UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS, WHITE EARTH BAND OF OJIBWE, HONOR THE EARTH, and SIERRA CLUB,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant,

ENBRIDGE ENERGY, LP

Defendant-Intervenor.

Case No. 1:20-cv-03817-CKK

PLAINTIFFS' OPPOSITION TO DEFENDANT'S AND DEFENDANT-INTERVENOR'S CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The U.S. Army Corps of Engineers ("Corps") asks this Court to find that there is no possibility that its decision to authorize construction of a brand-new, 338-mile oil pipeline ("Project") will result in *any* significant environmental effects. To rule for the Corps, the Court must find, among other things, that the Corps acted appropriately in refusing to consider entire categories of the Project's effects, including the greenhouse gas emissions that will result from the extraction, transportation, and combustion of the 760,000 barrels of oil that will flow through the pipeline *daily*. It must find that the Corps acted appropriately in dismissing concerns raised by the Red Lake Band of Chippewa Indians ("Red Lake") and the White Earth Band of Ojibwe ("White Earth") and concluding that the Project will not cause disproportionate harm to tribal citizens or interfere with their exercise of hunting, fishing, and gathering rights, even as it cuts through 227 waterbodies, 885 wetlands, and pristine tracts of territory. It must find that the Corps acted appropriately in determining that the Project—which, the Corps admits, will degrade and destroy habitat, displace species, and decrease biodiversity—somehow will have only minor negative consequences for local populations of wildlife. None of these findings is supportable.

The Corps and Enbridge Energy, LP ("Enbridge") offer a series of repetitive, inaccurate, and invalid arguments in defense of the Corps' short-shrift environmental review. But neither the Corps nor Enbridge can establish that the Corps satisfied its obligations to take a hard look at this Project, consider a reasonable range of alternatives, and justify its failure to complete an EIS under the National Environmental Policy Act ("NEPA") or establish that the Project is in the public interest under the Clean Water Act ("CWA"). For the reasons below, Plaintiffs respectfully request that this Court grant their motion for summary judgement and vacate the Corps' action.

ARGUMENT

I. THE CORPS IMPERMISSIBLY NARROWED THE SCOPE OF ITS NEPA ANALYSIS.

Throughout its environmental analysis of the Project, the Corps took an impermissibly narrow view of the mandatory scope of its analysis under NEPA. *See, e.g.*, AR000398 [JA___] (limiting review of greenhouse gas emissions from the Project); AR000471 [JA___] (dismissing tribal citizens' concerns about the Project's impact on their treaty rights). As a consequence, the Corps overlooked many of the Project's most significant effects, including the greenhouse gas emissions that will result from the combustion of oil transported through the pipeline and the manner in which those emissions will contribute to climate change, along with the degree to which the Project will harm tribal citizens and interfere with their rights to engage in cultural practices including subsistence hunting, fishing, and gathering. The Corps and Enbridge fail to justify these oversights.

The Corps offers a tangle of inadequate and invalid explanations for its refusal to complete an appropriate review, variously contending that it need not consider certain adverse effects because it does not have control over the entire pipeline and that the effects stem from activities outside its regulatory authority. These contentions mischaracterize Plaintiffs' arguments and misunderstand the Corps' obligations under NEPA. Plaintiffs do not argue that the Corps must consider the entire pipeline. Instead, Plaintiffs argue—and binding precedent makes clear—that the Corps must satisfy NEPA's unambiguous command to consider its action's direct and indirect effects. And here, the Corps' duty to consider indirect effects necessarily requires it to consider effects from activities that fall outside the Corps' regulatory authority. *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*") (explaining that the proper scope of an agency's NEPA analysis does *not* turn "on the question

'What activities does [the agency] regulate?'"). The Corps' argument to the contrary is inconsistent with this Circuit's caselaw under NEPA and the CWA, and it belies the reality that the Corps also is required to consider its action's impact on the public interest—an analysis that, the Corps admits, includes the effects of some activities over which the Corps has no regulatory authority. *See* Corps Opp'n, ECF No. 62 at 50 (conceding that greenhouse gas emissions from pipeline construction and operation are relevant to the Corps' public interest review).

A. NEPA Requires the Corps to Consider the Direct and Indirect Effects of Permit Issuance.

Under NEPA, an agency *must* consider the direct and indirect effects of its action, regardless of the agency's ability to exercise regulatory authority over an entire project.[1] Here, the fact that the Corps does not control the entire 338-mile pipeline, *see* Corps Opp'n at 17; Enbridge Opp'n, ECF No. 64 at 14–16, does not support the Corps' narrow view of its NEPA obligations. The Corps' NEPA analysis fell short not because it failed to consider the entire pipeline, but because it flatly refused to consider multiple categories of direct and indirect effects stemming from its issuance of the 404 and 408 permits.[2]

[1] Indirect effects are those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 53 n.3 (D.D.C. 2019) (quoting 40 C.F.R. § 1508.8 (2019)). Neither the Corps nor Enbridge argues that the effects at issue here are not reasonably foreseeable. Nor could they. *See Sabal Trail*, 867 F.3d at 1372–73 (concluding that greenhouse gas emissions were a reasonably foreseeable effect of a natural gas pipeline because transporting gas to users was "the project's entire purpose").

[2] Because Plaintiffs do not argue that the Corps must consider the entire pipeline, the Corps and Enbridge are mistaken to rely on cases holding that the Corps was not required to consider the entirety of other projects. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015) (considering whether "the agencies should have conducted NEPA review of the pipeline as a whole"); *Sierra Club v. Bostick*, 787 F.3d 1043, 1054 (10th Cir. 2015) (considering whether "the Corps should have evaluated the impacts of the entire pipeline project"); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009) (considering whether the Corps should have analyzed "the valley fill as a whole"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 130 (D.D.C. 2017) (stating that the Corps "was not required to consider the impacts from the whole pipeline"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 30–32 (D.D.C. 2016) (considering whether the Corps should have evaluated "the entire pipeline"). These cases are irrelevant to the present dispute.

Contrary to the Corps' assertion, its consideration of indirect effects is not limited to effects that stem from activities within its regulatory authority. This assertion rests on a fundamental misreading of U.S. Supreme Court precedent and related decisions from the D.C. Circuit, which establish the contours of an agency's duty to consider effects under NEPA. Relying on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Corps argues that it is not required to consider effects that lack a reasonably close causal relationship to the permitted activity, and this causal relationship is missing if the effect at issue stems from an activity outside the Corps' regulatory authority. *See* Corps Opp'n at 16–17. But this argument attempts to stretch *Public Citizen* further than the Supreme Court's decision and the D.C. Circuit's subsequent interpretation will allow.

In *Public Citizen*, the Department of Transportation was statutorily *required* to register Mexican motor carriers for operation in the United States, provided that those carriers could comply with certain safety regulations. 541 U.S. at 766. The Department had no discretion to refuse to register a carrier for any reason unrelated to the safety regulations; once a carrier established its ability to comply with the regulations, registration was a purely ministerial act. *Id.* at 758–59, 766. And because the Department had no discretion to deny a registration on non-safety-related grounds, "the environmental impact of the [carriers'] cross-border operations would have no effect on [its] decisionmaking—[it] simply lack[ed] the power to *act on*" that information. *Id.* at 768 (emphasis added). Thus, the Court concluded, the Department's action in registering the carriers was not the "legally relevant 'cause'" of the greenhouse gas emissions those carriers would generate in the United States. *Id.* at 770. Under *Public Citizen*, therefore, the relevant question is the agency's discretion to *act on* a potential adverse effect, not its ability to regulate the activity responsible for that effect.

The D.C. Circuit's interpretation of *Public Citizen* confirms that the Corps' reading of the case is wrong. In *Sabal Trail*, the D.C. Circuit concluded that *Public Citizen*'s "legally relevant cause" standard is satisfied if the effect at issue is one that the agency has the discretion to act on when making its permitting decision, regardless of whether the agency regulates the underlying activity. *See* 867 F.3d at 1373. Thus, the court found that *Public Citizen* "did not excuse FERC from considering the[] indirect effects" of granting a pipeline certificate for a natural gas pipeline, including the greenhouse gas emissions that would result from the burning of gas that travelled through the pipeline, because FERC "could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *Id.*; *see also Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (same). And, in *WildEarth Guardians*, this Court relied on the reasoning in *Sabal Trail* to conclude that the Bureau of Land Management ("BLM") must consider greenhouse gas emissions "as indirect effects of oil and gas leasing," because "BLM could decline to sell the oil and gas leases at issue . . . if the environmental impact of those leases—including use of the oil and gas produced—would not be in the public's long-term interest." 368 F. Supp. 3d at 73. In other words, "BLM could act on information regarding [greenhouse gas] emissions."[3] *Id.* at 74.

