IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor.	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases Nos. 1:16-cv-01796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS OF ENGINEERS'
REPLY BRIEF REGARDING REMEDY

As the Corps established in its opening brief, remand without vacatur of the challenged decisions is appropriate under both prongs of *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). Plaintiffs Standing Rock and Cheyenne River Sioux Tribes' response falls far short of establishing otherwise. Remand without vacatur remains appropriate under *Allied-Signal's* first prong because there is a serious possibility that the Corps will reaffirm its original conclusions based in part on its conclusion that the pipeline segment under Lake Oahe is highly unlikely to spill into the lake. Moreover, Plaintiffs largely fail to address, much less rebut, the Corps' argument that vacatur is inappropriate under *Allied-Signal's* second prong because vacatur could actually increase the risk of an oil spill if oil that would otherwise be transported in the pipeline was instead transported by rail. This Court should therefore remand the challenged decisions to the Corps without vacatur.

A. There is a serious possibility that the Corps will be able to substantiate its prior decisions on remand.

There is a serious possibility that the Corps will substantiate its prior decisions, in part because the risk that any oil will spill into Lake Oahe is low. Corps' Br. Regarding Remedy at 5-9 (ECF No. 258) ("Corps' Br.") (citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 U.S. Dist. LEXIS 91297 at *47 (D.D.C. June 14, 2017) ("*Standing Rock IV*") ("the Court cannot agree . . . that the Corps did not adequately consider or explain its conclusion that the risk of an oil spill is low.")). This foundational conclusion, along with the Court's conclusion that the Corps "largely complied with NEPA" and rejection of the majority of Plaintiffs' challenges, militates in favor of finding that the limited deficiencies in the Corps' analysis were not serious. *Id.*

Plaintiffs' response is based upon the premise that vacatur is all but mandatory in NEPA cases. Br. of Standing Rock and Cheyenne River Regarding Remedy at 2-17 (ECF No. 272)

("Pls.' Br."). Plaintiffs are simply incorrect. *E.g. Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 59 (D.D.C. 2014) (no vacatur in case involving violations of several statutes, including NEPA); *Conservation Cong. v. USFS*, 2017 U.S. Dist. LEXIS 82440 at *2-4 (E.D. Cal. May 26, 2017) (no vacatur in case with "serious error" where "[o]n the whole, the Court found that USFS complied with its NEPA obligations; Plaintiff lost its Motion for Summary Judgment on the majority of its claims."); *Pac. Rivers Council v. USFS*, 942 F. Supp. 2d 1014, 1018-1023 (E.D. Cal. 2013) (no vacatur where "relatively minor NEPA error . . . would have extremely disruptive consequences[.]"); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) ("A curable NEPA defect can be addressed absent vacatur if neither *Allied-Signal* factor has been established."). *See also Ctr. For Biological Diversity v. EPA*, 861 F.3d 174 (D.C. Cir. 2017) (no vacatur in case of Federal Insecticide, Fungicide and Rodenticide Act violation); *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997) (no vacatur in case of Clean Air Act violation). *Allied-Signal* has been applied in numerous cases involving environmental analysis, including NEPA cases, and should be applied here.

Plaintiffs' assertion that remand without vacatur is inappropriate here because it is not discussed in many NEPA cases, Pls.' Br. at 6-10, misses the mark. Plaintiffs cite cases that address prospective application of rules or future actions. *See* Corps' Br. at 11-12 (establishing that this is the uncommon case where vacatur would be more disruptive because a project is already constructed), *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 32 (D.D.C. 2000) (vacating permits where casinos were "proposed to be built"). It is unsurprising that the courts do not address remand without vacatur in cases where the vacatur would not cause

significant disruption. To be clear, *Allied-Signal* can and should be applied in Administrative Procedure Act challenges to environmental analysis, including NEPA cases.[1]

