are also mutually exclusive: if pipeline shutdown causes production to collapse, there would be no need to find alternative transportation. Conversely, if all of the production shifts to rail, there would be no drop in production. In reality, neither prediction is true. S.A.401.

Because the shutdown of the pipeline will cause neither a noticeable decline in production nor a significant shift to rail, the attempt to show other third party harms, including impacts to employment, agriculture, and state taxes, collapses. S.A.402. To the contrary, the impacts of a temporary closure will be "marginal and readily managed." S.A.403 ("Any impacts that could occur would be so minor as to be lost in the noise of the other factors affecting the market."); *see also* S.A.96 (DAPL "shutdown analysis"). Economic harm to some companies would benefit others. S.A.401-02; A.156. Under the circumstances of this competing evidence, DAPL's claims of economic "devastation" did not carry the day.[14]

DAPL characterizes the shutdown of the pipeline as "unprecedented," but this is neither a relevant factor under *Allied-Signal* nor an accurate characterization in any event. Permits for pipelines and similar major projects are vacated regularly. *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017)

[14] The district court's cautious approach to the company's hyperbole has proven prescient. At the same time that the industry was representing that suspending the pipeline would be an economic catastrophe, DAPL's customers were reassuring investors that it could be easily managed. *See, e.g.*, Laila Kearney, *Dakota Access oil pipeline users downplay need for line to investors*, Reuters (Aug. 5, 2020). The chief executive of Hess oil was quoted as saying "It would not have a major impact on moving all of our production if DAPL were shut in, and the cost to us would be a few dollars per barrel." *Id*. That is a drastically different message than the one presented by Hess' General Manager in a declaration filed in the district court, which claimed that "if the Court orders an immediate shut down of DAPL, Hess would have no choice but to shut in production volumes equal to what it is currently shipping on DAPL . . ." A.670; S.A.724.

(vacating permit for gas pipeline); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018) (applying *Allied-Signal* analysis to vacate Corps permits for gas pipeline); *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 366 (4th Cir. 2019) (vacating authorizations for gas pipeline); *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 2020 WL 3638125, at *12 (D. Mont. 2020) (vacating Corps permit for Keystone XL pipeline). "The fact that [a] project is currently under construction by no means insulates it from the equity power of a court" in a NEPA case. *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). This Court explicitly foreshadowed the vacatur of an operational pipeline when it observed that if the Corps violates NEPA, shutting it down pending compliance was an available remedy. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) ("If the NEPA analysis were legally inadequate, we could order that the pipeline be closed or impose restrictions on its use, at least on federally authorized segments, until the agencies complied with NEPA.") (internal quotations omitted)

DAPL next complains that it was improper for the district court to take into account NEPA's purposes when crafting the remedy. DAPL Br. at 37. But the Supreme Court has instructed courts to craft equitable remedies to further statutory purposes. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982). The district court did

just that, framing a remedy that would ensure that an EIS would inform a new Corps' decision on the easement. It acknowledged that NEPA "does not permit an agency to act first and comply later." *Oglala Sioux*, 896 F.3d at 523, 536. "The point of NEPA is not to generate paperwork but "to foster excellent action," 40 C.F.R. § 1500.1(c); *id*. § 1502.1 (stating that the "primary purpose" of an EIS is as an "action-forcing" device); *id*. ("An environmental impact statement is more than a disclosure document. It shall be used . . . to plan actions and make decisions."). A NEPA review must "not be used to rationalize or justify decisions already made." *Id*. § 1502.5; § 1502.2(g) (EIS shall "assess[] the environmental impact of *proposed* agency actions, rather than justify[] decisions already made."). And the court understood that in the absence of vacatur, the Corps would likely never finish the EIS—which was the outcome in another case where the Corps has been working on an EIS for a completed project for fifteen years, and is *still* incomplete. *Ocean Advocates*, 402 F.3d at 846. These are appropriate factors to weigh in a vacatur analysis.

No one disputes that vacatur would impact DAPL's anticipated revenues. The district court considered this issue carefully, but gave those impacts less weight in part because the company knowingly proceeded with the project despite formidable risks. The company aggressively moved this pipeline forward despite unprecedented opposition, ignoring legal and political risks that alternative routes

or additional review would be required. A.215-16 ("Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has secured a permit to then build across."). It disregarded a formal request from the federal government that it cease construction in the Oahe area. S.A.24. Construction continued even after the Corps denied the easement and declared that it would perform an EIS that considered "route alternatives." S.A.27. As the district court found in its previous vacatur analysis, the company's unclean hands render its "*cri de coeur* over lost profits and industrial inconvenience… not fully convincing." A.433. DAPL's choices undercut the claim that the equities weigh in its favor. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F. 3d 978, 998 (8th Cir. 2011) (economic impacts do not weigh against remedy where entity "repeatedly ignore[ed] administrative and legal challenges"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("state defendants are largely responsible for their own harm").[15]

D. The District Court Considered the Claimed Risks of Suspending Pipeline Operations.

DAPL's insistence that the district court "ignored" the risk of environmental harm if pipeline operations were suspended is equally startling. To the contrary,

[15] These aggressive tactics also violated NEPA. 40 C.F.R. § 1506.1 (entities cannot take action that "have an adverse environmental impact" or "limit the choice of reasonable alternatives" until NEPA compliance is complete).

