NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5201

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE, et al.,
Plaintiffs / Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant / Appellant.

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

FEDERAL APPELLANT'S OPENING BRIEF
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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

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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

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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

State of Nebraska

State of North Dakota

State of Ohio

State of South Dakota

State of Texas

State of Utah

State of West Virginia

State of Wyoming

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University of New Mexico School of Law Natural Resources and Environmental Law Clinic

Russell Vazquez

Wampanoag Tribe of Gay Head (Aquinnah)

Western Dakota Energy Association

Kathy Willcuts

Wastewin Young

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. 20-5197.

/s/ James A. Maysonett
JAMES A. MAYSONETT

Counsel for Federal Appellants

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TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

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GLOSSARY

APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
Council	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
HDD	Horizontal Directional Drilling
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Materials Safety Administration
Tribes	Plaintiffs Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes

INTRODUCTION

The United States Army Corps of Engineers (the "Corps") has spent years weighing the possible environmental effects of the construction and operation of the Dakota Access pipeline beneath Lake Oahe. In particular, the Corps has used extensive oil spill modeling to analyze how a spill might affect the drinking water, hunting and fishing rights, and cultural practices of the plaintiffs Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes (the "Tribes"). The Corps found that the risk of an oil spill is low and that its effects would be limited—not only because the pipeline was built with an array of safety features, but also because it is buried deep beneath the lake bed, such that 92 feet of clay create a physical barrier between the pipeline and Lake Oahe's waters. Based on that, and the rest of the analysis in its environmental assessment ("EA"), the Corps concluded that the effects of its action here are not "significant" and do not require the preparation of a more detailed "environmental impact statement" ("EIS").

The Tribes oppose the pipeline. Their experts argue that a catastrophic oil spill could be larger than the Corps estimated. But they have ignored that the risks of these more extreme spills—which could result only from a "perfect storm" of malfunctions and operator errors—are not just low, but remote and speculative. And they have ignored that the pipeline is buried deep beneath the lakebed, which makes many of these scenarios not just unlikely, but physically impossible. Nevertheless, the Corps carefully reviewed the Tribes' criticisms and rationally concluded that they did not render the effects of its action "highly controversial."

For its part, the district court decided that the Corps' analysis was irrelevant: even if the Corps' conclusions were rational, the effects of its action were rendered "highly controversial" by the mere existence of "consistent and strenuous opposition" by the Tribes. This was error: the law requires the court to review the Corps' reasoned analysis, not merely whether opposition exists. Because the Corps' conclusions are rational and are supported by the administrative record, the court should have entered judgment on these claims for the Corps. The district court also erred in ordering the Corps to prepare an EIS, vacating the easement granted by the Corps, and enjoining the operation of the pipeline without making the findings required by law.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the plaintiffs' claims arose under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.

(B) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because this is an appeal from an order granting an injunction. 1 Joint Appendix ("J.A.") 138–39. This Court also has jurisdiction because the district court vacated and remanded the Corps' action, effectively rendering its judgment on the merits final because the Corps will not have an opportunity to obtain review after remand. *See Sierra Club v. USDA*, 716 F.3d 653, 656–57 (D.C. Cir. 2013); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989).

(C) The court's order enjoining the operation of the pipeline and vacating and remanding the Corps' action was entered on July 6, 2020. 1 J.A.

138–39. The Corps timely filed its notice of appeal on July 13, 2020, or seven days later. ECF No. 557 (filed July 13, 2020); *cf.* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from an order granting an injunction and a judgment rendered final by an order remanding agency action.

STATEMENT OF THE ISSUES

1. Did the Corps comply with NEPA because it analyzed the criticisms presented by the Tribes' experts and then rationally concluded that the effects of its action were not "highly controversial" or "significant"? Or was it required to prepare an EIS merely due to the Tribes' consistent and strenuous opposition? Did the district court err in ordering the Corps to prepare an EIS when it is the agency's responsibility to determine, in the first instance, whether a controversy renders the effects of its action "significant"?

2. Did the district court abuse its discretion in vacating the easement granted by the Corps?

3. Did the district court err in enjoining the operation of the pipeline without making the findings required for such injunction?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

The Dakota Access pipeline is a domestic oil pipeline. 1 J.A. 8. It crosses under Lake Oahe, an artificial reservoir in the Missouri River created by Oahe Dam, which is operated by the Corps. *Id*. Because the pipeline crosses under

federally regulated waters and Corps project lands, the pipeline's owner and operator was required to obtain permits and an easement from the Corps. 1 J.A. 9.

The Corps completed an EA pursuant to NEPA before it granted the necessary permits and easement. 3 J.A. 448–610. Based on that EA, the Corps concluded that such grants were not likely to have a significant impact on the environment and that it was not required to prepare an EIS. 3 J.A. 615–620. The pipeline was completed and began operations in 2017.

The Tribes challenged the Corps' compliance with NEPA. In 2017, the district court remanded several discrete issues to the Corps for further explanation, and the Corps completed that remand in 2018. 1 J.A. 1–2, 4. In the decision now under review, the court then held that the Tribes' experts had shown that the effects of the Corps' action are "highly controversial." 1 J.A. 130. The court vacated the easement, remanded the matter to the Corps for the preparation of an EIS, and ordered Dakota Access to shut down the pipeline. 1 J.A. 138–63. On August 5, 2020, this Court stayed that injunctive relief and ordered expedited briefing of the appeals by the Corps and Dakota Access. Order (Aug. 5, 2020).

SUMMARY OF ARGUMENT

1. The Corps complied with NEPA because it closely analyzed the effects of its action and rationally concluded that they are not "highly controversial" or "significant." In particular, the Corps assessed the risk of an oil spill at Lake Oahe and modeled the potential consequences of such a spill.

It found that the risks of a spill are low both because the pipeline has been built with state-of-the-art safety features, and because it is buried deep beneath Lake Oahe, such that the clay between the pipeline and the lake create a physical barrier that would prevent oil from reaching the lake even in the unlikely event of a spill.

The opposition of the Tribes' experts, by itself, is not sufficient to show that the effects of the Corps' action are "highly controversial." As documented by the record, the Corps analyzed their criticisms and nonetheless rationally concluded that the effects of its action are not "highly controversial." Perhaps most significantly, while the Tribes and the district court both focused on the potential consequences of a catastrophic oil spill, they failed to discount those consequences by the very low risk that such a spill will ever occur.

2. The district court erred in vacating the easement granted by the Corps. Even if the court's judgment on these NEPA claims were correct, the deficiencies identified by the court in the Corps' analysis are not serious and vacatur could have profoundly disruptive consequences.

3. The district court erred in enjoining the operation of the pipeline. The court did not make the findings necessary to support such an injunction.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011). The Corps' compliance with NEPA is reviewed under the Administrative Procedure Act ("APA") and its deferential standard of review of agency action.

