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)

AMENDED CONSOLIDATED BRIEF OF STANDING ROCK SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, AND YANKTON SIOUX TRIBE REGARDING REMEDY

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INTRODUCTION

The Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe ("Tribes") ask this Court to vacate the easement and permits authorizing the Dakota Access Pipeline ("DAPL") under Lake Oahe. In the D.C. Circuit, vacatur of permits issued in violation of the National Environmental Policy Act ("NEPA") is the "default" remedy, with exceptions reserved for "rare cases." While remand without vacatur is sometimes permitted where an agency's violation of law can be cured through additional explanation, that is no longer an option. Instead, this Court has conclusively resolved the Tribes' legal claims by finding that the U.S. Army Corps of Engineers ("Corps") violated NEPA, and ordering it to perform the full environmental impact statement ("EIS") that the Tribes have long sought. The opportunity for the Corps to explain its failure to prepare an EIS has come and gone. Defendants' argument that the DAPL permits can easily be issued again because sufficient analysis already has been done fundamentally misapprehends both NEPA and this Court's summary judgment ruling.

As to the "disruptive impact" of vacatur, DAPL and amici offer a stunningly inaccurate portrayal of the facts. Oil production in North Dakota has collapsed, due to factors having nothing to do with this case, by the amount that DAPL carries. The nation is awash in unwanted crude oil. Production is unlikely to resume in the foreseeable future. DAPL can be taken offline while an EIS is prepared and there would be little noticeable impact outside of DAPL's own anticipated profits. Conversely, allowing DAPL to continue operating, despite a serious violation of NEPA, would expose Tribal treaty rights, trust resources, and the Tribes themselves to risks and impacts that have never been properly examined. It would turn the NEPA process on its head, by allowing the action before the analysis, in violation of law. Worst of all, it would

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balance the equities on the backs of the Tribes, continuing a shameful legacy that dates back to the 1800s. The law and the precedents of this Circuit call for vacatur.[1]

ARGUMENT

I. VACATUR IS THE DEFAULT REMEDY FOR A VIOLATION OF NEPA.

The Court already has extensive briefing discussing the appropriateness of vacatur for NEPA violations. ECF 272, 280 (Standing Rock and Cheyenne River briefs); ECF 269-1 (NEPA law professors amicus). To briefly summarize, the D.C. Circuit has "consistently affirmed" that "vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007), *citing Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *Pub. Emps. for Envtl. Responsibility v. U.S. Fish and Wildlife Service ("PEER")*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations."). The D.C. Circuit recently affirmed that remand without vacatur is appropriate only in the "rare case." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). Strict application of the vacatur standard, as applied in this Circuit, is consistent with the language of the APA itself, which commands that a court "*shall* . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A) (emphasis added); *FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) ("*in all cases* agency action must

[1] The Corps incorrectly assumes that the only permit to be vacated is the Mineral Leasing Act easement. Corps Br. (ECF 507) at 1. The Clean Water Act Nationwide Permit 12 verification (USACE_DAPL 67382) and the Rivers and Harbor Act § 408 authorization (USACE_DAPL 71185) also are based on the invalid NEPA analysis. All three authorizations should be vacated.

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be set aside if the action" inconsistent with APA) (emphasis added). Accordingly, the burden is on defendants to establish that they warrant an exception to the default rule. *Nat'l Parks Conserv. Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) ("defendants bear the burden to prove that vacatur is unnecessary."); *PEER*, 189 F. Supp. 3d at 3 (agency failed to make a "compelling case" for remand without vacatur).

Of particular relevance here, the D.C. Circuit emphasizes that the failure to follow proper procedures weighs heavily in favor of vacatur. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) ("Failure to provide the required notice and to invite public comment—in contrast to the agency's failure to ... adequately to explain why it chose one approach rather than another for one aspect of an otherwise permissible rule—is a *fundamental flaw* that normally requires vacatur of the rule.") (emphasis added); *Allina Health Serv. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (deficient notice "almost always requires vacatur"). This rule was affirmed very recently, when the D.C. Circuit vacated a regulation weakening air quality standards that was issued without notice-and-comment procedures. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 84-85 (D.C. Cir. 2020). Rejecting the argument that the lack of comment was harmless, the Court observed that "the entire premise of notice-and-comment requirements is that an agency's decisionmaking may be affected by concerns aired by interested parties through those procedures." *Id*. (failure of process was "most egregious" breach of obligations). Equally "serious" is the failure to adequately justify an agency's decision under arbitrary and capricious review. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("In the past we have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion.").

Of course, NEPA is a procedural statute designed to inform agency decisionmaking, and

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accordingly vacatur (or an injunction) has been imposed in the vast majority of NEPA cases in this Court. *See, e.g., Reed v. Salazar*, 744 F. Supp. 2d 98, 118-20 (D.D.C. 2010) (vacating wildlife management agreement undertaken without EIS); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) ("Because intervenors intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place."); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (vacating plan allowing snowmobiles in national park); *Humane Soc'y of U.S. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 25 (D.D.C. 2006) (vacating permits for sea lion research and ordering EIS); *Nat'l Wildlife Fed. v. Norton*, 332 F. Supp. 2d 170, 188 (D.D.C. 2004) (declaring Corps permit for private mine "invalid" due to NEPA violation); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) (vacating grazing leases issued in violation of NEPA); *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 44 (D.D.C. 2000) (vacating Corps permit for riverboat casino that was unlawfully issued based on EA rather than EIS); *see also Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("[W]hen an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance."). Vacatur of underlying permits in NEPA cases is not "overbroad," as the Corps contends. Corps Br. at 23. Rather, it is the norm, and exceptions are exceedingly difficult to find. *Public Employees for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016), relied on by the Corps, is not to the contrary. There, the D.C. Circuit adopted a modified form of relief under which some actions were vacated, thus ensuring no further potentially damaging action could occur before NEPA compliance was complete, but not requiring the agency to start the entire regulatory process over. *Id.* at 1084.

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Here, in contrast, vacatur is the only remedy that would ensure no harm occurs prior to the finalization of the EIS process.

As discussed below, this is not the "rare case" that warrants an exception to the general rule. The Corps' failure to prepare an EIS for the pipeline is a "serious" violation of NEPA because it allowed the Corps to make a significant decision without legally required procedures designed to ensure informed decisionmaking and public accountability. *See infra* § II. And their attempt to portray vacatur as a devastating threat to the economy and even national security blinks reality at a time when oil prices have dropped into negative values and the nation is running out of places to store unwanted oil. It further ignores the harm to the Tribes of allowing the pipeline to continue operating in violation of NEPA. *See infra* § III.

II. THE CORPS' NEPA VIOLATION IS SERIOUS.

The first part of the *Allied Signal* test requires the Court to determine the "seriousness" of the deficiencies in the agency action. *Allied Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Where the agency's failing is primarily one of inadequate explanation, and it is likely that the agency can sustain its decision by clarifying its reasoning, vacatur can sometimes be avoided. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017) *("Standing Rock IV")* (no vacatur where agency does not need to begin anew, but only to "better articulate their reasoning"). In contrast, where the legal deficiency is serious enough to raise doubts as to whether the agency "chose correctly," vacatur is warranted. *Nat'l Women's Law Ctr. v. Office of Management & Budget*, 358 F.3d 66, 93 (D.C. Cir. 2019) (vacating rule where agency decision did not suffer from lack of explanation, but agency's "reasoning lacked support in the record"). Defendants' attempts to persuade the Court that the failure to prepare an EIS is not a "serious" NEPA violation should fail.