the court *twice* rejected the company's self-serving theory that closing the pipeline would increase environmental risks by shifting crude oil transportation from pipeline to rail. A.161-62; A.437. First, given the significant decline in production due to extrinsic factors, the evidence before the court indicated there may be little or no impact on existing crude transportation at all. S.A.401-02. Second, the notion that the Tribes "did not dispute" DAPL's claim that trains are more dangerous than pipelines beggars reality. To be sure, Bakken crude is dangerous, and its transportation whether by rail, truck, or pipeline carries risks. In the first round of vacatur briefing, Standing Rock put in a comprehensive transportation analysis refuting the premise that closing the pipeline would increase the risk of spills from rail transportation. S.A.96. The district court found that the Tribe had the better of this issue. A.437 ("Defendants have failed to persuade the Court that transport by train is significantly more dangerous than allowing oil to continue to flow beneath Lake Oahe."). When it revisited the issue anew, the only new evidence on this question was a recent federal report which showed no clear difference between the risks posed by pipelines and trains. A.161 ("each mode has its own unique safety risks"). DAPL is reduced to citing an "undisputed study" that it never submitted below, is not part of the record, and does not focus on safety risks in any event. DAPL Br. at 39-40. Moreover, a generic comparison of pipelines and rail ignores the question of whether vacatur of permits for "*this*

pipeline in *this* location" will increase the risks of spills. A.438. The district court properly considered this issue and found that it did not tip the balance against vacatur.

As a crude oil pipeline company with a record notable for its aggressive tactics, poor safety record, and history of regulatory violations, DAPL's claimed concern for greenhouse gas emissions, methane leaks, and worker safety is unconvincing. DAPL Br. at 41. The district court reviewed evidence that crude oil pipelines are shut down for any number of "highly foreseeable" planned or unplanned reasons. S.A.55-56. DAPL's parent companies have had to shut down other pipelines due to accidents, regulatory violations, and government enforcement. S.A.512. Far from ignoring this evidence, the district court gave DAPL and the Corps every opportunity to present their concerns regarding the impacts of shutdown. It carefully weighed these claims and found that they did not carry the day. There was no abuse of discretion.

E. The Court Correctly Weighed the Risks of Not Suspending Pipeline Operations.

The district court also properly weighed the potential "disruptive impact" of *not* vacating the pipeline easement. Noting that the "impact of [an oil] spill has been one of the Court's central concerns throughout the case," it observed that the record revealed that "systems may not be in place to prevent [a] spill from becoming disastrous." A.161; A.434 ("there is no doubt that allowing oil to flow

through the pipeline during remand risks the potentially disruptive effect about which the Tribes are most concerned – a spill under Lake Oahe"). In light of the "potential harm each day the pipeline operates," the court was "forced to conclude that the flow of oil must cease." A.168. This finding was no abuse of discretion.

First, most of DAPL's claims about the safety of the pipeline had already been rejected during the district court's review of the merits, for example, when it found that Tribal experts raised "serious doubts" about the Corps' WCD calculation. A.122. The Corps "plainly [did] not succeed" in responding to "serious" concerns about leak detection capacity. A.115. The Corps failed to consider an operator safety record that "did not inspire confidence." A.118. The district court identified "serious gaps in crucial parts of the Corps' analysis" of spill risk. A.130. The Corps' failure to grapple with these concerns rendered its NEPA decision arbitrary and capricious.

But the district court went further, and gave DAPL yet another opportunity to submit evidence on safety as part of the vacatur analysis. The district court did not "ignore[]" this evidence, but evidently agreed with the Tribes that DAPL "simply repeated, or expanded upon, the same contested claims that the Tribe has been debunking throughout the process." S.A.499. Its bold assertion (notably never adopted by the Corps) that "no one disputes" that the risk of a major spill "is a once-in-human-existence" event is unmoored from a record that challenges every

aspect of DAPL's safety claims. DAPL Br. at 41-43; S.A.1384 (Solicitor Memo) ("Pipelines across the country routinely leak and rupture."); S.A.87 (industry considers slow leaks acceptable because "even the best practices cannot limit their existence"). Having already found the Corps' acceptance of DAPL's safety claims to be arbitrary and capricious, the court was under no obligation to walk through the flaws anew in the vacatur order.

The Tribes submitted extensive additional evidence of their own calling into question the claim that DAPL is operating a safe pipeline. A former senior federal safety regulator explained that "it is my expert opinion that continued operation of DAPL, while an EIS is being prepared, presents untenable risks to the Standing Rock Sioux Tribe and others who rely on Lake Oahe." S.A.526. He described DAPL's safety culture as "broken," and concluded that allowing it to continue operating "poses a serious threat to people, property, and the environment." S.A.499-500 ("DAPL is an unusually unsafe pipeline, managed by a corporate entity with an unusually troubled safety record"); S.A.505 (describing spill and integrity management record as "extremely troubling"); *see also* S.A.543 (Standing Rock Tribal emergency management director) (pipeline should be shut down due to risks to Tribal first responders in the event of a spill).

