UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE HEADWATERS, **Plaintiff,** **v.** **UNITED STATES ARMY CORPS OF ENGINEERS, COL. KARL JANSEN,** **Defendant,** **ENBRIDGE ENERGY, LP** **Defendant-Intervenor.**	**Case No.** 1:20-cv-03817-CKK

REPLY BRIEF OF PLAINTIFF FRIENDS OF THE HEADWATERS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

This case involves intervenor-defendant Enbridge's now nearly completed Line 3 crude oil pipeline project across Minnesota's lake country. The project crosses over 200 rivers and streams and over 800 protected wetlands. Under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, Defendant U.S. Army Corps of Engineers ("USACE" or "Corps") has the responsibility to determine whether the proposed "discharge of dredged or fill material" at each of those crossings meet the requirements of the "404(b)(1) Guidelines" promulgated by the U.S. Environmental Protection Agency (EPA), 40 C.F.R. § 230.10, and the Corps' own permitting rules, 33 C.F.R. § 320.4.[1]

There appears to be little disagreement about what the applicable rules are. All parties acknowledge that the Corps may not grant section 404 permits to allow the discharge of dredged or fill material into waters of the United States if (1) there are less environmentally damaging practicable alternatives; (2) the discharges will cause or contribute to "significant degradation" of protected waters; or (3) the permits are "contrary to the public interest." Corps Opp'n, ECF No. 62 at 41, 46; Enbridge Opp'n, ECF No. 64, at 12. Where the disagreement lies is with the scope of what those rules require the Corps to do.

Plaintiffs contend that alternative routes for the pipeline—and therefore alternative "disposal sites" for dredged and fill material are "less environmentally damaging practicable alternatives" the Corps is required to consider. Defendants argue they do not have to look at alternative routes, because Enbridge convinced a state agency to grant a permit for its preferred route before it officially applied for section 404 permits, and therefore all other alternative routes

[1] As with the opening briefs, Friends of the Headwaters will focus on the Clean Water Act issues, while the other plaintiffs will focus on the National Environmental Policy Act (NEPA).

or alternative "disposal sites" are now not "practicable." Corps Opp'n at 44; Enbridge Opp'n at 12. Plaintiffs contend that, not only the construction, but also the operation of a crude oil pipeline, the possibility of spills at the water and wetland crossings under the Corps' jurisdiction, and the climate risks from increasing the production and consumption of Canadian tar sands oil, all substantially increase the risk of "significant degradation" of aquatic resources. Defendants claim the Corps has no authority to consider oil spills or any other operational risks, only the authority to review construction techniques at specific water or wetland crossings. Corps. Opp'n at 46. Finally, Plaintiffs contend that the Line 3 project is not needed to meet demand for oil, and therefore cannot be in "the public interest." Defendants, on the other hand, simply assume that the project is needed, and do not even consider most of the "public interest" factors in the Corps' own rules. Corps Opp'n at 49.

Defendants' arguments are all based on interpretations of administrative regulations that are not supported by the language, are not reasonable, and are not consistent with the purpose of the Clean Water Act which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Because those interpretations are legal errors, the permits granted by the Corps for this project must be overturned.

ARGUMENT

I. DEFENDANT USACE'S INTERPRETATIONS OF THE RULES GOVERNING SECTION 404 PERMITTING ARE NOT ENTITLED TO DEFERENCE FROM THIS COURT.

This case almost entirely revolves around competing interpretations of the rules governing U.S. Army Corps of Engineers permitting under section 404 of the Clean Water Act, 33 U.S.C. § 1344. In particular, the dispute is over the proper interpretation of the so-called "404(b)(1) Guidelines," 40 C.F.R. § 230.10, and the Corps' own permitting rules, 33 C.F.R. §

320.4, which prohibit the Corps from permitting any discharge into waters of the United States if:

(1) there is a less environmentally damaging practicable alternative, that is, "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences," 40 C.F.R. § 230.10(a);

(2) the discharges might "cause or contribute to significant degradation of waters of the fUnited States," 40 C.F.R. § 230.10(c): or

(3) granting the permit would be "contrary to the public interest." 33 C.F.R. §320.4(a)(1).