Plaintiffs' contention, Pls.' Br. at 8, 12-14, that vacatur is necessary in NEPA cases to "satisfy NEPA's goals" is neither part of the *Allied-Signal* test nor supported by the cases Plaintiffs cite. The D.C. Circuit stayed the decision Plaintiffs principally rely upon, *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C. 2016). Order, *Fitzgerald v. Fed. Transit Admin.*, No. 17-5132 (D.C. Cir. July 19, 2017) (reinstating record of decision pending appeal for METRO's purple line) (Ex. 1).[2] Plaintiffs also misapply *Sierra Club v. Van Antwerp*, which (1) did not vacate permitting for completed construction, (2) allowed construction of a road to proceed, and (3) vacated permitting that related only to future development. 719 F. Supp. 2d 77 (D.D.C. 2010). And the single case Plaintiffs cite that addresses a pipeline is readily distinguishable. Pls.' Br.at 12-13 (citing *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006) (shutting down pipeline pending completion of an EA)). First, the court did not mention, much less apply, the D.C. Circuit's *Allied-Signal* test.

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[1] The Court should likewise disregard the Amici Curiae Brief of Law Professors and Practitioners in Support of Standing Rock on Vacatur, ECF No. 269-1, because it fails to cite, much less address, *Allied-Signal*. The Amici Curiae Brief of the Lakota People's Law Office ("LPLO") should also be disregarded. ECF No. 271-1. The LPLO brief discusses issues—the legality of the Corps' decision not to prepare an EIS, framed in the context of President Trump's January 24th memorandum—that are irrelevant to remedy analysis and which this Court already considered. *See* Mem. Op., ECF No. 239 at 55-59. Additionally, the LPLO brief seeks an order directing the Corps' remand process. ECF No. 271-1 at 8-9. Such an order is beyond this Court's jurisdiction. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

[2] Another court criticized *Friends of the Capital Crescent Trail* for employing the "legal chestnut that 'vacating a rule or action promulgated in violation of NEPA is the standard remedy.'" *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, 2016 U.S. Dist. LEXIS 134134, *41-42 n.16, (C.D. Cal. Aug. 12, 2016), *aff'd*, 2017 U.S. App. LEXIS 14591 (9th Cir. Aug. 8, 2017). And Plaintiffs' reliance on another vacated case, *Dine Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation and Enf't*, 2015 WL 1593995 (D. Colo., Apr. 6, 2015), Pls.' Br. at 13, is similarly misplaced. *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enf't*, 643 F. App'x 799 (10th Cir. 2016) (vacating April 6, 2015 order).

Second, in contrast to the limited issues remanded to the Corps in this case, that court found that the agency violated NEPA, the ESA, and the NHPA. *See Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1147-48 (D. Mont. 2004) ("It is hard to imagine a more blatant example of an agency's failure to . . . include citizens in the decision making process."). In short, Plaintiffs identify no basis for disregarding the D.C. Circuit's *Allied-Signal* framework in this case.

Perhaps most importantly, Plaintiffs acknowledge a series of cases standing for the principle that *Allied-Signal* should be applied to advance public safety. Pls.' Br. at 4-5. As discussed below, Plaintiffs do not seriously contest that it is generally safer to transport oil by pipeline than by rail. Plaintiffs' citation to cases analyzing risks of interbasin transfer of invasive species or importing spent nuclear fuel, *id*. at 8-9, are unavailing because those cases do not raise countervailing public safety concerns. *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010); *Sierra Club v. Watkins*, 808 F. Supp. 852, 875-76 (D.D.C. 1991). Here, as the Corps established in its opening brief, Corps' Br. at 13**,** vacatur could increase spill risks by causing more oil to be transported via rail.[3] This case is therefore squarely within the law rejecting vacatur where it would increase risks to the public.

Plaintiffs also offers little in response to the Corps' argument that there is a serious possibility that the Corps will reasonably confirm its original conclusions after remand. Plaintiffs do not challenge the fact that the Court found in the Corps' favor on the vast majority of the issues before it and specifically held that the Corps largely complied with NEPA. *Standing Rock IV*, 2017 U.S. Dist. LEXIS 91297 at *100. This, standing alone, can be sufficient

[3] The Corps noted findings in the EA regarding rail safety concerns. Corps' Br. at 12-13. As the Corps previously noted, the consequences of vacatur, while uncertain, would be disruptive. *Id.* at 14.

to satisfy *Allied-Signal*'s first prong even if the Corps made a "serious error" in its NEPA analysis. *See Conservation Cong.*, 2017 U.S. Dist. LEXIS 82440 at *2-4.