While the company brags that there has yet to be a major catastrophe on the pipeline, DAPL Br. at 41, it fails to mention the twelve separate spills, constituting

6,000 gallons of crude oil and $200,000 in property damage, that occurred in the pipeline's first three years of operations. S.A.504. As discussed above, the company's other pipelines fare even worse. The Standing Rock Tribe's vacatur review revealed an average of nearly 3 spills a month for ten years on ETP-Sunoco's other pipelines, resulting in the loss of 2 million gallons of hazardous liquids and $90 million in property damage. S.A.504-05; S.A.520. The Tribe documented scores of enforcement actions, and millions of dollars in fines, against the pipeline's operators. S.A.502-11. In one recent case, the company faced a $30 million fine and a criminal investigation. S.A.512.

The Tribes also documented violations of the Corps' easement and underlying regulations due to the lack of location-specific operations and maintenance plans and integrity management plans. S.A.516-18; *see also* S.A.524 (documenting how lack of backup power at emergency valves violates easement). As the Tribe's expert explained,

> These are serious breaches of the Corps' Lake Oahe DAPL easement conditions. Safety critical equipment that may not be capable of closure, lack of essential procedures that are necessary to operate and maintain the pipeline, lack of plans that prevent mechanical integrity failures, all are necessary to for the prevention of spills into the Lake Oahe high consequence area.

Id. The Standing Rock pipeline safety expert further concluded that the pipeline presents "unacceptable risk" and "should not be operating" due to the documented lack of surge relief systems to protect the Oahe crossing. S.A.532-36. DAPL's

own documentation found an "unacceptable" deficiency in surge protections that was inconsistent with regulatory requirements. S.A.525. This expert concluded that:

> [T]he Dakota Access pipeline poses a unacceptable risk to the Standing Rock Sioux Tribe as it fails to meet important PHMSA safety regulations, its safety systems lack installed performance verification required to demonstrate compliance with industry best practice for Safety Instrumented System risk reduction, and DAPL fails to provide adequate overpressure protection (surge relief valves) at the environmentally sensitive pipeline HDD river crossings. These risks justify that the pipeline should be shut down pending preparation of an environmental impact statement by the Army Corps of Engineers.

S.A.536-37.

Finally, the Tribes submitted extensive evidence that the operation of the pipeline, on unceded lands yards upstream of the Standing Rock Reservation, compounds the historical trauma of repeated government dispossession, and subjects the Tribes and their members to the stress of living under an existential catastrophe. S.A.548 ("The pipeline's ongoing presence, and the looming threat of seepage, leak, and rupture that necessarily accompanies it, inflicts ceaseless anxiety upon us that will not end until the pipeline is removed."); S.A.215 ("the single biggest element that assists native people in healing from government-inflicted trauma is a sense of safety and well-being" that is unavailable while DAPL remains in service); S.A.1118 (documenting "considerable psychological research on historical trauma and how it impacts tribal communities"); S.A.37-39.

The pipeline hangs like a sword of Damocles over Tribal communities who rely on Lake Oahe for economic, spiritual, subsistence, and other purposes. S.A.547 ("we are in constant fear" of a spill); S.A.391 (communities "have become very stressed" due to spill risk). Allowing DAPL to continue operating despite NEPA violations would continue a generations-long pattern of balancing the impacts of resource exploitation on the backs of Native Americans. S.A.64 ("Throughout history, non-Natives have profited by exploiting the resources of Indian Tribes: native communities have borne the risks, while others reaped the benefits."). As the Solicitor found, the reservations are the "permanent and irreplaceable homelands" for the Tribes, and "[t]heir core identity and livelihood depend upon their relationship to the land and environment." S.A.1384; S.A.16 ("In our language we say *Mni Wiconi*, or Water of Life, because without water there can be no life."). The district court did not abuse its discretion by considering this "disruptive impact" too.

* * *

The district court carefully weighed the competing arguments and evidence of both the seriousness of the Corps' NEPA violations, and the impacts of shutting down the pipeline. It did not abuse its discretion.

III. THE ORDER TO SHUT DOWN THE PIPELINE WAS NOT *ULTRA VIRES*.

Lastly, appellants argue that the district court acted *ultra vires* by specifying in its vacatur order that pipeline operations must be suspended pending compliance with NEPA. Appellants argue that vacatur by itself has no impact on pipeline operations, and that suspension requires an injunction subject to a different standard. This argument cannot be credited. Shutting down the pipeline is encompassed within the remedy of vacatur because without a valid easement from the Corps, the pipeline cannot lawfully operate. Under appellants' argument, vacatur would have virtually no meaning at all. To the extent that the motions panel preliminarily accepted this view, the Tribes ask the panel to reconsider based on full briefing.

A. Appellants Forfeited this Argument by not Raising it Below.

Throughout the history of this litigation, all of the parties and the district court understood that vacatur would mean pipeline operations would have to stop. A.431; A.153. Appellants embraced this view during both rounds of briefing on vacatur, presenting extensive argument and evidence about the alleged harm shutting down the pipeline would cause. A.155 ("Dakota Access's central and strongest argument as to the second *Allied-Signal* prong is that shutting down the pipeline would cause it…significant economic harm…); A.431 ("Defendants and their amici spend much of the briefing spelling out what they believe are

potentially dire economic consequences of vacatur."); *see also* App. Vol. VI (declarations describing impacts of pipeline shutdown). Indeed, they continue to argue *to this Court* that vacatur should be rejected because of the "disruptive consequences" of "shutting down an operational pipeline." DAPL Br. at 35.

