IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

REPLY IN SUPPORT OF IMPOSITION OF REMAND CONDITIONS

INTRODUCTION

The Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe (collectively, the "Tribes") respectfully submit this reply in support of their request for imposition of remand conditions. Neither the U.S. Army Corps of Engineers ("Corps) nor Dakota Access Pipeline ("DAPL") offers any compelling reason why this Court should not impose the three modest conditions on pipeline operations proposed by the Tribes as an alternative to vacatur. Instead, defendants first seek to relitigate the settled issue of this Court's authority to impose such

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

conditions, and next offer a series of unpersuasive arguments that the conditions would be unnecessary, duplicative, or burdensome. DAPL then undercuts those arguments by offering to undertake the measures voluntarily. Without a Court order and firm deadlines, however, such an offer is illusory. The Tribes respectfully request that the Court impose the conditions suggested by the Tribes, as clarified in the proposed order submitted herewith.

ARGUMENT

Defendants' responses to the Court's request for additional briefing on remand conditions suffer from two core failings. First, both defendants tout a supposedly robust and mature regulatory system for crude oil pipelines, reasoning that any additional conditions during the remand are unnecessary. But no such robust and mature regulatory system exists. The Tribes have extensively documented the ongoing problem of spills and leaks from crude oil pipelines, including modern pipelines subject to the identical regulatory standards as DAPL. *See, e.g.,* ECF 195 at 4-6; Third Kuprewicz Decl. ¶ 8 ("it is a virtual certainty that DAPL will suffer multiple leaks and spills during its lifetime"). Standing Rock's pipeline regulation expert, a former federal regulator, submitted a detailed declaration describing how the existing "regulatory infrastructure is widely regarded as inadequate for crude oil pipelines." Holmstrom Decl. ¶ 7-8 (ECF 272-4). The Pipeline Hazardous Materials Safety Administration ("PHMSA") regulations, touted by the Corps and DAPL as sufficient to protect the Tribe's interests during the remand period, "are predominately out of date with key modern standards." *Id*., Ex. 2 (ECF 291) at 27.[1] Sunoco, the pipeline's operator, has a particularly abysmal safety record, with a documented

[1] DAPL's brief claims that the pipeline was built and will be operated in accordance with industry standards, including voluntary standards laid out by the American Petroleum Industry ("API"). DAPL Br. at 5. As discussed in the Tribe's scoping comments on the abandoned EIS for the Oahe crossing, that is flatly incorrect. ECF 291 at 29-33. Numerous voluntary safety and oversight standards adopted by API are not achieved for this project. *Id.*

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

history of two spill incidents each month on average over the past ten years. Holmstrom Decl., ¶ 9. Indeed, it was PHMSA itself that recommended two of the Tribes' three proposed remand conditions. ESMT 1173.

The second critical flaw of defendants' responses is that they fail to acknowledge the core fact driving the discussion over remand conditions in the first place: the Corps' "serious" and "substantial" violations of NEPA in its review of the Oahe crossing. *See* Memorandum Opinion re. Vacatur, ECF 284, at 17. Indeed, the Corps seeks to deflect a remedy by pointing to its "extensive analysis" of pipeline risk, without any acknowledgement that this Court found that analysis unlawful under a deferential standard of review. The Corps is planning on a process to review its findings that will take close to a year. ECF 281. This includes technical issues, such as spill modeling, which should have been completed and scrutinized *before* the Corps granted permits for a major crude oil pipeline crossing one of the nation's most important waterways. *Id.* Because this Court declined to vacate the permits, the Tribes are being exposed to spill risks while those very same risks are being analyzed under NEPA—a situation that is at stark odds with the purposes of NEPA. In light of the serious shortcomings in the permitting process, and the extraordinary situation presented by the pipeline operating despite these shortcomings, additional measures related to safety and oversight are warranted.[2]

[2] The Corps' argument that the proposed remand conditions are not "tailored" to the Corps' NEPA violations is puzzling. One of the proposed conditions would enable the Tribes to better respond to an oil spill. The third party audit recommended by PHMSA would provide independent verification of DAPL's safety claims, and daylight potential risks that otherwise would go unaddressed. And as to the public reporting, the core tenet of NEPA is that transparency and public involvement yield better environmental outcomes. *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) The three proposed conditions are specifically tailored to the issues that will be the subject of the remand.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