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A. The NEPA Violation, Not the Underlying Permits, is the Proper Focus.

As a threshold matter, this Court should find that the *Allied-Signal* inquiry is focused on the Corps' NEPA determination not to perform a full EIS, rather than its issuance of the underlying permits. Accordingly, the first prong of the *Allied-Signal* test was resolved by this Court's summary judgment decision. The option of better "explaining" its decision not to perform an EIS is no longer available to the Corps. ECF 496 ("Remand Op.") at 35 ("The Corps has thus violated NEPA by determining that an EIS was unnecessary even though one of the EIS triggering factors was met."). This Court conclusively rejected the challenged environmental assessment ("EA") and finding of insignificance ("FONSI"), and ordered the Corps to perform the full EIS that the Tribes have long sought. *Id.* With nothing left to explain, and a legal violation conclusively established, the seriousness of the legal deficiencies has been settled. *Standing Rock IV*, 282 F. Supp. 3d at 103 (vacatur appropriate where "agency's reasoning is so crippled as to be unlawful"). Even DAPL appeared to concede in its previous vacatur brief that the situation would have been different had the Court ordered an EIS. ECF 277, at 1 ("Plaintiffs argue the remedy issue as if the Court ... ordered an EIS…").

Predictably, defendants now seek to reframe the *Allied-Signal* question as whether the Corps can justify the underlying permits once the EIS is complete. Corp Br. at 8. This is a notable departure from their previous position. *See, e.g.*, ECF 258 at 9-10 (issue is whether the Corps on remand would be able to "explain" its decision not to prepare an EIS). It is a departure from the analysis used in this Court's earlier vacatur decision, where the Court framed the question as whether "the Corps will be able to justify its prior decision to issue an EA and FONSI, rather than preparing a full EIS." *Standing Rock IV*, 282 F. Supp. 3d at 98; *see also id.* at 100 ("agency's action was not, in this case, so lacking as to cast serious doubt on its decision

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to issue an EA"). It is inconsistent with the way this Court framed the question in its summary judgment decision—which described the Tribe's case as a challenge to the decision not to prepare an EIS. Remand Op. at 1.[2]

The District Court in *Semonite* rejected the same sleight-of-hand. "Looking at the first *Allied-Signal* factor, the Court does not assess the deficiency of the ultimate decision itself—the choice to issue the permit—but rather the deficiency of the determination that an EIS was not warranted." *Semonite*, 422 F. Supp. 3d at 99. It should be similarly rejected here. The Tribes challenged the Corps' NEPA compliance. The question is whether the decision to proceed without an EIS can be justified with additional explanation. Since the answer to that question is clearly no, the first step of the *Allied-Signal* inquiry is complete.

B. Issuance of a Permit Without a Required EIS is a "Serious" NEPA Violation.

Whichever framework the Court applies, the NEPA violations here are far too "serious" to allow remand without vacatur. *W. Watersheds Project v. Zinke*, 2020 WL 959242. *26 (D. Idaho, Feb. 27, 2020) (vacating agency oil and gas policy for NEPA violation, the seriousness of which was "self-evident and weighs heavily in [plaintiffs'] favor" in light of NEPA's purposes). The fact that the Corps might ultimately reissue the permits at the conclusion of the EIS process is not a basis for avoiding vacatur: if it were, vacatur would be the rare exception rather than the default rule. Indeed, allowing the pipeline to continue operating despite the lack of an EIS would turn NEPA on its head. *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface*

[2] The Corps confuses matters by asserting that since the EA, standing alone, is not "final agency action," then the Court should look to the underlying permit instead. Corps Br. at 8. Whether or not an action is final is a threshold question of reviewability under the Administrative Procedure Act. It has nothing to do with the *Allied-Signal* inquiry into the "seriousness" of the agency's unlawfulness, nor has any court so found.

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Mining Reclamation and Enf't ("Diné CARE"), 2015 WL 1593995, at *3 (D. Colo., April 6, 2015) ("Remand alone will not fulfill NEPA's purpose. Absent some limitation on [the company's] ability to continue its operation while [the agency] corrects its NEPA violation, [the agency's] compliance with NEPA would become a mere bureaucratic formality.").

As with any remedy, the vacatur analysis must be guided by the purposes of the underlying statute. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *Nat'l Parks Conserv. Assoc. v. Semonite*, 925 F.3d 500, 502 (D.C. Cir. 2019) (ordering a remedy for violation of NEPA that will "protect the purpose and integrity of the EIS process"); *Oregon Nat'l Desert Ass'n v. Zinke*, 250 F. Supp. 3d 773, 774 (D. Or. 2017) (seriousness of the agency's error "should be measured by the effect the error has in contravening the purposes of the statutes in question"). The purpose of NEPA is to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) ("the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action *before* the action is taken") (emphasis added). "Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23 (2008). "The point of NEPA is not to generate paperwork but "to foster excellent action," 40 C.F.R. § 1500.1(c); *id*. § 1502.1 (stating that the "primary purpose" of an EIS is as an "action-forcing" device); *id*. ("An environmental impact statement is more than a disclosure document. It shall be used . . . to plan actions and make decisions.").

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"The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, *it may be persuaded to alter what it proposed*." *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) (internal quotations omitted) (emphasis added). NEPA's regulations include a strict prohibition on taking any action that would "have an adverse environmental impact" or limit the choice of reasonable alternatives" until NEPA compliance is achieved. 40 C.F.R. § 1506.1. A NEPA review must "not be used to rationalize or justify decisions already made." *Id*. § 1502.5; § 1502.2(g) (EIS shall "assess[] the environmental impact of *proposed* agency actions, rather than justify[] decisions already made.") (emphasis added). The court emphasized this point in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, where the agency had authorized uranium mining in traditional tribal lands without full consideration of cultural impacts. 896 F.3d 520, 536 (D.C. Cir. 2018). "The *seriousness* of the NEPA deficiency is particularly clear because the point of NEPA is to require an adequate EIS *before* a project goes forward, so that construction does not begin without knowledge" of the potential impacts. *Id*. (emphasis added). While the *Oglala Sioux* court ultimately decided against vacatur, that was because construction was already suspended and there would be no adverse impacts from remand without vacatur. *Id*. The situation here is the opposite, as continued operation of the project would expose the Tribe to ongoing harm and unexamined risks.

This remains true even in the unusual case where a project has been completed before a court can determine whether NEPA has been satisfied. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015). For example, in another oil pipeline case, the D.C. Circuit held that a NEPA challenge to completed crude oil pipeline was not moot because the pipeline could be shut down, and "more extensive environmental analysis could lead the

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agencies to different conclusions, with live remedial implications." *Id.; see also Diné Citizens Against Ruining the Env't v. Jewell*, 312 F. Supp. 3d 1031, 1110-11 (D.N.M. 2018) ("unconsidered impacts" of drilling and fracking due to NEPA violation was serious failure weighing in favor of vacatur). Accordingly, this Circuit has not hesitated to vacate agency decisions that were not supported by a required EIS under NEPA. *See, e.g., Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating management plan for wild horses after agency failed to prepare EIS); *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 483 (D.C. Cir. 2012) (vacating rule governing storage of nuclear waste due to invalid EA/FONSI); *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) *reh'g en banc denied* (vacating gas pipeline permits because EIS failed to consider climate impacts).