Sierra Club. v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017). This Court reviews the district court's vacatur of agency action for abuse of discretion. *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1190 (D.C. Cir. 2018). This Court reviews a district court's grant of an injunction under the traditional four-factor test for abuse of discretion, but reviews the court's identification of the proper standard for injunctive relief for error. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–58 (2010).

ARGUMENT

I. The Corps complied with NEPA.

A. The Corps thoroughly analyzed the effects of its action and the Tribes' criticisms.

For the purposes of NEPA, the "major federal action" at issue here is the granting of a right-of-way under the Mineral Leasing Act, 30 U.S.C. § 185. 8 J.A. 1919. The Corps reviewed the potential effects of that action before it granted the easement that allows the pipeline to cross Lake Oahe. 3 J.A. 448–610. On remand, the Corps extended that analysis to incorporate an even more detailed risk assessment and to respond directly to the Tribes' criticisms. 8 J.A. 1818–2097. Both initially and after remand, the Corps concluded that the effects of its action are not significant and not highly controversial. 3 J.A. 615–20; 8 J.A. 1818–19. The Corps' conclusions are rational and are supported by the record.

The Corps analyzed a broad range of potential effects, but in this brief, we focus on the risk and consequences of an oil spill at Lake Oahe because

that issue dominates both the decision under appeal and the Tribes' criticisms. 1 J.A. 113–30; 8 J.A. 1885. In that respect, the Corps found:

The risk of a spill is low. This pipeline has been built to meet or exceed all industry and regulatory standards. 3 J.A. 540. It has many safety features designed to minimize the risk of spills. The walls of the pipeline are thicker than usual under Lake Oahe, coated in "fusion bond epoxy," and shielded from stray electrical currents by an "active cathodic protection" system to prevent external corrosion, 3 J.A. 494, 544; 8 J.A. 1835.

The pipeline is equipped with an array of sensors that report pipeline conditions every six seconds, allowing a real-time model of pipeline flow to be updated every thirty seconds. 8 J.A. 2022. That data is used by a "computational pipeline monitoring" ("CPM") program to detect leaks in the pipeline: it can sense a rupture in the pipeline within one to three minutes, and small leaks (as small as 1% of the pipeline's flow rate) within one hour. 3 J.A. 494, 542. There are remote-controlled, motor-operated valves on both sides of Lake Oahe that allow the pipeline to be closed quickly if a leak is detected. 3 J.A. 546. The pipeline is inspected for corrosion every five years using "in-line inspection" tools. 3 J.A. 495, 544; 8 J.A. 2024. The operator is required to conduct aerial surveillance at least 26 times each year. 3 J.A. 495. The operator has a detailed plan, approved by the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA"), to respond to any spills. 3 J.A. 546. These safety features are not optional: the Corps mandated their use by including them as conditions on the right-of-way. 3 J.A. 661–65.

The pipeline is, in total, nearly 1,200 miles long; about a mile of it runs beneath Lake Oahe. 3 J.A. 469. One of the pipeline's most important safety features is the fact that it was buried 92 feet below the bed of Lake Oahe using "horizontal directional drilling" ("HDD") technology, along the same route but below an existing natural gas pipeline. 3 J.A. 494, 469. If the pipeline somehow spilled oil at those depths, 92 feet of clay and "low permeability alluvium and glacial deposits" (known as "overburden") would form a physical barrier separating the spill from the lake. 8 J.A. 1830, 1839. This depth was chosen after a geotechnical survey to ensure that the overburden will act as a barrier. 8 J.A. 2024. The weight and pressure of that material will "restrict the volume of oil spilled" and "virtually eliminate" the risk that a spill can reach the waters of Lake Oahe, 8 J.A. 1830. If the pipeline did leak, that oil would not enter the lake, but would likely travel up the pipeline's borehole and spill onto the land where the pipeline enters the ground, either [redacted] from the western shore or [redacted] from the eastern shore. *Id.*; 10 J.A. 2502.

The Corps required the operator to prepare detailed risk assessments of the pipeline's Lake Oahe crossing. 3 J.A. 540–46; 10 J.A. 2544–601 (threat assessment report); 10 J.A. 2602–41 (Lake Oahe crossing risk analysis); 11 J.A. 2642–767 (risk assessment algorithms). That assessment rated the overall weighted risk of an oil spill at Lake Oahe at 1.27 on a 100.00-point scale—in other words, a very low risk. 10 J.A. 2607. Importantly, this does not mean that the risk of an oil spill at Lake Oahe is 1.27%. It is not a probability, but rather an index score that shows that the relative risk of an oil spill at this project is

very low. And this risk assessment *overestimates* that risk because it did not take into account the fact that the pipeline is buried beneath the lakebed. 10 J.A. 2611, 2620.[1]

Based on all of these factors, the Corps concluded that the risk that this pipeline would cause an oil spill that would have significant impacts on Lake Oahe is "low," particularly "in light of engineering and design considerations and HDD depths below Lake Oahe." 8 J.A. 1831; 3 J.A. 544–46. The pipeline has been operating safely for three years, which confirms the Corps' conclusions. The district court accepted that the "possibility of a future spill . . . is low," 1 J.A. 136, but nonetheless failed to take that low risk into account in its decision.

The consequences of a spill—even a large spill—would be temporary and limited. Despite the low risk, the Corps nonetheless undertook a detailed analysis of the possible consequences of an oil spill at Lake Oahe. The Corps relied on models that simulated not only small and typical spills, but also the very unlikely event of a catastrophic release of the equivalent of [redacted] of oil as a result of a pipeline rupture. 8 J.A. 1836–39; *see also* 9 J.A. 2227–494. These models were prepared by the operator and validated by the experts at the Corps' Engineering Research and Development Center. 8 J.A. 1831. The models are aggressively conservative: some modelled scenarios, for example,

[1] Similarly, a PHMSA-approved spill model concluded that the risk of an oil spill at Lake Oahe is very low, ranking it between two and three on a ten-point scale. 8 J.A. 1829–30.

ignore the fact that the pipeline is actually buried deep under the lake and simply assume that the pipeline would release its oil directly into the lake. 8 J.A. 1839. The models also assume that no one would attempt to respond to the spill for ten days. 8 J.A. 1840.

The models show that the consequences of even a catastrophic spill would be temporary and limited. For example, the spill would not be likely to contaminate drinking water intakes. 8 J.A. 1879–82, 1908–10. Even ten days after a catastrophic and unmitigated spill, the oil would still be at least [redacted] upstream from the Standing Rock Sioux Tribe's water intake and about [redacted] upstream of the Cheyenne River Sioux Tribe's water intake. 8 J.A. 1877. Moreover, in the event of a catastrophic spill, the operator would be required to take steps to protect these water intakes within hours and long before ten days had elapsed. 3 J.A. 490–91, 495. If the operator failed to do so, the federal government is authorized to take the steps necessary to protect the Tribes (and to bill the operator for response costs). *See, e.g.,* 33 U.S.C. § 1321. And even if the spill were somehow allowed to continue unmitigated, the models show that by the time the oil reached the Tribes' intakes, the levels of contamination would be diluted below regulatory thresholds. 8 J.A. 1910.