I. THIS COURT HAS AUTHORITY TO IMPOSE CONDITIONS ON PIPELINE OPERATIONS DURING REMAND.

Both the Corps and DAPL start their briefs by seeking to relitigate an issue that this Court has already decided, specifically, its authority to impose conditions during remand in lieu of vacatur. Vacatur Order, at 27-28. Because the issue has already been fully briefed and decided, the Court should not revisit it. Even if the Court decides to consider these arguments, they must be rejected. Simply put, the same equitable authority that this Court relied on to depart from the statutorily mandated remedy of vacatur for the Corps' NEPA violation also allows it to craft a lesser remedy that reduces risks to the Tribes during the remand. Both DAPL and the Corps propose a rigid and mechanical framework at odds with the Court's flexible approach to remedies in similar situations. There is no need for this Court to impose the conventional four-part test for "injunctions." Rather, the requests for remand conditions are, in essence, a lesser form of vacatur: if this Court has the power to vacate the Corps' easements completely, surely it has the power to impose modest measures on those easements as a condition of allowing them to remain in place during the remand.

The concept of a partial vacatur is well established. In *Public Employees for Environmental Responsibility v. Hopper,* 827 F.3d 1077 (D.C. Cir. 2016), for example, the D.C. Circuit found unlawful an agency's NEPA analysis for offshore wind turbines. The Court looked at the equities and imposed a balanced remedy in which the agency would be required to conduct a new environmental analysis but would not have to redo its lease and other regulatory approvals. *Id*. at 1084. Notably, the Court ruled that a new environmental analysis must be complete before the project proponent could begin construction, but without applying the four-part test for injunctions. *See also Sierra Club v. Van Antwerp,* 719 F. Supp.2d 77 (D.D.C. 2010) (allowing some components of project to go forward during remand and partial vacatur of

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

agency decision). These decisions reflect the time-honored understanding that Courts have broad equitable powers to craft remedies appropriate for the situation.

Other courts have demonstrated this flexibility in other ways, such as a broad interpretation of "irreparable harm" in similar situations. For example, in *Conservation Congress v. U.S. Forest Serv.*, 2017 U.S. Dist. LEXIS 82440 (E.D. Cal. 2017), the District Court found a NEPA violation for a federal timber sale, but concluded that vacatur was inappropriate. Instead, it imposed a limited "tailored injunction" that blocked cutting of certain larger trees while the remand was underway. Such a remedy "will address the [NEPA] deficiency and ensure that the Project does not proceed in a manner that precludes the possibility of the agency adopting a diameter cap. This outcome accounts for the agency's error while also permitting some progress in the interim." Noting that plaintiffs had not actually established "irreparable harm" from cutting those larger trees, the Court nonetheless found that plaintiffs had suffered irreparable "procedural" harm that, "coupled with the permanent removal of trees that may be unnecessary to achieve the project's purpose and need," was sufficient basis for a limited injunction. *Id*.

As these cases demonstrate, applying a conventional injunctive relief test is not required for purposes of imposing limited conditions on remand. While irreparable harm need not be shown, this Court could find that the Corps' serious NEPA failings, coupled with the continuing exposure of the Tribes to oil spill risks, is sufficient to constitute irreparable harm for purposes of imposition of modest remand conditions. *Id*. The Tribes' filings in this case have demonstrated that spills somewhere along the pipeline's length are highly likely, even if predicting precisely when and where they will occur is not possible. *See supra*. As to the other injunction factors, neither DAPL nor the Corps even attempts to make the case that they present

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

any hardship to either of them, or that the public interest would be disserved by this modest relief. This Court was not persuaded that shutting down the pipeline would be unduly disruptive, ECF 284 at 18-27, and far less disruption would occur here. At most, DAPL complains that these measures would impose a modest administrative burden, but, even so, essentially agrees to adopt them voluntarily anyway. Accordingly, the other injunction factors are not at issue here.