The Corps and Enbridge attempt to distinguish *Sabal Trail* by emphasizing that, unlike the Corps, FERC has the authority to authorize entire pipelines. But the court in *Sabal Trail* expressly dismissed this reasoning, explaining that the proper scope of FERC's NEPA analysis "turned not on the question 'What activities does FERC regulate?' but instead on the question

[3] Citing *Sierra Club v. United States Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015) and *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), Enbridge asserts that "[l]ower courts applying *Public Citizen* in the context of Section 404 permitting have consistently recognized the limited scope of the Corps' NEPA review." Enbridge Opp'n at 19. Neither of these cases apply *Public Citizen's* analysis regarding the scope of an agency's NEPA review. Instead, they cite *Public Citizen* simply for its description of NEPA's undisputed procedural requirements.

'What factors can FERC consider when regulating in its proper sphere?'" *Sabal Trail*, 867 F.3d at 1373; *see also WildEarth Guardians*, 368 F. Supp. 3d at 73 ("The touchstone . . . is that an agency need not consider environmental effects that cannot influence its decision."). Because FERC could consider harm to the environment—including downstream greenhouse gas emissions—in reaching its decision, it was required to evaluate those emissions as part of its analysis under NEPA. *See Sabal Trail*, 867 F.3d at 1373.

Courts widely agree with the D.C. Circuit that, in a variety of circumstances, the scope of an agency's NEPA analysis must encompass the reasonably foreseeable effects of some activities outside that agency's regulatory authority. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("[T]he fact that 'climate change is largely a global phenomenon that includes actions that are outside of [an agency's] . . . control does not release the agency from the duty of assessing the effects of *its* actions on global warming . . . .'") (alterations in original) (citation omitted); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 867–68 (9th Cir. 2005) (concluding that there was a "reasonably close causal relationship" between the Corps' issuance of a permit to extend an oil refinery dock, "the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills," so the Corps was required to consider the risk of spills in its NEPA analysis); *Columbia Riverkeeper v. U.S. Army Corps of Eng'rs*, No. 19-6071, 2020 WL 6874871, at *4 (W.D. Wash. Nov. 23, 2020) ("The Corps['] assertion that . . . greenhouse gas emissions are outside their jurisdiction does not relieve it of its duty to take a 'hard look.'"). Together with the D.C. Circuit's binding precedent, these cases make clear that the Corps' focus on its regulatory authority is misplaced.

B. The Corps' Permits Are the Legally Relevant Cause of this Project's Indirect Effects.

The Corps' sole focus on its purported inability to regulate activities that emit greenhouse gases and impair tribal citizens' use of natural resources misses the legally relevant point—the Corps' permitting decisions are the causes of those effects, and its refusal to consider those effects in making its permitting decisions is thus unlawful and arbitrary. This is so because, under the Corps' own regulations implementing the CWA, it has the authority—and discretion—to *act on* these effects when deciding whether to issue permits. The Corps' regulations direct it to deny applications for permits under Sections 404 and 408 if it determines that issuance "would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). To make that determination, the Corps must consider the reasonably foreseeable impacts of each proposed activity and its intended use, and this consideration must reflect "all those factors which become relevant in each particular case," including general environmental concerns, wetlands, fish and wildlife, food production, and the needs and welfare of the people.[4] *Id.* Greenhouse gas emissions, climate change, and tribal citizens' use of natural resources plainly fit within these factors. The Corps does not argue otherwise.

Though Enbridge relies on *Center for Biological Diversity v. United States Army Corps of Engineers*, 941 F.3d 1288, 1299 (11th Cir. 2019), to claim that the Corps' public interest regulations apply "only if the *discharge itself* will have an unacceptable environmental impact," Enbridge Opp'n at 21 (emphasis added), that claim contradicts the plain language of the

[4] The Corps wrongly relies on a *Standing Rock Sioux Tribe* decision involving the agency's actions under Section 106 of the National Historic Preservation Act, 205 F. Supp. 3d at 7, to which 33 C.F.R. § 320.4(a) does not apply. Corps Opp'n at 20. As the court explained, "Section 106 analysis is designed only to 'discourag[e] federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control.'" 205 F. Supp. 3d at 32 (alteration in original) (quoting *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989)). The *Standing Rock Sioux Tribe* court did not consider *Sabal Trail* and its progeny.

regulations, which directs the Corps to consider the impacts of the proposed activity—the discharge—*and its intended use*. *See* 33 C.F.R. § 320.4(a)(1); *see also Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 410 n.4 (9th Cir. 1989) ("[U]nder the CWA, the Corps is not limited by [its regulation generally restricting the scope of its NEPA review to the direct and indirect impacts of the permitted activity] . . .. As a consequence, the Corps could properly consider a wider range of facts in conducting its public interest analysis . . .."). Indeed, here, the Corps itself considered effects from activities other than the permitted discharge. As explained above, the Corps conceded that it must consider greenhouse gas emissions from pipeline construction and operation in its public interest review. *See* Corps Opp'n at 50. In addition, the Corps theorized that pipeline construction would "have positive effects on employment, income, and tax revenue," AR000396 [JA___], and that pipeline operations would "support United States consumers' energy demands" and "ensure the continued delivery of North American crude oil to refineries," AR000405 [JA___]. If the Corps can consider jobs, market supply, and other factors that, it believes, weigh *in favor* of finding that permit issuance supports the public interest, it must also ensure a full accounting of the Project's direct and indirect harms.

* * *

Because the Corps has the authority and discretion to act on greenhouse gas emissions and tribal citizens' use of natural resources in deciding whether to issue permits under Sections 404 and 408—that is, "when regulating in its proper sphere"—it must also consider those effects in analyzing the Project's environmental consequences under NEPA. *See Sabal Trail*, 867 F.3d at 1373. The Corps' failure to do so here renders its analysis arbitrary and capricious.

Not only is the Corps' argument inconsistent with statutory commands and binding precedent, but it also constitutes a deeply disheartening and dangerous position that, if approved

and replicated by other agencies, could threaten the assessment of climate change under NEPA. Congress charged the Corps and other agencies with fully and genuinely accounting for harm to the environment and the public interest. *See Sabal Trail*, 867 F.3d at 1373; *WildEarth Guardians*, 368 F. Supp. 3d at 73. Rarely do agencies with regulatory authority over aspects of fossil fuel infrastructure also have regulatory authority to oversee the production and end uses of fossil fuels. But it is production and end uses that generate significant greenhouse gas emissions, driving our climate crisis. By ignoring the full extent to which its decision will hasten and exacerbate climate change, the Corps seeks to evade its statutory responsibilities, along with NEPA's express instruction to consider environmental impacts "to the fullest extent possible." *See* 42 U.S.C. § 4332.

The Corps' argument here runs directly counter to President Biden's Executive Order mandating that the Corps' "permitting decisions consider the effects of greenhouse gas emissions and climate change." *See* Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7626 (Jan. 27, 2021). As a result, it portends nearly insurmountable difficulties for President Biden's commitment to "implement a Government-wide approach that reduces climate pollution in every sector of the economy." *Id.* at 7622.

II. THE CORPS IMPERMISSIBLY RELIED ON THE STATE EIS.

The Corps and Enbridge unsuccessfully attempt to patch the holes in the Corps' NEPA analysis by emphasizing that the Corps "examined" and "referenced" the state EIS. *See, e.g.*, Corps Opp'n at 13, 17; Enbridge Opp'n at 22. But the Corps does not identify, and the record does not reflect, any evidence that the Corps satisfied the Council on Environmental Quality's and the Corps' own regulatory requirements for relying on another agency's analysis; there is no evidence that the Corps engaged in a joint process with the state, independently evaluated and verified information included the state EIS, or presented any reasoned analysis in its decision to

explain why it concurred with the state's conclusions.[5] The Corps' uncritical reliance on the state EIS conflicts with NEPA's core goals of ensuring informed and careful consideration of environmental impacts and enabling public participation in environmental reviews.