The models also show that, while a catastrophic oil spill would likely cause "a localized fish kill," the effects would be limited to the immediate vicinity of the spill and would in most cases not exceed a mortality rate of 10%. 8 J.A. 1853, 1860. The Corps recognized the "unique values" that the Tribes place on traditional fishing activities, but it found that the effects of its

action on fishing would not be significant because "the risk of an incident is low and any impacts to hunting and fishing resources will be of limited scope and duration." 8 J.A. 1860–61, 1905–07.

Similarly, the Tribes identified cultural practices that could be affected by an oil spill in Lake Oahe. 8 J.A. 1900. The Corps took those practices seriously, recognizing that any visible sheen of oil on the surface of the water could harm the Tribes' cultural and spiritual values. 8 J.A. 1878, 1901. Nonetheless, the models show that even a catastrophic spill would deter these practices only on a "limited scale" and for just "a few days to a couple of weeks," 8 J.A. 1878, 1885–86, 1904, effects that the Corps found were not significant, given the low risk of a spill.

The Tribes' criticisms do not show that the effects of this action are "highly controversial." On remand, the Corps reviewed and considered 339 comments submitted by the Tribes. 8 J.A. 1819, 1927. The Corps responded to all of the Tribes' comments, but it identified only 28 as providing the kind of criticism that could conceivably show that the effects of this action are "highly controversial." 8 J.A. 1927. The Corps responded to those 28 comments in greater detail. 8 J.A. 1927–57.

Ultimately, the Corps concluded that none of the Tribes' comments showed that "a substantial dispute exists as to the size, nature, or effect of the major federal action," and thus the effects of the Corps' action are not "highly controversial." 8 J.A. 1927, 1956–57. Although the Tribes had, for example, criticized the oil spill modeling used by the Corps, none of the Tribes provided

the results of their own preferred spill models for the Corps to consider. 8 J.A. 1831. And while "there may be other methods for predicting oil spill effects," the Corps found that "it is not likely that employing further methods will result in substantively different views or information that is more comprehensive than what the Corps has considered here." 8 J.A. 1956–57.

The effects of the Corps' action are not "significant." Because the risk of an oil spill is low, because the consequences of even a catastrophic spill would be limited and temporary, and because the effects of this action are not "highly controversial," the Corps concluded—both originally and on remand—that the effects of its action here are not significant and do not require an EIS. 3 J.A. 615–20; 8 J.A. 1818–19. The "critical factor" in that conclusion—and a factor ignored by the district court—is the "extremely low risk of a spill reaching the waters of Lake Oahe." 8 J.A. 1899. The Corps has not authorized the discharge of oil directly into Lake Oahe; it has simply granted a right-of-way authorizing the operation of a pipeline, which creates a small risk that oil will be spilled into the lake. In weighing the "significance" of its action, the Corps was required to weigh that risk, that is, to "look at both the probabilities of potential harmful events and the consequences if those events come to pass." *New York v. NRC*, 681 F.3d 471, 478 (D.C. Cir. 2012); *see also, e.g., Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989). The mere fact that there is some risk of an oil spill "does not, by itself, mandate an EIS." *New York*, 681 F.3d at 482. Instead, the Corps had to weigh the consequences of a spill "in proportion to the likelihood of its occurrence." *Id*. Put another

way, a rational assessment of overall risk "discount[s]" the consequences of an oil spill "by the improbability of [its] occurrence." *Id*. at 479.

Even though the Corps found that the effects of a catastrophic oil spill at Lake Oahe would be "high," 3 J.A. 546, it nevertheless made a rational finding of no significant impact because the risk of that spill "is so low as to be 'remote and speculative' " and "the combination of probability and harm is sufficiently minimal." *New York*, 681 F.3d at 478–79; *see also id.* at 482.

B. The district court erred in granting summary judgment to the Tribes on these NEPA claims.

In its earlier decisions, the district court "largely upheld" the Corps' NEPA analysis, but remanded certain specific issues back to the Corps for further explanation. 1 J.A. 102. But after the Corps completed that remand, this Court decided *National Parks Conservation Ass'n v. Semonite,* 916 F.3d 1075 (D.C. Cir.)*, amended on reh'g,* 925 F.3d 500 (D.C. Cir. 2019) (*"Semonite"*), and the district court concluded that *Semonite* had announced a sea change in the law. *See* 1 J.A. 109. The court decided that the question was no longer whether the Corps had rationally concluded that the effects of its actions were not "highly controversial"; instead, the question was whether the Corps had "succeeded" in resolving its controversy with the Tribes. 1 J.A. 110. Based on this misreading of *Semonite*, the court held that the Corps' extensive review was irrelevant and the effects of its action were rendered "highly controversial" merely by "the *existence* of 'consistent and strenuous opposition'" by the Tribes' experts. 1 J.A. 112 (emphasis in original).

Despite having held that the Corps' analysis was irrelevant to the controversy issue, the district court nonetheless deemed it "prudent" to review that analysis. *Id.* Throughout that review, the district court judged the Corps' conclusions not under the "arbitrary and capricious" standard, but instead by whether the Corps had succeeded "in resolving the scientific controversy." *Id.* at 112–13.

The district court applied the wrong legal standard. It ruled against the Corps even though the record shows that the Corps analyzed the Tribes' criticisms and rationally concluded that the effects of its action are not "highly controversial" or significant. The court ignored the fact that the risk of any oil spill reaching the waters of Lake Oahe is extremely low—a critical factor in the Corps' analysis—and that the consequences of such a spill must be "discount[ed]" "by the improbability of [its] occurrence." *New York*, 681 F.3d at 479. The court also assumed, without explanation, that because it had found that the effects of the action are "highly controversial," they must also be "significant," even though the degree of controversy is only one of ten factors that the Corps weighs in context to make a finding of significance. We discuss each of the district court's errors in detail below.

1. The district court applied the wrong legal standard.

The NEPA regulations that apply here advise agencies to consider the "degree to which the effects [of the agency's action] . . . are likely to be highly

controversial." 40 C.F.R. § 1508.27(b)(4).[2] "Highly controversial" is a term of art under these regulations that refers to "a substantial dispute" about "the size, nature, or effect of the major federal action." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). Controversy does not refer to the "existence of opposition to a use." *Id.* It is not "whether or how passionately people oppose" a project, but rather a dispute "over the size or effect of the action itself." *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017).

This factor does not create a "heckler's veto." *See, e.g., North Carolina v. FCC*, 957 F.2d 1125, 1133–34 (4th Cir. 1992). To be "highly controversial," something more is required "besides the fact that some people may be highly agitated and be willing to go to court over the matter." *Fund for Animals v. Frizzell*, 530 F.2d 982, 988 n.15 (D.C. Cir. 1975); *Semonite*, 916 F.3d at 1085. Otherwise, mere "opposition"—and "not the reasoned analysis set forth in the environmental assessment"—"would determine whether an [EIS] would have to be prepared." *North Carolina*, 957 F.2d at 1133–34. Moreover, controversy alone is not enough: the effects of the action must be "highly" controversial before they trigger the obligation to prepare an EIS. *Town of Cave Creek*, 325 F.3d at 331.