While appellants try to have it both ways in this appeal, they never argued to the district court that the effect of vacatur would be effectively zero because the pipeline would continue to operate—as it now is. Nor did they ever argue that a separate injunction was necessary to give effect to vacatur by shutting down the pipeline. To the contrary, the district court weighed literally thousands of pages of briefing and evidence built on the premise that vacatur would cause pipeline operations to be suspended until NEPA compliance was achieved. The district court explicitly recognized as much in a status conference after this Court stayed that portion of its decision.

> I don't think it's really fair to say that the issue the circuit remanded was ever in front of me. No one ever argued to me that I needed to consider the *Monsanto* factors. Everyone assumed, both on this remand and on the prior remand, when I didn't vacate the permit, that vacatur meant stopping the oil. And if anyone had told me differently, I would have looked at that. But that's not what anybody said.

S.A.797; S.A.808 ("I believe that we all were operating under the assumption that [vacatur] meant the oil would stop. Again, you are very good lawyers, I don't doubt that for a minute. I think that you should argue whatever you can to the circuit. *But it's certainly not what you argued below*.") (emphasis added).

The district court was right to feel misled: in two separate rounds of remedy briefing—one in 2017, the other in 2020—no party argued that the court needed to make additional findings, or explicitly enter an injunction, in order to suspend the pipeline. No party cited *Monsanto* in any of the vacatur briefs. S.A.807 ("Did you even mention *Monsanto* in your brief? . . . I can tell you the answer is no."). Once the order was entered, DAPL moved for a stay pending appeal, continuing to press its argument that vacatur should be stayed because of the disruptive effect of suspending operation of the pipeline during the pendency of a remand. S.A.742. On the final page of a lengthy brief, DAPL for the first time passingly cited *Monsanto* and the argument that the shutdown order was an injunction. But then the company demanded an immediate denial from the district court before plaintiffs or the court could respond to this newly raised issue. S.A.791.

This kind of tactical "sandbagging" is impermissible. *Puckett v. United States*, 556 U.S. 129, 134 (2009) (party cannot "remain[] silent about his objection and belatedly rais[e] the error only if the case does not conclude in his favor"). It is black letter law that a party that does not properly present its argument to the district court waives that argument on appeal. *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Appellate courts should be "loath to address issues that were not raised in the district court in

the first instance" to preserve the "role of neutral arbiter of matters the parties present." *Keepseagle v. Perdue*, 856 F. 3d 1039, 1052-53 (D.C. Cir. 2017). While courts have discretion to resolve issues raised for the first time on appeal where "proper resolution is beyond any doubt" or "injustice might otherwise result," that is not the case here: DAPL's "good lawyers" do not warrant the latitude granted a *pro se* litigant. *Id*.

As such, appellants forfeited the argument that an injunction was needed to shut down the pipeline. *Semonite*, 422 F.Supp.3d at 94-95; *Sierra Club*, 803 F.3d at 48–49 (rejecting unraised argument in NEPA case concerning pipeline). Indeed, appellants' newfound legal theory that vacatur would not result in suspension of the pipeline would have undercut their primary argument against vacatur—the "disruptive effects" of shutting it down. In other words, appellants strenuously argued the economic calamity of vacatur up until the point that the court granted one, then pivoted to assert that vacatur has no legal effect on operations at all. This gamesmanship is not allowed. *Keepseagle*, 856 F.3d at 1054. This Court should hold appellants to their original position, which defined the district court's legal framework through two rounds of remedy briefing, two vacatur orders, thousands of pages of evidence, and three years.

B. An Injunction is Not Necessary to Give Effect to Vacatur.

Even if this Court allows appellants to reverse their position on appeal, their argument fails. The Corps will likely allow the pipeline to operate while the EIS is being prepared despite the vacated easement. S.A.821. Allowing the pipeline to continue to operate without an easement, in violation of both NEPA and the Mineral Leasing Act, is not the law. *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy").

The vacatur analysis has always assumed that the activity authorized by challenged governmental action must cease. This is, in fact, the entire point of *Allied-Signal's* "disruptive consequences" prong, making vacatur hinge, in part, on what would happen if agency-authorized activity cannot proceed during remand. *Allied-Signal*, 988 F.2d at 151; *PEER*, 189 F. Supp. 3d at 4 ("Obviously the effect of vacatur is to stop these activities."); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010) (issuing "partial vacatur" to block construction, with limited exceptions). For example, when this Court vacated a pipeline authorization in *Sierra Club v. FERC* due to a NEPA violation, surely it did not contemplate that the project would simply continue to be built. 867 F.3d at 1379; *see also Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010) (refusing to vacate pipeline permit due to "disruptive consequences"); *City of*

Oberlin v. FERC, 937 F.3d 599, 611 (D.C. Cir. 2019) (declining to vacate pipeline authorization for "operational" pipeline due to disruption). This point was particularly clear in *Semonite* itself: there was never any dispute that the "disruptive consequences" of vacatur would stem from either stopping construction of the electrical towers or tearing them down. *Semonite II*, 925 F.3d at 502. The district court in *Semonite* understood "disruptive consequences" the same way. *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 101 (D.D.C. 2019). Nowhere did these opinions hint that the project could continue to operate despite vacated permits.