The Corps' treatment of greenhouse gas emissions and climate change is a prime example. There, the Corps' sole reference to the state's analysis is a single-sentence acknowledgement that the state's analysis exists. AR000398 [JA __] ("An analysis of greenhouse gas emissions was conducted by the Minnesota Department of State and included in the State EIS."). The Corps has not identified anything in the record, and Plaintiffs' review of the record has not revealed any evidence, demonstrating that the Corps meaningfully collaborated with Minnesota officials in preparing the state's analysis or that the Corps made any serious effort to evaluate or verify that analysis after it had been completed. Indeed, the Corps does not even indicate in its discussion of climate change what the state's analysis found, let alone explain why the Corps concurred with those findings.

The Corps incorrectly asserts that Plaintiffs "fail to show that a joint review process was required." Corps Opp'n at 34. To the contrary, as Plaintiffs repeatedly have explained, the Corps' own regulations call for a joint process when the Corps and a state agency are conducting environmental analyses of the same project. *See* Pls.' Br., ECF No. 53-1 at 18–19. The Corps must cooperate with the state "[t]o the fullest extent possible," and that cooperation shall include joint planning processes, joint environmental research and studies, joint public hearings, and joint environmental assessments. 40 C.F.R. § 1506.2(b) (2019); *see also* 33 C.F.R. pt. 325, app.

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[5] While the Corps occasionally and vaguely asserts that it coordinated with the state, *see* AR000483 [JA __], these assertions are not supported by any specific record evidence. And the mere fact that the Corps *received* comments from the state, *see* AR101085 [JA __], does not establish that a genuine joint process took place, as required under 40 C.F.R. § 1506.2(b).

B § 4 (incorporating 40 C.F.R. § 1506.2). This joint process avoids duplication and ensures that any resulting analysis complies with both state and federal law. *See* 40 C.F.R. § 1506.2(c).

The Corps emphasizes that it is not required to duplicate the state's analysis, but this argument misses Plaintiffs' point. Plaintiffs do not argue that the Corps must duplicate the state's analysis. Instead, Plaintiffs make clear that, at a minimum, the Corps must independently evaluate and verify information compiled by the state *before* relying on that information. *See Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) ("If another agency has conducted a responsible analysis[,] the Corps can rely on it in making its own decision . . . though not uncritically . . . ."); *see also Friends of the Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986) (concluding that the Corps "had an obligation to independently verify the information supplied to it" by an applicant); *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 968 (S.D. Ohio 2002) (warning that the court's determination "does not lead to the conclusion that the Corps could base its final decisions or could adopt a complete EA wholesale without critical, independent verification"); 40 C.F.R. § 1506.5(b)(2) (requiring that, when an agency relies on information submitted by applicants, the agency must "independently evaluate" the information); *cf. City of Oberlin v. FERC*, 937 F.3d 599, 610–11 (D.C. Cir. 2019) ("[T]he Commission fulfilled its duty to independently consider the pipeline's safety risks . . . ."); *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 2020 WL 1450750, at *11 (M.D. La. Mar. 25, 2020) ("The administrative record in this case demonstrates that the Corps 'independently evaluate[d] the information submitted' and 't[ook] responsibility for the scope and content of the' EAs and the underlying information's accuracy." (quoting 40 C.F.R. § 1506.5(a)–(b) (2019))) (alterations in original). Here, the record does not reflect the independent evaluation or verification required of the Corps. *See Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1265–68 (S.D. Fla. 2009),

aff'd, 362 F. App'x. 100 (11th Cir. 2010) (finding that the Corps is required to independently evaluate the practicability of alternatives). Indeed, the Corps plainly admits that it did *not* evaluate the adequacy of Minnesota's analysis. *See* AR000483 [JA___] ("The Corps did not evaluate the adequacy of the [state EIS], but rather incorporated relevant parts of the [state EIS] documentation into our evaluation as appropriate.").

Moreover, contrary to Enbridge's assertion, *Indigenous Environmental Network v. United States Department of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), supports Plaintiffs' argument. There, the court held that the Department of State violated NEPA by relying on information from an earlier EIS without presenting any "reasoned analysis" showing that it "would reach the same conclusion" in the EIS at issue. *Id.* at 579. Enbridge asserts that the court found the NEPA violation because the earlier EIS "was not a part of the agency's record, so the court remanded the matter for the agency to cure the defect." Enbridge Opp'n at 17. But the court in *Indigenous Environmental Network* was clear: the agency's analysis, and not the record, was at fault. *See* 347 F. Supp. 3d at 579 (explaining that the court "cannot assume without reasoned *analysis*" that the agency would have reached the same conclusion upon re-reviewing the information that it had reached in the earlier EIS) (emphasis added). Accordingly, on remand, the court directed the agency to "supplement [its] *analysis*" to include the information on which it purportedly had relied and to show that it "would reach the same conclusion." *Id.* (emphasis added).

The rules governing collaboration and independent verification strike a balance between avoiding duplication, on the one hand, and ensuring that the Corps' analysis satisfies NEPA's "twin purposes" of "includ[ing] informed and careful consideration of environmental impact" and "inform[ing] the public of that impact and enabl[ing] interested persons to participate in deciding what projects agencies should approve," on the other. *See Sierra Club*, 803 F.3d at

36–37. Requiring the Corps to evaluate and independently verify information obtained from another agency—and to provide reasoned analysis explaining why it considers that information to be reliable—ensures both that the Corps' analysis is based on an informed and careful consideration of environmental impacts and that interested members of the public have access to the Corps' reasoning. *Cf. Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 484 (D.D.C. 1994) ("'[T]o rely entirely on the environmental judgments of other agencies [is] in fundamental conflict with the basic purpose of [NEPA]': to require federal agencies to make an informed judgment of the balance between the economic and technical benefits of an action and its environmental costs." (alterations in original) (quoting *Idaho v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994))). Here, there is no evidence of collaboration or independent verification and, therefore, no indication that the Corps rationally considered environmental harm.

III. THE CORPS FAILED TO TAKE A HARD LOOK AT THE PROJECT'S CONSEQUENCES.

As explained above, the Corps cannot justify its refusal to consider entire categories of the Project's reasonably foreseeable effects simply because those effects stem from activities outside the Corps' regulatory jurisdiction, and it cannot rely on Minnesota's analysis to fill the gaps in its own, absent evidence that it collaborated in the development of Minnesota's analysis or independently evaluated and verified Minnesota's conclusions. Not only does the Corps therefore fail to justify its refusal to consider the full range of reasonably foreseeable effects, but it also fails to establish that it took a hard look at those effects. For the reasons described below, the Corps fell far short of its responsibility to evaluate this Project's contributions to climate change, threats to tribal citizens, interference with protected rights, and harm to wildlife. In addition, the Corps improperly relied on an invalid legal conclusion to avoid its responsibility to consider a reasonable range of alternatives. Each of these defects alone is sufficient to warrant

vacatur of the Corps' permits and underlying analysis; together, they demonstrate the Corps' consistent and thoroughgoing failure to live up to its responsibilities under NEPA.

A. The Corps Failed to Take a Hard Look at the Project's Contributions to Climate Change.

The Corps unsuccessfully attempts to defend its single-paragraph evaluation of the Project's contributions to climate change by asserting, *first*, it considered harm to air quality and "analyz[ed]" emissions from construction equipment; *second*, it did not approve or authorize tar sands oil production; *third*, it "reviewed and referenced" the state's environmental analysis; and, *fourth*, "the quantification of greenhouse gas emissions is not *always* required simply because those emissions are an indirect effect of an agency action." *See* Corps Opp'n at 14–18 (emphasis added). These assertions are variously irrelevant, inaccurate, and inadequate. For many of the same reasons that the Corps' excuses do not justify its impermissibly narrow scope of review, they also fail to justify the Corps' shallow analysis.