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[2] The Council on Environmental Quality recently published new final NEPA regulations. 85 Fed. Reg. 43,304 (July 16, 2020). The "Effective date" of those regulations is September 14, 2020. *Id.* at 43,372. The new regulations eliminate the consideration of "controversy" because the concept is "subjective and is not dispositive of effects' significance." *Id.* at 43,322.

Finally, the degree of controversy is only one of ten factors that agencies weigh, in context, to determine whether the effects of their actions are "significant." 40 C.F.R. § 1508.27(b)(1)–(10). By itself, controversy is not necessarily dispositive of whether an EIS is required. *Town of Marshfield v. FAA,* 552 F.3d 1, 5 (1st Cir. 2008); *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1181 (10th Cir. 2012).

A court's review of the Corps' "finding of no significant impact," including the agency's conclusion that the effects of this action are not "highly controversial," is governed by the APA's "arbitrary and capricious" standard. *Semonite*, 916 F.3d at 1082. Under that standard, when "specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). The fact that the record here contains evidence "supporting a different scientific opinion does not render the agency's decision arbitrary and capricious." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1120–21 (9th Cir. 2000). Scientific disputes are "part of the everyday existence" of agencies like the Corps, and NEPA does not demand "scientific unanimity in order to support a FONSI." *Indiana Forest Alliance, Inc. v. U.S. Forest Service*, 325 F.3d 851, 861 (7th Cir. 2003).

These basic principles of administrative law have led the courts to reject the notion that "an EIS must be prepared whenever qualified experts disagree." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993). If disagreement

of this kind "were all that was necessary to mandate an EIS, the environmental assessment process would be meaningless." *Id.* An agency's "careful evaluation of the impact of its proposed action. . . and its reasoned conclusions" would all be "for naught" if a litigant could "create a controversy necessitating an EIS" "by simply filing suit and supplying an affidavit by a hired expert." *Id.* at 1335. That result would also impermissibly shift the focus of judicial review from "the reasoned analysis set forth in the environmental assessment" to the mere existence of "opposition." *North Carolina*, 957 F.2d at 1133–34. And it would give any plaintiff that could hire a sympathetic expert the "heckler's veto" that the courts have unanimously rejected. Consequently, if there is "a substantial dispute concerning the specific environmental effects of the action," then NEPA simply "places the burden on the agency to come forward with a 'well-reasoned explanation' demonstrating why" the effects of its action are not "highly controversial." *Indiana Forest Alliance*, 325 F.3d at 858 (7th Cir. 2003).

The district court failed to apply this standard. Instead, it held that the "highly controversial" factor was triggered by the mere "*existence* of 'consistent and strenuous opposition' " by the Tribes' experts. 1 J.A. 112 (emphasis in original). Moreover, the court held that the Corps' reasoning and conclusions were irrelevant in light of the Tribes' opposition. *Id.* And when the court did review the Corps' findings, it did not apply the APA's "arbitrary and capricious" standard; instead, it rejected the Corps' conclusions on the grounds that the Corps' had not "succeeded" in persuading the Tribes, a party to the dispute. *See* 1 J.A. 110.

No part of this is consistent with the law. By wholly ignoring the Corps' reasoning and by failing to apply the "arbitrary and capricious" standard, the district court violated basic principles of administrative law. By elevating the Tribes' opposition over the Corps' reasoned analysis, the court gave the Tribes the very "heckler's veto" rejected by every other court. By requiring the Corps not only to respond to the Tribes' objections, but also to "successfully resolve" them, the district court impermissibly imposed on the agency extra-statutory duties of its own creation. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553, 558 (1978); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2385–86 (2020). The district court erred because it did not determine whether the Corps rationally concluded that these disputes did not render the effects of its action "highly controversial."

This Court's decision in *Semonite* does not require otherwise. *Semonite* concluded that a project to run power line towers across the James River near historic Jamestown was "highly controversial." 916 F.3d at 1077. The project had been met by "consistent and strenuous opposition" by "highly specialized governmental agencies and organizations." *Id*. at 1080, 1085. Those criticisms, the Court found, had identified flaws in the agency's methods. *Id*. at 1083–84. In response to the criticisms, the Corps directed the project proponent to revise its "photo simulations," *id*. at 1080, 1086—efforts that *Semonite* later deemed "superficial and inadequate." *Id*. at 1081. The Corps then dismissed the controversy as "inherently subjective." *Id*. This Court ruled against the Corps, finding that the agency had "failed to make a 'convincing case' that

an EIS is unnecessary." *Id.* at 1087. Importantly, it was not the mere existence of opposition that rendered the Corps' decision in *Semonite* "arbitrary and capricious"—it was that opposition combined with the agency's failure to come forward with a "well-reasoned explanation" showing that the effects of its action were not "highly controversial." *Indiana Forest*, 325 F.3d at 858.

The district court built its new standard on a single paragraph from *Semonite*, in which this Court opined that the "question is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id.* at 1085–86. But what the Corps had to do to "succeed" in "resolving the controversy" was not to convince the Tribes and their experts, but rather to analyze the issues and reach a rational conclusion on whether a controversy existed. Controversy requires more than just people who are "willing to go to court over the matter." *Fund for Animals*, 530 F.2d at 988 n.15. The Court did not overturn that principle in *Semonite*: it simply confirmed that, on the facts presented, the Corps had not rationally concluded that the effects of its action were not "highly controversial."

The facts here are nothing like the facts in *Semonite*. As discussed in detail below, the Corps' efforts to respond to the Tribes' criticisms were not "superficial." The Corps required the operator to complete extensive new studies to address the Tribes' concerns. 8 J.A. 1836. The Corps solicited new criticism from the Tribes and their experts, and responded to those criticisms in detail. 8 J.A. 1919–27. The Corps closely analyzed these disputes and concluded that the effects of its action—given the low risk of an oil spill,

and the limited and temporary consequences of even a severe spill—were not "highly controversial" or "significant." The Corps has made the "convincing case" that it failed to make in *Semonite*.

Moreover, unlike *Semonite*, opposition here has come from the Tribes and their consultants, not from disinterested public officials; the expert agency, PHMSA, did not object to the Corps' analysis. 8 J.A. 2070. Perhaps most significantly, the low risk of an oil spill was a "critical factor" here that was not present in *Semonite*; in that case, there was no question of risk because it was undisputed that the towers would harm the views around Jamestown.

If not corrected, the district court's decision will create a new, heightened standard of judicial review that will be impossible for agencies to meet as they consider vital infrastructure projects that excite opposition from some sector of society. No part of this is compelled by *Semonite* or consistent with the law.