II. THIS COURT SHOULD ORDER THE CORPS AND DAPL TO WORK WITH THE TRIBES ON SPILL RESPONSE.

In their remedy brief, the Tribes documented how they became aware of the spill response plans at Lake Oahe only very late in the process, and had been completely excluded from the planning process—even through the Tribes have emergency planning duties and staff, and would be the most immediately affected by a spill at the Oahe crossing site. ECF 272 at 36-38. The Tribes requested a meeting on spill response planning with DAPL, by letter dated May 12, 2017. 3rd Archambault Decl. ¶ 20 and Ex. A (ECF 272-3). Although DAPL asserted to this Court that there was no need for an order requiring coordination on spill response because DAPL "will do so voluntarily," ECF 227 at 10 n. 13, no such effort was made until five months later, and only *after* this Court indicated that it was open to considering the Tribes' request. Vacatur Order (ECF 284) at 27-28. Only then did DAPL offer to meet with Tribal representatives. *See* Borkland Decl., ¶ 2 (ECF 288-1). On the basis of an email from DAPL reaching out to Tribal emergency management officials, the Corps and DAPL argue that the request is now moot and this Court need not take action.

The Corps and DAPL misunderstand the Tribes' request. The Tribes asked that this Court direct *the Corps* and DAPL to coordinate finalization of the spill response plans with the Tribes, and immediately implement activities required under those plans. ECF 272 at 37. The Corps' involvement is both essential and required, yet it has largely abdicated its responsibilities,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

leaving them to DAPL to carry out. Spill response planning is not a voluntary activity carried out by pipeline companies, but a highly integrated, prescriptive planning process overseen by multiple federal government agencies prescribed under the Oil Pollution Control Act, 33 U.S.C. § 1321. Federal agencies are obligated to prepare spill response plans at multiple levels, including Area Contingency Plans, 33 U.S.C. §1321 (j)(4), and sub-area plans and geographic response plans ("GRPs") "where there are unique circumstances that require tailored response strategies." U.S. EPA, *Area Contingency Planning Handbook*, at 17.[3] Such plans must meet detailed substantive standards and be periodically updated. 33 U.S.C. § 1321(j)(4)(C). In turn, individual facility operators must prepare facility response plans ("FRPs") that are integrated with the federal area and sub-area plans. 33 U.S.C. § 1321(j)(5); 49 C.F.R. § 194.101 (implementing regulations). In preparing the area and sub-area plans, the law explicitly directs that federal agencies shall:

> work with State, local, *and tribal officials* to enhance the contingency planning of those officials and to assure preplanning of joint response efforts, including appropriate procedures for mechanical recovery, dispersal, shoreline cleanup, protection of sensitive environmental areas, and protection, rescue, and rehabilitation of fisheries and wildlife, including advance planning with respect to the closing and reopening of fishing areas following a discharge "work with State, local and tribal officials..
>
> 33 U.S.C. § 1321(j)(4)(B) (emphasis added).

Moreover, development of a GRP is a mandatory condition of the easement. ESMT 0037. Over a year ago, DAPL promised the Corps that it would submit revised spill models and the final GRP "before the pipeline was commissioned." AR 72255. The pipeline has been in operation for months, but DAPL itself concedes that it is still "reviewing and revising" the GRP.

[3] Available at https://www.epa.gov/sites/production/files/2014-04/documents/epa_acp_handbook_3-25-14_low-res.pdf

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Borkland Decl. ¶ 4. Moreover, an adequate GRP depends on an understanding of worst case discharges and other information developed through adequate spill modeling. Even so, DAPL is still at work on spill models, which are not expected to be provided to the Corps for review prior to December. ECF 281.

Although the Corps required a GRP as a condition of the easement, and although federal law requires it to "work with" affected Tribes on spill response planning, the Corps has made no effort to "work with" the Tribes on contingency planning. The Tribes are sovereign governments with emergency response capabilities and responsibilities. *See, e.g.*, Ward Decl. ¶¶ 2-3 (ECF 195-2). Even so, draft GRPs were developed without any involvement of the Tribes at all, leading to outrageous initial plans under which spilled oil would be diverted onto the Standing Rock Reservation for collection. *Id*. at ¶¶ 6-12.

