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 No. 1:16-cv-01796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS BRIEF REGARDING REMEDY

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I. INTRODUCTION

Before the Court is the question of whether the United States Army Corps of Engineers' (Corps) February 8, 2017 decision granting an easement to allow a portion of the Dakota Access Pipeline under Corps-managed lands at Lake Oahe should be vacated while the Corps conducts additional environmental review consistent with this Court's opinion. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Civ. A. No. 16-1534 (JEB), 2020 WL 1441923, at *19 (D.D.C. Mar. 25, 2020) (*Standing Rock V*).

Vacatur is unnecessary and inappropriate under both prongs of the D.C. Circuit's *Allied-Signal* test. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). First, the National Environmental Policy Act (NEPA) error identified by this Court is not "serious" within the context of the overall decisionmaking process. Though this Court found that additional environmental review is warranted due to scientific controversy, the Court has also found that the Corps "largely complied with NEPA." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 147 (D.D.C. 2017) (*Standing Rock III*).

Moreover, the issues that Plaintiffs identified as areas of purported controversy (leak-detection, operator safety, winter conditions, and worst-case discharge volume) do not invalidate the top line conclusion that the "possibility of a future spill . . . is low." *Standing Rock V* 2020 WL 1441923, at *19. There has already been a great deal of environmental and technical review that informed the Corps' substantive decisions. Given the amount of analysis that has occurred thus far and the specific easement conditions imposed, it is highly likely that the Corps will ultimately be able to substantiate its existing property management decision after correcting the procedural error identified by the Court.

Second, vacatur of the easement could impose extremely disruptive consequences. If the

easement is vacated, Energy Transfer Partners will no longer have the required property interest to cross and occupy Corps-managed federal land. Without this property interest, the portion of the Pipeline under lake Oahe would constitute an encroachment on federal land prompting the Corps to undertake an administrative process to determine whether corrective measures, such as removal, are required. Disruptions from removal could include, among other things, creating the "extreme waste" of dismantling and rebuilding the Pipeline. Removal or even temporary decommissioning could create additional construction-related impacts and result in oil being transported by truck or rail—transportation methods that entail both greater risk of spills and greater air pollution than pipeline transport.

Emergency injunctive relief was previously denied in this matter, and the Pipeline has been constructed and operational for years without any of the serious spills that Plaintiffs allege are commonplace. Indeed, Plaintiffs' own experts argued that spill risk was greatest during the first and last years of a pipeline's operation. As the Pipeline has been operating for three years, spill risk is, according to Plaintiffs' own experts, even lower than the last time the Court considered the issue.

Vacatur on remand would be inconsistent with this Circuit's precedent and would result in undue hardship and additional risks for the federal government, the Pipeline owner, and the public. The Corps estimates that the preparation of the Environmental Impact Statement (EIS) consistent with the Court's order could be completed by approximately mid-2021. The Corps respectfully submits that the Court should allow the Corps' easement decision relating to the already-constructed Lake Oahe pipeline segment to remain in place while the Corps conducts additional environmental review.

II. BACKGROUND

A. Factual background

The Court is familiar with the factual and procedural history of this case; as a result, only a brief summary follows. *See, e.g., Standing Rock III*, 255 F. Supp. 3d at 114–16. The Dakota Access Pipeline, designed to carry crude oil from North Dakota to Illinois, crosses several waterways along its 1,200-mile path. *Id.* at 114 (*Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* , 205 F. Supp. 3d 4, 7 (D.D.C. 2016) (*Standing Rock I*)). One of these is Lake Oahe, an artificial reservoir in the Missouri created by construction of a dam in 1958. *Id.* (citing *Standing Rock I*, 205 F. Supp. 3d at 13); *see* ECF No. 172-1 (Final EA) at 35.

As a first step in determining whether it would grant Dakota Access the permissions needed to construct a portion of the Pipeline under Lake Oahe, the Corps published a Draft Environmental Assessment (EA), finding that it would not need to prepare an EIS. *Standing Rock III*, 255 F. Supp. 3d at 115–16; ECF No. 6-19 (Draft EA). In July 2016, the Corps published its Final EA—finding that no EIS was required—and a Finding of No Significant Impact (FONSI). *See* ECF Nos. 172-1 (Final EA), 172-2 (FONSI). Following the NEPA process as well as the processes under the Mineral Leasing Act (MLA) and Rivers and Harbors Act (RHA), the Corps ultimately issued an easement under and associated permissions that permitted Dakota Access to construct the Pipeline under Lake Oahe.

The Standing Rock Sioux and Cheyenne River Sioux Tribes pursued several rounds of emergency motions between August 4, 2016 and January 18, 2017. Minute Entry (Sept. 6, 2016); *Standing Rock I*, 205 F. Supp. 3d at 4; Minute Order (Feb. 13, 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*,239 F. Supp. 3d 77 (D.D.C. 2017). Those unsuccessful emergency motions challenged the authorizations necessary for Dakota Access to construct a portion of the Dakota Access pipeline under Corps-managed lands at Lake Oahe. *See*

Standing Rock Sioux III, 255 F. Supp. 3d at 111-12, 114. The primary focus of those emergency motions were alleged violations of the National Historic Preservation Act (NHPA) and the Religious Freedom Restoration Act (RFRA). This Court denied each of Plaintiffs' emergency motions, as did the D.C. Circuit. *See id.* at *4-5; *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, No. No. 16-5259, 2017 WL 4071136, at *1 (D.C. Cir.).