Moreover, Plaintiffs do not challenge the Corps' well-established position that high-volume spills are rare and that the typical cause of large-diameter pipeline leaks – construction accidents – are unlikely to impact a pipeline buried 100 feet under Lake Oahe's bed. *See* Corps' Br. at 8-9. Plaintiffs' effort to address spill risks is based on declarations which focus on the possible effects of a low-possibility spill, rather than the likelihood that such a spill will occur. *See* Pls.' Br. at 18-19; Second Dec. of R. Kuprewicz, ECF No. 272-1; Third Dec. of R. Kuprewicz, ECF No. 272-2. Plaintiffs' arguments regarding the likelihood of any spill are based on the flawed suggestion that the pipeline is more dangerous than shipping crude by rail because of landslide risk at Lake Oahe. Mr. Kuprewicz admits that the Corps provided "additional discussion of landslide risks" but asserts that this analysis did not address the relevant area near Lake Oahe. ECF No. 272-1 ¶ 17. The safety risk posed by landslides is a merits issue that was resolved in the Corps' favor on summary judgment. *Standing Rock IV*, 2017 U.S. Dist. LEXIS 91297 at *41-47. Regardless, Mr. Kuprewicz is incorrect. Geotechnical borings indicated that the "subsurface conditions are not conducive to landslide activity in areas with . . . gradients less than 30 percent" on Lake Oahe's west side. USACE_ESMT000938 (also noting that no such gradients exceed 30 percent) (Ex. 2). Plaintiffs offer nothing to suggest that the Court erred in concluding that "the risk of a spill was low and was further mitigated by the easement conditions." *Standing Rock IV*, 2017 U.S. Dist. LEXIS 91297 at *90.[4] And while the Corps will

[4] Plaintiffs' suggestion, Pls.' Br. at 29, that the risks of transporting crude oil by rail are minimal because Plaintiffs are "unaware of an incident adversely affecting their Treaty area or water from crude rail transportation in recent decades" is unavailing. Just as there have been no adverse affects from rail transport, the Corps is unaware of a landslide impacting the Northern

consider the potential impacts of a low-possibility spill on remand, Plaintiffs fall far short of establishing that there is not a serious possibility the Corps will confirm its original conclusions on remand given the low spill risk. *See New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012).

Plaintiffs' arguments regarding treaty rights and environmental justice are further undermined by Plaintiffs' own declarations, which state that vacatur would cause more crude oil to be transported by rail and raise the possibility of increased transportation by rail over Lake Oahe at Mobridge, South Dakota. Dec. of I. Goodman ¶¶ 103-04 (ECF No. 272-5) ("Goodman Dec."). As Mr. Goodman previously pointed out, transporting crude oil by rail can result in serious accidents "in a small town by a lake, thus proximate to people, water and economic activity." Analysis of the Potential Costs of Accidents/Spills Related to Crude by Rail at 9 (Nov. 8, 2013) ("2013 Goodman Report") (Ex. 3). And the rail line at issue crosses Lake Oahe just upriver of the new Standing Rock Sioux Tribe water intakes and the Cheyenne River reservation. *See* Maps from Standing Rock and Dakota Access USACE_ESMT001368-69 (Ex. 4). It is therefore possible that shipping crude oil under Lake Oahe by pipeline will decrease the risk of a spill impacting Plaintiffs' water intakes.

In sum, the Court's rejection of the majority of Plaintiffs' claims and affirmance of the Court's conclusion that there is a low risk that oil will spill into Lake Oahe raise the serious possibility that the Corps will reaffirm its original conclusions. Vacatur is inappropriate because the Corps has satisfied *Allied-Signal*'s first prong.

Border Pipeline that is co-located with the Lake Oahe easement. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 14, 23 (D.D.C. 2016) ("*Standing Rock I*").

B. The disruptive consequences of vacatur would be significant.

As the Corps established in its opening brief, vacatur is inappropriate under *Allied-Signal's* second prong because, if pipeline operations were ultimately shut down, it would increase spill risks and impose unique disruptions because the challenged construction is complete. Corps' Br. at 11-15. And as discussed above, the low risk that the Dakota Access pipeline will spill oil into Lake Oahe means that Plaintiffs will likely suffer no disruption or harm during remand. Plaintiffs largely ignore, and offer little to rebut, these arguments.