This Court's decision makes clear that the Corps' NEPA failures are not minor transgressions or paperwork missteps. Rather, they cut to the very heart of the issues that have propelled this litigation since its inception. This Court found that the Tribal experts raised "serious doubts" about the Corps' worst case discharge calculation, which formed the heart of the remand analysis. Remand Op. at 27. The Corps "plainly did not succeed" in responding to "serious" concerns about leak detection capacity. *Id.* at 20. The Corps failed to consider an operator safety record that "did not inspire confidence." *Id.* at 23. In remanding the matter to the Corps for an EIS, this Court observed "serious gaps in crucial parts of the Corps' analysis." *Id.* at 35. These gaps mean the risks of an incident, and its consequences, are far higher than ever acknowledged. It is difficult to imagine a more "serious" violation of NEPA than the one this Court has already found.

Moreover, as the Court acknowledged, the Corps had already been given one chance to get this right. *Id.* at 17. Courts agree that the "seriousness" of an agency's failure is greater

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when the agency has already been given an opportunity to better explain itself, but failed. *Checkosky v. S.E.C.*, 139 F.3d 221, 226 (D.C. Cir. 1998). An agency's failure to resolve identified problems on a first remand reveals "serious" deficiencies and supports vacatur. *Comcast*, 579 F.3d at 9 (agency "failed to heed our direction and we are again faced with the same objections…"); *In re Core Commc'ns.*, 531 F.3d 849, 861 (D.C. Cir. 2008) ("Having repeatedly, and mistakenly, put our faith in the Commission, we will not do so again."). Here, the Court gave the Corps a second chance to address the NEPA issues, without vacatur, but the Corps squandered that opportunity. Many of the issues highlighted by this Court in its recent summary judgment opinion—like the inadequate leak detection system, worst case discharge estimates, and winter spill response—had been called out in the first round of technical critiques. *See* ECF 433-2. But in its rush to justify the decision it already made, the Corps never took the Tribes' concerns and technical expert input seriously. It should not get another such opportunity.

Finally, the NEPA violations at issue here are subject to heightened "seriousness" because they threaten Tribal treaty and trust resources. U.S. Const. art. VI; *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (connecting treaty obligations to trust relationship); *see also United States v. Sioux Nation*, 448 U.S. 371, 415 (1980). The Corps concedes that the Tribes' treaty rights factor in the "seriousness" equation, but attempts to downplay these rights by claiming that this Court found no fault with the Corps' consideration of treaty hunting and fishing on remand. Corps Br. at 10. That is not an accurate interpretation of this Court's order, which did not reach these issues. More importantly, it does not detract from the enhanced seriousness that treaty and trust resources bring to this calculus. This Court has acknowledged repeatedly that "NEPA additionally requires an agency to determine how a project will affect a tribe's treaty rights." Remand Op. at 4 (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps*

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of Eng'rs, 255 F. Supp. 3d 101, 130-31 (D.D.C 2017) ("*Standing Rock III*"). Tribal treaty rights impose special obligations upon the United States and therefore necessarily enhance the magnitude of the NEPA analysis. *Sioux Nation of Indians*, 448 U.S. at 415.

C. Vacatur is Needed to Protect the Integrity of the EIS Process.

Defendants denigrate both NEPA and this Court's opinion by downplaying the importance of the EIS ordered by the Court. In defendants' view, the Corps has already done most of the work needed for an EIS: finalizing the permits would involve little more than putting a different cover sheet on the existing analysis. DAPL Br. at 10-17; *see also id*. at 12 (maintaining that the effort "already dwarf[s] the extent of analysis required when preparing an EIS"). Both parties also suggest that affirmance of the underlying permits at the conclusion of the EIS process is a foregone conclusion. Corps Br. at 14; DAPL Br. at 2. But defendants fundamentally misapprehend the changed circumstances of this case now that an EIS is required. *Semonite*, 422 F. Supp. 3d at 100 ("Although the Corps could ultimately substantiate [its] original substantive decision to issue the permit, that is not a foregone conclusion, as the EIS will be far more extensive than the EA."). Defendants repeatedly cite to the Court's 2017 summary judgment decision, which upheld portions of the Corps' EA, to support their view that little if any new analysis is required. Corps Br. at 9. The argument is confounding, as that is not the controlling decision at this stage. Rather, the controlling decision is the Court's recent remand order finding that the Corps violated NEPA by failing to prepare an EIS

"No matter how thorough, an EA can never substitute for preparation of an EIS" where significant effects are present. *Anderson*, 371 F.3d at 494. The EIS serves entirely different purposes: while an EA is prepared to determine whether an action will not have a "significant" impact, the EIS is a comprehensive assessment of the risks and benefits of projects, as well as

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alternatives to achieve the same goals, with multiple levels of agency and public review. 40 C.F.R. § 1501.4(c). An EIS "attract[s] the time and attention of both policymakers and the public" via comment opportunities, hearings, and increased visibility. *Anderson*, 371 F.3d at 494. It focuses attention on the key issues and provides greater transparency, scrutiny, and independence of the claims made. Here, the EIS process for Lake Oahe must provide a fair accounting of the actual risks and impacts of spills at Oahe, their impacts on the Tribes and their treaty rights, route alternatives that reduce risks or distribute them differently, and other mitigation options, such as better spill detection and response. 88 Fed. Reg. 5543 (Jan. 18, 2017) (scoping notice for last DAPL EIS). An EIS will allow the public, other federal agencies, as well as state and tribal experts to provide technical input on the Corps' conclusions and require that these comments be addressed. It will prevent DAPL from providing unsupported and unseen technical assessments that are rubber-stamped by the Corps without being subject to outside scrutiny. 40 C.F.R. § 1502.24 ("Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.").

One of the issues that the EIS will have to study is the pipeline's effect on incentivizing crude oil production. When the pipeline was originally proposed, the Corps and DAPL claimed that the pipeline would not have any effect on the amount of oil produced in North Dakota. *See* EA, at 98 (USACE_DAPL 71220). Now that the pipeline has been built, defendants admit that the opposite is true. DAPL Br. at 15–18 (cost advantages of DAPL "encourage oil production—and hence employment—by North Dakota producers"). Such impacts must be fully disclosed in an EIS. *Sierra Club v. FERC*, 867 F.3d at 1372 (agency must consider "indirect effects" of pipeline operations including additional gas consumption).

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The EIS will need to cover all of the pipeline's environmental effects, not only the issues held deficient by this Court in its summary judgment order. *Contra* DAPL Br. at 19 (asserting that EIS will only consider four issues identified by this Court). The Court did not reach other issues, including other instances of technical "controversy," treaty impacts, and environmental justice, because these issues will have to be covered in the EIS—and hence resolving them served no purpose. Remand Op. at 36. Whether or not an EIS is triggered is a binary question—either effects are significant enough to warrant an EIS, or they are not. Once that threshold has been crossed, the EIS must address *all* of the issues of concern, not just those that this Court found to have triggered the EIS.