First, Plaintiffs do not challenge the Corps' evaluation of harm to air quality, and the Corps' acknowledgment of Enbridge's efforts to "suppress dust," *see id.* at 14, is altogether unrelated to its responsibility to "engage in 'informed decision making' with respect to the greenhouse-gas effects of this [P]roject." *See Sabal Trail*, 867 F.3d at 1374. The Corps' claim that it "analyz[ed] emissions from construction equipment, vehicles, and construction-related activities in the Section 408 EA," *see* Corps Opp'n at 15, is similarly irrelevant—if not misleading. As should be immediately apparent from the Corps' conclusion that the effects of those emissions would be "localized" and "temporary," *see id.* (quoting AR002544 [JA___]),

this analysis concerns harm to air quality, not contributions to climate change. In fact, the terms "climate" and "greenhouse gas" do not appear in the 408 EA at all.[6]

Second, Plaintiffs do not contend that the Corps "approved" tar sands production. Instead, as explained above, Plaintiffs argue that the Corps has an obligation under NEPA to evaluate the indirect effects of its actions, *see WildEarth Guardians*, 368 F. Supp. 3d at 53, and greenhouse gas emissions from the production and combustion of tar sands oil are plainly an indirect effect of the Corps' action here, given that the Corps undertook this action for the basic purpose of facilitating the "[t]ransportation of crude oil" destined for combustion. *See* AR000364 [JA___]; *cf. Sabal Trail*, 867 F.3d at 1371–73 (concluding that an agency had an obligation to evaluate greenhouse gas emissions as an indirect effect of its decision to approve a natural gas pipeline, because transporting gas to users was "the project's entire purpose"). The Corps' failure to consider the reasonably foreseeable consequences of achieving this Project's basic purpose is the "critical flaw" inhibiting NEPA's information-promoting and accountability goals. *See* Corps Opp'n at 16 (quoting *Friends of Cap. Crescent Trail v. FTA*, 877 F.3d 1051, 1067 (D.C. Cir. 2017)).

Third, the Corps cannot save its analysis by claiming that it "reviewed and referenced" Minnesota's evaluation. *See* Corps Opp'n at 17. As explained above, the "reference" identified by the Corps is truly no more than that—a single-sentence observation that "[a]n analysis of

[6] The Corps' claim that it "noted" that greenhouse gas emissions "may" result from the operation of construction equipment, *see* Corps Opp'n at 15 (citing AR000398 [JA___]), also is misleading. Immediately following this single-sentence observation, the Corps asserted that it "has no authority to regulate emissions that result from the combustion of fossil fuels," and "[t]hese are subject to federal regulations under the Clean Air Act and/or the Corporate Average Fuel Economy (CAFE) Program." AR000398 [JA___]. But, as the D.C. Circuit has made clear, "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sabal Trail*, 867 F.3d at 1375 (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122–23 (D.C. Cir. 1971)).

greenhouse gas emissions was conducted by the Minnesota Department of State and included in the State EIS." *See* Corps Opp'n at 17 (citing AR000398 [JA___]). The evidence of "review" is thinner still; the Corps points to the presence of the state analysis in the record and to a letter asserting that, as of October 2017, the Corps had "*not* evaluated [the] adequacy of the [state EIS], but rather [would] incorporate relevant parts of the [state EIS] documentation into [its] evaluation as appropriate." *See* AR151471 [JA___] (emphasis added); Corps Opp'n at 17; *see also* AR000483 ("The Corps did not evaluate the adequacy of the [state EIS] . . . ."). As explained above, NEPA requires more. *See* 40 C.F.R. § 1506.2(b) (2019) (directing federal agencies seeking to use state analyses to satisfy their responsibilities under NEPA by engaging in joint processes "to the fullest extent possible"); *id.* § 1506.2(c) (indicating that cooperation is necessary to ensure that the resulting analysis complies with state and federal law).

Fourth, Plaintiffs do not argue that the Corps must quantify greenhouse gas emissions whenever those emissions are the indirect effects of the Corps' actions. To the contrary, Plaintiffs explained that the D.C. Circuit requires the Corps and other agencies *either* to quantify the emissions traceable to their activities *or* to explain why they cannot do so. *See* Pls.' Br. at 10 (citing *Sabal Trail*, 867 F.3d at 1375). The Corps did neither here, and it fails to identify any controlling authority to justify its oversight. For instance, although the Corps invokes the D.C. Circuit's decision in *Friends of the Capital Crescent Trail*, *see* Corps Opp'n at 18, that decision does not support the Corps' argument. There, the court concluded that quantification was not appropriate *under the particular facts at issue in that case*. *See Friends of Cap. Crescent Trail*, 877 F.3d at 1065. The court expressly contrasted those facts with a situation like this one, in which an agency has access to information about the amount of fossil fuel that will travel through a particular pipeline, "and so could have estimated with some precision the level of

greenhouse gas emissions" that will result from combustion of that fuel. *Id.* In such a situation, quantification of indirect effects is appropriate.[7] And in any case, here, the Corps did not quantify greenhouse gas emissions *or* explain why quantification was impracticable.

B. The Corps Failed to Take a Hard Look at Environmental Justice Considerations.

Plaintiffs argue that the Corps' environmental justice analysis is inadequate because it is "silent . . . on the distinct cultural practices . . . and the social and economic factors that might amplify [the Tribes'] experience of the [Project's] environmental effects," despite the CEQ's express instruction that tribal citizens who depend on subsistence fish, vegetation, or wildlife consumption might experience environmental harm more intensely than members of the general population. Pls.' Br. at 14 (alterations in original) (citing *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 140). In response, the Corps again ignores the CEQ's instruction and overlooks the degree to which reliance on subsistence activities will amplify tribal citizens' experience of environmental harm. Instead, the Corps asserts that its selection of "methodologies" to evaluate environmental justice is entitled to deference and that it adequately fulfilled its responsibilities by disclosing the Project's location, consulting with multiple Tribes about a variety of harms, and concluding—based on census data—that the Project would not have a disproportionate effect

[7] The Corps also fails to find support in *Sierra Club v. Department of Energy*, in which the D.C. Circuit found that the Department of Energy satisfied its responsibilities under NEPA by disclosing the amount of greenhouse gas emissions that would result from its action in a *supplement* to its EIS, rather than in the EIS itself. *See* Corps Opp'n at 18 (citing 867 F.3d 189, 202 (D.C. Cir. 2017)). The Corps prepared no similar supplement here.

on minority or low-income populations. *See* Corps Opp'n at 21–25.[8] The Corps is wrong, and its analysis is insufficient.

Plaintiffs do not challenge the Corps' choice of methodology; they challenge its arbitrary and capricious failure to consider an important aspect of the problem: the extent to which reliance on subsistence hunting, fishing, and gathering will amplify tribal citizens' experience of the Project's environmental harm. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The evidence identified by the Corps to support the adequacy of its analysis, in fact, serves only to confirm that more thorough review was necessary. Indeed, the Corps acknowledged that the Project's location will affect lands and waters in which tribal citizens engage in subsistence hunting, fishing, and gathering of natural resources. *See* AR000400 [JA___]. Its communications with tribal citizens and their representatives revealed their serious, well-founded concerns about harm to subsistence resources. *See, e.g.*, AR101141 [JA___] (advising that the Project "has the significant potential to cause . . . degradation of traditional fishing areas"); AR151570 [JA___] ("[T]he pipeline would run adjacent to the largest berry patches in the region . . .. We depend on these berries for nourishment . . .."); AR151676 [JA___] (explaining that the Project will "endanger[] primary areas of hunting, fishing, wild rice harvest, medicinal plant harvest, and organically certified wild rice crops"). Its analysis of census data showed that the Project will cross at least six tracts with significant populations of tribal citizens. AR000473 [JA___]. And the Corps conceded that the Project will destroy habitat

[8] To support its assertion that it adequately disclosed the significance of the Project's location, the Corps confusingly points to passages in the record that discuss the path of *existing* Line 3 in relation to the Leech Lake and Fond du Lac Reservations. *See* Corps Opp'n at 22 (citing AR000369 [JA___], AR000371 [JA___]). But the Leech Lake and Fond du Lac Bands are not parties to this challenge, and the Red Lake and White Earth Bands are independent sovereign entities with distinct practices and interests.

and displace wildlife, potentially resulting in the extirpation of species, *see* AR000383 [JA___], while an oil spill likely would cause "acute toxicity" to fish, *see* AR002551 [JA___].

The Corps' record includes ample evidence to suggest that the Project will cause disproportionate harm to tribal citizens who depend on subsistence resources. These findings should mark the *beginning* of an environmental justice analysis, not its end. For the reasons identified above, the Corps cannot artificially constrain the scope of its environmental justice analysis. Neither can it rely on state environmental justice analyses without meaningful coordination or independent verification of those state analyses. Therefore, the Corps' failure to evaluate whether tribal citizens' "distinct cultural practices," together with other social and economic factors, "might amplify [their] experience of the [Project's] environmental effects" is arbitrary and capricious. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 140. So too is its conclusory assertion that the Project would not have a disproportionate effect on minority or low-income populations.[9]

C. The Corps Failed to Take a Hard Look at the Project's Effects on the Tribes' Rights to Hunt, Fish, and Gather Natural Resources.