This Circuit's decision in *Oglala Sioux*, 896 F.3d at 523, confirms as much. There, the Nuclear Regulatory Commission found a "significant deficiency" in the agency's NEPA compliance for a mining project, but nonetheless left the license in place—allowing the project to proceed—because the Tribe could not show "irreparable harm." *Id*. at 531 ("The Agency thus conditioned enforcement of NEPA on a showing of irreparable harm by the Tribe" despite a "significant deficiency" in the NEPA review). This Circuit flatly rejected this approach. "Nothing in NEPA's text suggests that the required environmental analysis of a 'proposed' action is optional if a party does not prove that 'irreparable harm' would result from going forward before the agency completed a valid EIS." *Id*. at 532. Moreover, in defining a remedy, the *Oglala Sioux* court—like literally every

other court to ever consider the issue—assumed that "vacatur" of the license meant that the project would not go forward. *Id*. at 538 (declining to vacate because of disruptive impacts and because project could not go forward anyway).

The Mineral Leasing Act requires a right of way for pipelines to cross federal lands. 30 U.S.C. § 185. The statute expressly preserves NEPA, *id*. § 185(h)(1), and requires appropriate plans "prior to granting" any authorization. *Id*. § 185(h)(2). Accordingly, without an authorization that meets the standards of NEPA, a pipeline cannot lawfully operate. But appellants seek judicial imprimatur on the ongoing operation of the pipeline in violation of this requirement. Accepting this view would eviscerate the Mineral Leasing Act, NEPA, and the entire concept of vacatur. *See Diné Citizens Against Ruining the Environment v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) ("Once the [permits] are vacated, drilling operations will have to stop because no drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to APD approval") (internal quotations omitted). This Court should decline the invitation to upend years of precedent.

Defendants cite *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), but the case is inapplicable to the situation here. There, the district court held that an agency's action completely deregulating a genetically modified crop without an EIS violated NEPA, and vacated the decision. No court entertained the

notion that a separate injunction had to issue to bar the agency from deregulating the crop without completing the EIS. Indeed, no one even challenged vacatur. Instead, the Supreme Court focused on the district court's additional order enjoining the agency from issuing *any* partial deregulation orders without preparing a full EIS. The Court deemed the injunction overbroad since it foreclosed the possibility of a limited partial deregulation that might not have significant environmental impacts requiring an EIS, *id*. at 162-63, and plaintiffs would have "ample opportunity to challenge" such a partial deregulation if it harmed them. *Id*. 164. But "partial deregulation" has no analogue here. The easement authorizes DAPL to use federal property for a pipeline: without one, the pipeline cannot operate. Vacatur removed that authorization, and it cannot be reissued before NEPA has been satisfied. *Monsanto* does not address the question here—whether vacatur, by itself, blocks the authorized action—and does not preclude the district court's clarification that DAPL cannot lawfully operate the pipeline in the absence of the easement.[16]

[16] DAPL's argument, not joined by the Corps, that "[p]rivate parties have no cause of action to enforce federal property rights" is a red herring. DAPL Br. at 42. Of course, the district court has equitable authority to enjoin an intervening party in a NEPA case. *Schneider v. Dumbarton Developers, Inc*., 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."). This appeal does not involve any cause of action against DAPL or a challenge to the Corps' enforcement discretion.

It is axiomatic that courts have equitable discretion to shape the contours of a remedy to address the facts of the case and serve the purposes of the underlying statute. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). This Circuit demonstrated this very point in *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). There, the Court did not vacate all regulatory approvals, because the purposes of NEPA could be served by requiring the agency to analyze the risks at issue "before Cape Wind may begin construction," i.e., effectively prohibiting construction activity until NEPA compliance was complete. *Id*. at 1084. The Court did not engage in a separate injunction analysis. Rather, it shaped a vacatur remedy to ensure the permitted activity would not proceed until the agency complied with NEPA, while minimizing ancillary disruption. The district court here did the same thing.

Appellants fail to identify a single case, from any jurisdiction, holding that it is necessary to issue a separate injunction to prevent action from going forward under a vacated agency permit. *Allied-Signal*, 988 F.2d at 151 (agency required to take affirmative action under vacatur without separate injunction). An injunction was not necessary here because vacatur gave the Tribes the relief they were seeking: invalidation of the underlying easement, which means suspension of

pipeline operations pending compliance with NEPA. The district court's vacatur order should be upheld.