For these reasons, a voluntary meeting between the Tribes and DAPL is insufficient to satisfy either the requirements of the law or the exigencies of this situation. Instead, the Tribes ask this Court to direct the Corps to lead the spill response planning process, as the law requires. In order to be effective, the Court should direct the Corps to make available to the Tribes the technical documents and assumptions underlying the facility and geographic response plans, as well as fully unredacted versions of the plans themselves. Effective response planning must be based upon an accurate assessment of the risks of the hazardous material released, the worst case discharge, and an understanding of credible release scenarios. Virtually none of this documentation has been provided to the Tribes. Without it, assessing response strategies—including where, how much, and what kind of equipment to stage—would be fundamentally ineffective.[4] The Tribes ask this Court to hold the Corps to its obligation to

[4] Indeed, even basic information about the worst case discharge and the response zone maps on

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

"work with" the Tribes in a meaningful way to prepare for both true "worst case" events as well as other release scenarios like slow underground leaks.[5]

III. THIS COURT SHOULD IMPOSE THE PHMSA RECOMMENDATIONS FOR INCREASED PIPELINE SAFETY AND TRANSPARENCY.

The other component of the Tribes' proposed relief is implementation of two recommendations made by PHMSA to the Corps for inclusion in the Oahe easement. Specifically, PHMSA recommended that the Corps and DAPL hire an independent third party to conduct an audit of DAPL's compliance with pipeline conditions and any other threat to the pipeline's integrity. PHMSA also recommended that DAPL provide to both the Corps and to the public an annual report of specific categories of information. The Tribes proposed that these reports be made monthly for the duration of the remand period.

In issuing the easement, the Corps rejected these recommendations for reasons that were never explained in the administrative record. Given another opportunity, the Corps still does not explain why these modest and reasonable measures were not imposed. While it has at other times in this litigation submitted declarations from PHMSA staff, *see* ECF 146-1, the Corps did not submit any evidence from PHMSA backing away from these measures. As PHMSA staff told Corps leadership when it made these recommendations, "the cost of these measures would be *very achievable* for the operator and *certainly beneficial* to all if they allow the project to proceed." ESMT 1173 (emphasis added) ("[M]any of these suggested conditions may become regulatory requirements in the coming years"). The Corps and DAPL fail to demonstrate

---

which response planning is based were redacted from the copies of the response plans that have been made available to the Tribe.

[5] If necessary, confidential information can be shared with the Tribes' experts and officials who are subject to the confidentiality agreement, as well as the Tribes' attorneys, pursuant to the Court's protective order.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

otherwise, and the other objections to implementing these measures are unpersuasive. The Court should impose these recommendations with the minor modifications that the Tribes proposed.

A. Third Party Audit

The Corps and DAPL have little to say about the third party audit except to complain that PHMSA already has the power to conduct oversight and "works closely" with other agencies like the Corps. Corps Br. at 6; DAPL Br. at 5. Since it was PHMSA itself that recommended the third party audit, the argument is unpersuasive. The Corps also complains that involving the Tribes in the audit would "destroy the independent nature" of any audit. *Id*. That is not the Tribes' intent. Rather, the Tribes want: a) to participate in the selection of the auditor to ensure that the auditor is truly independent; and b) have the opportunity to share its own data relevant to pipeline integrity with the auditor as part of the process. *See generally* Holmstrom Decl. (describing Standing Rock technical team review of pipeline safety and shortcomings of Corps review). Allowing the Tribes an opportunity to share relevant information with the third party auditors will not "destroy" the independence of the audit, as the auditors will simply be collecting information and considering it as part of the independent audit.[6] Presumably, the auditors will be getting information from DAPL too. That does not render it a "contested and adversarial proceeding." DAPL Br. at 6. It means that the auditors are speaking to stakeholders with relevant information and considering it as they deem appropriate. This Court should order the independent third party audit recommended by PHMSA.

[6] The Corps observes that it must "follow certain rules" when it selects contractors. The Tribes agree that the Corps must follow applicable rules in contracting. While the Corps does not explain why the original language in the PHMSA recommendation needs amendment, the Tribes do not object to the Corps' proposed revision on page 9 of the Corps brief—with one important caveat. The Court should require that the Operator *and the Tribes* jointly select an independent auditor. This should occur as soon as practicable, and publication of the audit should be filed with the Court no later than April 1, 2018

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

B. Public Reporting

The Corps and DAPL raise half-hearted objections to PHMSA's recommendation that DAPL report publicly on various categories of information, including information on testing results, spills and leaks, and changes to corporate structure. ESMT 1189-90. DAPL nonetheless agrees to the reporting on voluntary basis, albeit with minor modifications. This Court should impose this condition as proposed by the Tribes.