A threshold question, then, is whether the Corps' interpretations of any of those rules are entitled to deference from this Court. They are not entitled to deference for the following reasons:

First, the Defendants have waived or forfeited any deference arguments based on either *Auer v. Robbins,* 519 U.S. 452 (1997), or *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), as "cabined in" by *Kisor v. Wilkie,* 139 S.Ct. 2400 (2019) by not raising a deference claim in their District Court briefs. *See e.g. Massachusetts Mutual Life Ins. Co. v. United States,* 782 F.3d 1354, 1369 (Fed. Cir. 2015); *Scheidelman v. Commissioner of Internal Revenue,* 682 F.3d 189, 197 n. 6 (2nd Cir. 2012) (agency waiver of *Auer* deference); *Maine Medical Center v. Burwell,* 775 F.3d 470, 479 (1st Cir. 2015) (private party waiver of *Auer* deference); *Hydro Resources,*

Inc. v. EPA, 608 F.3d 1131 (10th Cir. 2010) (en banc) (Gorsuch, J.) (waiver of *Skidmore* deference).[2]

Second, the 404(b)(1) Guidelines, which are central to this litigation, are not the Corps' own regulations. The 404(b)(1) Guidelines were drafted by the U.S. Environmental Protection Agency (EPA) "in conjunction with" the Corps, largely to address Congressional concerns that the Corps would not take its new clean water responsibilities under section 404 of the Clean Water Act seriously. As Sen. Muskie, the CWA's chief author, commented "the Corps' mission was not to protect the environment but to promote navigation."[3] The compromise when the CWA was adopted was to leave jurisdiction over dredge and fill material discharges with the Corps, but to subject the Corps' exercise of permitting authority to binding EPA regulation. 33 U.S.C. § 1344(b)(1). Even if properly invoked, *Auer* and *Skidmore* deference only apply "when an agency interprets its own regulation" *Decker v. Northwest Envt. Def. Ctr.,* 568 U.S. 597, 613 (2013); *see also Martin v. OSHRC,* 499 U.S. 144, 157-58 (1991) (Occupational Safety and Health Review Commission not entitled to deference in interpreting Labor Department regulations).

Third, none of the Corps' proffered interpretations in this case involve any application of technical agency expertise. *Kisor,* 139 S.Ct. at 2417. Indeed, in this case, the problem has been that the Corps has interpreted the rules to allow it to *avoid* applying its technical expertise. Its

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[2] The D.C. Circuit rejected *Chevron* waiver in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 920 F.3d 1 (2019), but did not reach any conclusions about *Auer* or *Skidmore* deference. Of course, it is no longer clear whether any of these deference doctrines enjoy majority support on the U.S. Supreme Court.

[3] Michael C. Blumm & Elizabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform,* 33 UCLA J. Envt. L. & Pol'y 215, 228-29 (2015)(quoting Sen. Muskie). *See also* Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers,* 63 Va. L. Rev. 503 (1977).

interpretation of words like "project" and "practicable" are not technical; they are exactly the kinds of words it is the responsibility of the judiciary to construe.

And finally, the language in dispute in this case is not ambiguous. *See* Section II *infra.*

The task for this Court, then, is not to assess whether the Corps' interpretations of these rules meet some deferential test of "reasonableness." The task is to decide whether the Corps' interpretations are the *best* interpretations, in light of the structure, context, and purpose of the Clean Water Act. "A textually permissible interpretation that furthers rather than obstructs the [law's] purpose should be favored." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 63 (2012). In this case, the question therefore should be which interpretation best furthers the CWA's explicit purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251; *County of Maui v. Hawaii Wildlife Fund,* 140 S.Ct. 1462, 1476 (2020) ("[T]he object in [a Clean Water case] will be to advance, in a manner consistent with the statute's language, the statutory purposes the Congress sought to achieve"). The Corps' interpretations cannot meet that test.

II. DEFENDANTS' OVERLY NARROW INTERPRETATION OF WHAT THE RULES GOVERNING SECTION 404 PERMITS REQUIRE IS INCONSISTENT WITH BOTH THE ORDINARY PLAIN MEANING OF THE RULES AND THE PURPOSES OF THE CLEAN WATER ACT.

A. The EPA's "404(b)(1) Guidelines" do not permit the Corps to duck its independent responsibility to evaluate less environmentally damaging alternate pipeline routes just because Enbridge was able to obtain a state permit approving its preferred route from a state utility regulator.

No party disputes that the Corps may not lawfully grant a section 404 permit for any proposed discharge of dredged or fill material "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as

the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a) ("least environmentally damaging practicable alternative" or "LEDPA"); Corps Opp'n at 41, 46; Enbridge Opp'n at 12. Nor is there any dispute that, under the EPA's "404(b)(1) Guidelines," which govern Corps section 404 permits, "practicable alternatives" typically mean alternative locations, locations "that avoid discharges altogether, or . . . that would involve discharges with less adverse environmental impact." *Id.* § 230.10(a)(1)(i) or (ii). Corps Opp'n at 41. And the Corps does not deny in this case that alternative routes, and therefore alternative "disposal sites" for "dredged or fill material," that would avoid protected waters and wetlands might have "less adverse impact on the aquatic ecosystem." Corps. Opp'n at 44.

