ORAL ARGUMENT SET FOR NOVEMBER 4, 2020
No. 20-5197

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK, Chairman of the Yankton Sioux Tribe Business and Claims Committee; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVEN VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee,

DAKOTA ACCESS, LLC,

Intervenor for Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:16-cv-1534

REPLY BRIEF FOR DAKOTA ACCESS, LLC

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GLOSSARY

DAPL:	Dakota Access Pipeline
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FONSI:	Finding of No Significant Impact
HDD:	horizontal directional drilling
NEPA:	National Environmental Policy Act
PHMSA:	Pipeline and Hazardous Materials Safety Administration
the Corps:	the U.S. Army Corps of Engineers

SUMMARY OF ARGUMENT

Plaintiffs won summary judgment only after convincing the district court that *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), imposed a heightened standard under NEPA—a heckler's veto where "robust technical criticism" by objecting parties alone "trigger[s] a finding that [an] action [is] 'controversial,'" compelling an EIS. D.E. 433-2, at 11. Having successfully urged that *Semonite* "clarified the legal landscape governing [their] claims" and that it "would be hard to find controlling precedent more on point," D.E. 465, at 1-2, Plaintiffs now backtrack from the erroneous positions they persuaded the district court to adopt. Their brief consigns *Semonite* to a fleeting footnote and suggests the case merely provided some sort of analogous guidance that the court was required to "consider." Opp. 20-21 n.5. Instead of squarely defending the proposition that an EIS is required because the action under review was "controversial" under NEPA—the ruling *actually* under review—Plaintiffs now launch a generalized APA merits attack on the Corps' decision. Plaintiffs thus ask this Court to rule on grounds the district court did not accept and that are erroneous in any event.

These tactics must be viewed in context. The parties have litigated for years over a 1.7-mile segment of a 1,172-mile pipeline. The remaining 99.9% is unquestionably legal. Only the Lake Oahe crossing is subject to federal oversight, not because of nearby tribal lands, as Plaintiffs suggest, but because it crosses a

narrow strip of federally owned property. Career Corps employees approved the crossing repeatedly under two Presidential administrations, rejecting alternatives that would have required more pipeline, with greater construction impacts, through more populous sites with larger minority populations, A1869. The Corps found a costly, years-long EIS process unwarranted because a large, high-consequence spill was extremely unlikely, so granting an easement for the 1.7-mile segment would not "significantly" impact the environment—a conclusion this Court's precedent expressly allows. *New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012).

Plaintiffs now challenge a strawman version of the Corps' reasoning: "[T]he risk of a pipeline spill is low … because the risk of a pipeline spill is low." Opp. 1. To the contrary, the Corps found the risk very low, based on extensive real-world PHMSA data that *overstate* a large spill's likelihood (because DAPL has modern safety features superior to those of other pipelines in the dataset), and extensive modeling showing that the largest once-in-the-history-of humanity spill would have only "temporary" and "limited" impact on Plaintiffs, A1818, 2033-34. DAPL's industry-leading safety record over three years of operation bears this out.

Under the legal standards that actually govern the Corps' decisionmaking, the Corps easily satisfied its obligations by appropriately addressing every asserted criticism. Plaintiffs fail to engage with the Corps' actual reasoning because their beef is with the ultimate decision to issue an easement, not the underlying analysis.

NEPA leaves both to the Corps' expertise. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). And if more explanation were required—to justify either the easement or forgoing an EIS—the Corps could easily supply it, including with supplemental evidence from Dakota Access that the court never considered.

These considerations should have precluded the court from ordering an EIS and vacating the easement under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993), let alone ordering a shutdown of the pipeline that would cause billions of dollars in harm to states, the oil industry, employees, and the economy at large. The district court rejected Plaintiffs' argument that a shutdown would be harmless; its error was in failing to address the *full* extent of the economic and environmental harms. And the record belies Plaintiffs' assertion that the pipeline must be emptied to motivate the Corps to complete its environmental review expeditiously. In the initial remand-without-vacatur, the Corps prepared hundreds of pages of new analysis addressing hundreds of criticisms within six months of receiving Plaintiffs' completed submissions, which Plaintiffs were tardy in providing. D.E. 456, at 8-9. Inflicting billions of dollars of harm on third parties as the economy regains its footing is an unnecessary and inappropriate "incentive" for regulatory compliance. A157. And the mere possibility of a spill is far too remote to justify vacatur, let

alone to establish the irreparable harm necessary for injunctive relief. The Court should reverse.

