UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS, *et al.*, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS, Federal Defendant, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Defendant-Intervenor.	Civil Action No. 1:20 cv-03817 (CKK)
FRIENDS OF THE HEADWATERS, Plaintiff, vs. UNITED STATES ARMY CORPS OF ENGINEERS, COL. KARL JANSEN, District Engineer, St. Paul District, Federal Defendants, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Defendant-Intervenor.	Civil Action No. 1:21 cv-00189 (CKK)

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Contrary to Red Lake Band Plaintiffs' claim, the Corps did not authorize the construction of this state-approved private pipeline. Instead, the Corps issued a Section 404 permit to allow for the limited discharge of fill material into waters of the United States during the construction of portions of Replacement Line 3, along with a Rivers and Harbors Act (RHA) authorization for crossings of RHA Section 10 waters (Permit), and RHA permission to alter a federal project (Permission). Federal Defendants' Cross-Motion for Summary Judgment demonstrated that the Corps complied with its obligations under NEPA and the CWA when issuing the Permit and Permission. Plaintiffs' briefs do not show that the Corps' review process was arbitrary or capricious under the APA. The Corps did not give "short-shrift" to its review or ignore evidence of the potential impacts of issuing the Permit and Permission. Instead, the Corps applied a sufficient scope in its NEPA analysis and took a hard look at potential impacts to the climate, minority and low-income populations, Tribal rights, and wildlife. Plaintiffs fail to cast serious doubt upon the Corps' NEPA conclusions, show that the Corps was required to consider alternative pipeline routes, or establish that the preparation of an Environmental Impact Statement (EIS) is required. The Corps' public interest analysis and evaluation of project alternatives under the controlling CWA Section 404 implementing regulations also were reasonable. Throughout, the Corps explained the processes it followed and articulated the record bases for the determinations it reached. The Corps' motion for summary judgment therefore should be granted, and the Plaintiffs' motions should be denied.

I. The Corps Complied with NEPA by Preparing Detailed EAs.

Red Lake Band Plaintiffs' efforts to discredit specific parts of the Corps' NEPA analysis are unavailing. Plaintiffs selectively pick parts of the Corps' analysis to focus on, but overall, the administrative record supports the Corps' conclusion that no significant impacts, as defined

by NEPA, would flow from the issuance of the Permit and Permission. The Environmental Assessments (EAs), Tribal cultural resources survey, Avoidance, Mitigation, and Implementation Plan for Construction (Avoidance Plan), Biological Assessment, Enbridge's Environmental Protection Plan, state EIS, and the additional documents, analyses, and public comments considered by the Corps support the conclusions in the Permit and Permission.

A. The Corps' NEPA Scope of Analysis Was Not Arbitrary and Capricious.

The Corps applied a sufficient scope of analysis in its EAs by focusing on environmental effects with a reasonably close causal relationship to the permitted activities. ECF No. 62 at 14-21, 27; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). And Plaintiffs fail to show that the scope of the Corps' NEPA review was arbitrary and capricious. *See* ECF No. 65 at 2-9. The Corps' NEPA regulations explicitly address scope of review. *See* 33 C.F.R. pt. 325 App. B ¶ 7(b). They provide that the agency "should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review." *Id.*[1] Consistent with its regulations, the Corps set the scope of its NEPA analysis to include "the regulated activities in waters of the U.S. associated with linear crossings as well as uplands adjacent to, and in some cases between, waterbodies where the Corps has sufficient control and responsibility to expand its analysis." AR_360; *see also* AR_2542.

Plaintiffs concede that the Corps' NEPA analysis did not need to examine impacts from the entire pipeline here. ECF No. 65, at 3 n.2. Plaintiffs nonetheless argue that the Corps

[1] *See also* AR154531 ("Because the Corps has no broad authority related to pipelines along their entire domestic routes, the agency's analyses to support its authorization decisions are scoped to focus on the application of Corps authorities to specific pipeline segments.").

focused too narrowly on effects related to its regulatory jurisdiction. *Id*. at 2-9. The Corps explained that the agency did not extend its analysis to "the entire pipeline construction, or operation, because the Corps does not have sufficient control and responsibility over the entire project to warrant an expanded analysis." AR_361; AR_398 (noting that the Corps "has no authority to regulate emissions that result from the combustion of fossil fuels"). That analysis was reasonable.