In concluding that this Project will not interfere with Red Lake and White Earth citizens' rights to hunt, fish, and gather natural resources, the Corps entirely failed to consider an important aspect of the problem—the effects stemming from operation of the pipeline—and offered an explanation that runs counter to the evidence before the agency. *See State Farm*, 463

[9] In observing that tribal citizens might be entitled under Minnesota law to recover damages for the loss of subsistence resources, *see* Enbridge Opp'n at 23, Enbridge betrays a fundamental misunderstanding of the significance of traditional cultural practices. Red Lake and White Earth citizens hold deep, longstanding connections to the lands and waters of northern Minnesota, and those connections, once broken, cannot be remedied through the award of damages. *See* Decl. of Michaa Aubid ¶ 3, ECF No. 2-10 at 1 ("The Ojibwe and Anishinaabe people have lived in [northern Minnesota] since 1730, and since then, they have hunted, fished, and gathered both on and off their reservations."); Decl. of Winona LaDuke ¶ 7, ECF No. 2-12 at 3 ("I am a traditional harvester of wild rice, medicinal plants, maple syrup, fish and other animals, and I live from this land. Indakiingimin. This is the land to which I belong.").

U.S. at 43. Now, the Corps attempts to defend its caveat-heavy conclusion that the Project's *construction* is "not *likely* to *significantly* reduce the *overall* availability of resources" that Red Lake and White Earth citizens retain rights to use, and it argues that Plaintiffs' challenge stems from mere disagreement. *See* Corps Opp'n at 27 (emphasis added) (citing AR000401 [JA___]). Enbridge, in turn, questions whether the Red Lake and White Earth Bands' rights entitle their citizens to any resources at all, a suggestion that is as needlessly disrespectful as it is plainly incorrect.[10] Enbridge Opp'n at 24. Neither the Corps nor Enbridge can reconcile the Corps' conclusion with the evidence before the agency or justify the Corps' failure to consider harm to tribal citizens' rights stemming from oil spills and other aspects of the Project's *operation*. Therefore, Corps' analysis is arbitrary and capricious.

As Plaintiffs already have made clear, the Corps acknowledged that this Project will cross lands and waters in which Red Lake and White Earth citizens hold and exercise rights to hunt, fish, and gather natural resources. *See* AR000400 [JA___]. The Corps admitted that the Project will destroy habitat and displace wildlife, potentially resulting in extirpation. *See* AR000383 [JA___]. The Corps also admitted that these effects will be "most pronounced in large undisturbed areas," *id.*, and it knows that those areas are "vital" to the success of protected traditional hunting. *See* AR151769 [JA___]; *see also* AR151769 [JA___] ("The proposed pipeline route cuts through the second and fourth most productive regions for wild turkey

[10] Not only is Enbridge's narrow interpretation of tribal rights inconsistent with longstanding U.S. Supreme Court precedent and lower court decisions, *see, e.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (explaining that tribal fishing rights secure tribal citizens "a share of each run of fish that passes through tribal fishing areas," not "merely the chance . . . occasionally to dip their nets into the territorial waters"), but its assertion that the Project's effects on protected resources would be entirely temporary also conflicts with the Corps' own conclusions. *See, e.g.*, AR000383 [JA___] (explaining that the Project could result in the extirpation of wildlife species); AR002551 [JA___] (explaining that oil spills "commonly" result in "acute toxicity" to fish).

hunting in Minnesota."). The Corps admitted that oil spills "commonly" result in "acute toxicity" to fish, AR002551 [JA___], and concluded that a spill would "disrupt[]" *recreational* fishing, AR002552 [JA___], but did not evaluate how a spill might affect tribal citizens' fishing rights. In light of this evidence that the Project's construction and operation will impair tribal rights, the agency's conclusion cannot stand.

The Corps attempts to muddy the waters by pointing to its efforts to consult with multiple Tribes about a variety of potential problems, especially harm to archaeological sites and historic properties. *See* Corps Opp'n at 25; *see also* AR001359 [JA___] (explaining that, as of late September 2019, the Corps' cultural resource surveys included an archaeological survey, an architectural survey, and a report concerning the Corps' "effort to identify historic properties of significance to Indian Tribes"). But the Red Lake and White Earth Bands raised concerns that extend beyond harm to historic resources. *See, e.g.*, AR001245–50 [JA___–__] (describing in detail the White Earth Band's dissatisfaction with the consultation process, and reiterating the Band's concerns for waterways, water quality, diverse aquatic life, and "numerous hunting and fishing locations used for generations," among other things). And the Corps' efforts to fulfill *some* of its mandatory responsibilities to Tribes through consultation cannot excuse its arbitrary and capricious treatment of tribal rights to hunt, fish, and gather natural resources. The agency cannot now rely on mitigation to resolve problems it did not fully consider. *See, e.g.*, *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) ("[M]itigation measures, while necessary, are not alone sufficient to meet [an agency's] NEPA's obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved."); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (emphasizing that agencies cannot rely on mitigation proposals "as a way to avoid preparation of

an EIS"). For the reasons set forth above, neither can it depend on the state's analysis to fill gaps in its own or dismiss tribal citizens' concerns by inappropriately narrowing the scope of its review under NEPA. *But see* AR000471 [JA___] (reporting that Plaintiff Red Lake Band expressed concern that the Project "would adversely impact their treaty rights" and indicating that the Corps responded by asserting that it "cannot control the entire pipeline construction or operation").

D. The Corps Failed to Take a Hard Look at Harm to Local Populations of Wildlife Species.

The Corps' analysis is inadequate because it failed to resolve "uncertainty as to the [Project's] impact . . . on . . . local population[s]" of wildlife species. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 234 (D.D.C. 2003); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) ("General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.") (citation omitted); *Ctr. for Biological Diversity v. Walsh*, No. 18-CV-00558-MSK, 2021 WL 1193190, at *8 (D. Colo. Mar. 30, 2021) (finding an agency's NEPA analysis to be insufficient because it acknowledged the possibility of short-term impacts to local populations of wildlife species but failed to include a "detailed examination" of those impacts). The Corps does not dispute that it has an obligation to evaluate harm to local populations, and it does not explain how it reconciles its conclusion that the Project will have only "minor" effects on biodiversity and wildlife, *see* Corps Opp'n at 28, with its findings that the Project will degrade and destroy habitat, displace and potentially extirpate species, and decrease biodiversity. *See* AR000383 [JA___]; *see also* AR000401 [JA___] (conceding that Project construction could affect "localized populations" of wildlife species). Instead, the Corps relies on a series of distractions and attempts to blame Plaintiffs for its own insufficient analysis.

These efforts fail. The Corps' analysis is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem—harm to local populations of wildlife species that are neither threatened nor endangered, but nonetheless significant—and it offered an explanation that runs counter to the evidence before the agency. *See State Farm*, 463 U.S. at 43.

The Corps attempts to defend its analysis by explaining that it "took into account" Enbridge's plans to implement measures that might minimize harm to wildlife, and the Corps endeavored to comply with its obligations under the Endangered Species Act. *See* Corps Opp'n at 29. However, mitigation proposals "are not alone sufficient to meet [the Corps'] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved," *see N. Plains Res. Council, Inc.*, 668 F.3d at 1084; the Corps cannot rely on mitigation "as a way to avoid preparation of an EIS," *see Nat'l Audubon Soc'y*, 132 F.3d at 17. And Plaintiffs do not challenge the Corps' analysis under the Endangered Species Act, which focuses exclusively on threatened and endangered species. The deficiency in the Corps' analysis is its failure to evaluate harm to local populations of *all* wildlife species likely to be affected by the Project, including species with special significance to tribal citizens.

The Corps' assertion that "Plaintiffs do not specify any local animal populations that the Corps failed to analyze . . . [or] any public comments that suggested particular areas or types of wildlife that would be most affected," *see* Corps Opp'n at 29, is more puzzling, but equally flawed. *First*, Plaintiffs did identify areas and species at risk, as did other commenters. *See, e.g.*, AR151765–66 [JA___–__] (reporting that regional species important to the Anishinabeg include "gray owls, northern hawk-owls, wolves, deer, bear, beaver, . . . sturgeon" and sharp-tailed grouse); AR101118–29 [JA___–__] (identifying numerous areas and species at risk, including colonial waterbirds, trumpeter swans, boreal chickadees, boreal owls, red-breasted nuthatches,

great gray owls, northern hawk owls, snowy owls, black-backed woodpeckers, American three-toed woodpeckers, bobcat, and moose). *Second*, Plaintiffs cannot now identify particular species *missing* from the Corps' analysis, because the Corps failed to identify any species *included* in that analysis. *See* AR000382–84 [JA___] (referring generally to "wildlife," "forest-nesting birds," "terrestrial wildlife," "birds," and "animals"). Contrary to the Corps' suggestion, "uncertainty as to the impact of a proposed action on a local population of a species" is not a shortcoming in Plaintiffs' argument but, instead, a basis for setting aside the Corps' finding of no significant impact. *See Fund for Animals*, 281 F. Supp. 2d at 234 (citing *Anderson v. Evans*, 314 F.3d 1006, 1018–21 (9th Cir. 2002)) (finding an agency's analysis of harm to a local population inadequate because, even though the agency identified the specific species at risk, it "failed to identify the precise locations at which [members of the species] will be killed, the number of [members] that will be killed at particular individual sites, or the environmental impacts of those killings on local communities").