C. The District Court Made the Requisite Findings to Uphold an Injunction.

Even if this Court finds an injunction is necessary, the district court made all of the requisite findings for an injunction even if it did not explicitly label it as such. In its order obliging DAPL's request for an immediate resolution of its stay motion, the district court found that the stay factors—which are essentially the same as the injunction factors, *Nken v. Holder*, 556 U.S. 418, 426 (2009)—were "essentially subsumed" within its vacatur order. A.164. As this Circuit has held, there is no requirement that a district court make "express findings as to the elements necessary for a permanent injunction." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) ("district courts enjoy broad discretion in awarding injunctive relief").[17] The court definitively found for the Tribes on the merits. It balanced the harms of shutting down the pipeline with the harms of letting it operate, finding that the risks and impacts to the Tribes outweighed the financial impacts of shutdown. A.153-62. And the Court's vacatur

[17] The motions panel granting a stay cited *Monsanto*, but that case does not address the question here. *Monsanto* merely held that injunctions are not automatic in NEPA cases, and can only issue if the four-part test is satisfied. 561 U.S. at 158. It does not require the invocation of any specific terminology before issuance of an injunction.

order is infused with consideration of the public interest, primarily the implications of allowing DAPL to continue to operate despite a "serious" NEPA violation. *Id.*; S.A.65 ("it has always been the Tribe that has borne the heavy burdens, through the loss of our lands and harm to our way of life").

The Corps observes that no injunction is available without a finding of irreparable harm, and that the harm of an oil spill is not "likely." Corps Br. at 35. But the likelihood and potential impacts of a spill were at the heart of the district court's ruling, which rejected the Corps' sweeping claims of safety and considered extensive expert evidence that the pipeline was not safe. *See supra* at § II.D. The entire point of the EIS ordered by the court was to further probe the issue. Contrary to the Corps' argument, there is no requirement that the likelihood of catastrophic harm exceed a particular numerical threshold for an injunction to issue. *See, e.g.*, *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (7th Cir. 2011) (upholding injunction for catastrophic but relatively unlikely environmental harm). *Winter* does not stand for the proposition that courts lack remedial power to enjoin activities that threaten catastrophic harm just because they are not "more likely than not." The balancing of risks, impacts, and consequences is within the district court's authority to determine.

CONCLUSION

For the foregoing reasons, this Court should uphold the district court's challenged rulings in their entirety, and dissolve the partial stay of the district court's order shutting down the pipeline.

Dated: September 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 17,210 words and complies with the type-volume limitation and typeface requirements of Federal Rule of Appellate Procedure 27(d)(2) and Federal Rule of Appellate Procedure 32(a) because it contains less than 19,000 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate 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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ADDENDUM

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United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

30 U.S.C.A. § 185

§ 185. Rights-of-way for pipelines through Federal lands

Currentness

(a) Grant of authority

Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

(b) Definitions

(1) For the purposes of this section "Federal lands" means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

(2) "Secretary" means the Secretary of the Interior.

(3) "Agency head" means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

(c) Inter-agency coordination

(1) Where the surface of all of the Federal lands involved in a proposed right-of-way or permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary, is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

(2) Where the surface of the Federal lands involved is administered by the Secretary or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. The Secretary may enter into interagency agreements with all other Federal agencies having jurisdiction over Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of rights-of-way or permit applications, issuing joint regulations, and assuring a decision based upon a comprehensive review of all factors involved in any right-of-way or permit application. Each agency head shall administer and enforce the provisions of this section, appropriate

regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.

(d) Width limitations

The width of a right-of-way shall not exceed fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) unless the Secretary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites, and they need not necessarily be connected or contiguous to the pipe and may be the subjects of separate rights-of-way.

(e) Temporary permits

A right-of-way may be supplemented by such temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary in connection with construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

(f) Regulatory authority

Rights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accord with the provisions of this section and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination.

(g) Pipeline safety

The Secretary or agency head shall impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline.

(h) Environmental protection

(1) Nothing in this section shall be construed to amend, repeal, modify, or change in any way the requirements of section 102(2)(C) or any other provision of the National Environmental Policy Act of 1969.

(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit

granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section.

(i) Disclosure

If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity. Such disclosure shall include where applicable (1) the name and address of each partner, (2) the name and address of each shareholder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote, and (3) the name and address of each affiliate of the entity together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

(j) Technical and financial capability

The Secretary or agency head shall grant or renew a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way or permit is requested in accordance with the requirements of this section.

(k) Public hearings

The Secretary or agency head by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications filed after the date of enactment of this subsection.

(l) Reimbursement of costs

The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area and shall pay annually in advance the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head.

(m) Bonding

Where he deems it appropriate the Secretary or agency head may require a holder of a right-of-way or permit to furnish a bond, or other security, satisfactory to the Secretary or agency head to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or permit or by any rule or regulation of the Secretary or agency head.

(n) Duration of grant

Each right-of-way or permit granted or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years. In determining the duration of a right-of-way the Secretary or agency head shall, among other things, take into consideration the cost of the facility, its useful life, and any public

purpose it serves. The Secretary or agency head shall renew any right-of-way, in accordance with the provisions of this section, so long as the project is in commercial operation and is operated and maintained in accordance with all of the provisions of this section.

(o) Suspension or termination of right-of-way

(1) Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and (C) an appropriate administrative proceeding pursuant to section 554 of Title 5, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

(2) If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

(3) Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way: *Provided*, That where the failure to use the right-of-way is due to circumstances not within the holder's control the Secretary or agency head is not required to commence proceedings to suspend or terminate the right-of-way.

(p) Joint use of rights-of-way

In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary or agency head the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section.