Plaintiffs unsurprisingly do not dispute that an increase in oil spill risk is sufficient to satisfy *Allied-Signal*'s second factor, which looks to the disruptive consequences of vacatur. *See Allied-Signal*, 988 F.2d at 150; Pls.' Br. at 28-29. Nor do Plaintiffs offer any credible challenge to the conclusions that (1) vacatur would likely lead to more crude oil being transported via rail and (2) transporting crude oil via rail is generally more dangerous than transporting it via pipeline. In short, vacatur would increase the risk of a potentially-serious crude oil spill. Indeed, Plaintiffs' single-paragraph addressing the potential disruptive consequences of rail accidents concedes that "transporting Bakken crude by rail presents risks" and "shipping crude by rail involves a greater number of incidents," Pls.' Br. at 29. And Plaintiffs' declarations concede that vacatur would likely shift crude oil transportation back to rail. Goodman Dec. ¶¶ 60, 72. The remainder of Plaintiffs' one-paragraph response suggesting that pipelines pose a greater risk of spill than rail is unsupported by Plaintiffs' declarations and conflicts with their prior statements.

In particular, Plaintiffs fail to support their contention that "pipelines have more serious 'worst case incidents'" than rail. Pls.' Br. at 29. The declaration Plaintiffs rely upon makes no such claim, instead stating that "comparison of the risks associated with pipelines and those associated with rail is nuanced." Goodman Dec. ¶ 89. Notably, Mr. Goodman's previous

research for a PHMSA rulemaking relating to railroad tank car safety highlighted the significance of rail accidents and concluded that "[t]he costs of crude by rail (CBR) accidents/spills can be very large. . . . [A] major . . . train accident/spill could cost $1 billion or more for a single event." 2013 Goodman Report at 1.[5] And while Mr. Goodman acknowledges that the Lac-Mègantic rail accident killed 47 people and that "a major crude by rail accident in a metropolitan area could be even more damaging," Goodman Dec., Technical Appendix at 35, such loss of life is notably absent from Plaintiffs' discussion of potential worst-case spills. Indeed, Plaintiffs offer no basis for concluding that any pipeline spill, particularly the type of slow leak they assert presents a unique risk at Lake Oahe, Pls.' Br. at 29, imposes a comparable risk of highly disruptive, fatal accidents.

Plaintiffs' remaining efforts to suggest that transporting crude oil by rail is safer than transporting it by pipeline fare no better. Plaintiffs' suggestion that rail transportation is safer because rail lines are less proximate to people, water and economic activity falls far short of supporting vacatur. Plaintiffs' current representations about proximity to people, water and economic activity is at best difficult to square with (1) the fact that a rail line goes through Mobridge, South Dakota and (2) Plaintiffs' proposal to route the pipeline across the Missouri River at Bismarck. *See Standing Rock IV*, 2017 U.S. Dist. LEXIS 91297 at *66-71. And Mr.

[5] Mr. Goodman's 2013 report analyzing crude by rail transportation argued for greater regulation because "the regulation of transport of hazardous materials by rail . . . is in many ways both weaker and more fragmented than the regulation of liquid pipelines." 2013 Goodman Report at 14. Mr. Goodman's 2013 report was incorporated into comments submitted on behalf of, among other organizations, Earthjustice. Comments of the Natural Res. Def. Council, Sierra Club and Oil Change Int'l re: Hazardous Materials: Rail Petitions and Recommendations to Improve Safety of Railroad Tank Car Transp. (Dec. 5, 2013) (Ex. 5). Those comments highlighted the risks posed by transporting crude oil by rail, including an increase in incidents relating to "corrosion of the internal surface of" railroad cars, *id*. at 2, the "growing risks" of crude by rail accidents, *id*. at 7, the "devastating consequences" of crude by rail accidents, *id*. at 8-10, the security risk posed by crude oil tank cars, *id*. at 10.