Defendants also overlook a key element of the EIS process—to develop alternatives that could achieve the agency's goals with lesser, or different, impacts. Consideration of alternatives represents the "heart" of the EIS. 40 C.F.R. § 1502.14; *id*. § 1500.2(e) (noting that the NEPA process is intended "to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects"); *Union Neighbors United v. Jewell*, 831 F.3d 564, 576 (D.C. Cir. 2016) (faulting the agency for an EIS that "failed to consider any economically feasible alternatives" that would have had less of an environmental impact). Defendants incorrectly presume that the Corps will be making a determination as to whether the pipeline should be affirmed exactly as is, or not at all. That is incorrect. A full EIS must explore alternatives in terms of routing, mitigation, or spill detection and response. 40 C.F.R. § 1502.22(a) (agencies must supplement incomplete information in an EIS if "essential to a reasoned choice among alternatives"); *id*. § 1502.14(f) (requiring the inclusion of "appropriate mitigation measures"). The Corps will have the option of authorizing the pipeline in a different place, with different operating conditions, or with additional mitigation. Notably, while DAPL

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touts the alternatives analysis in the EA, the requirements for the study of alternatives in the EIS are far more robust. *Compare* 40 C.F.R. § 1502.14(a), (b) (requiring an EIS to "[r]igorously explore and objectively evaluate all reasonable alternatives" with "substantial treatment to each alternative considered in detail") *with id.* § 1508.9(b) (noting that an EA shall contain a "brief discussion[]" of alternatives).

Of course, one alternative that must be considered will be the option of denying the permits outright. Consideration of this option is mandatory under NEPA. 40 C.F.R. § 1502.14(d); *Gov't of the Province of Manitoba*, 926 F. Supp. 2d 189, 192 (D.D.C. 2013) ("NEPA requires an environmental analysis of the full consequences of a large federal project—with the inevitable, and necessary, possibility that those consequences will result in a no-project determination."). Consideration of permit denial is also required pursuant to the Corps' obligations under the Mineral Leasing Act ("MLA"), 30 U.S.C. § 185(b)(1) (prohibiting easement if agency is "inconsistent with the purposes of the reservation"). Permit denial may also be warranted under § 408 of the Rivers and Harbors Act, 33 U.S.C. § 408, and § 404 of the CWA, 40 C.F.R. § 230.1, both of which authorize permit denial when a permit may be inconsistent with the "public interest," which is broadly defined. Moreover, while the Corps may believe that reissuance of permits is a foregone conclusion, the permitting decision will be made in the next administration, which could decide differently. *Standing Rock III*, 355 F. Supp. 3d at 119 ("elections have consequences").[3] Affirmance of the permits in their existing configuration is far from assured.

[3] Joe Biden's campaign platform calls for an end to permitting new oil and gas facilities on public lands and an aggressive shift away from fossil fuels to meet climate goals. *See* <https://joebiden.com/climate>. Biden has also pledged to "work harder" to honor trust and

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It cannot be the rule that the *possibility* a decision will come out the same means vacatur can be avoided. It will virtually always be possible to affirm an original decision despite a violation of NEPA, or other procedural standard like notice and comment rulemaking. If vacatur were reserved for situations in which affirmance of the original decision was impossible, it would virtually never be imposed. Because NEPA is a procedural statute, "taking such an approach would vitiate it." *Oglala Sioux Tribe*, 896 F.3d at 536. Instead, the opposite is true: vacatur is the default, and the exception reserved for highly unusual situations. *See supra* § I.

Vacatur is also important because, without it, the Corps will have no incentive to finalize the EIS.[4] *Standing Rock IV*, 282 F. Supp. 3d at 106 (concern about denying vacatur in light of "undesirable incentives"). This is no idle concern. In *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005), conservation groups challenged the issuance of a Corps permit to construct a dock at an oil refinery. The Ninth Circuit agreed with the plaintiffs that the Corps had violated NEPA by failing to complete a full EIS that looked at the impacts of increased marine tanker traffic and attendant risks of accidents. By the time of the decision, construction of the project was complete. *Id*. at 871. The court did not vacate the permit, and *fifteen years later*, the Corps has yet to issue a final EIS. Here, in the absence of vacatur, the Corps could slow-walk the EIS for years, denying the Tribes the relief to which they are entitled.

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treaty obligations. <https://nativenewsonline.net/currents/joe-bidens-commitment-to-indian-country/>. Several other presidential candidates had explicitly pledged to shut down DAPL if elected. *See, e.g., Warren calls for revoking DAPL, Keystone XL permits*, Grand Forks Herald (Aug. 16, 2019).

[4] The Corps promises to be done with the EIS in 13 months. Corps Br. at 2. Such a rapid timeline is outside the norm: across the federal government, the mean time from initiation to completion of an EIS is 3.6 years, although the Corps is slower. https://www.whitehouse.gov/wp-content/uploads/2017/11/CEQ-EIS-Timelines-Report.pdf.

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Finally, the argument that the Corps has already done all the work needed for an EIS ignores the fact that DAPL now proposes to *double* its capacity, to 1.1 million barrels a day. ECF 433-2 at 10. As DAPL has previously argued, "'[T]he adequacy of an environmental impact statement'—or here, an EA—is judged by reference to the information available to the agency at the time of review." *City of Bos. Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018)." ECF 453-1 at 27 n.9. The information available to the Corps at the time of the permit, and again during the remand, was that the pipeline's capacity would be 570,000 bbl/day. USACE_DAPL 13680; ESMT 602 (EIS will be prepared for DAPL "with a capacity as high as 570,000 barrels per day"); RAR 8790 (spill model based on existing design volumes). Now, DAPL plans to increase the pipeline's capacity to 1.1 million bbl/day, and has received approval to do so by North Dakota and other states. Third Declaration of Donald Holmstrom, ¶ 67. As Standing Rock's expert confirms, doubling the capacity of the pipeline renders all of the previous analysis about spills and risks obsolete. *Id*. With major changes in operations, and marked increases in risks and consequences, the Corps will need to conduct an entirely new analysis of worst-case discharges and impacts on Lake Oahe and Tribal Treaty rights. It must effectively start major portions of the analysis over. *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (vacatur mandatory where agency "must redo its analysis from the ground up"); *Sierra Club v. FERC*, 867 F.3d at 1370 (EIS must consider "reasonably foreseeable" impacts). Defendants' failure to say even a single a word about the proposed expansion ignores the magnitude of the task ahead in revising the analysis.

In sum, vacatur is the only way to ensure the integrity of the EIS process and to satisfy NEPA's objectives to consider the risks and impacts of agency decisions *before* they are imposed on the public. *Oglala Sioux Tribe*, 896 F.3d at 523 (NEPA "does not permit an agency to act

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first and comply later"). As DAPL itself indicates, the operation of the pipeline to date has resulted in additional infrastructure investments and long-term contract decisions in reliance on the project. DAPL Br. at 34. Allowing the pipeline to continue operating during another remand would only allow additional reliance, further undermining the NEPA process and "steamrolling" the new permit decision. 40 C.F.R. § 1506.1 (prohibition on actions during EIS that might limit the choice of alternatives). While DAPL has benefited from continuing to operate the pipeline, the Tribes have borne the burden of the project's operation while the Corps proceeded with its inadequate remand. The default remedy of vacatur is appropriate.

III. THE DISRUPTIVE EFFECT OF VACATUR IS LIMITED AND DOES NOT OUTWEIGH THE HARM TO THE TRIBES OF ALLOWING DAPL TO CONTINUE OPERATING IN VIOLATION OF THE LAW.

A. Financial Impacts Rarely Outweigh Environmental Harms.

While this Court has found that economic impacts are not irrelevant to the vacatur analysis, they are not entitled to any "determinative effect." *Standing Rock IV*, 282 F. Supp. 3d at 104; *Village of Gambell*, 480 U.S. at 545. Even where financial impacts exist, they rarely warrant an exception to the default remedy of vacatur. *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 261 (D.D.C. 2003) ("Public interest weighs in favor of protecting ecosystem over avoiding economic harms."). As another District Court, which recently invalidated Corps permits for a major oil pipeline, observed: "A court largely should focus on potential environmental disruption, as opposed to economic disruption, under the second *Allied-Signal* factor." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 19-cv-0044-BLM (D. Mont., May 11, 2020).