Dakota Access, by late March 2017, completed construction of this last segment beneath Lake Oahe and began placing oil in the Pipeline. *Standing Rock III*, 255 F. Supp. 3d at 120. In February 2017, Standing Rock, Cheyenne River, Dakota Access, and the Corps filed cross-motions for partial summary judgment on a large number of claims relating to NEPA, the Clean Water Act, the MLA, tribal rights, and environmental justice. On June 14, 2017, the Court largely resolved the cross-motions for partial summary judgment in the Corps' favor. The Court granted in part and denied in part the parties' cross-motions for partial summary judgment, and remanded this matter to the Corps. The Court's opinion identified several "discrete issues" for the Corps to address on remand: the impact of the Corps' action on tribal hunting and fishing rights, environmental justice, and the extent to which the project was "highly controversial" due to Plaintiffs scientific critiques. *Standing Rock III*, 255 F. Supp. 3d at 127-28.

The Corps completed its remand analysis in August 2018, ECF No. 362 (Status Report Regarding Remand), and the parties filed a joint appendix containing that record a month after the remand administrative record was filed. *See* ECF No. 398 (Notice of Service of Administrative Record); ECF No. 406 (Remand Analysis Record). The Parties cross-moved for summary judgment, with the Tribes arguing that the Corps' environmental review was still insufficient under NEPA. The Court found that as to one issue, the Tribes were correct. The Court found that the Tribes' experts had identified sufficient scientific and methodological

questions such that the action was "highly controversial," as understood under this Circuit's precedent in *National Parks Conservation Association v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). As a result, the Court ordered the Corps to prepare an EIS. *Standing Rock V*, 2020 WL 1441923, at *19.

B. The Corps' process for preparing an Environmental Impact Statement[1]

The Corps is in the early stages of planning the process it will undertake to produce the EIS ordered by this Court. At this time, the Corps anticipates the process described below will take approximately thirteen months. However, while the process below represents the Corps' plan at present, the process and time periods are subject to revision.

The Corps plans to first issue a Notice of Intent to prepare an EIS in the federal register. *See* 40 C.F.R. § 1508.22. The next step will be initiating the scoping process, 40 C.F.R. § 1508.25, which involves mailing letters to interested parties approximately a week after the Notice of Intent was published. Parties will have 30 days to respond to the scoping letters. The Corps then plans to hold scoping meetings, to be scheduled 30 days after the Notice of Intent was published.

After the scoping process has concluded, the Corps plans to prepare a Draft EIS (DEIS), which is likely to take at least five months. When the DEIS is finalized, the Corps plans to make it available for a comment period of 45 days. During the public comment period, the Corps anticipates holding a number of public meetings. Following consideration of the comments received during the comment period, the Corps plans to prepare a final EIS (FEIS), which it

[1] While the Corps anticipates preparing an EIS as ordered by this Court, the Corps does not waive its right to appeal or seek other relief with respect to the order.

anticipates will take approximately two months. After the FEIS has been prepared, the Corps plans to make it available again for public comment for a period of 30 days. The Corps plans to review the comments on the FEIS for approximately 30 days and then expects to issue a Record of Decision (ROD), as well as any associated agency action.

C. The Corps' policy regarding curing encroachments

In the event the Court sets aside the MLA easement while the Corps prepares an EIS, the Pipeline would constitute an "encroachment" on federal property as defined by Corps Engineering Regulation, and would implicate the Corps' procedures for addressing encroachments. *See* Engineering Regulation (ER) 405-1-12, USACE_ESMT005810; *see also* Ex. 1, 1980 Omaha District Memorandum.

In general, the Corps' Engineering Regulations provide that the "policy is to require removal of encroachments." ER 405-1-12. However, the Engineering regulation provides for exceptions to this general policy. *Id.* at 8-13. Specifically, the Engineering Regulation provides that there are "four basic methods of curing an encroachment: removal, disposal, exchange, and outgrant or consent (for easements)." *Id.* at 8-14. The Engineering Regulation and Omaha District Memorandum establish a specific procedure for the Corps to undertake in determining the appropriate means to cure an encroachment. Thus in the event the Court sets aside the Corps' MLA Easement such that the Pipeline constituted an encroachment, the Corps would undertake the processes established by Engineering Regulation to determine the appropriate next steps. *See* ER at 8-14.