E. The Corps Failed to Evaluate Route Alternatives.

The Corps contends that it is entitled to deference in its selection of alternatives. *See* Corps Opp'n at 31. Deference is not appropriate here, however, because the Corps' refusal to consider alternative pipeline routes did not reflect a "rule of reason" but, instead, an incorrect understanding of the Corps' obligations under NEPA. Contrary to the Corps' assertion, "[a]n agency is generally not entitled to deferential review . . . in interpreting NEPA or its regulations." *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 226 (D.D.C. 2011); *see also Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001) (explaining that "[b]ecause NEPA's mandate is addressed to all federal agencies," an agency's interpretation of NEPA "is not entitled to the deference that courts must accord to [the] agency's interpretation of its governing statute").

The Corps limited its analysis to three alternatives: (1) transporting Enbridge's preferred quantity of 760,000 barrels of oil every day to Minnesota and Wisconsin via train or truck, (2) maintaining the existing Line 3, and (3) building a brand-new pipeline along Enbridge's preferred route. AR000365–73 [JA___–__]. Not only did the Corps inappropriately discount the alternative of transporting less oil, but it also refused to consider alternative pipeline routes that would avoid the existing Line 3 corridor in its entirety—even though Plaintiffs identified an option that, according to the Minnesota Pollution Control Agency, would minimize environmental injustice, bypass tribal lands, reduce the risk of surface and groundwater pollution, and cross relatively resilient ecosystems, as compared with Enbridge's preferred route. *See* AR097792 [JA____]. This alternative also would bypass "sensitive Mississippi Headwaters and Minnesota Lakes Regions." AR097793 [JA___] (citation omitted).

The Corps' administrative record reveals that its refusal to consider alternative pipeline routes stemmed solely from its erroneous belief that it lacked legal authority to do so. *See* AR000479 [JA___] ("The review of impacts associated with system and route alternatives is outside the scope of the USACE's regulatory authority."); AR000480 [JA___] ("Other route and system alternatives evaluated by the State were not evaluated in the EA *since* the USACE does not regulate the siting of pipelines/utility lines.") (emphasis added). But there can be no question that the Corps has the authority—and responsibility—to consider the environmental effects of various alternatives. *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 134 ("To comply with NEPA, an Environmental Assessment must include a 'brief discussion[] of reasonable alternatives to the proposed action.'" (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (alteration in original) (internal quotation marks omitted))). To the extent that the Corps *now* argues it properly deferred to the substance of

Minnesota's analysis or properly determined that the alternative pipeline routes were not reasonable, that argument amounts to an impermissible *post hoc* rationalization. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1164–65 (10th Cir. 2002) (rejecting the agency's argument regarding a ground on which it eliminated an alternative because the agency's Final EIS did not identify that ground and the court "can only affirm agency action, if at all, on grounds articulated by the agency itself"). The Corps did not participate in Minnesota's analysis, and it did not independently verify Minnesota's conclusions. And, as the D.C. Circuit has made clear, "[t]he existence of permit requirements overseen by [a] state permitting authority cannot substitute for a proper NEPA analysis." *Sabal Trail*, 867 F.3d at 1375.

IV. THE CORPS CANNOT JUSTIFY ITS FAILURE TO PREPARE AN EIS.

Not only does the Corps' failure to take a hard look at the Project's environmental effects and consider a reasonable range of alternatives invalidate its decision, as described above, but the Corps' rationale for failing to prepare an EIS also is unlawful. As explained below, the Corps failed to resolve multiple controversies, address critical uncertainties, and adequately consider the material risk for grave or catastrophic harm posed by the Project. If the Corps had evaluated these issues properly, it would have concluded that the Project requires an EIS.

A. The Corps Failed to Resolve Multiple Controversies.

Plaintiffs put substantial evidence into the record disputing the Corps' and Enbridge's characterization of the Project's size, nature, and effect. The Corps summarily dismissed this evidence without providing a reasoned explanation. As a result, the Corps did not fully consider "the degree to which [the Project's] effects on the quality of the human environment are likely to be highly controversial." *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017).

Instead of engaging with the substance of Plaintiffs' evidence, the Corps summarily dismissed and ignored large swaths of that evidence. As is discussed above, the Corps refused to consider entire categories of effects based on its impermissibly narrow view of the mandatory scope of its analysis under NEPA, *see supra* Section I, and, as a result, did not engage with the technical evidence that Plaintiffs submitted regarding those effects. For example, the Corps completely ignored Plaintiffs' extensive evidence concerning the volume of greenhouse gases the Project will emit, and failed to provide any valid, reasoned explanation for doing so.[11]

Similarly, by improperly relying on the state's EIS, *see supra* Section II, the Corps failed to engage with the evidence provided in *its* docket and, as a result, dismissed a long list of controversies raised by Plaintiffs and other expert groups. For example, the Corps failed to address criticisms that its consideration of oil spills did not include an analysis of the impact of a spill on Lake Superior itself, which also was excluded from the initial state EIS. *See, e.g.*, AR097686–87 [JA__–__]. The Corps' passing description of the state's oil spill risk model, included in the Corps' 408 EA, references only the Lake Superior watershed, not Lake Superior specifically, AR02548 [JA___], and nowhere does the Corps address one of the chief critiques of the state's analysis—its failure to consider how a spill from a site close to Lake Superior could affect the lake and the Duluth-Superior Harbor. Although the Corps and Enbridge attempt to rely on a recent state court decision deferring to the state's revised EIS, the very fact that the

[11] The Corps attempts to dodge its responsibility to consider Plaintiffs' submissions by claiming that Plaintiffs have not specifically identified a controversy regarding "jurisdictional waters, the Permit, or the Permission." *See* Corps Opp'n at 37; *see also* Enbridge Opp'n at 28. *First*, the mandatory scope of the Corps' analysis under NEPA is not so limited. *Second*, contrary to the Corps' assertion, Plaintiffs did provide evidence of multiple unresolved scientific disputes regarding jurisdictional waters, the Permit, and the Permission. With respect to jurisdictional waters, for example, record documents "cast substantial doubt on the adequacy" of data collected by the Corps as to the size, nature, and effect of the Project's impacts on wetland biodiversity, ecological health, and local species. *See, e.g.*, AR097776–77[JA__–__].

litigation involving the state EIS continued long after the Corps issued its decision illustrates why the Corps' NEPA analysis must be sufficient to stand on its own. The Corps cannot now rely on a state court decision applying state law and handed down six months *after* the Corps completed its analysis to resolve scientific controversies raised months, if not years, earlier. NEPA requires that the Corps resolve any controversies in its own decision documents. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1044–49 (D.C. Cir. 2021) (concluding that the Corps' failure to resolve *in the record* the Tribes' criticisms of its oil spill risk analysis showed that the pipeline project was highly controversial and necessitated preparation of an EIS).

In addition, as the D.C. Circuit has made clear, the Corps' failure to resolve scientific criticisms from the Tribes undermines its decision not to prepare an EIS, because "[Tribes] are sovereign nations with at least some stewardship responsibility over the precise natural resources implicated by the Corps' analysis" and, thus, "of at least equivalent status" to "highly specialized governmental agencies and organizations." *See id.* at 1043–44; *see also* Memorandum from President Joseph R. Biden Jr. to Heads of Exec. Dep'ts & Agencies, Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26. 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/. Among other materials, the Tribes here submitted an extensive study, the Anishinaabe Cumulative Impact Statement, describing the Tribes' special ties to the land and waters crossed by the Project, as well as the manner in which the Project threatens the Tribes and their citizens. AR151641–891 [JA___–___]. The Corps failed to reference that study at all in its decision, and it entirely failed to take the Tribes' expert opinions seriously. *See supra* Section III.C. Dismissing tribal concerns as mere differences of opinion

does not respect tribal sovereignty or provide a rational basis for the Corps' failure to prepare an EIS. The Corps' EAs lack sufficient reasoning to allow this Court to determine whether the Corps properly considered the full record and "chose correctly in making its decision." *See Standing Rock*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017) (citation omitted).