(q) Statutes

No rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations, and conditions of this section. Any application for a right-of-way filed under any other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section. The Secretary or agency head may require the applicant to submit any additional information he deems necessary to comply with the requirements of this section.

(r) Common carriers

(1) Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers.

(2)(A) The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

(B) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported or purchased.

(3)(A) The common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

(B) Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipelines is offered for sale, each such pipeline shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

(4) The Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner or operator of a controlling interest in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this chapter.

(5) Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

(6) The Secretary or agency head shall require, prior to granting or renewing a right-of-way, that the applicant submit and disclose all plans, contracts, agreements, or other information or material which he deems necessary to determine whether a right-of-way shall be granted or renewed and the terms and conditions which should be included in the right-of-way. Such information may include, but is not limited to: (A) conditions for, and agreements among owners or operators, regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand; (B) conditions for adding or abandoning intake, offtake, or storage points or facilities; and (C) minimum shipment or purchase tenders.

(s) Exports of Alaskan North Slope oil

(1) Subject to paragraphs (2) through (6) of this subsection and notwithstanding any other provision of this chapter or any other provision of law (including any regulation) applicable to the export of oil transported by pipeline over right-of-way granted pursuant to section 1652 of Title 43, such oil may be exported unless the President finds that exportation of this oil is not in the national interest. The President shall make his national interest determination within five months of November 28, 1995. In evaluating whether exports of this oil are in the national interest, the President shall at a minimum consider--

(A) whether exports of this oil would diminish the total quantity or quality of petroleum available to the United States;

(B) the results of an appropriate environmental review, including consideration of appropriate measures to mitigate any potential adverse effects of exports of this oil on the environment, which shall be completed within four months of November 28, 1995; and

(C) whether exports of this oil are likely to cause sustained material oil supply shortages or sustained oil prices significantly above world market levels that would cause sustained material adverse employment effects in the United States or that would cause substantial harm to consumers, including noncontiguous States and Pacific territories.

If the President determines that exports of this oil are in the national interest, he may impose such terms and conditions (other than a volume limitation) as are necessary or appropriate to ensure that such exports are consistent with the national interest.

(2) Except in the case of oil exported to a country with which the United States entered into a bilateral international oil supply agreement before November 26, 1979, or to a country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency, any oil transported by pipeline over right-of-way granted pursuant to section 1652 of Title 43 shall, when exported, be transported by a vessel documented under the laws of the United States and owned by a citizen of the United States (as determined in accordance with section 50501 of Title 46).

(3) Nothing in this subsection shall restrict the authority of the President under the Constitution, the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), or Part B of title II of the Energy Policy and Conservation Act (42 U.S.C. 6271-76) to prohibit exports.

(4) The Secretary of Commerce shall issue any rules necessary for implementation of the President's national interest determination, including any licensing requirements and conditions, within 30 days of the date of such determination by the President. The Secretary of Commerce shall consult with the Secretary of Energy in administering the provisions of this subsection.

(5) If the Secretary of Commerce finds that exporting oil under authority of this subsection has caused sustained material oil supply shortages or sustained oil prices significantly above world market levels and further finds that these supply shortages or price increases have caused or are likely to cause sustained material adverse employment effects in the United States, the Secretary of Commerce, in consultation with the Secretary of Energy, shall recommend, and the President may take, appropriate action concerning exports of this oil, which may include modifying or revoking authority to export such oil.

(6) Administrative action under this subsection is not subject to sections 551 and 553 through 559 of Title 5.

(t) Existing rights-of-way

The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section. Any action taken by the Secretary or agency head pursuant

to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1970 (Public Law 90-190; 42 U.S.C. 4321).[1]

(u) Limitations on export

Any domestically produced crude oil transported by pipeline over rights-of-way granted pursuant to this section, except such crude oil which is either exchanged in similar quantity for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1979 (50 U.S.C.App. 2401 and following)[2] and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements and penalty and enforcement provisions of the Export Administration Act of 1979 the President must make and publish an express finding that such exports will not diminish the total quantity or quality of petroleum available to the United States, and are in the national interest and are in accord with the provisions of the Export Administration Act of 1979: *Provided,* That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such report Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within this time period passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

(v) State standards

The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.

(w) Reports

(1) The Secretary and other appropriate agency heads shall report to the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

(2) The Secretary or agency head shall promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to the terms and conditions he proposes to impose, has been submitted to such committees.

(3) Periodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems.

(x) Liability

(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this chapter shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(y) Antitrust laws

The grant of a right-of-way or permit pursuant to this section shall grant no immunity from the operation of the Federal antitrust laws.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 28, 41 Stat. 449; Aug. 21, 1935, c. 599, § 1, 49 Stat. 678; Aug. 12, 1953, c. 408, 67 Stat. 557; Pub.L. 93-153, Title I, § 101, Nov. 16, 1973, 87 Stat. 576; Pub.L. 95-91, Title III, §§ 301(b), 306, Title IV, § 402(a), (b), Title VII, §§ 703, 707, Aug. 4, 1977, 91 Stat. 578, 581, 583, 584, 606, 607; Pub.L. 99-64, Title I, § 123(b), July 12, 1985, 99 Stat. 156; Pub.L. 101-475, § 1, Oct. 30, 1990, 104 Stat. 1102; Pub.L. 103-437, § 11(a)(1), Nov. 2, 1994, 108 Stat. 4589; Pub.L. 104-58, Title II, § 201, Nov. 28, 1995, 109 Stat. 560; Pub.L. 104-66, Title I, § 1121(k), Dec. 21, 1995, 109 Stat. 724.)