III. LEGAL STANDARD

The Administrative Procedure Act (APA) provides that "[n]othing [in the APA's judicial review provisions] affects . . . the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground." 5 U.S.C. § 702. A court therefore retains its equitable

discretion to grant or withhold vacatur of a rule where it finds an error of law. As relevant here, the Court has discretion to remand an agency decision without vacating it. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) ("While unsupported agency action normally warrants vacatur . . . , this court is not without discretion." (citation omitted)). The D.C. Circuit has "commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking, . . . but also where the order was otherwise arbitrary and capricious." *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990) (citations omitted).

Under this Circuit's *Allied-Signal* test, the decision whether to vacate or remand without vacatur depends on: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)," and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150-51 (citation omitted); *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (remand without vacatur warranted where the "disruptive effect of vacatur" is high); *Coal. for Common Sense in Gov't Procurement v. United States*, 671 F. Supp. 2d 48, 59-60 (D.D.C. 2009). Ultimately, "[t]he decision whether halting a project pending revaluation of environmental factors warrants the social and economic costs of delay rests in the sound discretion of the court." *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261, 1272 (D.C. Cir. 1979).

IV. ARGUMENT

Both *Allied-Signal* factors weigh in favor of remanding the Lake Oahe easement without vacatur: (1) the Corps' decisionmaking process and associated environmental review was thorough and the Corps will likely substantiate its substantive easement decision after conducting

additional environmental review; and (2) vacating an easement after the servient interest has fully exercised its property right and the associated portion of the project is constructed and operational—in this case for several years—imposes significant disruptive consequences. Moreover, vacatur of the underlying easement, which the court did not find to be substantively flawed, would be overbroad compared to the NEPA deficiency the Court found.

A. The first *Allied-Signal* factor supports remand without vacatur

1. The Corps' NEPA error was not "serious" in context

The first *Allied-Signal* factor asks whether the agency's errors are "serious," as "the seriousness of the . . . deficiencies" inform "the extent of doubt whether the agency chose correctly . . . . " *Allied-Signal*, 988 F.2d at 150-51 (quoting *Int'l Union*, 920 F.2d at 967). Here, the Corps' overall environmental review and decisionmaking process was robust, and, in context, the error identified by this Court (an alleged failure to adequately evaluate the "controversy" intensity factor, and the associated decision not to prepare an EIS based on that single intensity factor) is not so serious as to cast doubt on the Corps' substantive decision under the MLA.

The question before the Court is "whether the easement should be vacated during the remand." *Standing Rock Sioux V*, 2020 WL 1441923, at *19 (citation omitted). Thus the Court's inquiry under the first *Allied-Signal* prong should be whether the procedural NEPA violation is so serious as to cast doubt on the Corps' decision to grant the easement, such that it should be vacated while the environmental review ordered by this Court occurs.[2] *See, e.g.*, *Pub.*

[2] The question is not whether the Corps' procedural choice to prepare an EA rather than an EIS was correct; this Court has already found it was not. *Standing Rock V*, 2020 WL 1441923, at *19. But NEPA compliance documents are not themselves reviewable final agency actions that can be set aside under the APA. Rather they are "preliminary, procedural, or intermediate agency action" meant to inform the agency's decision whether to take some other, substantive final agency action. 5 U.S.C. § 704; *see Pub. Citizen v. Office of U.S. Trade Representatives*, 970

Emps. for Envtl. Responsibility v. Hopper, 827 F.3d 1077, 1083–84 (D.C. Cir. 2016) (declining to vacate an applicant's lease and other regulatory approvals based on a NEPA violation).

The error this Court identified in the Corps' environmental review is not so serious in the context of the larger decisionmaking process surrounding the final agency action in this case to warrant vacatur of the Oahe easement. This is demonstrated, in part, by the fact that this Court overwhelmingly upheld the Corps' decisionmaking and rejected the vast majority of Plaintiffs' challenges. Indeed, this Court first found that "the Corps' decision on July 25, 2016, and February 8, 2017, not to issue an EIS largely complied with NEPA." *Standing Rock IV*, 2017 U.S. Dist. LEXIS 91297, at *100. *Standing Rock III*, 255 F. Supp. 3d at 147. The Court rejected: (1) Standing Rock Sioux Tribe's claims that the EA failed to consider the cumulative risk imposed by the pipeline, *id*. at 129-30; (2) a substantial portion of Standing Rock's legal analysis of its treaty rights, *id*. at 130-132; (3) S Standing Rock Sioux Tribe's claims regarding the impact of construction activities on its treaty rights, *id*. at 132-33; (4) Standing Rock Sioux Tribe's challenge to the Corps' alternatives analysis, *id*. at 134-36; (5) Standing Rock Sioux Tribe's argument that the Corps' grant of the Lake Oahe easement arbitrarily and capriciously reversed previous positions, *id*. at 140-43; (6) Standing Rock Sioux Tribe's and Cheyenne River Sioux Tribe's legal analysis of applicable trust duties, *id*. at 143-45, 147-48, 155; (7) S Standing Rock Sioux Tribe's challenge to the Corps' Nationwide Permit 12 verification at Lake Oahe, *id*.