Instead, the Corps and Enbridge make a purely legal argument based on an interpretation of the word "practicable." Their argument is that, because Enbridge applied for and secured a routing permit from the Minnesota Public Utilities Commission (PUC) before applying to the Corps for its section 404 permits, the Corps is legally precluded from even considering the possibility of less environmentally damaging alternative routes, or no longer needs to do so, because those routes are no longer "practicable" or "available." Corps Opp'n. at 43-44; Enbridge Opp'n at 12.

As Plaintiff Friends of the Headwaters ("FOH" "Friends") pointed out in its opening brief, the Corps' argument essentially makes the order in which a project proponent applies for permits outcome-determinative. If an applicant can convince one other agency, at any level, applying different law, to approve a proposed route or site, then the Corps may not, or need not, consider alternative routes or sites under the Clean Water Act. FOH Br. in Support of Mot. for

Summ. J., ECF No. 52, at 8-9.[4] Defendants do not seriously dispute that characterization, but they nevertheless contend that any project developer can avoid a Corps LEDPA analysis if it can first get a routing or siting permit from some different state or local agency.[5]

There is no support for that interpretation in the text of the rule. 40 C.F.R. § 230.10(a)(3). If the Corps had, for example, concluded that Enbridge needed to avoid Minnesota lake country for its pipeline to secure section 404 permits, it would certainly have been "practicable" for Enbridge to apply for a routing permit from the Minnesota PUC that would incorporate that condition. Indeed, Enbridge could do that today. Just because the PUC approved one alternative route does not mean that it could not consider another route with a new application. Corps Opp'n. at 43-44; Enbridge Opp'n at 12.

Nor does there appear to be any case law support for Defendants' interpretation. Defendants' attempt to distinguish away *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs,* 606 F.Supp.2d 121, 130 (D.D.C. 2009), where the Court held that state opposition to an alternative does not make that alternative "impracticable," is unavailing. That case involved a proposed reservoir in the state of Virginia for which, as in this case, the state had granted the necessary permits. *Id*. at 126. Part of the rationale for that permitting decision was a state policy against large-scale groundwater withdrawals, an alternative the state rejected. *Id*. at 130. Yet, the court refused to allow that state permitting decision to give the Corps the option of declining to consider whether large-scale groundwater withdrawal might nevertheless be a less

[4] By this same logic, if a big box retailer can get a building permit from a local government to construct a store in a protected wetland, the Corps would be precluded from conducting any LEDPA analysis because no other site would be "practicable" or "available." That cannot be what Congress intended.

[5] This interpretation of course involves no application of "technical expertise." This is precisely the kind of legal interpretation that belongs to the courts, not the agency. *See* section I *supra.*

environmentally damaging practicable alternative. *Id.* That is exactly the situation here, with the only exception being that, by approving one route, the Minnesota agency did not suggest that there were no alternative routes it could not also approve. If anything, the state opposition in *Mattaponi* posed a much more daunting barrier to a proposed alternative than anything the Minnesota PUC has done in this case because that case concerned permits that had issued based on a broad state policy against groundwater alternatives. Yet, the Court, despite that broad state policy and political opposition from the Virginia Governor, insisted that the Corps do its own independent analysis of groundwater alternative based in federal law. *Id*. ("The Clean Water Act compels that the least-damaging alternative be considered and selected unless proven impracticable.") (citing *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1189 (10th Cir.2002) (internal brackets and quotes omitted).

The Defendants' interpretation is certainly not consistent with the structure, context, and purpose of the Clean Water Act either. The Clean Water Act was adopted precisely because state water agencies were not doing enough to protect water quality.[6] To give a project proponent the ability to avoid independent federal review of alternatives that might better protect water quality simply by getting a state permit from a utility regulator would frustrate the purposes of the CWA. That is an outcome this Court should not accept.

The Corps protests that, even though it was not required, it did consider "off-site" alternatives, namely transporting all 760,000 barrels per day by rail or truck, or building a new

[6] Carol M. Browner, Environmental Protection: Meeting the Challenges of the Twenty-First Century, 25 HARV. ENV'T. L. REV. 329, 330-331 (2001) ("City after city, state after state, had essentially failed in their efforts to protect their air and their water, the land, the health of their citizens. By 1970, our city skylines were so polluted that in many places it was all but impossible to see from one city skyscraper to another. . . . We had rivers that were fouled with raw sewage and toxic chemicals. One actually caught on fire.")

pipeline along the same route as the current Line 3. Corps Opp'n. at 42. Of course, no one has ever contended that all-rail or all-truck alternatives would ever be "practicable." Nor would a pipeline along the existing route because it would require a new easement from the Leech Lake Band, which has committed to not reissue the easement in 2029.[7] Defendants can set up straw men and knock them down, but that does not relieve the Corps of its obligation to consider serious alternatives, and deny permits when those alternatives exist.