ARGUMENT

I. The Corps Complied With NEPA

Plaintiffs argued below that *Semonite* "significantly clarified the legal landscape governing … NEPA." D.E. 465, at 1. Now, however, they insist that *Semonite* merely applied "well-established APA" standards. Opp. 11, 19-20 & n.5. This course-reversal is a confession of error because the district court grounded its decision in Plaintiffs' now-abandoned position. It treated *Semonite* as "new" and "significant guidance," A97, 110, that now requires agencies to "succeed" in "resolving" disputes to an objector's satisfaction. A112-13. This erroneous view even led the court to reverse its earlier determinations that the Corps had adequately considered topics of potential controversy. *E.g.*, A27-28 (originally concluding that EA adequately addressed leak detection). That misapplication of *Semonite*—which Plaintiffs invited and now seek to hide under the rug—requires reversal. Moreover, even had the court not misread *Semonite*, supposed controversy over the *effects* of a major spill did not require an EIS because the Corps' finding of no significant impacts was properly grounded in the extremely low *likelihood* of such an event.

Well-established APA principles defeat Plaintiffs' claims. The Corps properly supported its ultimate conclusion that no EIS is needed because the

likelihood of a high-consequence spill at Lake Oahe is too low to "significantly affec[t] the quality of the human environment." 42 U.S.C. § 4332(C). That remote likelihood made an EIS unnecessary because "after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI." *New York*, 681 F.3d at 482. Plaintiffs never engage with the analysis this Court found dispositive in *New York*, nor explain why a remote likelihood could support dispensing with an EIS with respect to nuclear rod fires there but not with respect to the remote possibility of a leak in the small segment of pipeline here.

The district court repeatedly accepted the Corps' low-likelihood determination, crediting the conclusion that spill risk from third-party damage is low because the pipeline is 92 feet below the lakebed; from manufacturing defects "is also slim" because of hydrostatic strength testing of the pipe; and from incorrect operations including "human error" is "low because the pipeline is designed to withstand twice the maximum-allowable operating pressure." A32. In its March 2020 opinion, the district court deployed the same conclusion to reject the argument that the Corps violated an asserted trust duty to provide a safe water supply. A136 (invoking June 2017 ruling, which "accepted" that the "possibility of a future spill" is "low"). Plaintiffs assert (at 24) that the district court found many of the Corps' conclusions about "risks of leaks and spills" to be "unsupported," but they cite only

their own expert because the court never questioned that a major leak (more than 10,000 barrels) on a segment this length is highly unlikely. The district court identified four "controversies" over the *effects and magnitude* of a major leak, but none refuted the very low *likelihood* of such an event.

There is nothing "tautolog[ical]" about this low-likelihood conclusion. Opp. 1. The Corps considered exhaustive empirical PHMSA data (all reported spills over a decade) to identify the range of possible outcomes. A1831-36. The Corps then extensively modeled consequences, under 100 different weather scenarios, of a spill volume at the upper range of that data set, A2227-2448—an event so "extremely uncommon," A1835-36, that for an average segment the length of the Lake Oahe crossing it would be expected to occur just once in 193,971 years, A1152. The modeling then confirmed that the consequences of even that extremely-low-likelihood worst-case spill would be temporary and localized. *See* DA Br. 18-19. The Corps thus *did* account for the range of "reasonably foreseeable" outcomes—including "both the chance of a spill and the impacts should one occur"—based on extensive "real world experience." Opp. 2, 17, 24.