2. The record shows that the Corps analyzed the Tribes' criticisms and rationally concluded that the effects of its action are not "highly controversial."

The district court erred in granting summary judgment against the Corps even though the record shows that the Corps analyzed the Tribes' criticisms and rationally concluded that the effects of its action are not "highly controversial" or significant. Two serious errors run throughout the district court's analysis of these issues:

The district court ignored the low risk of an oil spill. The Corps was required to "look at both the probabilities of potential harmful events and the

consequences," *New York*, 681 F.3d at 478, and the "extremely low risk" of an oil spill at Lake Oahe was a "critical factor" in its analysis. 8 J.A. 1899. The pipeline has operated safely for the last three years, which confirms the Corps' conclusion that the risk of a spill is low. But the court made no attempt to analyze whether the Corps had rationally discounted the consequences of a catastrophic oil spill based on its low probability.

The district court ignored the fact that the pipeline is buried under Lake Oahe. Ninety-two feet of clay and other materials form a physical barrier between the pipeline and the waters of Lake Oahe that "virtually eliminate[s]" any risk that an oil spill will affect the lake. 8 J.A. 1830. That fact was critical to the Corps' analysis, 3 J.A. 617, and it means that the disputes between the Corps and the Tribes about the potential magnitude of a catastrophic spill all relate to an event that is not only unlikely, but also physically impossible. The district court ignored this issue entirely.

On each of the issues raised by the Tribes' experts, the record shows that the Corps closely analyzed their criticisms and rationally concluded that they did not create "a substantial dispute":

a. Leak detection

This pipeline is equipped with a series of safety systems, including a CPM program that can detect the pressure drop from a pipeline rupture "within seconds." 3 J.A. 542. The district court found that "a substantial dispute" exists about the effectiveness of the CPM system because a 2012 PHMSA report indicated that it has "an 80% failure rate." 1 J.A. 115.

The court misread PHMSA's report. The report did not state that CPM systems have "an 80% failure rate," but instead found that the CPM system was the first system to detect a leak (the "leak identifier") in 20% of reported cases. 11 J.A. 2800. This may mean merely that CPM systems take longer to detect small leaks than other systems. Notably, the Tribes' experts did not recommend against using a CPM system; instead, they asked the Corps to require the operator to test and calibrate the system. 4 J.A. 854. Those tests were done. 8 J.A. 1990–91.

In any event, the CPM system is only one of several systems used by this pipeline to prevent and detect leaks. While the Corps did not explicitly discuss the 2012 PHMSA report, it did consider it. *See* 11 J.A. 2768–3048. The Corps also analyzed historical data from PHMSA on the frequency of pipeline spills. 8 J.A. 1831–36. It found that pipeline accidents are infrequent and usually small (less than 105 barrels' worth of oil was released in 75% of accidents). 8 J.A. 1833, 1835. The Corps also found that spills from Horizontal Directional Drilling crossings like that at Lake Oahe are especially infrequent and small: in recent years, a total of only 1.7 barrels' worth of oil has been released from spills at such crossings. 8 J.A. 1836.

That historical data, the Corps concluded, "confirms that the chance of an oil spill at the Lake Oahe crossing is low and even if there were a spill, it would be of a small amount." 8 J.A. 1836. The Corps did not base its conclusions on a theoretical estimate of how effective the CPM system may be; it used actual, real-world data. Accordingly, even if there were a technical

controversy about the efficacy of the CPM system, the Tribes have not shown how that controversy creates "a substantial dispute" about the effects of the Corps' action, especially since the risk of any spill is low.

The district court also found that the CPM system's ability to detect small leaks was "controversial." CPM systems are not designed to detect leaks that constitute 1% or less of a pipe's flow rate, 1 J.A. 115; this results from practical limitations on the accuracy of its sensors. 11 J.A. 2964. The court then jumped to the conclusion that the pipeline could leak up to 6,000 barrels every day, "continuously, over a long period of time, without detection." 1 J.A. 115.

The district court got most of this wrong. As the Corps explained, although "the alarm threshold may be 1%," the pipeline's systems are also "sensitive to smaller changes in flow and pressure," 8 J.A. 1944, 1992, 2022–25, 2029–30. Even if a leak is too small to show a significant drop in pressure, "a detectable meter imbalance will develop over a period of time resulting in an alarm to the Control Center." *Id*. Thus, although small leaks may take longer to detect, they will eventually be found. 8 J.A. 2023.

Again, the CPM program is only one of several systems that this pipeline uses to prevent and detect leaks. The pipeline is not likely to develop a pinhole leak in the first place because it was built with a "high performance external coating," thicker walls, and a cathodic protection system, all designed to prevent the corrosion that could lead to such a leak. 8 J.A. 2024. The district court noted that another pipeline had leaked 8,600 barrels of oil, over a long time, 1 J.A. 116—but that leak was caused by corrosion created by "stray

current interference," and that risk was prevented here because the operator was required to survey for interference and eliminate it, 3 J.A. 663–64. The pipeline is also regularly inspected using "in-line inspection" tools to search for signs of corrosion that might lead to small leaks. 8 J.A. 2024. And if a small leak did occur, it would be sharply limited by the 92 feet of overburden. *Id.*

Based on all of this, the Corps found that the "risk of an undetectable underground leak is low." 8 J.A. 1948. The Corps also found that the Tribes had not identified new scientific evidence that would lead the Corps to reevaluate, for example, its assessment of corrosion risks. 8 J.A. 1948. Thus, the agency rationally concluded that there was no substantial dispute between the parties—and no controversy—about the possibility of a small leak.

Finally, the district court found that the effects of the Corps' action are "controversial" because the Corps failed to disclose the location of "critical leak detection monitoring devices." 1 J.A. 116. As the Corps explained, its models incorporated the locations of these devices into their analysis. 8 J.A. 1946–47; *see also* 8 J.A. 1995–97; 2 J.A. 380–81. But the court held that the Corps was not only required to consider this information, but also to disclose it. 1 J.A. 117. But there is no such requirement in NEPA or its regulations. This kind of information, moreover, could be construed as information that should be withheld for security reasons. Nor is it clear how the Corps' decision to leave this data out of its EA somehow rendered the effects of its action either "highly controversial" or significant: the Tribes advised the Corps to take the

locations of these sensors into account, and it did, meaning that there is no dispute between the parties and no controversy.

b. "Worst case discharge"

The Corps' finding of no significant impact is based in part on its analysis of how a catastrophic pipeline rupture would affect the environment. 8 J.A. 1908. The Corps estimated that a full-bore rupture could release some [redacted] worth of oil before the pipeline was shut down. 8 J.A. 1838, 1928. The Corps based that estimate on the "worst case discharge" defined by PHMSA's regulations. 8 J.A. 1838 (citing 49 C.F.R. § 194.105). PHMSA uses this "worst case discharge" as the basis for "spill planning and preparedness." 8 J.A. 1843, 1928. PHMSA reviewed and approved the operator's "facility response plan" based on these "worst case discharge" calculations. 8 J.A. 2070.