B. The Corps Did Not Demonstrate the Absence of Uncertainty as to the Project's Impacts.

For the same reasons that the Corps failed to demonstrate the absence of a controversy, the Corps also failed to establish that there is sufficient certainty as to the scope of the Project's effects to justify its decision not to prepare an EIS. The Corps wrongly contends that uncertainty giving rise to significance under NEPA, here, is limited to effects from "temporarily discharging dredge or fill materials in waters of the United States." Corps Opp'n at 39. Again, the Corps' view of the mandatory scope of its analysis under NEPA is impermissibly narrow. *See supra* Section I. As a result, the Corps has not demonstrated that it collected sufficient data on climate change, environmental justice, tribal citizens' rights to engage in traditional subsistence activities, or local populations of wildlife species. Plaintiffs have provided specific scientific critiques of the gaps in the Corps' analysis, *see, e.g.*, AR033893–914 [JA___–___]; AR151641–891 [JA___–___], demonstrating that the Project's impacts are uncertain. If properly considered, these uncertainties would warrant completion of an EIS. *See Standing Rock Sioux* Tribe, 985 F.3d at 1043.

C. The Project Creates a Material Risk for Grave or Catastrophic Harm.

In *Standing Rock Sioux Tribe*, the D.C. Circuit set out a clear principle arising from established precedent: "[U]nder NEPA, an agency *must* look at both the probabilities of potentially harmful events and the consequences if those events come to pass. A finding of no significant impact is appropriate *only if* a grave harm's probability is so low as to be remote and

speculative, or if the combination of probability and harm is sufficiently minimal." *See* 985 F.3d at 1049 (emphasis added) (citations and internal quotation marks omitted); *see also id.* at 1049–50 ("[T]he government is not in the business of approving pipelines, offshore oil wells, nuclear power plants, or spent fuel rod storage facilities that have any material prospect of catastrophic failure."); *New York v. Nuclear Regul. Comn'n*, 681 F.3d 471, 478 (D.C. Cir. 2012); *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 65 (D.D.C. 2005).

There can be no question that this Project poses a risk of grave harm: an oil spill affecting waterbodies of great significance to tribal citizens and countless others undoubtedly, would be catastrophic. Seeking to avoid application of the D.C. Circuit's clear principle to the facts of this case, the Corps suggests that a risk of grave harm requires preparation of an EIS only if there also is a "serious scientific dispute[]" that creates a "controversy." Corps Opp'n at 39–40. But *Standing Rock Sioux Tribe* does not hold that a risk of grave harm requires a controversy to warrant preparation of an EIS. Indeed, such a rule would be nonsensical, because the existence of a controversy alone is sufficient to warrant an EIS. Moreover, in focusing on the existence of a risk of grave harm, the D.C. Circuit in *Standing Rock Sioux Tribe* quoted and expressly relied on another D.C. Circuit case in which the existence of a scientific controversy was not discussed: *New York v. Nuclear Regulatory Commission*. *See* 985 F.3d at 1049 (citing 681 F.3d at 478–79). There, the D.C. Circuit held that an EIS is required if an EA failed to "describe a probability of failure so low as to dismiss the potential consequences of such a failure" and stipulated that "[a]n agency may find no significant impact [only] if the probability [of grave harm] is so low as to be 'remote and speculative,' or if the combination of probability and harm is sufficiently minimal." *New York*, 681 F.3d at 478–79. The Corps' reading of *Standing Rock Sioux Tribe*, therefore, is incorrect.

Because the Project carries a material risk of grave harm, an EIS plainly is required. *See Standing Rock Sioux Tribe*, 985 F.3d at 1049; *New York*, 681 F.3d 471 at 478–79. And even if the existence of a serious dispute *were* also required for the Project's material risk of grave harm to warrant an EIS, which it is not, Plaintiffs have demonstrated the existence of multiple controversies and uncertainties. Thus, the Corps cannot justify its refusal to prepare an EIS.

V. THE CORPS ARBITRARILY AND CAPRICIOUSLY DETERMINED THAT THE PROJECT IS NOT CONTRARY TO THE PUBLIC INTEREST.

Plaintiffs identified four failures in the Corps' public interest review, each of which renders the review arbitrary and capricious. Specifically, the Corps' review failed to consider (1) the Project's greenhouse gas emissions and contributions to climate change, (2) the risk of oil spills, and (3) risks and harms from the Project's operation, despite accounting for purported *benefits* from operation, and it failed to include (4) an independent assessment of public need for the Project. The Corps' efforts to justify these failures largely mirror its attempts to justify its failures to take a hard look at the Project's effects under NEPA and to prepare an adequate EIS. And for many of the same reasons that those earlier attempts fail, so too do the Corps' efforts to defend its public interest review.

A. The Corps Failed to Consider Certain Greenhouse Gas Emissions and Contributions to Climate Change.

The Corps admits that it was required to consider the greenhouse gas and climate change impacts from the construction and operation of the Project in its public interest review,[12] but it does not explain why it, in fact, considered—and promptly dismissed—only emissions from the

[12] To the extent that the Corps argues that it is not required to consider emissions from the pipeline's construction and operation as part of its public interest review, this argument contradicts the plain language of the Corps' own regulation, which directs the agency to consider the reasonably foreseeable impacts of the proposed activity *and* its intended use. 33 C.F.R. § 320.4(a)(1). Here, the Corps acknowledges that the proposed activity and intended use are the construction and operation of a pipeline. Corps Opp'n at 50 (agreeing that "[t]here is no dispute that the proposed activity is construction" and its intended use is "transporting petroleum").

loss or conversion of wetlands, *see* Corps Opp'n at 50, 52–53, which represent a small fraction of the total greenhouse gas emissions associated with the Project. The Corps' confusing, circular, and often, *post hoc* rationalizations do not excuse the lack of record evidence showing that it complied with its regulations under Section 404 and considered the full extent of the Project's greenhouse gas emissions in determining that the Project is not contrary to the public interest. Corps Opp'n at 50; *see also* 33 C.F.R. § 320.4.

First, the Corps did not evaluate all the greenhouse gas emissions from construction, specifically failing to consider emissions from the equipment used to conduct the dredging and filling it authorized. In its EA, the Corps expressly stated that it did not consider those emissions because it "has no authority to regulate emissions that result from the combustion of fossil fuels." AR000398 [JA___]. Now, the Corps sidesteps Plaintiffs' point that it impermissibly confused the scope of its regulatory authority with the scope of its public interest review under the CWA. *See* Corps Opp'n at 52. Instead, the Corps claims that its statement about its lack of regulatory authority "does not reflect a refusal by the Corps to consider [greenhouse gas] emissions at all." *Id.* at 52–53. But Plaintiffs do not contend that the Corps failed to consider *all* greenhouse gas emissions; they contend that the Corps did not consider *a substantial portion* of the greenhouse gas emissions, including those from construction equipment. And although the Corps' brief claims that "the Corps *did* consider the impact of [greenhouse gases] related to the construction of the pipeline," *id.* at 53, it cites to the exact page on which the Corps asserted it was not required to assess emissions from construction equipment. *Id.* There is nothing in the record that indicates that the Corps evaluated those emissions.

Second, the Corps did not evaluate the greenhouse gas emissions generated directly by the Project's operations. The single paragraph in the EA discussing greenhouse gas emissions

does not reference operations, and the record does not demonstrate that the Corps undertook any such analysis. *See* AR000398 [JA___]. Instead, for the first time in its brief, the Corps claims that its refusal to evaluate operational emissions is due to *Plaintiffs'* failure to identify "anything in the record suggesting that pipeline operations . . . are a significant source of [greenhouse gas] emissions." Corps Opp'n at 54. This *post hoc* rationalization is simply impermissible.[13] *See State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 129 (holding that the failure to include an explanation in the decision document undermined the agency's analysis). If the Corps wanted to rely on this rationale for refusing to consider operational emissions in its public interest determination, it was obligated to say so in its decision documents.