F.2d 916, 918-19 (D.C. Cir. 1992). Standing alone, an EA or EIS does not create rights or obligations or produce other legal consequences and is thus not a reviewable final agency action. *See id.; Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Therefore, the *Allied-Signal* prong is best understood as being directed at whether the agency "chose correctly" as to its ultimate substantive agency action rather than the specific NEPA violation. *But see Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) ("On remand, the Corps cannot substantiate its initial procedural decision to forgo an EIS, as the [court] has already found that such a decision would violate NEPA.").

at 145-47.

Even though this Court found that the Corps' evaluation of the controversy factor was not sufficient, the Court found no fault with the Corps' consideration of environmental justice or of the impacts to the Tribes' treaty hunting and fishing rights. The Court also rejected Plaintiffs' claims regarding the NHPA and an alleged trust duty to provide clean water, the latter because of the low risk of any oil spill into Lake Oahe. *Standing Rock V*, 2020 WL 1441923, at *19.

Ultimately, the Corps' procedural error does not detract from the Corps' conclusion that the easement granted for the portion of the Pipeline that crosses approximately 100 feet under the bed of Lake Oahe meets the substantive requirements of the MLA. Nor does the Corps' procedural error call into question the Corps' conclusion that spill risk at the crossing is low. Indeed, additional work on remand confirmed that the possibility of a future spill from the portion of the Pipeline within the easement is low, a conclusion this court has accepted. *Standing Rock V*, 2020 WL 1441923, at *19. Additionally, only a single significance factor was implicated in the Court's finding in this case. In contrast, in *Semonite*, "[t]hree factors indicated that there would be serious environmental impacts as a result of the project." 422 F. Supp. 3d at 99. For these reasons, the Corps' NEPA error was not so "serious" to warrant vacatur of the underlying MLA easement.

2. The Corps is likely to substantiate its easement decision

After preparing an EIS on remand, the Corps is likely to reach the same substantive decision under the MLA. While the Corps will not prejudge the outcome, the Corps retains the legal authority to re-approve or leave unaltered the easement currently in place, and there is good reason to conclude that it may do so. This suggests vacatur is unwarranted. *See, e.g., Allied-Signal*, 988 F.2d at 151; *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C.

Cir. 2002) (remanding without vacatur where "it is as least possible" agency could reach the same conclusion again on remand); *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 451 (D.C. Cir. 2017) (remanding without vacating because agency "may be able to approve the Plan once again, after conducting a proper analysis on remand"); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 68 (D.D.C. 2010), *aff'd in part, rev'd in part*, 661 F.3d 1147 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012) ("It is important to note that the preparation of an EIS does not foreclose the [project]; it simply mandates the Corps to follow NEPA's procedures.").

The MLA, 30 U.S.C. §§ 181-196, requires a project proponent to obtain a right-of-way or easement "before it can construct, operate, or maintain a pipeline on federal lands." *Hammond v. Norton*, 370 F. Supp. 2d 226, 233 (D.D.C. 2005). Such easements "may be granted" in accordance with 30 U.S.C. § 185(a)-(y). The MLA authorizes the "appropriate agency head" to grant "[r]ights-of-way through any Federal lands . . . for pipeline purposes," 30 U.S.C. § 185(a), "subject to regulations promulgated in accord with the provisions of this section, and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination." *Id.* § 185(f). The standard for granting rights-of-way to cross federal land within the Corps' control is whether the activity will "be in the public interest" and "compatible with the installation/ project mission." Army Reg. 405-80 ¶ 4-1(c), USACE_ESMT004250; *see also* Engineering Regulation 405-1-12, USACE_ESMT005810; Engineering Regulation 1130-2-550, USACE_ESMT003656.

Dakota Access applied for a MLA easement for the Lake Oahe crossing on October 21, 2014. Feb. 3, 2017 Memo., ECF No. 172-9 at 89. The July 25, 2016 EA and FONSI recognized that an easement would be required for the proposed Pipeline. *Id.* at 12. On October 31, 2016,

the Corps issued a memorandum identifying drafts of possible conditions that could be included in the proposed Lake Oahe easement to address the Tribes' concerns and to satisfy the requirements of MLA § 185(h)(2). ECF No. 172-9 at 56–58.

In its decisionmaking process, the Corps considered extensive technical documentation to evaluate whether the pipeline crossing would limit the functionality of the Lake Oahe project. *See, e.g.,* Section 408 Decision Package, ECF No. 183-9 at 71201-02. The Corps requested that Dakota Access conduct a geotechnical investigation. *See* Responses to Questions (June 2, 2016), ECF No. 172-3 at 64145. Dakota Access made changes to its construction designs and Operations & Maintenance ("O&M") Manual based on Corps technical comments. *See, e.g.*, Geotechnical Investigation Package, ECF No. 183-10 at 75304-07; Section 408 Decision Package, ECF No. 183-9 at 71201. Numerous technical documents considered by the Corps are included in the appendices to the EA. *See* Final EA, ECF No. 172-1 at 71224. Section 2.3.2 of the EA summarizes construction design features and describes measures the Corps required to mitigate any short-term risks to soil or the Lake from the HDD drilling process, such as following a Stormwater Pollution Prevention Plan and a Spill Prevention Control and Countermeasure Plan. *Id*. at 71241-46. The Corps also considered the EA and its supporting information and analyses to evaluate whether the pipeline crossing would compromise or change other purposes of the Lake Oahe project. *See, e.g.*, Section 408 Decision Package, ECF No. 183-9 at 71183-85, 71201, 71205.