Plaintiffs take issue not with this reasoning, but with the Corps' ultimate conclusion (a FONSI). Plaintiffs do not argue that the Corps misapplied PHMSA data in establishing the infrequency of large spills, nor did the court question that DAPL is at least as safe as the average pipeline. In fact, it credited the Corps'

conclusion that DAPL is *less* likely to leak. A32. Plaintiffs' arguments thus fail to engage with the Corps' determination that a major spill at Lake Oahe is extremely unlikely. Because Plaintiffs' criticisms are generalized—*e.g.*, leak detection systems sometimes fail, and winter slows response times, Opp. 26-27, 30-32—rather than DAPL-specific, the data the Corps considered already account for the effects of those criticisms by including all leaks from all causes under all conditions, such as the 8,600-barrel spill Plaintiffs cite at 26, A1836. These criticisms also ignore the Corps' finding that DAPL has a "leading" leak-detection system, better than those used by many pipelines. A1943. The Corps recognized that not one spill exceeding 5,000 barrels has gone undetected since 2010 on pipelines with comparable systems. A1147-48. Regardless of how any controversy over DAPL's leak-detection system is resolved, the chance of a large spill would still be lower than the industry average the Corps calculated.

In attacking Sunoco's safety record, Plaintiffs still cite only the *number* of leaks, Opp. 28-30, ignoring that Sunoco aligns with the industry average on the metric that matters: spills *per mile* of pipeline operated. A1831; A1608-13. Plaintiffs' own statistics show that even including past Sunoco data (*e.g.*, older pipelines and different management), average annual spill *totals* for *all* of Sunoco's thousands of miles of pipelines put together were less than half of the spill volume the Corps modeled for the 1.7-mile DAPL segment. *See* Opp. 29 (showing *annual*

average of 5,800 barrels over 15 years). Nothing about Sunoco's safety record suggests the Corps underestimated the likelihood or magnitude of a large spill at Lake Oahe.

Nor did Plaintiffs' apples-to-oranges comparisons require the Corps to model a spill larger than those already extensively modeled. DAPL can detect a full-bore guillotine break within 1 minute. A2071. *Slower* leaks obviously take longer to detect *because* less oil escapes per minute. Yet Plaintiffs did not show that a slow leak resulting from their so-called detection "failures," Opp. 26-27, 33-34, has ever exceeded the volumes the Corps modeled. The Corps reasonably followed PHMSA regulations, which specify using detection times and spill rates assuming a full-guillotine cut.

The district court already found, moreover, that none of the "submissions from the EPA and the Department of the Interior" that were "before the Corps as of July 25, 2016" "suggested substantial methodological or data flaws in the Corps' analysis." A35; *see* Opp. 7. The December 2016 Interior memorandum that Plaintiffs cite at 21 predated the Corps' extensive remand analysis, and did not mention, nor invoke Interior's own expertise as to, any of the four topics of controversy, instead raising spill concerns at a general level and suggesting further analysis, SA1355-91, which the Corps conducted on remand.

Finally, Plaintiffs note the district court's allusion to additional "'unresolved scientific criticisms.'" Opp. 38. Plaintiffs are of course free to pursue any non-forfeited arguments on remand, after this Court corrects the district court's errors, but it is strange to suggest that the judgment might be affirmed on grounds not yet briefed or argued by the parties or addressed by the district court. "Sentence first, verdict afterwards" is a Lewis Carroll witticism, not a rule of appellate procedure.

II. An EIS Is Unnecessary

Plaintiffs' reframing of the decision below as "well-established APA review," Opp. 20, also undercuts the order to prepare an EIS. NEPA calls for one when an action will "significantly" affect the "quality of the human environment," 42 U.S.C. § 4332(C); an EIS is not the required mechanism "to address … expert critiques," Opp. 11. The APA remedy when an agency "fail[s] to address … commenters' concerns" is ordinarily remand for a "reasoned response to the comments"—not an order resolving the underlying issues in the agency's stead. *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012).