This Court has repeatedly found that the potential for environmental harm outweighs financial impacts in NEPA cases. As this Court has emphasized, the "disruption" of halting an

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activity that has been found legally flawed cannot be the basis for an exception to the default remedy, as if it was, then "vacatur would never be appropriate." *PEER*, 189 F. Supp. 2d at 3–4; *Reed*, 744 F. Supp. 3d at 120 ("The fact that there may be some costs or 'field level' effects associated with the rescission does not mean that there should be an exception from the default rule that arbitrary and capricious agency action be set aside."); *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010) ("The Court is acutely aware that Reclamation and North Dakota have built miles of pipeline and that the citizens of the area want the Project completed. These facts do not excuse Reclamation's failure to follow the law."). The same is true in other courts. *See, e.g.*, *Diné Citizens*, 312 F. Supp. 3d at 1111–12 (vacating rule despite "serious" harm of suspending operations at hundreds of oil and gas wells: costs do not "overwhelm the environmental concern" of a NEPA violation); *Diné CARE*, 2015 WL 1593995, at *3 (vacating mine approvals despite finding that doing so would create considerable economic harm to the intervenor).

It is true that the District Court in *Semonite* on remand found that the "disruptive consequences" of vacating the unlawful Corps permits outweighed the "seriousness" of failing to prepare an EIS. *Semonite*, 422 F. Supp. 3d at 101. To the Tribes' knowledge, this may be the only instance, in any court ever, in which the failure to prepare a required EIS resulted in remand *without* vacatur. But the Court in *Semonite* addressed unusual circumstances radically different than those presented here. First, the Court focused on the disruptive impact of removing the electrical towers while the EIS was underway, and the potential "waste" if the Corps ultimately decided to re-authorize the structures. *Id*. Here, the Tribes do not ask the Court to order the removal of the pipeline from under Lake Oahe while the EIS process goes forward. *Standing Rock IV*, 282 F. Supp. 3d at 107–08 ("Plaintiffs are not asking for the pipeline itself, or for any

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existing infrastructure, to be dismantled."). While the Corps holds out its own threat to require removal as a reason not to vacate, its argument is a red herring. Nothing in the Corps' encroachment guidance requires the Corps to seek removal of the pipeline.

Second, the *Semonite* court cited serious consequences to innocent third parties, including "rolling blackouts" affecting utility customers. *Id*. The court concluded that the towers were a "crucial source of electricity" for the region that had suffered a recent power "emergency" resulting in violations of air pollution limits from aging coal-fired power facilities. *Id.* at 101. The fact that "hundreds of thousands of people will be left with an unreliable power source if the permit is vacated" weighed strongly against vacatur. *Id.* at 103. Here, in contrast, there will be marginal or no impacts on innocent parties if DAPL is shut down. *See infra* § III.B.

The Corps and DAPL argue that a remedy that blocks the operation of infrastructure like a pipeline would be unprecedented. They are wrong. The D.C. Circuit has explicitly recognized that closure of major crude oil pipelines is an available remedy for NEPA violations. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d at 43 ("If the NEPA analysis were legally inadequate, 'we could order that the [pipeline] be closed or impose restrictions on its use,' at least on federally authorized segments, 'until [the agencies] complied with NEPA.'"). This Circuit did not hesitate to vacate permits for a gas pipeline that was already in operation after finding it had conducted an inadequate EIS. *Sierra Club v. FERC*, 867 F.3d at 1379. There is nothing unusual about vacating or enjoining pipelines—either while under construction or once operations begin—where violations of environmental standards have been found. For example, other circuits have, on several occasions, vacated approvals for major pipelines under construction over violations of environmental statutes. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018) (vacating Corps permits for gas pipeline); *Defs. of*

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Wildlife v. U.S. Dept. of the Interior, 931 F.3d 339, 366 (4th Cir. 2019) (vacating Endangered Species Act authorizations for gas pipeline). A district court in Montana not only enjoined permits for the Keystone XL pipeline (where construction was underway), but vacated the entire Nationwide Permit that the Corps relies on for oil pipeline permitting. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 2020 WL 1875455, at *9 (D. Mont. 2020); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006) (shutting down already-operating pipeline pending compliance with NEPA in light of the difficulty of an agency "fulfilling its procedural obligations without favoring a predetermined outcome"); *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 2020 WL 2104760, at *13 (D. Mont. 2020) (vacating oil and gas leases for failing to consider impacts under NEPA). Defendants ignore these cases and rely instead on *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), which only reveals the weakness of their position. There, the court rejected the "vast majority" of the plaintiffs' claims, including their NEPA claim. In one minor respect, the court concluded that the agency had insufficiently explained itself. As to the remedy for this narrow legal shortcoming, the court remanded without vacatur, finding that the agency would be able to "supply the explanations required." *Id*. at 611. Here, the violation went far beyond inadequate explanation to failing to prepare a required EIS, which virtually always results in vacatur. There is nothing unprecedented or even unusual about the remedy the Tribes seek here.

B. DAPL Greatly Overstates the Impacts of Vacatur.

DAPL and amici variously describe the effects of vacatur as "staggering," "devastating," and "catastrophic." This hyperbolic description assumes that closure of the pipeline will radically alter the production and transportation of oil in North Dakota, with cascading impacts to agriculture, tax revenues, and national security. But no such change is going to occur, as a

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precipitous collapse in oil prices, demand, and production has fundamentally altered the equation. By failing to tether its evidence to the reality that exists on the ground, DAPL's arguments are wildly exaggerated at best, and dead wrong at worst. This Court has already noted that DAPL's history of exaggeration warrants "some cause for skepticism regarding Dakota Access's predictions of economic devastation." *Standing Rock IV*, 282 F. Supp. 3d at 104–08 ("[I]n this case vacatur would be, at most, an invitation to substantial inconvenience."). Its latest round of filings continues this pattern of exaggeration.

The oil industry in North Dakota is undergoing a dramatic period of decline brought about by multiple factors having nothing to do with this case. As demand for oil (and oil prices) have taken a nosedive, production in North Dakota has plummeted. Declaration of Dr. Marie Fagan, at ¶ 4. In fact, crude oil production in the Bakken region of North Dakota has recently fallen by almost the same volume as DAPL carries. Amicus North Dakota's declarant has been quoted in the media as saying production in the state has dropped by 550,000 barrels/day, almost identical to DAPL's 570,000 barrel/day capacity. *See* James MacPherson (AP), *North Dakota aims to use COVID-19 aid to plug oil wells*, Billing Gazette (May 15, 2020), *available at* <https://billingsgazette.com/news/state-and-regional/north-dakota-aims-to-use-covid-19-aid-to-plug-oil-wells/article_eadee456-3b1f-5b04-8d75-a0280fcb72ea.html>. This means that closure of the pipeline would not result in any noticeable change in oil transportation through other options (like rail and other pipelines) compared to a few months ago. Fagan Decl., ¶ 5. In other words, the world that the DAPL declarations describe does not exist anymore, and it is unlikely to return during the period of vacatur. *Id.*

DAPL's failure to disclose the true situation in North Dakota undermines its entire argument. For example, it asserts that shutting down DAPL could result in the shut-in (i.e.