The Corps considered anticipated environmental, economic, cultural, social, and environmental justice effects, as well as potential cumulative effects of the proposed crossing. Beyond the analysis of potential spill risks, the EA examined and discloses the potential impacts of the construction and operation of the portions of the Pipeline under Corps' jurisdiction on

geology, soil, water resources, vegetation, agriculture, wildlife, aquatic resources, land use, recreation, social and economic conditions, from hazardous waste, air quality, noise, environmental justice, and cultural as well as historical resources. EA at 71247-320; *see generally* EA §§ 3-4, ECF No. 172-1 at 71247-331; *see also* FONSI, ECF No. 172-2 at 71179; Section 408 Decision Package, ECF No. 183-9 at 71181-85.

The Corps also considered the numerous measures that would mitigate against any risk of oil impacts to the Lake and its resources. FONSI, ECF No. 172-2 at 71175-78; EA § 6 & Table 8.2, ECF No. 172-1 at 71333-34, 71341-49. Additionally, the Corps compared the risks of alternative methods of transporting crude oil, such as by truck or rail, with the proposed Lake Oahe crossing. *See, e.g.*, EA, ECF No. 172-1 at 71229-46; FONSI, ECF No. 172-2 at 71175. The Corps also considered the fact that the Pipeline would be co-located with an existing pipeline and other utilities. *See, e.g.*, FONSI, ECF No. 172-2 at 71174-75. This extensive review of the application resulted in imposition of numerous easement conditions intended to ensure safety. ECF No. 172-9 at 56-58.

Ultimately, on December 3, 2016, the Omaha District Commander issued a Memorandum for Record documenting the Corps' review of the Lake Oahe easement application. ECF No. 172-6. The Omaha District Commander concluded that, with the additional easement conditions, the Lake Oahe easement "would be consistent with the statutory requirements" of the MLA, and recommended "that that the Army notify Congress that the Corps intends to grant the attached easement to Dakota Access." *Id*. at 10-11. This substantive decisionmaking has been upheld by this Court, which rejected Cheyenne River Sioux Tribe's claims that (1) the Pipeline will impair the function of the Lake Oahe project, *Standing Rock III*, 255 F. Supp. 3d at 148-50; and (2) the Corps failed to satisfy Sections 185(h)(2) and 185(x) of

the MLA, *id*. at 153-55.

There has undeniably been a great deal of environmental and technical review thus far, the overwhelming majority of which has been challenged by the multiple Plaintiffs and Plaintiff-Intervenors across numerous preliminary and dispositive motions, and nonetheless upheld by this Court. Crucially, while the Court found that Plaintiffs had identified areas of scientific controversy, the top line conclusion that the risk of a spill is low has not been placed in doubt, and has been accepted by this Court. Given the amount of analysis that has occurred thus far and the easement conditions imposed to provide increased safety, it is likely that the Corps will be able to substantiate its existing decision after correcting its procedural error. This ultimately weighs in favor of remand without vacatur. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (declining to enjoin an action for which the agency had done considerable environmental review, and contrasting that situation against a hypothetical situation with "little if any information about prospective environmental harms and potential mitigating measures").

B. The second *Allied-Signal* factor supports remand without vacatur

The Court should not vacate the Corps' Lake Oahe easement during remand because doing so would be far more disruptive than leaving the decision in place during the remand process. Because the portion of the Pipeline within the easement at issue is completed and has been fully operational for nearly three years—since June 2017—vacatur would impose several disruptive consequences that are not present in the typical challenge to a project that has not yet been constructed. Vacatur would require the Corps to take administrative steps to consider whether corrective action is necessary to cure the pipeline's encroachment on federal property, including potentially ordering the Pipeline to be removed, which would likely impose additional construction-related or environmental impacts or risks. Such a removal, or even halt in oil flow

within the Pipeline, may also cause oil that would otherwise be transported through the Pipeline to be transported via other modes of transportation that could impose greater spill risks and greater pollution impacts. *See* USACE_DAPL0071230. In contrast, the low risk that the Pipeline will spill oil into Lake Oahe means that vacatur will not disrupt, much less harm, Plaintiffs or the public. Indeed, according to Plaintiffs' own experts the risk of spill is now lower than when the Court previously considered remedy. While vacatur may be the "standard remedy" for a NEPA violation where a project has not yet been constructed or is not operational, this case presents the more rare circumstance where permitted construction has long ago been completed. Because construction in this case is complete, vacating the Lake Oahe easement would have greater disruptive consequences than the typical NEPA case, and vacatur is not warranted.