Plaintiffs cite no precedent for ordering an EIS simply because an agency failed to rebut criticisms or resolve controversies. *See* Opp. 39-40. It is one thing to order an EIS if the agency agrees that environmental impacts will be significant, *e.g.*, *Sierra Club v. FERC,* 867 F.3d 1357, 1379 (D.C. Cir. 2017); *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012), or where

multiple NEPA factors compelled that conclusion; *e.g.*, *Semonite*, 916 F.3d at 1081-87; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 867-71 (9th Cir. 2004). But the court offered no basis—beyond purportedly *unresolved* "controversy"—to conclude that speculative impacts were sufficient to require an EIS. As much as Plaintiffs wish otherwise, the district court did not *resolve* any controversy—or any other NEPA factor—in their favor. Opp. 40; A114-29. It believed that four issues "remain[ed]" "*unresolved*," and these controversies were the "*only* [NEPA factor] relevant." A108, A113 (emphases added). Plaintiffs cannot backfill the decision below by invoking NEPA factors that the district court did not accept. Opp. 40-41.

Ultimately, "whether an EIS should be prepared is left to the agency's informed discretion." *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982). Demanding "more explanation," A125—then depriving the Corps of the chance to provide it—usurps that discretion, especially where the Corps had no chance to consider the additional support for its FONSI that Dakota Access offered in its remedy briefs, D.E. 509-1, at 17-19; D.E. 538-1, at 11-15. Because "more explanation" could justify the Corps' low-risk/high-consequence bottom line, ordering an EIS was error.

III. Vacating The Easement Was Unwarranted

Even if an EIS were required, the court erred under *Allied-Signal* in vacating the easement. Here again, Plaintiffs try to change the subject, invoking cases dealing with notice-and-comment failures[1] and cases lacking any *Allied-Signal* discussion.[2] *Allied-Signal*'s two-prong test and the facts of the case—not some categorical preference for vacatur—instead govern the remedy in NEPA cases. *See Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 538 (D.C. Cir. 2018) (denying vacatur under both *Allied-Signal* prongs despite "serious" NEPA violations).

Plaintiffs' claim that "vacatur is virtually always the remedy" in NEPA cases (Opp. 45) is misleading in the extreme. Many NEPA decisions allow agency action to stand in whole or in part.[3] And Plaintiffs *still* cannot find a single case where the

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[1] *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009); *see Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 84-85 (D.C. Cir. 2020).

[2] *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017); *New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012).

[3] *See*, *e.g.*, *Oglala*, 896 F.3d at 538; *Sierra Club v. FERC*, No. 16-1329, Doc. 1721094 (Mar. 7, 2018) (staying vacatur mandate pending remand, thus allowing pipeline construction to continue); *PEER v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (declining to vacate existing approvals); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309 (D.C. Cir. 2014) (remanding pipeline certificate without vacatur); *NRDC v. NRC*, 606 F.2d 1261, 1272 (D.C. Cir. 1979) (declining to enjoin construction of tanks); *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) (declining to set aside sale of oil and gas lease), *vacated on other grounds*, *W. Oil & Gas Ass'n*, 439 U.S. 922 (1978); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 457 (D.C. Cir. 1977) (denying injunction and allowing office building construction to

remedy required shutting down a major pipeline or *any* already operational infrastructure project. DA Br. 35-36; Opp. 54-55 (citing only decisions vacating construction permits for *not-yet-operational* pipelines). Vacatur was error.

1. Plaintiffs do not meaningfully dispute that *granting an easement* was "potentially lawful," even if "insufficiently … explained," and that such actions are "frequently remand[ed]" without vacatur. *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999). Instead, like the district court, A150, they shift focus to whether the Corps could justify the *separate* decision "'that an EIS was not warranted,'" Opp. 50.

If only an EA and FONSI were at issue, the question under *Allied-Signal* would be whether further explanation would likely substantiate proceeding without an EIS. But the court went much farther than vacating an EA and FONSI; it vacated the *easement*, so it needed to assess the Corps' ability to justify *that* action on remand. *See Heartland*, 566 F.3d at 197 (applying *Allied-Signal* to the action the court was "deciding whether to vacate"); *see also Oglala*, 896 F.3d at 538 (considering agency's ability to cure defects in underlying licensing decision). Plaintiffs' suggestion that "the parties endorsed" a contrary approach in the first remand is risible. Opp 50 (citing A420). The parties focused on whether the Corps

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proceed); *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 103 (D.D.C. 2019) (declining to vacate permits).

could substantiate its EA and FONSI because the court left that option open as the most direct path to substantiating the easement. A421, 430.