Courts routinely reject the idea that the Corps must assess all operational effects from an entire pipeline when the Corps permit plays only a limited role. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 46-47 (D.C. Cir. 2015); *Sierra Club v. Bostick*, 787 F.3d 1043, 1052 (10th Cir. 2015); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 31 (D.D.C. 2016). Just as in these cases, the scope of the Corps' involvement with Replacement Line 3 was limited and the agency "neither acted as 'gatekeeper' nor approved the pipeline." *Bostick*, 787 F.3d at 1052. Accordingly, the Corps' NEPA analysis reasonably focused on the potential effects of the activities permitted by the agency. Similar cases reinforce this point. For example, *Winnebago Tribe of Nebraska v. Ray*, concluded that a Corps permit to cross the Missouri River did not give the Corps sufficient control and responsibility to require to it consider the "environmental impacts posed by the entire transmission line, rather than just the river-crossing portion." 621 F.2d 269, 272 (8th Cir. 1980). *See also Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014) ("agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility").

Plaintiffs' renewed citation to *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*) does not dictate otherwise. ECF No. 65 at 5. In *Sabal Trail*, the scope of FERC's

action (approving three natural gas pipelines) and authority (natural gas pipelines cannot be constructed or operated without FERC's approval) is distinctly different than the agency action and authority involved in this case. *See* ECF No. 62 at 19 (contrasting FERC's authority with the Corps'). Indeed, the 11th Circuit has rejected Plaintiffs' attempted analogy to *Sabal Trail*, explaining that, unlike FERC's authority over natural gas pipelines, the Corps does not have broad statutory authority to deny a Section 404 permit based upon a private project's overall impacts. *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019) (discussing *Sabal Trail*, 867 F.3d 1357).[2] Plaintiffs' other citations involve materially different agency authorities or projects and do not demonstrate the Corps' scope of analysis or decisions were either arbitrary or capricious. *See Birckhead v. FERC*, 925 F.3d 510, 514, 519 (D.C. Cir. 2019) (citation omitted) (no requirement that FERC consider "emissions from downstream gas combustion . . . as a categorical matter" in connection with an application to "authorize the construction and operation of a new natural gas compression facility" in Tennessee); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 55 (D.D.C. 2019) (involving Bureau of Land Management's NEPA analysis when it approved oil and gas leases on 460,000 acres of federal land); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866 (9th Cir. 2005) (Corps erroneously granted permit for dock modification where it incorrectly determined BP refinery was at capacity and accepted BP's projections "without a reasoned evaluation of the potential for increased traffic"); *Columbia Riverkeeper v. U.S. Army Corps of*

[2] As Federal Defendants previously noted, a better analogy rests in the three cases the court distinguished in *Sabal Trail*. ECF No. 62, at 19 n.5. In those cases, FERC was not the legally relevant cause of effects from the natural gas exports flowing through shipping terminals, because its authority was to license terminal upgrades, not to approve or regulate exports. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2017); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59, 68-69 (D.C. Cir. 2016).

Eng'rs, No. 19-6071 RJB, 2020 WL 6874871, at *14-15 (W.D. Wash. Nov. 23, 2020) (remanding where Corps failed to consider "indirect cumulative greenhouse gas emissions" in connection with permits for a fracked gas-to-methanol refinery). Plaintiffs' citation to Executive Order 14008 should not change this court's analysis. Executive Order 14008 postdates the issuance of the Permit and Permission and, by its own terms, the order does not create any judicially enforceable rights or benefits. 86 Fed. Reg. 7619 (Jan. 27, 2021); *see also id*. at § 301(c). Here, the Corps applied a sufficient scope in its NEPA analysis and "adequately considered and disclosed the environmental impact of its action...." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (citation omitted).