Kuprewicz's conclusions that pipelines are safest once they have been in operation for "some time" falls far short of establishing that a pipeline that has been operating for two months without serious incident imposes greater risk than transporting crude by rail.[6] In sum, Plaintiffs' limited critique offers nothing to undermine the Corps' conclusion that transporting crude oil by pipeline is safer than transporting it by rail.[7]

And as the Corps established in its opening brief, vacating the Lake Oahe easement would have the disruptive consequence of likely placing Dakota Access in violation of the Mineral Leasing Act months after construction was completed and operations commenced. Corps' Br. at 14. Plaintiffs dismiss this argument in a footnote suggesting that the remedy here is subject to the United States' enforcement discretion. Pls.' Br. at 30 n.14.[8] Plaintiffs notably do not suggest that the pipeline would be in compliance with the Mineral Leasing Act. Put another way, Plaintiffs do not seriously contest that vacating the Lake Oahe easement months after Plaintiffs' unsuccessful emergency motions would have disruptive consequences.

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[6] The 1996 study cited in Paragraphs 9 and 10 of Mr. Kuprewicz's third declaration states that "there will be a very low failure rate for a long period of time for a well-installed pipeline." New Jersey Inst. of Tech., Final Report - Pipeline Indus. Comparison of U.S. with Foreign Pipeline Land Use and Siting Standards, Maint., Rehab. and Retrofitting Policies and Practices, Apr. 1996, p. 34 (available at: http://pstrust.org/docs/usdot_doc4.pdf).

[7] *See also*, PHMSA, General Pipeline FAQs, available at https://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=a62924cc45ea4110VgnVCM1000009ed07898RCRD&vgnextchannel=f7280665b91ac010VgnVCM1000008049a8c0RCRD&vgnextfmt=print. ("Pipeline systems are the safest means to move these products").

[8] This suggestion is difficult to harmonize with the remainder of Plaintiffs' brief and raises the question of what consequences Plaintiffs believe vacatur would entail. As Plaintiffs appear to realize, they have not even attempted to frame their remedy as a request for injunctive relief. Pls.' Br. at 3 (distinguishing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). Regardless of whether injunctive relief against Dakota Access is appropriate here, Plaintiffs' acknowledgement of enforcement discretion highlights the fact that vacating an easement for an already-constructed and operating pipeline segment would have disruptive consequences.

C. The Court should not prejudge or constrain the Corps' remand process.

Plaintiffs' repeated attacks on the integrity of the Corps' remand process are unwarranted and provide no basis for either vacatur or an injunction. Plaintiffs' brief repeatedly mischaracterizes the Corps' analysis of the D.C. Circuit's *Allied-Signal* test. That test requires the court to analyze whether there is a "serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal, Inc.*, 988 F.2d at 151. As discussed above, such a serious possibility exists. The Corps' brief reasonably analyzed the *Allied-Signal* test. Its honest assessment of the possibility that the Corps will reaffirm its original conclusions does not, as Plaintiffs claim, mean that "the remand process will invariably support the same outcome." Pls.' Br. at 14. *See id.* at 1 (claiming the Corps has made clear that it "will treat the remand as a paper exercise designed to generate additional explanation for decisions already made"). To the contrary, the Corps addressed timely-raised NHPA concerns and repeatedly defended its administrative record from challenges by both Plaintiffs and Dakota Access in a manner that refutes Plaintiffs' unsupported attacks. *See Standing Rock I*, 205 F. Supp. 3d at 19-20.

Plaintiffs' suggestion that this Court should impose temporary injunctive relief during the remand process, Pls.' Br. at 35-40, should be denied. After generally declining to engage in discussions about easement conditions,[9] Plaintiffs now seek an injunction imposing or modifying the conditions. Plaintiffs do not even attempt to establish that such an injunction is warranted. *See id.* at 3. Regardless, the Corps could evaluate additional easement conditions on remand to the extent that such conditions are appropriate under its remand analysis.

Dated: August 17, 2017 Respectfully submitted,

[9] *See* Email from Gen. Spellmon, Corps, to Assistant Sec'y of the Army (CW) Darcy (Dec. 2, 2016) (USACE_ESMT000849) (Ex. 6); Letter from Chairman Archambault, Standing Rock, to Assistant Sec'y Darcy (Dec. 2, 2016) (USACE_ESMT000803) (Ex. 7).

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CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of August, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Matthew Marinelli
Matthew Marinelli