This Court has not suggested that it would "'vitiate'" NEPA to consider the Corps' ability to justify the easement on remand. Opp. 51 (quoting *Oglala*, 896 F.3d at 536). Instead, *Oglala* warned *agencies* to apply *Allied-Signal* properly by considering that very point. 896 F.3d at 536 (agency failed to give weight to the seriousness of the deficiencies that prompted remand). *Oglala* itself applied *Allied-Signal* to a license grant, and found that *both* factors favored remand without vacatur. 896 F.3d at 538. Applying *Allied-Signal* in NEPA cases does not mean vacatur is "literally never … the outcome." Opp. 51. It merely requires a case-by-case assessment.

Multiple factors—the extensive environmental analysis the Corps already performed, the limited nature of the issues the district court identified, and the voluminous unrebutted evidence accompanying Dakota Access's remedy brief that thoroughly resolves those issues—distinguish this case from others where, for example, the agency "never environmentally assessed [its action] in any manner whatsoever," *Humane Soc'y v. Johanns*, 520 F. Supp.2d 8, 35-36 (D.D.C. 2007), or its analysis is irredeemable, *e.g.*, *Semonite*, 422 F. Supp. 3d at 99. In addition, the district court has already rejected challenges Plaintiffs make to key aspects of the Corps' work. For example, the Corps *already* "develop[ed]" and "explore[d]

alternatives," including "the option of denying the permits," Opp. 48-49, and the district court upheld that analysis, *see* A46.

Finally, the district court did not "already g[ive] the Corps one opportunity to" resolve the issues it identified. Opp. 47. The initial remand directed the Corps to consider comments for the *first time*, A36, and the Corps addressed them all at length—including many that Plaintiffs added *during* the remand. A1958-2097. Plaintiffs offer no reason the Corps cannot substantiate its easement decision expeditiously.

2. Plaintiffs also wrongly discount the "disruptive consequences"—supported by 19 declarations the district court ignored, A693-710, 787-97, 808-820, 1391-1561, 1689-1809—that independently preclude vacatur if, as Plaintiffs contend, vacatur would result in a shutdown. *Allied-Signal*, 988 F.2d at 150-51. The district court acknowledged that shuttering DAPL would have "serious" economic consequences. A156. Plaintiffs offer no basis to overturn that factual finding, and their defense of the court's decision to treat the disruption as *favoring* vacatur is legally flawed.

The district court rejected Plaintiffs' factual argument that a temporary, pandemic-induced, market slump would render the economic disruption of a shutdown "marginal and readily managed." Opp. 54. The court instead accepted that a shutdown would "immediate[ly] harm" "many states, companies, and

workers" "*even if* its effects are tempered by a decreased demand for oil." A156 (emphasis added). And rightly so: Oil demand and production have surpassed Plaintiffs' gloomy predictions for months. A1747-48, 1766. Removing the safest, most cost-effective means of transporting 40% of North Dakota's current crude oil production thus would *exacerbate* current economic hardship. A1738-40, 1768; Doc. 1859628, at 14-19.

Plaintiffs' only *legal* argument for ignoring these devastating economic consequences is that NEPA's "purposes" are incompatible with consideration of economic harm. Opp. 55-56. But their cases hold the opposite: Even an agency's *deliberate* decision to "'act first and comply [with NEPA] later'" does not support vacatur where a permitholder "reasonably relied" on the permit, and disruptive economic consequences would result. *Oglala*, 896 F.3d at 526. In *Oglala*, the agency forged ahead even after *acknowledging* that its environmental review lacked *any* NEPA-mandated analysis of cultural impacts on Native Americans. *Id.* at 525-26. Yet this Court *still* declined to vacate the permit after accepting that the permitholder's "stock price 'would plummet.'" *Id.* at 538.