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temporary closure) of "between 3,460 and 5,400" oil wells in the state. DAPL Br. at 36. But North Dakota concedes that 5,000 of the state's 16,000 wells have *already* been shut-in in recent weeks due to the collapse in the state's oil production. ECF 504 at 3 n.4. Since that time, the situation has continued to deteriorate, with state leaders confirming that the number of shut-in wells has increased to 7,000. *See* Patrick Spring, *Is it even worth it? North Dakota to mull whether pumping oil at low prices is waste*, Duluth News-Tribune (May 19, 2020), *available at* <https://www.duluthnewstribune.com/business/energy-and-mining/6496896-Is-it-even-worth-it-North-Dakota-to-mull-whether-pumping-oil-at-low-prices-is-a-waste>. Similarly, the state's rig count—which provides a glimpse of future oil production—has dropped to its lowest level since the start of the shale revolution. *See* Mike Hughlett, *With demand in the dumps, North Dakota oil fields grow quiet*, Star Tribune (May 18, 2020), *available at* <https://www.startribune.com/with-demand-in-the-dumps-north-dakota-oil-fields-grow-quiet/570515752/>. The report cited North Dakota's declarant as observing that the number of rigs had dropped from the 50s earlier this year to under 10.

In fact, one of the biggest problems in the oil industry is that it can find no place to store all of the unwanted crude oil. DAPL's parent company, ETP, is seeking approval in Texas to store excess oil *in its pipelines*. *See* Rachel Adams-Heard, *One Pipeline Giant Is Looking to Stash the Oil Glut In its Lines*, Bloomberg (April 23, 2020), *available at* <https://www.bloomberg.com/news/articles/2020-04-23/energy-transfer-wants-to-free-up-pipeline-space-to-store-crude>. DAPL relies on a declaration from one of its customers, Enerplus, which has a contract to ship a small amount of oil via DAPL. Doll Decl., p. 2. But Mr. Doll's declaration—which claims significant harm from closure of DAPL—omits salient information, such as the fact that its company has already significantly curtailed its North Dakota

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production. *See Enerplus Provides Corporate Update*, Yahoo Finance (April 22, 2020), *available at* <https://finance.yahoo.com/news/enerplus-provides-corporate-100000732.html>. Disclosures by Enerplus executives to investors have touted the company's "ability to shut-in and quickly restore volumes to pre-shut-in production levels," undercutting DAPL's argument that temporary shut-ins can cause harm to oil wells or environmental impacts. *Id.* Indeed, the executives explained that shutting in wells now, while prices are low, would "protect against selling oil at negative margins and [] preserve value." *Id.*[5] Many other major producers in North Dakota have stopped production altogether. Exhibit 1 to Fagan Decl., ("Fagan Report") at § 3.3.

Virtually all of the claims of devastation made by DAPL rely on one of two false premises. First, DAPL hypothesizes that the entire volume currently carried by DAPL will seek to move to rail, resulting in logistical problems obtaining rail cars, increased costs, congestion in the rail system, and rail accidents. This implausible scenario is untethered to reality. Production in North Dakota has already declined by roughly as much as DAPL's operating capacity, and any changes in the transportation system for the remainder will be difficult to discern. Fagan Decl., ¶ 5. Second, DAPL and amici posit that shutting down DAPL will cause production to plummet, leading to losses of jobs and tax revenues. This too is nonsensical. Oil production in North Dakota, along with attendant tax revenues and employment, has already collapsed. Conditions are unlikely to recover for years. *Id.* ¶ 10. Any impacts associated with shutting down DAPL

[5] DAPL also invokes the interests of the sovereign Mandan, Hidatsa and Akira ("MHA") Nation in arguing against vacatur, DAPL Br. at 39, evidently without their consent. The MHA Nation *supported* the historic protests against DAPL. *See* Forum news service, *MHA Nation expresses support for Standing Rock pipeline protest*, Dickinson Press (Aug. 22, 2016) *available at* <https://www.thedickinsonpress.com/news/4099591-mha-nation-expresses-support-standing-rock-pipeline-protest>.

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are so minor as to be "lost in the noise" of these other industry currents. *Id.* ¶ 5. DAPL's predictions of catastrophe are entitled to little weight.

Rail safety: Defendants resurrect their claims that rail transportation of crude oil is less safe than transportation via pipeline. Corps Br. at 19. This Court already rejected these arguments. *Standing Rock IV*, 282 F. Supp. 3d at 107 ("Defendants have failed to persuade the Court that transport by train is significantly more dangerous than allowing oil to continue to flow beneath Lake Oahe."). Nothing has changed since then. The Corps misrepresents a U.S. Department of Transportation Report as establishing that pipelines are always safer. Corps Br. at 19–20. To the contrary, the report says that "each mode has its own safety risks" and that rail is safer than pipeline according to some safety metrics, while pipelines are safer under others. ECF 507-2 at 9. In any event, a generic comparison of pipelines and rail begs the question of whether vacatur of permits for "*this* pipeline in *this* location" will increase the risks of spills. *Standing Rock IV*, 282 F. Supp. 3d at 107. Defendants have again offered no reason to conclude that this would be so. Goodman Decl., ¶ 97 (finding DAPL more proximate to Tribal reservations than rail).[6] In any event, the premise that closure of DAPL will increase the amount of oil being transported by rail is flawed. With production in North Dakota declining and national demand collapsing, there may be little or no increase in rail transportation at all. Fagan Decl., ¶ 5.[7]

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[6] DAPL's claim that the Tribe "conceded" that oil trains could cross the Missouri River closer to the water intake (DAPL Br. at 42) is a fabrication. Goodman Decl., ¶ 104 (observing that it was "unlikely" that Gascoyne terminal would be utilized).

[7] While DAPL insists that diverting oil from the pipeline to trains would be equivalent to a "major federal action" with no oversight, DAPL Br. at 41, transportation of crude via rail is regulated by the federal Surface Transportation Board and the U.S. Department of Transportation. DAPL itself points to federal regulation that has taken older, unsafe tank cars off the market. Rennicke Decl., ¶ 7.

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Rail costs: DAPL and amici complain that since rail transportation of crude is more expensive than DAPL, closing DAPL will put North Dakota producers at a competitive disadvantage to other producers. First, such a cost is not "disruption" as defined in this Circuit's vacatur precedent. Instead, it reflects a shift in the distribution of benefits and burdens within a market. While some participants in the North Dakota oil market could face increased costs, other participants would benefit from the shift. *See, e.g.* Kub Decl., ¶ 30 (railroads prefer carrying oil to grain because it is more profitable); Fagan Decl., ¶ 7 (drop in North Dakota production would be replaced by oil from Texas or other locations). This is how markets work, not a measure of "disruption" that counsels against vacatur. Second, DAPL again wildly exaggerates the actual cost difference. The unsupported claim that there will be as much as a $10/barrel difference (DAPL Br. at 35) is not even consistent with the claims of amicus. *See, e.g.*, ECF 257-2 at 6 ($3/barrel difference). The Tribes' expert found that the actual difference of transporting between North Dakota and Patoka, Illinois (the location of DAPL's terminus) is between $2 and $2.65/barrel. Fagan Report at § 4.2.3.

Rail car availability: DAPL and amici question how swiftly the market could respond to make rail cars available should an increase be needed. Even the Corps disagrees. Corps Br. at 21 ("railroads can increase capacity relatively quickly"). The Tribes have previously demonstrated how the national energy market is not easily disrupted by logistical challenges. Goodman Decl., ¶¶ 44, 53. Moreover, the claimed shortage of rail cars is an illusion, as recent declines in oil production and transportation have made abundant rail cars available for use, and also decreased costs. Fagan Decl., ¶ 8. In any event, the entire premise that significant additional rail transportation will be needed is flawed since production has already dropped by roughly the amount DAPL carries.