1. Vacating the Pipeline's easement would be disruptive

Vacating the Lake Oahe easement now would likely place Dakota Access in violation of the MLA and trigger the Corps' policies regarding curing an encroachment of Federal Property. *See* Section I(C), *supra*. Serious questions would be raised about potential remedies, if any, given that the Pipeline is fully constructed. If the Corps were ultimately to require the Pipeline to be removed during the remand, disruption would be significant. These consequences counsel against vacatur, particularly as Plaintiffs' did not prevail on their motions seeking preliminary injunctive relief. *See Sugar Cane Growers*, 289 F.3d at 97.

As discussed in Section I(C), the Corps' policy regarding encroachments contemplates that "removal" of an unauthorized encroachment is the general policy, subject to applicable exceptions. Any such removal would entail significant costs. In addition to the administrative burden of processing the encroachment for corrective action, removal may subject Corps-

managed lands at Lake Oahe to sustain additional construction activities and associated environmental impacts. If following completion of the EIS the Corps substantiates its earlier decision, these additional costs will be for naught.

An illustrative case is *National Parks Conservation Association v. Semonite*, 422 F. Supp. 3d at 103. In *Semonite*, the Corps was ordered to prepare an EIS because the visual impacts of a power line were found to be scientifically controversial. *Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500 (D.C. Cir. 2019). On remand, the court found that vacatur was not warranted in light of the disruptive "negative impacts of tearing down the project," including the environmental and economic costs that could be incurred. *Semonite*, 422 F. Supp. 3d at 103. Specifically, the court considered that vacating the permit after the power line was already constructed would require the operator to remove "seventeen steel lattice towers . . . 37.8 miles of conductor, 8.4 miles of fiber optic shield wire, 32 solar panels and solar lighting systems, and all associated hardware." *Id.* If, following the preparation of the EIS, the Corps re-issued the vacated permit, the court found that "large sums of money would have been wasted" and that this waste made vacatur inappropriate. *Id.* (citing *Pub. Emps.*, 827 F.3d at 1084; *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989,994 (9th Cir. 2012)). The *Semonite* court also considered environmental harms that would result from unnecessary construction including "emissions from tugboats and heavy equipment, which would negatively impact water quality and aquatic life in the area." *Id.*

As in *Semonite*, the amount of waste that could result from vacatur in this case is "extreme" and this counsels against vacatur. *Id.; see also Public Emples. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (explaining that the second *Allied-Signal* factor includes consideration of "social and economic costs"); *N. Air Cargo*

v. U.S. Postal Serv., 674 F.3d 852, 860-62 (D.C. Cir. 2012) (declining to vacate on remand where agency could cure and impact on community of cessation of certain mail service would be dire). If vacatur resulted in removal of the Pipeline crossing at Lake Oahe, there would be waste of time, energy, and resources, as well as environmental impacts such as ground disturbance and increased emissions from heavy construction machinery. In short, vacatur could result in impacts at least as "extreme" as were present in *Semonite*, if not greater. The economic impact would be particularly acute for the Pipeline operator as well. *See, e.g.*, *Pub. Emps.*, 827 F.3d at 1084 (declining to vacate all regulatory approvals while additional environmental studies were conducted because "[d]elaying construction or requiring Cape Wind to redo the regulatory approval process could be quite costly . . . "). And even if the Pipeline is not removed, which is possible under the Corps' encroachment policy, significant work would have to be undertaken by the Corps and Pipeline operator to determine the appropriate remedy.

Moreover, the Corps found that the Pipeline was not injurious to the public interest, and the economic benefits to the public of the Pipeline would be lost if the easement were vacated. The EA concluded that the Pipeline has "tremendous secondary and sustainable economic benefits to the United States by supporting energy independence, increasing employment opportunities, and adding to demand in many manufacturing sectors, which would be a boost to the overall economy." ECF No. 172-1 (Final EA) at 71305. The Corps found these benefits accrue not only in the region where the Pipeline is operated, but also throughout the United States. *See id.* ("[I]n summary, the economic impact to the U.S. as well as the immediate region where the pipeline is located is considerable.").

Finally, the easement already contains 36 conditions that are intended to further mitigate risk of rupture at the Lake Oahe crossing, including specific coatings to prevent corrosion during

installation; corrosion surveys after installation; more stringent requirements for Dakota Access's Facility response plan; mainline valve and automatic shutdown requirements; and additional measures for initial and ongoing leak and crack detection. *See* Dep't of the Army Easement for Fuel Carrying Pipeline Right-of-way Located on Lake Oahe Project, USACE_ESMT000005. Because the current easement imposes safety-enhancing conditions, including corrosion surveys automatic shutdown requirements, maintenance requirements, and other relevant conditions, vacating the easement—and thereby vacating its associated conditions—might increase future risks by disrupting inspection and maintenance of the already-constructed Pipeline segment. *See id.* at USACE_ESMT000028-33, 41-42. Indeed, vacating the easement would at a minimum call into question the enforceability of conditions that were specifically designed to promote safety and minimize environmental risks.