Third, the Corps' public interest review wrongly ignored emissions and climate impacts from upstream oil production and downstream combustion. The Corps contends that upstream and downstream emissions "fall outside the intended use of the proposed activity and therefore are outside the scope" of its public interest review. Corps Opp'n at 50. But the Corps' regulations expressly direct it to consider the "*reasonably foreseeable*" impacts of the pipeline's intended use—transporting crude oil to refineries. 33 C.F.R. § 320.4(a)(1) (emphasis added). The Corps fails to explain why emissions from the production and use of oil are not reasonably foreseeable impacts of transporting oil from producers to users. Moreover, elsewhere in the Corps' public interest review, it has no trouble considering impacts from oil production and use.

[13] This *post hoc* rationale also reveals just how little independent evaluation the Corps gave to the state EIS. The state found that the emissions from the pipeline's operation and power generation to support its operation alone, AR148689–91 [JA __], will result in greenhouse gas emissions costing $672,806,234. AR148693 [JA __]. The Corps failed to independently evaluate and verify this finding or weigh it against the Project's purported benefits.

The Corps highlights as a purported benefit that the Project will "ensure the continued delivery of North American crude oil to refineries," which "convert the crude oil into a variety of products for use." AR000405 [JA___]. Just as the Corps considered *this* reasonably foreseeable impact of the pipeline's intended use, which it perceived to be beneficial, it must also consider greenhouse gas emissions from upstream oil production and downstream use.[14]

The Corps cannot shore up the deficiencies in its public interest review by asserting, once again, that it reviewed and considered the state's analysis of greenhouse gas emissions. *See* Corps Opp'n at 50, 53. As explained above, the Corps' lone statement that "[a]n analysis of greenhouse gas emissions was conducted" by the state does not constitute proper reliance on the state's analysis. AR000398 [JA __]. Nor does it satisfy the Corps' duty in its public interest review to conduct a "careful weighing" of the impact of greenhouse gas emissions from the pipeline's construction and operation. *See* 33 C.F.R. § 320.4(a)(1).

The Corps also cannot support the assertions in its brief that "with respect to greenhouse gas emissions arising from pipeline construction and operation, the Corps considered the Minnesota Department of State's analysis . . . and . . . weighed [the emissions] against benefits of the proposed activity," Corps Opp'n at 50, and that it "reviewed the state's conclusions [about emissions from pipeline operations] but properly declined to weigh the benefits and detriments as part of its public interest analysis," *id.* at 53. The Corps' brief contains a far more detailed discussion of what the state EIS found—and the Corps allegedly considered—regarding climate change than do the EAs themselves. Other than the statements in the Corps' brief, the Corps

[14] As is discussed in Section I, Enbridge is also incorrect that that the Corps' public interest regulations "authorize[] the Corps to deny permits 'only if the discharge itself will have an unacceptable environmental impact' and not 'for any other reason.'" Enbridge Opp'n at 21 (citations omitted).

does not point to any evidence indicating that it weighed the emissions described in the state's analysis against the Project's purported benefits. That is impermissible.

The Corps' assertion now that full consideration of the Project's greenhouse gas emissions and climate impact would not have altered its public interest review is an equally unfounded *post hoc* rationalization. *See* Corps Opp'n at 54–55. Annual life-cycle greenhouse gas emissions from the Project, including upstream production and downstream use, could total up to 273.5 million tons, with a social cost of carbon of $287 billion. AR148697 [JA__]. Public comments from the 1855 Treaty Authority explain that climate change has already begun to disrupt some Tribe members' ability to catch walleye, forcing them to move to other areas where they can still find the fish. *See* AR148160–61 [JA __]. Climate change also disproportionately harms urban Minnesotans of color. Amicus Br., ECF No. 55-1 at 5–8. If the Corps considered and intended to dismiss these real costs, it should have done so in its EAs. But it cannot now hide behind the state EIS in its briefs, after failing to dismiss these costs in its decision documents.

B. The Corps Failed to Consider the Risk of Oil Spills.

The Corps asserts that it "*did* consider the risk of oil spills as part of its public interest analysis." Corps Opp'n at 56–57. But, in support, the Corps points everywhere but its public interest review. Indeed, the only mention of spills in the public interest review is a cursory reference to Enbridge's Environmental Protection Plan ("EPP"). AR000398 [JA___]. Because the EPP is limited to evaluating *construction* impacts, AR007591 [JA __], it does not reflect the risk of oil spills from the Project's *operation*. Thus, the Corps cannot rely on the EPP to satisfy its duty to consider impacts of the Project's "intended use." 33 C.F.R. § 320.4(a)(1).

The Corps' attempt to rely on the oil spill analysis in its 408 EA also comes up short. The Corps' regulations require it to consider and balance "[a]ll factors which may be relevant,"

including "wetlands," "food production," and "the needs and welfare of the people." *Id.* The Corps fails to identify any consideration in its 408 EA of the risk and impact of a spill on wetlands; tribal citizens' ability to hunt, gather, and produce food; or tribal citizens' needs and welfare. To distract from this shortcoming, the Corps asserts that Plaintiffs fail to show that consideration of these impacts would change the Corps' public interest review. But, as commenters explained to the Corps, and Plaintiffs highlighted in their brief, a spill would "potentially impact or entirely obliterate the cultural and economic value of the wild rice lakes along the proposed pipeline," AR097684 [JA___], and would "harm Ojibwe cultural and property interests, a variety of shipping, commercial, recreational, and tourism interests, and sensitive aquatic environments," AR097932–33 [JA___]. The Corps could not have conducted a "careful weighing" of the Project's benefits and detriments without including these impacts on the scale.[15] *See* 33 C.F.R. § 320.4(a)(1).

C. The Corps Considered Purported Benefits but Not Detriments from the Project's Operation.

The Corps fails to rebut Plaintiffs' argument that the Corps' public interest review impermissibly considered benefits from the Project's operation while ignoring its detriments. In fact, the Corps admits that, although its review mostly focused on the Project's construction, there was "one exception—energy needs." Corps Opp'n at 57 n.20. Within the "energy needs" category, the Corps considered many purported benefits from the Project's operation. *See* AR000405 [JA __] (asserting that the Project will "provid[e] a safe and efficient means of transporting crude oil," "support United States consumers' energy demands," and "ensure the

[15] The Corps' emphasis on its conclusion that the risk of spills from the Project is lower than from alternatives is irrelevant. *See* Mem. Op., ECF No. 40 at 21 (explaining that comparing the risk of spills from various alternatives does not constitute "specifically discuss[ing] the risks or impacts of *this* Project").

continued delivery of North American crude oil to refineries"). Yet, the Corps' public interest review is silent with respect to any potential detriments from the Project's operation.

The Corps cannot by evade responsibility for this error by arguing that the scope of its public interest review is only *a little* uneven. The Corps' analysis must reflect a "careful weighing" of the Project's benefits and detriments, and it fails to do so here. *See* 33 C.F.R. § 320.4(a)(1); *cf.* 33 C.F.R. pt. 325 app. B § 7 (providing that, for purposes of the Corps' NEPA review, "[i]n all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal").

D. The Corps Failed to Conduct an Independent Assessment of Public Need.

The Corps also fails to rebut Plaintiffs' argument that the Corps did not conduct an independent assessment of the "relative extent of the public . . . need" for the Project. 33 C.F.R. § 320.4(a)(2). The Corps asserts that it "reviewed the information provided to the Minnesota Public Utility Commission and reached its own conclusions that the activity would provide numerous, significant energy-related benefits . . . ." Corps Opp'n at 49. But the only record evidence the Corps can offer in support of this assertion is the Corps' parroting of Enbridge's statements of need. There is no evidence that the Corps considered or assessed the ample evidence in the record that there is no public need for the Project. *See* Pls.' Br. at 29.

CONCLUSION

For the foregoing reasons, Plaintiffs Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and Sierra Club respectfully request that this Court grant their motion for summary judgment and vacate the challenged agency action.

DATED: July 12, 2021

s/ Moneen Nasmith
Moneen Nasmith
[Admitted Pro Hac Vice]
Alexis Andiman
[Admitted Pro Hac Vice]
Mekela Panditharatne
[Admitted Pro Hac Vice]
Kara Goad
[Admitted Pro Hac Vice]
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
(212) 845-7376
mnasmith@earthjustice.org
aandiman@earthjustice.org
mpanditharatne@earthjustice.org
kgoad@earthjustice.org

*s/ Seth Johnson*___
Seth L. Johnson, D.C. Bar No. 1001654
Earthjustice
1001 G St. NW, Ste. 1000
Washington, D.C. 20001
(202) 667-4500
sjohnson@earthjustice.org

Attorneys for Plaintiffs