The Corps' complaint that public reporting is potentially "burdensome" falls far short. PHMSA provided a very specific list of what must be reported to the Corps and published for public review. The list did not include any additional investigations, studies, or data collection, but simply public reporting of information that is collected anyway. For example, PHMSA recommended that DAPL report on "reportable" incidents and "leaks or ruptures" that occur. ESMT 1189-90. It is not "burdensome" to report on events that are already "reportable." DAPL must already report spills and ruptures to state authorities. But that data is not made available to the public, even though it is the subject of keen public interest. *See, e.g.*, Associated Press, *North Dakota recorded 300 oil spills in two years without notifying the public*, The Guardian (Oct 13, 2013) ("North Dakota regulators, like in many other oil-producing states, are not obliged to tell the public about oil spills under state law.") In any event, the assertion that public reporting would be burdensome must be rejected insofar as DAPL has effectively agreed to it.

For its part, DAPL focuses on the claimed "redundancy" of the reporting—a claim at direct odds with the notion that it is "burdensome." DAPL Br. at 7-8. PHMSA's recommendations are not redundant because, as explained above, nothing requires public disclosure of this material.[7] Moreover, there are differences between what the recommendations

[7] DAPL misleadingly claims that oil spills must be "publicly disclosed" within ten days, DAPL Br. at 7, *citing* 49 C.F.R. § 195.56, but that regulation only requires reporting to PHMSA, not

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

called for, and what existing (non-public) reporting requirements include. *Compare* ESMT 1189 (requiring reporting on "any" inline inspections or direct assessments) *with* 49 C.F.R. § 195.55(a)(1) (requiring reporting on specific parameters of corrosion). Importantly, this recommendation does not call for any new or additional work—just public reporting of tests that are completed anyway.

DAPL agrees to report "voluntarily" on most categories of information. In the absence of a court order requiring it, such an offer is meaningless. DAPL's previous promises to do things voluntarily have proven hollow. *See supra*. DAPL also asks this Court to make some modifications to the PHMSA recommendations, but these modifications are unnecessary. First, DAPL complains that it should not have to report on "security measures aimed at thwarting intentional damage." DAPL Br. at 8. But PHMSA did not recommend that DAPL report on security measures, it recommended that the Corps require reporting on "damage prevention initiatives." As this Court already knows, existing regulations provide for maintaining confidentiality of information where necessary for security concerns. ECF 206 (memorandum opinion regarding protective order). DAPL has already demonstrated a willingness to overreach with respect to security-related information. *Id*. (rejecting DAPL arguments about confidentiality). The Court should leave PHMSA's original language intact.

Second, DAPL wishes to modify PHMSA's recommendation so that it does not need to report on "all repairs" but only those that repairs that implicate spill risk. DAPL Br. at 8. But making such a change would give DAPL an opportunity to define for itself which "repairs" involve spill risk and which ones do not, in a way that PHMSA did not endorse and that no independent party could oversee. Given that PHMSA's recommendation refers only to the

---

disclosure to the public.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

pipeline "segment" at issue, and not the entire pipeline, DAPL should have to report on all repairs so that the public can monitor the pipeline's integrity without DAPL's editorial control. Finally, DAPL offers to report once, in late February of next year. DAPL Br. at 9. The Tribes maintain that monthly reporting during the remand would provide the greatest benefit to public transparency and accountability. The majority of events required to be reported are unlikely to occur on any regular basis, and hence monthly reports pending the conclusion of the remand will not be any more burdensome than a single report.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that the Court impose the three remand conditions as identified in the Tribes' initial remedy brief and further clarified in the attached proposed order.

Dated: November 15, 2017

Respectfully submitted,

/s/ Jan E. Hasselman
Patti A. Goldman, DCB # 398565
Jan E. Hasselman, WSBA # 29107 *Pro Hac Vice*
Stephanie Tsosie, WSBA # 49840 *Pro Hac Vice*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
pgoldman@earthjustice.org
jhasselman@earthjustice.org
stsosie@earthjustice.org
Attorneys for Plaintiff

/s/ Nicole E. Ducheneaux
Nicole E. Ducheneaux, *Pro Hac Vice*
Joseph V. Messineo, *Pro Hac Vice*
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053 | Fax: (402) 333-4761
nducheneaux@ndnlaw.com
Attorneys for Intervenor-Plaintff Cheyenne River Sioux Tribe

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340