Because Plaintiffs did not prevail on the first two rounds of emergency motions, the Pipeline segment at issue was constructed and the disruptive consequences of vacatur have been heightened. *Sugar Cane Growers*, 289 F.3d at 97; *see also, Wilderness Watch v. U.S. Forest Serv.*, 143 F. Supp. 2d 1186, 1210 (D. Mont. 2000) (declining to order the removal of hunting and fishing lodges that were unlawfully constructed absent evidence that there was imminent ongoing environmental harm from the structures). Simply put, it is generally more disruptive to vacate authorizations for completed construction than it is to prohibit construction that has not yet commenced.

Under these circumstances, vacatur is disfavored. An analogous case is *Sugar Cane Growers*, in which the court found that "because we denied preliminary relief in this case . . . [t]he egg has been scrambled and there is no apparent way to restore the status quo ante." 289 F.3d 89 at 97. So too here. Both this Court and the D.C. Circuit rejected Plaintiffs' motions for

preliminary relief under the National Historic Preservation Act and Religious Freedom Restoration Act. As a result, the portion of the Dakota Access Pipeline under Lake Oahe was constructed and has been operating for approximately three years. To vacate the easement now would not restore the status quo ante, but cause severe and unnecessary disruption.

2. Oil transportation via rail or truck entails greater risk of disruptive consequences than pipeline transport, particularly where the pipeline has been safely operational for years

Vacatur would also potentially impose risks upon the public by diverting oil from the Pipeline to other modes of transportation, such as rail or truck, with higher spill risks and more associated pollution than pipeline transport. As this Court has recognized, it is appropriate to consider whether remand with or without vacatur will cause "greater pollution emissions [to] occur." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 106–07 (D.D.C. 2017) (quoting *Davis Cty. Solid Waste Mgmt. v. EPA* , 108 F.3d 1454, 1459-60 (D.C. Cir. 1997)). In the prior round of remedy briefing, the Court found that the defendants had not substantiated the claim "that rail transport 'poses a higher accident risk' than the use of pipelines." *Id.* at 107 (citing Corps Brief at 13). Since then, a Pipeline and Hazardous Materials Safety Administration (PHMSA) report has been published that establishes that rail and truck transport poses a great risk, as has additional research that highlights the consequences of rail versus pipeline transport. The relative danger and pollution risk of rail or truck transport therefore counsels against vacatur.

In October 2018, PHMSA finalized a report to Congress on "the comparative safety of shipping crude oil by truck, rail, and pipeline." Ex. 2, PHMSA, The Comparative Safety of Shipping Crude Oil By Truck, Rail, And Pipeline, 2018 (PHMSA Report). The PHMSA Report notes that each mode has its own unique safety risks, and greater research is required to

comprehensively answer the question of which mode is the safest on all dimensions. PHMSA Report at 9. Nonetheless, PHMSA was able to draw analytical conclusions regarding the relative safety of each transportation method, and on each relevant metric pipeline transport was significantly safer than transport by rail or truck. *Id.*

Using either the metric of "percent spilled" or "incident rate" per volume transported as a proxy for safety, shipping crude oil by "pipeline would be safer than by truck, and by truck would be safer than by rail." PHMSA report at 9.[3] The report found that for oil transported by pipeline, an incident occurred approximately once every 720 million gallons of crude oil shipped. For rail, an incident occurred approximately once every 50 million gallons of crude oil shipped. For truck, an incident occurred approximately once every 55 million gallons of crude oil shipped. PHMSA Report at 8. And the overall amounts spilled per mile were also significantly smaller for pipeline transport. *Id.*

This supports the Corps' conclusions in its EA that "[f]rom a safety standpoint, railroad transport consistently reports a substantially higher number of transportation accidents than pipelines" and "[a] series of major accidents taking place in 2013 and 2014 in Canada and the U.S. has heightened concern about the risks involved in shipping crude by rail." Final EA, ECF No. 172-1 at 71231 (citations omitted). One of the accidents the Corps was referring to was the 2013 Lac-Mégantic tragedy, in which a 72 car-train filled with Bakken crude exploded in a small town in Quebec, killing 47 people. *See* Transportation Safety Board of Canada, Lac-Mégantic Runaway Train And Derailment Investigation Summary.[4]

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[3] The Report found transport by boat to be even safer, but that is not a realistic option for the oil at issue in this case.