Working with the operators, the Corps then modeled how that oil would affect the environment. 8 J.A. 1840–50. The Corps recognized that the consequences of a catastrophic spill would be "high," 3 J.A. 546, but the models showed that they would also be "temporary" and of "short duration." 8 J.A. 1904. The models showed that oil would not reach the Tribes' water intakes even if the spill were left unmitigated for ten days. *Id.*

The Corps' analysis is highly conservative and does not model a *likely* spill; instead, it tests the outer limits of the effects of this action. The Corps' models assume, for example, that "the pipeline is lying directly on top of the water" and will discharge [redacted] of oil into Lake Oahe. 8 J.A. 1929. But that assumption is not merely conservative; it is impossible, because 92 feet

of overburden create a physical barrier between the pipeline and the lake's waters. *Id*.

Similarly, an accident leading to a full-bore rupture of the pipeline is extremely unlikely. The historical record shows that spills of 10,000 barrels' worth or more are "extremely uncommon" and that the Corps' estimate here "overestimate[s] the majority of spills seen in actual releases." 8 J.A. 1835–36, 1928–29. In the past, such spills have usually been the result of a pipeline's being cut by construction equipment, which is essentially impossible here because the pipeline is buried under the lakebed. 8 J.A. 1836 n.8; 10 J.A. 2620. The Corps' models also assume that there would be no attempt to respond to the spill for ten full days, 8 J.A. 1840, despite the fact that a rupture can be detected within seconds, 8 J.A. 1943. Taking all of this together, the Corps rationally concluded that the effects of its action are not significant, in part "due to the low risk of a large or catastrophic spill." 8 J.A. 1908, 1917–18.

The Tribes and their experts argued that a larger volume of oil could be spilled because it might take longer both to detect a rupture and to shut the pipeline down. The Corps then closely analyzed those criticisms. It reconfirmed the operator's estimate that the pipeline's CPM system is capable of detecting this kind of catastrophic rupture in less than one minute. 8 J.A. 1943, 1991–92, 2022–23; 2 J.A. 377. The Corps nonetheless assumed that it would take nine minutes for the operators to detect and respond to a rupture. 8 J.A. 2071. The Corps reconfirmed that it takes 24 to 30 seconds to close the shut-down valves at Lake Oahe (which are controlled remotely), but

nonetheless assumed that it would take as long as 3.9 minutes to do so. 8 J.A. 1937; *see also* 8 J.A.1972–76.

Having reconfirmed its original estimate that it would take 12.9 minutes to detect a rupture and shut the pipeline down, the Corps found that there was no "substantial dispute" about the magnitude of a catastrophic spill; in fact, the Corps' estimate of that spill exceeded some estimates by the Tribes' experts. 8 J.A. 1941. As the Corps explained, while "there may be other methods for predicting oil spill effects, it is not likely that employing further methods will result in substantively different views or information that is more comprehensive than what the Corps considered here." 8 J.A. 1956–57. And while it is "not dispositive," PHMSA's approval of this "worst-case discharge" estimate is "additional evidence of a lack of controversy." *See, e.g., Hillsdale*, 702 F.3d at 1182. The Corps rationally concluded that the effects of its action are not "highly controversial." 8 J.A. 1957.

The district court rejected the Corps' analysis, holding that—due to the Tribes' opposition—the agency must assume that a series of improbable malfunctions will cause an unprecedented disaster of epic proportions. 1 J.A. 128. The court erred. To begin, the question here is not whether the Corps' estimate that a catastrophic spill could release some [redacted] worth of oil is the "worst case scenario," because NEPA does not require a "worst case scenario." NEPA's regulations were amended decades ago to eliminate that analysis because it "overemphasiz[ed] highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989); *compare* 40 C.F.R.

§ 1502.22 (1985) (requiring a "worst cast analysis") *with id.* § 1502.22(b) (1987) (requiring instead "a summary of existing credible scientific information").

The Council on Environmental Quality (which promulgates NEPA regulations) found that the "worst case scenario" was "a flawed technique" that generated "endless hypotheses and speculation." *See* 51 Fed. Reg. 15,620, 15,624 (Apr. 25, 1986). The Council affirmed that an agency's environmental assessment must be supported "by credible scientific evidence," not by "pure conjecture." *Id*. at 15,621. Thus, although the Corps was required to analyze the potential effects of its action, it was not required to model the "worst case scenario" oil spill. *Robertson*, 490 U.S. at 354, 356; *Defenders of Wildlife v. Bureau of Ocean Energy Management*, 684 F.3d 1242, 1250 (11th Cir. 2012).

The question that the district court should have answered is whether the Corps *rationally concluded* that the effects of its action are not "highly controversial." The record shows that the Corps did that. The fact that the Tribes could construct an even more extreme and even more improbable spill is immaterial. Nothing in law or logic required the Corps to pile together a "perfect storm" of errors and accidents to generate the largest oil spill imaginable, especially when the risk of such a spill is so "remote and speculative" that it may be discounted entirely. *New York*, 681 F.3d at 478–79. NEPA's regulations were rewritten specifically to stop the "endless hypotheses and speculation" that follow this kind of "worst case" thinking. 51 Fed. Reg. at 15,621, 15,624.

The Corps' own estimate, moreover, is conservative enough because it does not consider that this pipeline is separated from the waters of the lake by 92 feet of overburden, a critical fact ignored by both the Tribes and the district court. And both failed to discount the potential consequences of a catastrophic spill by the low risk that such a spill will ever occur. Finally, the Corps' estimate was based on calculations approved by PHMSA, the expert agency charged by Congress with "the furtherance of the highest degree of safety in pipeline transportation." 49 U.S.C. § 108(b). Therefore, the Corps rationally concluded that the effects of its action here are not "highly controversial" and are not "significant."

c. Winter conditions

Lake Oahe may be covered by ice during the winter. 3 J.A. 491. The Corps noted that this could have a mixed effect on efforts to contain an oil spill: ice slows down response efforts, but it might also create "a natural barrier" that slows the spread of oil. 3 J.A. 491; *see also* 8 J.A. 1968. To address the difficulties created by North Dakota's cold winters, the Corps required the operator to conduct full scale winter spill response training exercises at Lake Oahe as a condition of its easement. 3 J.A. 665.