As is the case under NEPA, the Corps also is required to consider "no action" alternatives, i.e. leaving the status quo in place. The Corps dismisses that option on two grounds: first, that the status quo does not meet the "purpose" of replacing an old pipeline for safety reasons, Corps Opp'n. at 42, and second that it has no authority to force Enbridge to shut down its old Line 3, Corps Opp'n. at 43. Neither reason has merit.

First, the new Line 3 cannot fairly be characterized as a safety-based "replacement" for the old Line 3. Enbridge began planning to retire the old Line 3 at least a decade ago when it cut its capacity in half, and it has "replaced" that reduced capacity several times over since with the expansion of the Alberta Clipper pipeline (Line 67) and general expansion to the mainline system. *see* Enbridge Energy, *Alberta Clipper (Line 67) Expansion*, https://www.enbridge.com/~/media/Enb/Documents/Public%20Awareness/Minnesota%20projects/ENB_Line67_Expansion_Aug2017.pdf?la=en; *see also* Enbridge Energy, *Growth Projects*, https://www.enbridge.com/projects-and-infrastructure/projects. And, despite the Defendants' efforts to muddy the picture, Enbridge has made it clear that a new Line 3 will predominantly

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[7] Dan Kraker, *Enbridge, Leech Lake Band rip Judge's Line 3 report*. MPR News. https://www.mprnews.org/story/2018/05/09/enbridge-leech-lake-band-rip-judges-line-3-pipeline-report-on-route.

carry heavy tar sands oil from northern Alberta, not the light oil that the old Line 3 currently carries. Enbridge Energy, *Line 3 Replacement Program Pipeline Products*, https://www.enbridge.com/projects-and-infrastructure/projects/line-3-replacement-program-canada ("Shippers are permitted to ship crude oil blends . . . on Enbridge's liquids pipelines system . . . [t]his includes heavy crudes such as diluted bitumen".) Moreover, Enbridge has never said that the old Line 3 is not safe; what it has said is that maintenance of Line 3 is becoming more and more expensive. *See* AR152507 (MN-DOC-EERA Final Environmental Impact Statement – Line 3 Project).

Nor is the "no action" alternative somehow foreclosed by the consent decree Enbridge and the federal government agreed to in 2017. That consent decree was the end result of litigation over Enbridge's catastrophic 2010 oil spill into the Kalamazoo River.[8] In that document, one of many things Enbridge agreed to do was something it had already done, that is, seek permission from Minnesota regulators to "replace" its old Line 3. *United States v. Enbridge Energy Ltd. P'ship*, Case No. 16-cv-914 (W.D. Mich.), ECF No. 9 (Jan. 19, 2017) (Consent Decree Mem.); Consent Decree ¶ 22. Nothing in the consent decree obligates Minnesota regulators to do anything, and it certainly does not foreclose a "no action" or "no build" alternative if Minnesota were to deny Enbridge's permit applications. *Id*. at ¶ 22.

Second, Friends has not contended that the Corps has the legal authority to shut down the old Line 3. If denied the permits it needs to build this new pipeline, Enbridge may or may not decide to keep pumping light oil through the existing Line 3 in light of the forthcoming

[8] *See e.g.* Michigan Dep't of Env't Great Lakes and Energy, Oil Spill Photos and Video, https://www.michigan.gov/egle/0,9429,7-135-3313_56784-241427--,00.html.

expiration of the Leech Lake easement in 2029 and the Corps should evaluate the status quo alternative in that context.

Defendants cannot narrow the range of alternatives to be considered by narrowing the "purpose" of the project. The 404(b)(1) Guidelines are very clear that the range of alternatives to be considered is defined by the project's "overall" purpose, its "basic" purpose, not an unreasonable narrow claimed purpose. 40 C.F.R. § 230.10(a)(2) & (3). In this case, the "basic" purpose of the proposed Line 3 is to carry crude oil from Canadian producers to refiners and export terminals in the Midwest, eastern Canada, and, mostly, along the Gulf Coast. It is not to carry crude oil from North Dakota to Superior, Wisconsin, because, as all parties acknowledge, there is little or no refinery demand for crude oil at Superior. *See e.g.* AR003762-63 (Corps Environmental Assessment) (describing the oil market to be select refineries in Minnesota that are not located in Superior, the Gulf Coast, and Eastern Canada); AR150027 (Supplemental Information for an Application for a Permit, Enbridge Energy) (describing same). But of course, that kind of narrow "purpose" statement effectively precludes alternative routes that would avoid Minnesota lake country but still carry oil from Canadian producers to their refinery customers.[9] As courts have recognized, "[o]bviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." *Sylvester v. U.S. Army Corps of Eng'rs,* 882 F.2d 407, 409 (9th Cir. 1989); *accord Gulf Coast Rod, Reel & Gun Club, Inc. v. U.S. Army Corps of Eng'rs,* 676 Fed. Appx. 245, 250, 2017 WL