Even if an EIS were required, the case against vacatur is much stronger here. The Corps applied NEPA in good faith by *extensively* analyzing the pertinent environmental impact. Dakota Access relied on agency approvals, reached by career employees during successive Presidential administrations, and the pipeline operated

for years after Plaintiffs had multiple opportunities to enjoin its construction and operation. Plaintiffs' argument ignores *billion*-dollar losses to states and other innocent bystanders. And their assertion that the Corps may "never finish" an EIS absent vacatur, Opp. 56, is unjustified and baseless. The agency has published the notice of intent, D.E. 564, at 2, with a "rapid" 13-month timeline for completing an EIS, D.E. 527 at 16 n.4. If delay becomes a concern, the court has means to address it, including status reports.

Plaintiffs, like the district court, have no answer to the environmental effects of the shutdown they seek. Plaintiffs' expert conceded that a shutdown would increase rail transport, A1693-94, which is demonstrably more dangerous than DAPL. Responding to the district court's assertion in 2017 that "substantiated studies" on rail's dangers were unavailable, A437; Opp. 58, Dakota Access cited numerous such studies—including the "undisputed" study that Plaintiffs falsely state was "never submitted below," Opp. 58. Dakota Access's remedy brief discussed these studies prominently, D.E. 509-1, at 41-42, but the court (like Plaintiffs) missed them, stating incorrectly that the "only new evidence" cited was a separate PHMSA study. A162. Like Plaintiffs, the court also got *that* study wrong: It confirmed that *on net*, shifting to rail increases spill risks, potential fatalities and injuries, and air pollution, DA Br. 39, A725, A1591-92 (despite fewer rail injuries in one category, *overall* injuries from derailments and traffic accidents are higher). And the court

missed the other environmental harms of a prolonged shutdown—including methane and nitrogen emissions and injury risks to workers. No matter how "unconvinc[ed]" Plaintiffs are of these harms, Opp. 59, the district court's duty was to consider them.

Finally, Plaintiffs' advance a flawed not-in-my-backyard approach to assessing environmental consequences. Opp. 58-59 (limiting analysis to "'*this* pipeline in *this* location'"). The court was required to consider the risks vacatur posed to "the *public* health" and "the environment," not just Plaintiffs' localized interests. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (emphasis added). Its failure to do so was error.

3. Plaintiffs seek to counter these certain economic and environmental harms from a shutdown with the speculative possibility of a spill, Opp. 59-64, but they ignore that the district court's *only* finding on the probability, magnitude, or impact of such an event at Lake Oahe was its *agreement* with the Corps that spill risk was low, A36. Finding controversies "unresolved," A113, is a far cry from accepting Plaintiffs' contrary views as fact. This only reinforces the irony that the court's remedy for an agency not resolving all controversies was the equivalent of a new major federal action unsupported by *any* agency review or analysis. Generalized truisms that operating a pipeline "risks … a spill," A434, fail to establish any *meaningful* risk of harm.

Further, DAPL's industry-leading safety record—***zero*** mainline spills in three years, A1174-75—dispels any risk. Plaintiffs distort that record by attributing to DAPL spills on the separate ETCO pipeline and using gallons instead of barrels. Opp. 61-62 (citing SA504-05, 520).[4] The district court did not "agre[e]" with these error-riddled arguments. Opp. 60. It did not even *address* Dakota Access's six remedy-stage declarations—145 pages plus exhibits, A869-1390, 1565-1688, 1810-17—regarding pipeline safety. By Plaintiffs' own metric, the court's "fail[ure] to consider [Dakota Access's] expert" evidence, Opp. 9, would undermine any finding of spill risk—had the district court even made such a finding.

Weighing the recognized "immediate" and "serious" harms, A156, from the shutdown Plaintiffs claim is required under *Allied-Signal* against the profound improbability of a spill is not balancing the equities "on the backs of Native Americans," Opp. 64. "Certain and substantial" harms outweigh doomsday speculation every time. *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011).