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Impacts to Agriculture: For the same reasons, the claim that shutting down DAPL will have major adverse impacts to agricultural commodities fails. *Id*. ¶ 8. (Agriculture is a primary driver of Tribal economies and hence of critical concern to the Tribes as well. Of course, Tribal agriculture—like other tribal economic drivers—relies on clean water from Lake Oahe that is jeopardized by ongoing operation of the pipeline.) As previously emphasized, no significant volume from DAPL would have to shift to rail, either today or in the foreseeable future. *Id.* To the contrary, there should be little or no discernable increase in rail transportation at all. *Id*. The argument by amici states that shutting down DAPL presents "staggering implications" for national and worldwide "food security" is both wrong and irresponsible. ECF 514 at 15.

Government Revenues: Amicus state of North Dakota, like DAPL, emphasizes that closure of DAPL would decrease tax revenues. But these claims are vastly overstated. Shutting down DAPL would not trigger a decrease in North Dakota oil production of 570,000 barrels a day, or anything close to it. Fagan Report at § 7.2. Oil production—and associated tax revenue—has already plummeted by that amount, and is not expected to recover soon. Future production in the state will be determined by supply and demand in light of the available transportation options. *Id*.; Goodman Decl., ¶ 13–14. The fact that tax revenues may decrease because the state allows producers to "deduct transportation costs from the value of the oil" reflects the state's policy choices, not some immutable fact. North Dakota Amicus, (ECF 504) at 7. In any event, if North Dakota becomes marginally less attractive for oil production due to higher transportation costs, which is unlikely, other states will benefit. North Dakota Amicus, at 9 (documenting how production moved to Texas, Colorado, and Wyoming when North Dakota conditions became less favorable). The fact that oil production may move from one state to another is not the sort of "disruption" that warrants departure from the standard remedy of

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vacatur. North Dakota's argument also ignores the fact that federal law severely limits Tribes' ability to generate tax revenue, particularly when compared with states; hence Tribes must rely on economic development to fill this gap. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810–11 (2014) (Sotomayor J. concurring). As noted, agriculture and tourism are important drivers of Tribal economies, and both require clean water from Lake Oahe.

Employment: Employment in the oil industry in North Dakota has fallen dramatically as a significant portion of the state's production has disappeared. Hughlett, *supra* at 23 (36% of industry workforce has applied for unemployment: "There were 25 frac crews operating in North Dakota in March. Today, there is one."). Because the closure of DAPL will have little or no effect on oil production or transportation, it will not impact employment either.

Safety risks of shutdown: DAPL resurrects their argument that it is safer to operate the pipeline than to shut it down. This is false. Pipelines like DAPL are shut down all the time in the normal course of events. Holmstrom Decl., (ECF 272-4), ¶ 29 ("Operators are expected to shut down pipelines periodically, for any number of planned or unplanned reasons."); 3rd Kuprewicz Decl., (ECF 272-2) ¶¶ 3–4 ("The implication that the operation of a crude oil pipeline cannot be shut down without creating structural and safety risks is misleading at best, and flatly false at worse."). If managed properly, there is no safety risk in shutting down a pipeline. *Id*. ¶ 11 ("there are no technical or physical barriers to shutting down DAPL" and to do so "would be prudent and warranted"). To the contrary, the safety risks of *not* vacating are heightened due to a recent decline in government enforcement. The federal government has announced that enforcement of environmental standards will be relaxed due to the pandemic, with companies like DAPL to comply with standards to the extent they are "reasonably practicable," to "[a]ct responsibly under the circumstances," and to come back into compliance "as soon as possible."

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See U.S. EPA, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (March 26, 2020), available at* <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>. Similarly, PHMSA has recently announced a plan to even further weaken its already weak regulations. 3rd Holmstrom Decl., ¶ 4; 85 Fed. Reg. 21140 (April 20, 2020). Of course, shutdown should not be handled haphazardly. The Court's vacatur order should give the Corps sufficient time to order the safe closure of the project. The Tribes' proposed order proposes that the Corps and DAPL shut down the pipeline within 30 days pursuant to safety plans.

National oil market and security: DAPL's wildest reach is to claim that shutting down the pipeline would disrupt national oil markets, raise gasoline prices, and even endanger national security. *See* Caruso Decl. These hyperbolic claims were not supportable even before the market collapsed. Goodman Decl., ¶ 43-48, 75-82 (marginally higher transportation prices would have "small to very small" impacts on energy market). Today, the nation—and indeed, the world—is awash in unneeded oil, with virtually no place left to store the excess that is being produced. Moreover, as even DAPL concedes, the U.S. now *exports* significant amounts of both crude oil and refined products, and is no longer reliant on unstable or unfriendly foreign nations for energy security. Fagan Decl., ¶ 9. While exports are presumably profitable for producers, there is no question that more than sufficient crude is available for national needs. *Id*. There are no national security implications of taking DAPL offline while an EIS is prepared.

In sum, this Court previously found that DAPL failed to carry its burden of providing a "strong showing" of undue economic harm. *Standing Rock IV*, 282 F. Supp. 3d at 105. In this round, DAPL presents the Court with similarly exaggerated claims of economic impacts without addressing current market conditions. Due to the oil crash, the impacts of shutting down the

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pipeline are even less today than they were previously, and the industry in a better position to accommodate the "inconvenience" of a shutdown. *Id*. The "disruption" factor does not weigh in DAPL's favor.

C. DAPL Bears Responsibility for Any Financial Impacts to Its Profits.

DAPL is left with claiming "disruption" due to a decline in its own anticipated profits. But losing the ability to continue operating a pipeline that was not lawfully authorized in the first place should count for little in the vacatur balancing. If anything, the Court should consider that DAPL has *benefited* from billions of dollars in revenues from a pipeline that was not properly authorized. Emery Decl., ¶ 10. Moreover, DAPL bears primary responsibility for the situation it finds itself in. This Court has already found as much, discounting DAPL's "*cri de coeur* over lost profits and industrial inconvenience" as "not fully convincing." *Standing Rock IV*, 282 F. Supp. 3d at 104. DAPL began operating the project "with full knowledge" of this litigation, and "assumed some risk of economic disruption." *Id*.

In other NEPA cases, courts have refused to credit economic harm that arises from a defendant's own risk-taking. *Fund for Animals v. Norton*, 294 F. Supp. 3d 92, 116-17 (D.D.C. 2003) (refusing to grant equitable relief where defendant took risks during litigation: "any economic or emotional harm . . . falls squarely on the defendants' shoulders"). In *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F. 3d 978, 998 (8th Cir. 2011), a court enjoined construction of a power plant that was almost complete despite claims of significant economic harm. The court reasoned that the company "commenced plant construction a year before the § 404 permit was issued, repeatedly ignoring administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk." *Id*. at 996*; Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("The state entities involved in this case have 'jumped the gun' on the

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environmental issues by entering into contractual obligations that anticipated a pro forma result. In this sense, the state defendants are largely responsible for their own harm"); *Diné CARE*, 2015 WL 1593995, at *3 ("it is important to note that the responsibility for such delay and expense lies with Respondents and not with Petitioners").