[4] Available at http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054-r-es.asp

In addition to risk of oil spill or accident, transport by rail or truck also entails other environmental costs. A National Bureau of Economic Research working paper that studied the environmental impacts of oil transported out of North Dakota found "air pollution and greenhouse gas costs are nearly twice as large for rail as for pipelines." Karen Clay et al., *The External Costs of Transporting Petroleum Products by Pipelines and Rail: Evidence from Shipments of Crude Oil from North Dakota* (Nat'l Bureau of Econ. Research, Working Paper No. 23852, Sept. 2017).[5] The paper's abstract concludes by noting that "the policy debate surrounding crude oil transportation has put too much relative weight on accidents and spills, while overlooking a far more serious source of external cost: air pollution and greenhouse gas emissions." *Id.*

The Corps cannot state definitively that a particular percentage of the oil currently being transported by pipeline would be switched to rail in the event the Pipeline's easement is withdrawn. Nonetheless, it appears likely. Railroads do not require a special federal permit to transport crude oil, nor do they need approval to improve existing lines to expand capacity. *See* U.S. Rail Transportation of Crude Oil: Background and Issues for Congress (Dec. 2014), USACE_ESMT3634. As a result, railroads can increase capacity relatively quickly. *Id.* Shipment of oil by rail is thus, in many cases, an alternative to pipeline transport. *See id. at* USACE_ESMT3651. Vacating the Corps' decisions could thus result in at least some portion of that oil being transported via rail.

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see also Daniel Gross, The Dakota Access Pipeline Should've Happened 10 Years Ago, Slate, (October 21, 2016). ("An explosion [in 2015] in Oregon was [one of] a long string of accidents involving trains carrying oil from North Dakota and Canada.").

[5] Available at: https://www.nber.org/papers/w23852

Finally, an additional relevant consideration when comparing the relative risks of pipeline versus rail transport is that the risk of spill from the Pipeline is now less than it was than when the issues was raised in 2017. The Tribe's own information shows that the highest risk of spill from a pipeline is during commissioning and decommissioning (the latter of which is a conceivable ultimate result of vacatur). *See* ECF No. 272-2 at 5. When remedy was last before the Court, Standing Rock's expert stated that "pipelines are mostly likely to leak or fail when they are brand new, and then again when they reach the end of their useful lives" and concluded "the likelihood of a leak or rupture is likely higher now [in August 2017] for DAPL than for pipelines that have been operating for years." *Id.* As the Pipeline has now been operating without issue "for years," Standing Rock's own expert establishes that the risk of spill is lower than it was when the Court first considered remedy in 2017.

A proper weighing of the potential disruptive consequences of vacatur must therefore balance the low risk of a pipeline spill against the risks related to transporting oil by rail. *See Cal. Cmtys. Against Toxics*, 688 F.3d at 994 (remanding EPA rule without vacatur and allowing power plant construction to continue where preventing construction of power plant would increase use of diesel generators).[6] That rail and truck transportation poses a higher risk of disruptive accident and greater pollution risk ultimately weights against vacatur.

C. Vacatur is overbroad

Equitable relief must be narrowly tailored to the precise violation found. *Califano v.*

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[6] Notably, *California Communities Against Toxics* allowed construction of a power plant to proceed, finding that "if saving a snail warrants judicial restraint . . . so does saving the power supply." 688 F.3d at 994 (internal citation omitted). The Corps expects that Dakota Access will address the economic impact that vacatur would have on Dakota Access, but notes that at least one court has declined to vacate a Corps permitting decision where a "partnership stands to lose hundreds of thousands of dollars, if not more, if the uncertainty of a vacatur is introduced." *Md. Native Plant Soc'y v. U.S. Army Corps of Eng'rs*, 332 F. Supp. 2d 845, 862-63 (D. Md. 2004).

Yamaski, 442 U.S. 682, 702 (1979). This standard applies to vacatur decisions as well as injunctions. *Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006). Here, the violation found by the Court concerned procedural NEPA environmental review—the underlying MLA easement was not found to be substantively flawed. It therefore is appropriate to narrowly tailor the relief to redressing the NEPA issue identified by the Court, instead of setting aside the substantive MLA decision that was upheld.

A narrow remand to the Corps to address the procedural flaw in the environmental review identified by the Court would be more appropriate and in line with the mandate of *Califano. See also Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 193 (2000) (federal courts should ensure "the framing of relief no broader than required by the precise facts"); *U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1117 (D.C. Cir. 2009) ("[W]e must ensure the remedy imposed is tailored to 'the violation found.'" (quoting *United States v. Microsoft*, 253 F.3d 34, 105 (D.C. Cir. 2001)).

This tailoring approach has been followed in this Circuit, for instance in *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d at 1083–84. There, the Court found the agency's EIS to be arbitrary and capricious but found that this "does not necessarily mean that the project must be halted or that [the applicant] must redo the regulatory approval process." *Id.* (citations omitted). Instead, the Circuit narrowly tailored the relief to the specific NEPA violation found, ordering the agency to undertake specific additional environmental review to address the NEPA deficiency—but not vacating the project's lease or other regulatory approvals based on this NEPA violation. *Id.* A similar result is appropriate here.

V. CONCLUSION

The Corps respectfully submits that the Court should not vacate the Corps' easement

decision authorizing Dakota Access to construct a portion of the Dakota Access Pipeline 100 feet under the bed of Lake Oahe. The Corps' errors were not "serious" in context, and the disruptive consequences of vacatur would be significant.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reuben S. Schifman, hereby certify that on April 29, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Reuben Schifman
REUBEN S. SCHIFMAN