[9] Of course, the Corps should consider Enbridge's goals, and, contrary to defendants' arguments, Corps Opp'n. at 43, Friends has never argued that those goals should be ignored. Friends is not suggesting a purpose like "meeting global energy needs," where there would be an unlimited range of alternatives, but is suggesting that the Corps has the responsibility to assess what the project proponent's basic purposes actually are.

243340 st *3 (5th Cir. 2017); *City Club of New York v. U.S. Army Corps of Eng'rs,* 246 F.Supp.3d 860, 870 (S.D.N.Y. 2017).[10]

Courts should be skeptical of any "purpose" statement that too precisely specifies the location of the project, because that is the easiest way for project developers (and the Corps) to avoid any serious consideration of alternatives. *City Club* is good example of how reviewing courts should approach this issue. That case involved a proposed park and performance space the developers wanted to build on a new artificial "island" to be constructed on old Hudson River piers in lower Manhattan. The court quite properly concluded that the "basic" purpose for the proposed project was the need to provide additional open space and cultural resources in Hudson River State Park, not to build a new pier platform, and so the Corps' conclusion that the project was "water dependent" was in error. *Id.* at 871-72. As a consequence, the Corps could not limit its LEDPA review to alternative ways to build the pier platform, but needed to consider alternative ways to meet the overall purpose of adding open space and cultural facilities to the Park before granting a permit. *Id.* Failure to do so was arbitrary and capricious.

Likewise, Defendants in this case cannot use a too-narrow purpose to conclude that this project is "water dependent," that it requires access or proximity to, or a location on, water in order to fulfill its basic purpose. 40 C.F.R. § 230.10(a)(3). Transporting crude oil from land-locked Canadian oil producers does *not* require access or proximity to, or a location on, water, it is therefore not water dependent, and consequently, under the 404(b)(1) Guidelines, the availability of practicable alternatives must be *presumed. Id*; *see also Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1262 (S.D. Fla. 2009), aff'd, 362 F. App'x 100 (11th Cir. 2010)

[10] The same basic concept applies to the consideration of alternatives under NEPA. The caution against too-narrow "purposes," and the requirement to consider only "overall" or "basic" purposes, is express in the 404(b)(1) Guidelines. 40 C.F.R. § 230.10(a)(2) & (3).

(finding that a private mining company failed to carry its burden to show that its project was water dependent and that the Corps failed to independently analyze the company's statements); *Id*. (collecting cases on water dependency). Defendants attempt to shift the burden of proof to Plaintiffs to delineate alternative routes and prove that they will meet Enbridge's purposes. Corps Opp'n at 44 n. 13. But the express language of 40 C.F.R. § 230.10(a)(3) puts that burden squarely on the project proponent whenever a project is not "water dependent," and Enbridge has not met that burden. *See e.g. Id*; *see also Utahns for Better Transp.*, 305 F.3d at 1186 (10th Cir. 2002) (holding that the burden is on the applicant, "with independent verification by the [Corps] to provide detailed, clear and convincing information *proving* impracticability, overturning Corps permits) (emphasis in original). Consequently, because Enbridge has not proven that alternative routes will be impracticable, the Corps' permit is arbitrary and capricious and must be vacated.

B. The Corps' decision that the Line 3 project and the discharges of dredged and fill materials at over 1000 water and wetland crossings will not cause or contribute to a "significant degradation" of aquatic resources was arbitrary and capricious, because it ignored the risks of oil spills at those crossings.

As with the alternatives issue, Defendant Corps relies on a purely legal argument to justify its position on "significant degradation" under 40 C.F.R. § 230.10(c). Corps Opp'n. at 46. The Corps position is not entitled to deference from this court. *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1053 (2d Cir. 1985). The Defendants contend that section 230.10(c) and the rest of the 404(b)(1) Guidelines do not require the Corps to evaluate operational risks, like the risks of oil spills, when conducting its "significant degradation" analysis. *Id.* Plaintiff Friends submits that that interpretation is not consistent with the text of 40 C.F.R. § 230.10(c) or with the purposes of the Clean Water Act.