DAPL aggressively moved this project forward despite unprecedented Tribal and public opposition, and extensive legal and political risk that alternative routes or additional environmental review would be required. It even acknowledged several times that it pressed the project forward before these issues were resolved "at its own risk." ECF 6-60 at 5 ("Dakota Access has full confidence in receiving the PCNs from the [Corps] and is prepared to move forward with construction at its own risk to keep the Project on schedule…."); ECF 6-61 at 9 ("Any such activities [*i.e.*, construction prior to receiving Corps permits] will be conducted at the company's own risk."). DAPL built a significant portion of the pipeline before it had obtained *any* federal permits. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 34-35 (D.D.C. 2016) ("Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has secured a permit to then build across."). It disregarded the federal government's request that it cease construction in the Oahe area. ECF 42-1. Construction around Lake Oahe continued even after the Corps denied the Oahe permits and declared that it would perform an EIS that considered "route alternatives." ECF 65-1. And DAPL chose to initiate operations in early June of 2017 even though the Tribes' summary judgment motions were fully briefed and pending before this Court. In short, DAPL rolled the dice and bet that it would prevail over these challenges. It was not "reasonable" at all for DAPL to rely on permits that were under a cloud since the project's inception. DAPL Br. at 34.

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In the last round of vacatur briefing, the Tribes predicted that DAPL's reliance on the pipeline would only grow if vacatur was denied. ECF 280 at 7 ("one can only imagine the arguments that DAPL would try to make if operations continue for an extended period"). The Tribes were right: DAPL is now trying to leverage the additional investments it made and contracts it signed during the last remand as a reason not to vacate now. Presumably, reliance on DAPL would only continue without vacatur. The fact that DAPL and others will likely continue to invest in its future operation—making it even more difficult to choose something different at the conclusion of the EIS process—is yet another reason to vacate.

D. The Court Must Weigh the "Disruptive Effect" of Leaving the Pipeline Operating During the EIS.

As this Court knows, it must also weigh the "disruptive consequences" of *not* vacating. *Standing Rock IV*, 282 F. Supp. 3d at 105. In this case, this means allowing the pipeline—the risks and impacts of which have never been considered in the way that the law requires—to continue operating for what could be years. The Court has acknowledged that an oil spill at Oahe would be "devastating" to the Tribes, and that vacatur would mitigate the risk. *Id*. The "disruptive effects" of allowing such risks during remand offends the solemn obligations of the U.S. government to protect Tribal Treaty rights and the integrity and safety of Lake Oahe. *Id.* (DAPL's "economic myopia ignores the fact that the possible effects of an oil spill on the Tribes' treaty rights and communities were at the center of this Court's prior Opinion."). Defendants respond by saying the risk of an oil spill is low, but that conclusion is based on the same flawed risk assessment that this Court already found wanting under NEPA. And it skirts a core issue, which is what the consequences of an oil spill would be on the Tribes' treaty-protected rights.

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The Court should also consider the impact to tribal members of having to live under the constant threat of an incident, an ongoing trauma that compounds a history of government-sponsored dispossession and Treaty violations. RAR 7555 at App. G (Tribal member declarations on the impacts of the pipeline); Declaration of Steve Vance, ¶ 17 ("The pipeline's ongoing presence, and the looming threat of seepage, leak, and rupture that necessarily accompanies it, inflicts ceaseless anxiety upon us that will not end until the pipeline is removed."); Spotted Eagle Decl., (ECF 290-4) ¶ 5-6 ("the single biggest element that assists native people in healing from government-inflicted trauma is a sense of safety and well-being" that is not available while DAPL remains in service). "Throughout history, non-Natives have profited by exploiting the resources of Indian Tribes: native communities have borne the risks, while others reaped the benefits." 3rd Archambault Decl., (ECF 272-3) ¶ 13. Allowing the pipeline to operate despite "serious" violations of law would compound this shameful legacy.

DAPL focuses the bulk of its brief trying to relitigate the pipeline's safety. It repackages its arguments about the likelihood and size of oil spills, its worst-in-class safety record, and the effectiveness of its leak detection systems in an attempt to assure the Court that the risks of a pipeline spill are low and the consequences minor. But this Court held to the contrary in its summary judgment ruling, finding serious deficiencies in the Corps' analysis of these very issues. DAPL's sweeping claims of safety, which the Tribes have contested for years, will now be subjected to scrutiny in an EIS. It would upend the EIS process for this remedy phase of the case to try to resolve technical issues that now must be examined through the public and accountable NEPA process. DAPL cannot rely on the safety claims it put forward throughout this case, and that this Court has rejected, to avoid vacatur.

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Moreover, to the extent that the Court is open to considering these issues again, the company's assurances remain hotly contested. 3rd Holmstrom Decl., ¶ 9. For example, DAPL strives to rehabilitate its troubled safety record, but the facts tell a different story. Even now, ETP still has one of the industry's worst safety records, and a corporate culture that consistently tolerates accidents and regulatory violations. *Id*. Its newfound claim (previously unmentioned in the remand litigation) that it is implementing industry best practices like API 1173 is unsupportable. *Id*. ¶ 45-47. Its claim that its leak detection systems are superior to those that have failed elsewhere is incorrect. *Id*. ¶ 55-56. And its flawed worst-case discharge estimate remains undercut by numerous mistakes and misrepresentations. *Id*. ¶ 61-62. In fact, the risks of continued operations are even greater than what was evident during the remand litigation, which was limited to review of the administrative record. For example, internal documents reveal that DAPL does not have required protections in place against dangerous surges at Lake Oahe, despite the recommendations of its own consultants. *See* Declaration of Patrick E. Flanders, ¶ 15-17. As a result, regulatory requirements to limit surge risks are not being implemented at the Oahe crossing. *Id.* Similarly, the "independent assessment" of DAPL's operations revealed that the company still lacks critical operations safety plans required under federal law and the Corps' easement. *Id*. ¶ 19; 3rd Holmstrom Decl., ¶ 65-66. The company's spill plans are based on false assumptions and fail to recognize the unique hazards of Bakken crude. 2nd Declaration of Elliot Ward, ¶ 10. The company's assurances that all is well mask the fact that it is out of step with industry standards and regulations. Finally, the Tribes' safety concerns would be even greater if DAPL moves ahead with its plans to double the capacity of the pipeline. 3rd Holmstrom Decl., ¶ 66.

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In short, the disruptive effects of *not* vacating during the EIS process are severe. The pipeline hangs like a sword of Damocles over Tribal communities who rely on Lake Oahe for economic, cultural, subsistence, and other purposes. Even without a spill or leak, ongoing operation of the pipeline in the face of repeated legal violations compounds the historical trauma suffered by the Tribes, and signals that federal laws like NEPA do not matter when it comes to Tribes. 3rd Archambault Decl., (ECF 272-3) ("Throughout history, we have seen that money prevails over the rule of law, at least where Tribal rights are concerned."). Whatever the actual risk of a spill into the Missouri, the impacts would be intolerable. Vacatur is warranted.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that the Court impose the default remedy of vacating the permits and authorizations for DAPL to cross the Missouri River at Lake Oahe pending completion of a lawful and valid EIS.

Dated: May 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing *Amended Consolidated Brief of Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe Regarding Remedy*; and additional attachments to this document as follows:

1) [*Proposed*] Order
2) Declaration of Marie Fagan, PhD (with Exhibits 1 and 2)
3) Third Declaration of Donald Holmstrom (with Exhibits 1 and 2)
4) Declaration of Patrick S. Flanders
5) Second Declaration of Elliot Ward
6) Declaration of Steve Vance
7) Declaration of Albert Two Bears

These were filed 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.

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