The Tribes' experts argued that the Corps should have presented a "quantitative evaluation of the winter spill scenario." 1 J.A. 119–21. The record shows that the Corps analyzed these criticisms. 8 J.A. 1932–33, 1967–68. The Corps agreed that "the recovery of oil under ice is difficult," which is exactly why it required full-scale winter training exercises. 8 J.A. 1932–33. The

Tribes asked for "a more serious quantitative evaluation," but they identified no "particular evaluation" and no "particular factors, criteria, or technique" for performing such an evaluation. *Id*. Nor did they provide the results of such an evaluation for the Corps to consider. *Id*. Because the Tribes did not offer any alternatives or identify any other science, the Corps concluded that they had not shown that "a substantial dispute exists." *Id.*

Notably, this is a key difference between this case and *Semonite:* in that case, the plaintiffs identified a specific alternative methodology and provided the results of that methodology to the Corps. *See National Parks Conservation Ass'n v. Semonite*, 311 F. Supp. 3d 350, 364 (D.D.C. 2018) (noting that the National Park Service had conducted its own assessment). Here, in contrast, the Tribes' experts objected, but they never presented their own risk analysis to the Corps. In addition, the operator invited the Tribes to participate in meetings with the Corps to finalize the operator's spill response plans, where their concerns about winter spill responses could have been addressed. But the Tribes chose not to participate. *See, e.g.,* ECF No. 473, at 17–20 (Nov. 20, 2019).

The district court concluded that the Corps' response was "insufficient" to resolve the "controversy." 1 J.A. 120–21. But there is no controversy: everyone agrees that a clean-up will be more difficult during the winter, and no one has identified any way to calculate exactly how much more difficult. The district court went on to hold that the Corps must develop a quantitative model that predicts "how exactly winter conditions would delay response efforts," 1

J.A. 121, even though no one even claims that such a model exists. That, too, is error: NEPA does not require the Corps to develop new science or to predict the future with perfect accuracy.

Moreover, even if this were a "controversy," it is not clear how it could be "substantial" because the Corps' ultimate conclusion—that the effects of its action are not "significant"—is not based on the assumption that the operator would prevent significant effects by conducting an effective winter clean-up. It is based instead on the low risk of such a spill, a point that the Tribes and the district court ignored. Therefore, the record here shows that the Corps analyzed the Tribes' criticisms about "winter conditions" and rationally concluded that they did not make the effects of its action "highly controversial."

d. Operator safety record

Finally, the Tribes' experts argued that the Corps' analysis of the risk of an oil spill at Lake Oahe should have taken "the performance history of its operator" into account. 1 J.A. 117. The record shows that the Corps considered these criticisms. 8 J.A. 1953–54. As the Corps noted, 70% of the operator's reported accidents on other pipelines were minor and limited to the operator's property and thus did not implicate a spill into Lake Oahe. *Id.*

The district court held the Corps had failed to resolve this issue. 1 J.A. 118–19. But the Corps rationally concluded that these criticisms did not show "a substantial dispute" about the effects of the Corps' action. The record shows that other objective measures of the operator's safety practices were weighed as part of the Corps' assessment of the risk of an oil spill. 10 J.A.

2581, 2591–601 (describing results of survey of operator safety practices), 2631. The Corps also considered PHMSA's historical data on oil spills, which necessarily includes this operator's safety record. 8 J.A. 1831–36. The Corps' decision to use all data on oil spills, and not just the operator's safety record, is the kind of technical judgment that is entrusted to the agency and entitled to deference from the Court. *New York v. NRC*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) (holding that an agency does not engage in arbitrary and capricious decisionmaking by relying on "incomplete data").

C. The district court erred in ordering the Corps to prepare an EIS.

The district court assumed without explanation that these technical disputes between the Corps and the Tribes' experts compelled the preparation of an EIS. *See* 1 J.A. 130. This was error for two reasons.

First, even if there were a technical dispute between the Corps and the Tribes, that dispute is not necessarily "substantial" in the sense that it calls into question the Corps' ultimate conclusion that the effects of its action are not "significant." Any disputes between the Corps and the Tribes about the potential consequences of an oil spill, for example, must be discounted for the low risk that such a spill will occur. The district court ignored that point.

Second, even if the district court were correct and the effects of the Corps' action are "highly controversial," that does not necessarily mean that an EIS is required. Controversy is only one of ten factors that agencies must consider when deciding whether to prepare an EIS. 40 C.F.R. § 1508.27(b)(4).

"Implicating any one of these factors *may* be sufficient to require development of an EIS," *Semonite*, 916 F.3d at 1082 (emphasis added), but "the presence of one factor does not necessarily do so," *Wild Wilderness*, 871 F.3d at 719. Thus, "if a project is controversial, this does not mean the Corps must prepare an EIS, although it would weigh in favor of an EIS." *Hillsdale*, 702 F.3d at 1181; *see also* 51 Fed. Reg. 15618, 15622 (Apr. 25, 1986) (agreeing that "controversy does not, alone, require preparation of an EIS; rather, it is one of many factors which the responsible official must bear in mind").

NEPA's regulations entrust the weighing of these factors to the agencies. Because the Corps has not yet done that weighing, the district court should have remanded the EA to the Corps to allow the Corps to make a new finding in light of the court's decision, as this Court has recognized. *See, e.g., Grand Canyon Trust v. FAA*, 290 F.3d 339, 347 (D.C. Cir. 2002). The district court erred in short-circuiting that process and ordering the Corps to prepare an EIS.

In sum, the Corps complied with NEPA.

II. The district court abused its discretion in vacating the easement.

The district court should not have vacated the easement granted by the Corps. *See* 1 J.A. 148–62. The factors set out in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), do not support vacatur. The first *Allied-Signal* factor—"the seriousness of the order's deficiencies"—weighs against vacatur because the thoroughness of the Corps' analysis and the narrow errors identified by the district court do not create significant doubt about whether the Corps "chose correctly." The second *Allied-Signal* factor—the "disruptive

consequences" of vacatur—also weighs against vacatur: if one assumes that vacating the easement means enjoining the operation of the pipeline, it will cause profound economic harm; and, if not, vacatur does nothing more than render unenforceable the conditions that the Corps placed on this easement to ensure its safe operation.

III. The district court erred in enjoining operation of the pipeline.

The district court also enjoined the operator to "shut down the pipeline and empty it of oil by August 5, 2020." 1 J.A. 139. To grant this injunction, the district court had to find not only that the Tribes had succeeded on the merits, but that the continued operation of the pipeline is likely to cause irreparable injury to the Tribes, that the economic harm done by shutting the pipeline down is outweighed by the likely injury to the Tribes, and that the public interest will not be disserved. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

The district court made none of these findings, and instead mistakenly held the *Allied-Signal* test for vacatur replaces the four-factor test for injunctive relief. As this Court has already held, the district court erred because it "did not make the findings necessary for injunctive relief." Order (Aug. 5, 2020). Most importantly, the court did not find that the Tribes are likely to suffer irreparable injury without an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). There is no evidence of likely irreparable injury here because the Corps rationally concluded that the risk of a spill is low, and the pipeline has operated safely for three years, confirming the Corps' conclusions. The

district court did not find likely irreparable injury; instead, it agreed that the risk an oil spill was small and but concluded that the injunction "would mitigate even this small risk." 1 J.A. 159. Injunctions, however, are not tools for mitigating small risks, and nothing less than a finding of irreparable injury can sustain one. *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Nor did the court balance the "small" risk faced by the Tribes against the immediate and irreparable economic harm that shutting this pipeline down will cause.