As all parties understand, section 230.10(c) provides that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. *Id*. Findings of significant degradation related to the proposed discharge shall be based on appropriate factual determinations." 40 C.F.R. § 230.10(c). "[E]ffects contributing to significant degradation" must be considered "individually or collectively" and include "significant adverse effects" on human health or welfare, on aquatic life and wildlife dependent on aquatic ecosystems, on aquatic ecosystem diversity, productivity, and stability, and on recreational, aesthetic, and economic values. *Id.* § 239.10(c)(1)-(4).

Defendants of course do not deny that an oil spill at many of the "disposal sites" where Enbridge will discharge dredged or fill material, i.e. the water and wetland crossings, would directly cause significant degradation. Corps Opp'n. at 46. And Defendants do not deny that, without discharges of dredged or fill material at the over 1000 water and wetland crossings, Line 3 cannot be built and the additional risk of oil spills will be avoided. *See* Corps Opp'n at 16; Enbridge Opp'n at 17-20. Defendants nevertheless contend that it need only consider direct and immediate adverse effects of the discharges that occur during construction. *Id*.

The key phrases in the rule are "cause or contribute to" and "related to." Plaintiff pointed out in its opening brief that, according to EPA, the author of the 404(b)(1) Guidelines, "cause or contribute to" cannot include only "sole" or even "major" causes, but must extend further consistent with the precautionary and preventive focus of the Clean Water Act or closely related laws like the Clean Air Act. FOH Br. in Support of Mot. for Summ. J., at 11. Those laws require the agencies to assess both the likelihood and potential severity of future risks like oil spills, and not limit their role solely to addressing virtually certain, present-tense harms. *Id*. 33 U.S.C. § 1251(a)(1)-(2). If a directly regulated activity, or, in this case, over 1000 directly regulated

activities considered "collectively," create additional future environmental risk, then the activities "cause or contribute to" significant adverse effects. That is the interpretation that fulfills the purposes of the CWA, not the Defendants' attempt to narrow "cause or contribute to" to intentional, immediate and direct causation. Defendants offer no rationale, no textual basis, no case law basis for their overly narrow interpretation.

Moreover, Defendants offer no justification for reducing the broad phrase "related to" to direct and immediate causation either. The dictionary definition of "relate to" is to "be connected with," which goes well beyond direct and immediate causation. Merriam-Webster, *Relate to.* In Merriam-Webster.com dictionary, https://www.merriam-webster.com/dictionary/relate%20to. The Corps' permits in this case are certainly "connected with" the operation of the pipeline, because, without those permits and without the "discharges" they allow, there can be no operation of a pipeline.

The test should be that the Corps must consider any potential "significant adverse effects" that denial of its permits would prevent.[11] If this were a case where the pipeline would be built with or without Corps permits, thereby preventing the risk of oil spills at the "disposal sites" where the Corps has direct responsibility, there would be a colorable argument that the causal relationship between the regulated discharges and the pipeline's operational risks was too attenuated. In this case, however, the pipeline cannot go forward without these Corps permits, and the Corps indeed does have the power to prevent the added risk of a catastrophic spill that Line 3 entails.

[11] This is fully consistent with the standard the U.S. Supreme Court articulated in *Department of Transp. v. Public Citizen,* 541 U.S. 752, 770 (2004) in the NEPA context—that the ability of the agency to prevent an adverse environmental effect is the test for whether a causal relationship is close enough to require the agency to evaluate the risks that that adverse environmental effect will occur and its potential severity.

Nothing in the text of those phrases necessitates the narrow construction the Defendants ask this Court to adopt. There is no textual barrier to a broader interpretation. This court's task, then, is to pick the interpretation that best fulfills the purposes of the Clean Water Act. An interpretation that prevents any significant federal review of potential effects on water quality from the operation of a new, massive, 338-mile, heavy crude oil pipeline project through the Mississippi River headwaters only obstructs the purposes of the Clean Water Act, and therefore should be rejected.

C. The Corps' truncated "public interest" review and deference to the state utility regulator does not meet the requirements of the Corps' own rules.

As all parties agree, the Corps' own rules require the Corps to conduct a thorough "public interest" review before granting permits for projects like Line 3, to assess whether "[t]he benefits which reasonably may be expected to accrue from the proposal" exceed "its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1); Corps Opp'n at 46-47; Enbridge Opp'n at 21. Projects that are contrary to the public interest may not be permitted.[12]

Defendants cite cases saying Corps' "public interest" reviews are entitled to deference, Corps Opp'n. at 47, but there are several reasons why deference is inappropriate in this case.