MEMORANDA OF PRESIDENT

EXPORTS OF ALASKAN NORTH SLOPE (ANS) CRUDE OIL

<Apr. 28, 1996, 61 F.R. 19507>

Memorandum for the Secretary of Commerce [and] the Secretary of Energy

Pursuant to section 28(s) of the Mineral Leasing Act, as amended, 30 U.S.C. 185 [subsec. (s) of this section], I hereby determine that exports of crude oil transported over right-of-way granted pursuant to section 203 of the Trans-Alaska Pipeline Authorization Act [43 U.S.C.A. § 1652] are in the national interest. In making this determination, I have taken into account the conclusions of an interagency working group, which found that such oil exports:

--will not diminish the total quantity or quality of petroleum available to the United States; and

--are not likely to cause sustained material oil supply shortages or sustained oil price increases significantly above world market levels that would cause sustained material adverse employment effects in the United States or that would cause substantial harm to consumers, including those located in noncontiguous States and Pacific Territories.

I have also considered the interagency group's conclusions regarding potential environmental impacts of lifting the ban. Based on their findings and recommendations, I have concluded that exports of such crude oil will not pose significant risks to the environment if certain terms and conditions are met.

Therefore, pursuant to section 28(s) of the Mineral Leasing Act [subsec. (s) of this section] I direct the Secretary of Commerce to promulgate immediately a general license, or a license exception, authorizing exports of such crude oil, subject to appropriate documentation requirements, and consistent with the following conditions:

--tankers exporting ANS exports must use the same route that they do for shipments to Hawaii until they reach a point 300 miles due south of Cape Hinchinbrook Light and then turn toward Asian destinations. After reaching that point, tankers in the ANS oil trade must remain outside of the 200 nautical-miles Exclusive Economic Zone of the United States as defined in the Fisheries Conservation and Management Act (16 U.S.C. 1811). This condition also applies to tankers returning from foreign ports to Valdez, Alaska. Exceptions can be made at the discretion of the vessel master only to ensure the safety of the vessel:

--that export tankers be equipped with satellite-based communications systems that will enable the Coast Guard independently to determine their location. The Coast Guard will conduct appropriate monitoring of the tankers, a measure that will ensure compliance with the 200-mile condition, and help the Coast Guard respond quickly to any emergencies:

--the owner or operator of an Alaskan North Slope crude oil export tankship shall maintain a Critical Area Inspection Plan for each tankship in the trade in accordance with the U.S. Coast Guard's Navigation and Inspection Circular No. 15-91 as amended, which shall include an annual internal survey of the vessel's cargo block tanks; and

--the owner or operator of an Alaskan North Slope crude oil export tankship shall adopt a mandatory program of deep water ballast exchange (i.e., in 2,000 meters water depth). Exceptions can be made at the discretion of the captain only in order to ensure the safety of the vessel. Recordkeeping subject to Coast Guard audit will be required as part of this regime.

The Secretary of Commerce is authorized and directed to inform the appropriate committees of the Congress of this determination and to publish it in the Federal Register.

William J. Clinton

Notes of Decisions (41)

Footnotes

1 So in original. Probably should be "National Environmental Policy Act of 1969 (Public Law 91-190; 42 U.S.C. 4332(2)(C))".

2 Now, 50 U.S.C.A. § 4601 et seq.

30 U.S.C.A. § 185, 30 USCA § 185

Current through P.L. 116-158.

End of Document

PART 1500—PURPOSE, POLICY, AND MANDATE

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ''action-forcing'' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act)

except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).
(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).
(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).
(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).
(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).
(f) Preparing environmental impact statements early in the process (§ 1502.5).
(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).
(i) Combining environmental documents with other documents (§ 1506.4).
(j) Using accelerated procedures for proposals for legislation (§ 1506.8).
(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.
(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase ''to the fullest extent possible'' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:
(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.
(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.
(c) Providing for the swift and fair resolution of lead agency disputes.
(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.
(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed

action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by §1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the

Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under §1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in §1502.18(d) and unchanged statements as provided in §1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under §1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in §1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is ''unsatisfactory from the standpoint of public health or welfare or environmental quality,'' section 309 directs that the matter be referred to the Council (hereafter ''environmental referrals'').

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews

must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered

not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of

a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the ''detailed statement'' required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a

rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

(a) Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252–A, Room 7220, 1200 Pennsylvania Ave., NW., Washington, DC 20460. This address is for deliveries by US Postal Service (including USPS Express Mail).

(b) For deliveries in-person or by commercial express mail services, including Federal Express or UPS, the correct address is: US Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Room 7220, 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

(c) Statements shall be filed with the EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

[70 FR 41148, July 18, 2005]

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see §1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by §1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as ''NEPA.''

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

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EDITORIAL NOTE: This listing is provided for information purposes only. It is compiled and kept up-to-date by the Council on Environmental Quality, and is revised through July 1, 2019.

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