In addition, once the easement was vacated, the district court should have left any further steps (at least in the first instance) to the Corps, which is administratively reviewing how to address the encroachment of this pipeline on federal property. Please note that the Corps expects to complete the initial stage of its review by October 10, 2020 (and, pursuant to this Court's order, expects to clarify the status of its review concerning the continued operation of the pipeline to the district court at that time). But the district court should not have directed the outcome of that process by ordering the pipeline to be shut down. *Miguel v. McCarl,* 291 U.S. 442, 451 (1934); *Vermont Yankee,* 435 U.S. at 544; *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

CONCLUSION

For the foregoing reasons, the district court's judgment on the Tribes' NEPA claims—as well as its orders vacating the easement, remanding these matters to the Corps for the preparation of an EIS, and enjoining the operation of the pipeline—should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 9,745 words.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Calisto MT font.

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Counsel for Federal Appellant

ADDENDUM

the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) 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;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibil-

ities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter

[1] So in original. The period probably should be a semicolon.

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

that it is unlikely that the worst case discharge from any point on the line section would adversely affect, within 12 hours after the initiation of the discharge, any navigable waters, public drinking water intake, or environmentally sensitive areas.

(ii) A line section that is 6⅝ inches (168 millimeters) or less in outside nominal diameter and is 10 miles (16 kilometers) or less in length, where the operator determines that it is unlikely that the worst case discharge from any point on the line section would adversely affect, within 4 hours after the initiation of the discharge, any navigable waters, public drinking water intake, or environmentally sensitive areas.

[58 FR 253, Jan. 5, 1993, as amended by Amdt. 194–3, 63 FR 37505, July 13, 1998; Amdt. 194–4, 70 FR 8747, Feb. 23, 2005; 70 FR 11140, Mar. 8, 2005]

§ 194.103 Significant and substantial harm; operator's statement.

(a) Each operator shall submit a statement with its response plan, as required by §§ 194.107 and 194.113, identifying which line sections in a response zone can be expected to cause significant and substantial harm to the environment in the event of a discharge of oil into or on the navigable waters or adjoining shorelines.

(b) If an operator expects a line section in a response zone to cause significant and substantial harm, then the entire response zone must, for the purpose of response plan review and approval, be treated as if it is expected to cause significant and substantial harm. However, an operator will not have to submit separate plans for each line section.

(c) A line section can be expected to cause significant and substantial harm to the environment in the event of a discharge of oil into or on the navigable waters or adjoining shorelines if; the pipeline is greater than 6⅝ inches (168 millimeters) in outside nominal diameter, greater than 10 miles (16 kilometers) in length, and the line section—

(1) Has experienced a release greater than 1,000 barrels (159 cubic meters) within the previous five years,

(2) Has experienced two or more reportable releases, as defined in § 195.50, within the previous five years,

(3) Containing any electric resistance welded pipe, manufactured prior to 1970, operates at a maximum operating pressure established under § 195.406 that corresponds to a stress level greater than 50 percent of the specified minimum yield strength of the pipe,

(4) Is located within a 5 mile (8 kilometer) radius of potentially affected public drinking water intakes and could reasonably be expected to reach public drinking water intakes, or

(5) Is located within a 1 mile (1.6 kilometer) radius of potentially affected environmentally sensitive areas, and could reasonably be expected to reach these areas.

[58 FR 253, Jan. 5, 1993, as amended by Amdt. 194–3, 63 FR 37505, July 13, 1998]

§ 194.105 Worst case discharge.

(a) Each operator shall determine the worst case discharge for each of its response zones and provide the methodology, including calculations, used to arrive at the volume.

(b) The worst case discharge is 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 (cubic meters); or

(2) The largest foreseeable discharge for the line section(s) within a response zone, expressed in barrels (cubic meters), based on the maximum historic discharge, if one exists, adjusted for any subsequent corrective or preventive action taken; or

(3) If the response zone contains one or more breakout tanks, the capacity of the single largest tank or battery of

tanks within a single secondary containment system, adjusted for the capacity or size of the secondary containment system, expressed in barrels (cubic meters).

(4) Operators may claim prevention credits for breakout tank secondary containment and other specific spill prevention measures as follows:

Prevention measure	Standard	Credit (percent)
Secondary containment >100%	NFPA 30	50
Built/repaired to API standards	API STD 620/650/653.	10
Overfill protection standards	API RP 2350	5
Testing/cathodic protection	API STD 650/651/653.	5
Tertiary containment/drainage/treatment	NFPA 30	5
Maximum allowable credit		75

[58 FR 253, Jan. 5, 1993, as amended by Amdt. 194–3, 63 FR 37505, July 13, 1998; Amdt. 194–4, 70 FR 8747, Feb. 23, 2005; Amdt. 194–5, 70 FR 35042, June 16, 2005]

§ 194.107 General response plan requirements.

(a) Each response plan must include procedures and a list of resources for responding, to the maximum extent practicable, to a worst case discharge and to a substantial threat of such a discharge. The ''substantial threat'' term is equivalent to abnormal operations outlined in 49 CFR 195.402(d). To comply with this requirement, an operator can incorporate by reference into the response plan the appropriate procedures from its manual for operations, maintenance, and emergencies, which is prepared in compliance with 49 CFR 195.402.

(b) An operator must certify in the response plan that it reviewed the NCP and each applicable ACP and that its response plan is consistent with the NCP and each applicable ACP as follows:

(1) As a minimum to be consistent with the NCP a facility response plan must:

(i) Demonstrate an operator's clear understanding of the function of the Federal response structure, including procedures to notify the National Response Center reflecting the relationship between the operator's response organization's role and the Federal On Scene Coordinator's role in pollution response;

(ii) Establish provisions to ensure the protection of safety at the response site; and

(iii) Identify the procedures to obtain any required Federal and State permissions for using alternative response strategies such as in-situ burning and dispersants as provided for in the applicable ACPs; and

(2) As a minimum, to be consistent with the applicable ACP the plan must:

(i) Address the removal of a worst case discharge and the mitigation or prevention of a substantial threat of a worst case discharge;

(ii) Identify environmentally and economically sensitive areas;

(iii) Describe the responsibilities of the operator and of Federal, State and local agencies in removing a discharge and in mitigating or preventing a substantial threat of a discharge; and

(iv) Establish the procedures for obtaining an expedited decision on use of dispersants or other chemicals.

(c) Each response plan must include:

(1) A core plan consisting of—

(i) An information summary as required in § 194.113,

(ii) Immediate notification procedures,

(iii) Spill detection and mitigation procedures,

(iv) The name, address, and telephone number of the oil spill response organization, if appropriate,

(v) Response activities and response resources,

(vi) Names and telephone numbers of Federal, State and local agencies which the operator expects to have pollution control responsibilities or support,

(vii) Training procedures,

(viii) Equipment testing,