First, the Corps did not make an apples-to-apples comparison of the proposal's benefits and detriments. What it did was count up what Enbridge claims are the benefits of the entire Line 3 project, and then compares those only to the immediate, direct detriments from the discharges of dredged or fill material during construction at specific water and wetland crossings. Corps Opp'n. at 47-48. That framework of course predetermines the outcome. The central purpose of

[12] The Corps says that is not a substantive requirement, only a procedural one, Corps Br. at 46 n. 14, but it is difficult to understand how the flat prohibition on permits that are contrary to the public interest in 33 C.F.R. § 320.4 is anything less than substantive.

this rule is to obligate the Corps to step back and evaluate the benefits and detriments of an entire proposal, including upstream and downstream benefits and detriments, before it grants the discharge permits the project will require. That would include an analysis of the risks of oil spills,[13] climate impacts, and impacts on tribal resources. The Corps' position is that it has no obligation to include any of those considerations in its "public interest" analysis.

Second, the Corps did not do its own work. On every issue, the Corps simply copies what Enbridge claims will be the benefits of this project, or copies what the Minnesota PUC itself copied from Enbridge's application materials, and then claims it conducted its own "inquiry" or an "analysis." *See e.g.* AR000366 (alternatives), AR000383 (wildlife) AR000386 (water supply); *see generally* USACE Environmental Assessment and FONSI, AR000347. Nowhere in this record is there any description of what "analysis" the Corps actually did beyond read and incorporate the materials Enbridge submitted. If the Corps had done any independent evaluation of market need, or local economic benefits, or energy needs, or wetland impacts, or the effectiveness of wetland mitigation, the details of that evaluation process would be in the administrative record. There is nothing like that in this record.

Third, the Corps' description of what Minnesota state agencies did or said is often simply erroneous. For example, no agency of Minnesota state government with technical expertise ever concluded that this project was justified by "energy needs." The Division of Energy Resources

[13] The Corps points out that the state environmental impact statement included "fate analyses" for spills at several river crossings, which are assessments of how far spilled oil would travel under different weather conditions. The Corps suggests that those results can be extrapolated to any water or wetland crossings, that, if one knows what natural resources might be in the vicinity of any of those crossings, one can make a guess about potential environmental impacts, and perhaps potential remediation options and costs. That is, on its face, not any kind of reasonable assessment of oil spill risks. To the extent this Court previously relied on those proffered extrapolations to conclude that the Corps did adequately consider oil spill risks, the Court should reconsider.

(DER) at the Minnesota Department of Commerce, which is charged with doing (and has the expertise to do) the economic analysis of the need for all "large energy facilities," including this pipeline, concluded that there was no evidence of demand for crude oil sufficient to justify this project, and has consistently taken that position throughout the ongoing litigation over the PUC decision to grant a certificate of need.[14] AR146462 (PUC Order on CN describing DOC-DER opposition); AR146909-11 (DOC briefing papers to staff on objections of DOC-DER). The state public utility commission (PUC) and, more recently, the state court of appeals have been split on whether the need criteria for this project have been met.[15] Yet, not only did the Corps make no attempt to assess which side at the state level has had the best understanding of the facts, it has not even acknowledged the existence of the ongoing controversy. Nevertheless, the Corps simply defers to the side that has so far gained the most votes, and then asks this Court to defer to that "judgment." That is not a "public interest" review to which this Court owes any deference.

The same flaws exist for the assessment of wetland impacts and the effectiveness of any mitigation. In 2008, the Corps and the EPA jointly adopted rules governing "compensatory mitigation for losses of aquatic resources." 33 C.F.R. pts. 325 & 332; 40 C.F.R. pt. 230. Those rules incorporate what by now is the familiar "avoid-minimize-mitigate" sequence for evaluating

[14] The Corps confuses the "environmental resources department of the State Department of Commerce," which supervised the state environmental review, with the Division of Energy resources, which has the expert economic staff and resources to assess energy demand and energy needs, and which found no such need in this case. Corps Opp'n. at 49

[15] There is no requirement that members of the Minnesota Public Utilities Commission (PUC) have any technical expertise; the only requirements are that no more than three of the five be from the same political party, and that at least one reside outside the Twin Cities metropolitan area. Minn. Stat. § 216A.03, subd. 1. The one current member with a technical background, Commissioner Schuerger, dissented from the grant of the certificate of need. The court of appeals decision deferring to the PUC's determination was 2-1, with a strong dissent from Judge Reyes. *Matter of Enbridge Energy, Ltd. P'ship,* No. A20-1071, 2021 WL 2407855 (Minn. Ct. App. June 14, 2021). That decision is on appeal to the Minnesota Supreme Court.

applications for section 404 permits. *See also* Memorandum of Agreement regarding Mitigation under CWA Section 404(b)(1) Guidelines, (Feb. 6, 1990) https://www.epa.gov/cwa-404/memorandum-agreemement-regarding-mitigation-under-cwa-section-404b1-guidelines-text.