IV. The Injunction Is Ultra Vires

A motions panel stayed the injunctive portion of the remand order, rejecting Plaintiffs' arguments (at 65-75) that the requirements for an injunction under

[4] 6,000 gallons, Opp. 62, is 143 barrels—a tiny fraction of the worst-case spill modeled by the Corps. And 2,000,000 total gallons over 10 years is still less than 5,000 barrels per year across thousands of miles of ETP and Sunoco pipelines—and well within the industry average. A1835-36.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010), could be ignored. Doc. 1855206, at 1. Plaintiffs offer no basis to hold otherwise.

Plaintiffs' lead argument—that Defendants forfeited this challenge—is false. From the beginning of the remedy briefing in 2017, Dakota Access argued that "an order stopping the flow of oil" would "go beyond mere vacatur," that "an injunction" does not routinely issue as "the appropriate remedy for NEPA violation," and that Plaintiffs were instead required to meet "the traditional (and demanding) test for injunctive relief." D.E. 277, at 1-2 n.1 (citing *Monsanto*). The Corps likewise noted Plaintiffs' failure to seek injunctive relief under *Monsanto*, D.E. 276, at 9 n.8, and argued that *Monsanto* precluded imposing conditions on pipeline operations, D.E. 287, at 2. The district court acknowledged this "dispute" over "what, precisely, vacatur would entail." A418.

In the latest remedy briefing, Defendants followed the district court's instruction to address "vacat[ur]." A137. Plaintiffs did not attempt to justify the language in their proposed order going beyond vacatur of agency action to enjoin Dakota Access. D.E. 527, at 4. The only forfeiture, therefore, is Plaintiffs' failure to move for their requested injunction, and to support the requested relief with appropriate legal and factual arguments demonstrating how they claimed to satisfy the stringent requirements for injunctive relief. The Corps, for its part, argued that the court should "decline to order additional injunctive relief," because

"decommission[ing]"—*i.e.*, a court-ordered shutdown—would both "intrude upon" the Corps' authority to determine what follows from vacatur and violate *Monsanto*. D.E. 536, at 2, 19. Dakota Access joined the Corps' argument opposing injunctive language in a vacatur order because it would "invad[e] the Corps' prerogative to determine how to deal with an encroachment." D.E. 539, at 25.

The ultimate question is not whether "the district court *had* to issue a separate injunction." Opp. 13 (emphasis added). Rather, it is whether the record (Plaintiffs' arguments and the court's ruling) supported the injunction that *did* issue—an order "'directed to a party, enforceable by contempt, and designed to accord … substantive relief.'" *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 749 (D.C. Cir. 2016). That injunction should be reversed because Plaintiffs never moved for such relief, much less satisfied *Monsanto*. "Plaintiffs have not shown that a damaging oil spill is likely to occur, and it is bedrock law that injunctions 'will not issue to prevent injuries neither extant nor presently threatened, but only merely feared.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 41 (D.D.C. 2013) (quoting *Comm. in Solidarity With People of El Salvador (CISPES) v. Sessions*, 929 F.2d 742, 745-46 (D.C. Cir. 1991)).

Indeed, Plaintiffs have no basis for an injunction even assuming vacatur of the easement was warranted. Vacatur merely returns the matter to the agency to determine what to do in the absence of an easement under its "encroachment"

regulations. RSA56-63. It is up to the Corps to determine how to enforce its property rights in the absence of an easement. The agency would need to issue a decision on that subject before there could be "final agency action" for Plaintiffs to challenge and a court to review. 5 U.S.C. § 704. Apart from that, the remote and speculative risks that Plaintiffs have urged as the centerpiece of this litigation could not establish the required irreparable harm. Nor could Plaintiffs proceed against Dakota Access, which intervened solely to defend the Corps' regulatory actions. Neither the APA nor the Mineral Leasing Act creates a cause of action against Dakota Access, *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295, 1298 (D.C. Cir. 2007) (APA); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789-90 (D.C. Cir. 1983) (Mineral Leasing Act). Under any view of the law or the record, the injunction must be reversed.

CONCLUSION

This Court should reverse the district court's summary judgment and remedy rulings.

September 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 4,885 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2020, I electronically filed the Reply Brief for Intervenor-Defendant-Appellant Dakota Access, LLC with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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