Applicant must prove that, first, they have avoided wetland impacts to the extent possible. Second, any unavoidable impacts must be minimized. Finally, third, only "after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem," compensatory mitigation may be considered. 73 Fed. Reg. 19594, 19594 (April 10, 2008). "The longstanding national goal" is "'no net loss' of wetland acreage or function." *Id.*

In this case, the Corps has made no independent assessment of whether any of those steps have been followed. First, "avoidance" is dispensed with entirely. The only way to "avoid" wetland impacts is, of course, to avoid building in wetlands, and the only way to do that in a case like this one is to route the pipeline away from where wetlands are concentrated. The Corps simply assumed that option was not "practicable," again because Enbridge had been previously able to secure a routing permit from the Minnesota Public Utilities Commission (PUC) for a route that crosses over 800 wetlands. That abdication of its responsibility is just as unjustifiable in the "public interest" review as it is in the Corps' alternatives analysis. *See* section II.A. *supra.*

Second, the Corps makes little or no attempt to determine whether there are further opportunities to "minimize" wetland impacts even along Enbridge's preferred route. The Corps cites Enbridge's wetlands plans in its environmental assessment, Corps Opp'n at 51, but again there is no analysis of whether or to what extent those plans will actually minimize wetland impacts.

And third, the Corps offers no analysis of why Enbridge's agreement to purchase wetland bank credits will amount to effective compensatory mitigation. Wetland banks are mechanisms where wetland restoration, enhancement, establishment, or preservation projects are assigned a credit value which applicants can use as compensatory mitigation. To be effective, however, the wetlands restored, enhanced, established, or preserved need to be in the same watershed as the wetlands that will be lost and need to be of the same kind so there can be assurance that there will be "no net loss" of wetland *function* as well as acreage. 33 C.F.R. 332.3(b)(1).[16]

The Corps made no attempt to provide that assurance. There is no evidence in the record that the Corps or any agency ever made any assessment of wetland function or value at any of the over 800 wetlands that will be trenched through or tunneled under. Nor is there any attempt to require the in-kind, in-watershed mitigation the compensatory mitigation rule requires. As the EPA observed in its comments:

> Enbridge has not provided a compensatory mitigation plan consistent with the requirements under the Guidelines. Enbridge has not provided an evaluation or

[16] "When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports)."

> discussion of their efforts to seek in-kind and in-watershed mitigation options over out-of-kind, out-of-Bank Service Area mitigation.[17]

EPA Comments on Wetland Mitigation, March 6, 2020, AR033890.

And, of course, the compensatory mitigation rule requires that functional losses actually be replaced, but, again as EPA commented:

> The Guidelines also require adequate compensatory mitigation to offset environmental losses resulting from unavoidable impacts to waters of the United States and mitigation requirements must be commensurate with the amount and type or impact associated with a particular permit. The Mitigation Plan [submitted by Enbridge] does not provide any scientific evidence or rationale for use of the proposed mitigation ratios or how those ratios were developed or determined.

Id.[18]

As the Corps emphasizes, Enbridge has provided "written assurance" that wetland restorations will be successful, Corps Opp'n. at 52, but that is hardly the kind of analysis to which this Court owes deference.

To do an adequate "public interest" analysis under 33 C.F.R. § 320.4, then, the Corps must assess the benefits and detriments of an entire proposal, not the benefits of the entire proposal against the detriments of a subset of immediate construction impacts at specific locations; and the Corps must make that overall assessment independently, not relying entirely

[17] "Bank Service Areas" are larger areas including several watersheds where the level of historic wetland loss and wetland characteristics are similar.

[18] "Ratios" are multipliers applied to wetland acreage, supposedly to provide some proxy for losses of wetland function. As EPA pointed out, there is nothing in Enbridge's plan providing any rationale for the ratios chosen.

on other agencies, particularly when there is substantial controversy even within those agencies on the central facts. The Corps met neither of those requirements in this case, and consequently, its "public interest" analysis was arbitrary and capricious, and must be vacated and remanded for further proceedings.

CONCLUSION

For the reasons stated above, and in Plaintiffs' other briefs and memoranda, Plaintiff Friends of the Headwaters respectfully requests that this Court grant Plaintiffs' motions for summary judgment, deny Defendants' motions for summary judgment, and vacate the Corps' permits for the Line 3 project.

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