B. The Corps Took a Hard Look at the Potential Effects of Issuing the Permit and Permission.

The Corps analyzed the potential effects from the issuance of the Permit and Permission, weighed the evidence, and concluded that there would be no significant impacts to the environment. ECF No. 62 at 14-30. The Corps also explained its conclusions and did not omit any important information in its NEPA analysis.

1. Air Quality Impacts, Greenhouse Gas Emissions, and Climate Change

The Corps' conclusion that air quality impacts, greenhouse gas emissions, and climate change impacts related to the permitted activities would be "negligible to minor" is neither arbitrary nor capricious and is well-supported in the record. AR_398; ECF No. 62 at 14-16; AR_397-98; AR_2544. The Corps' analysis did not show any direct changes to hydrology that could trigger climate variables, nor that the functions of wetland basins would be reduced and result in climate change impacts. AR_479. The Corps examined the connection between greenhouse gas emissions and impacts to aquatic resources, and concluded that such impacts would be minimal and mitigated through compensatory mitigation. AR_398. The Corps also

disclosed that greenhouse gas emissions may result from the fossil fuels used to operate construction equipment and from tree removal. AR_398; AR_2544; AR_98735.

Plaintiffs raise a handful of complaints regarding the Corps' analysis (ECF No. 65 at 14-17), but none of them show that the Corps' conclusion is arbitrary or capricious. Plaintiffs take issue with the Section 408 EA because it does not use the terms "climate" or "greenhouse gas." ECF No. 65 at 15. But the Section 408 EA factored in that "emissions" would result from construction equipment and referenced the Section 404 EA's analysis of this issue. AR_2544 (referencing AR_397-98). As the Court previously noted, "courts in this circuit apply a rule of reason to an agency's NEPA analysis and decline to flyspeck the agency's findings in search of any deficiency no matter how minor." ECF No. 40 at 20 (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,* 255 F. Supp. 3d 101, 122 (D.D.C. 2017) (internal quotations omitted)). The Corps' qualitative analysis is also "consistent with the rule of reason," because requiring the Corps to attempt to quantify these "negligible to minor" impacts (AR_398) would not "facilitate meaningful analysis." *Sierra Club v. Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017) (internal quotations omitted). Plaintiffs contend that the Corps should have considered the greenhouse gas emissions from the production and combustion of oil. ECF No. 65 at 15. But the Corps' scope of review here was consistent with Corps regulations and is supported by the record. *See supra* pp. 2-5. To the extent that a broader review was required, the Corps reviewed and referenced the extensive analysis in the state EIS regarding climate conditions, greenhouse gas emissions, operations impacts, loss of trees, the social cost of carbon, upstream and downstream effects, and measures to minimize greenhouse gas emissions. AR_398; AR_56840 (state EIS, § 5.2.7.3). The Corps complied with NEPA when it "appropriately and reasonably examined" potential air quality impacts, greenhouse gas

emissions, and climate change. *Pub. Citizen*, 541 U.S. at 770.

2. Environmental Justice

Using EPA's EJSCREEN tool and environmental justice information in the state EIS, the Corps completed a detailed review of the census tracts within Replacement Line 3's corridor. AR_472-73; AR_56840 (state EIS, § 11) (identifying tracts with higher minority and Native American populations). The Corps also discussed Replacement Line 3's proximity to Native American reservations and lands on which Tribes exercise their treaty rights to access Tribal resources. AR_369; AR_371. After assessing and disclosing potential effects on minority and low-income populations, the Corps concluded that the issuance of the Permit and Permission would not have a disproportionately high or adverse impact on these populations. AR_473-74. Plaintiffs contend that the Corps did not sufficiently address factors that relate to Tribes. ECF No. 65 at 17. The record shows that the Corps completed eighty-six Tribal consultation conference calls over the span of four years and requested that the Tribes provide comments concerning areas of concern that should be considered as part of the Corps' review. *See*, *e.g.*, AR_456-72; AR_56811 (summarizing consultation meeting); AR146987-89 (Corps reviewed report recommended by White Earth); AR147002-03 (correspondence with Red Lake Band).[3] The Corps' EAs considered information from these meetings, the Tribal cultural resources survey, and recommendations made by Tribes, and the EAs describe potential impacts to Tribal subsistence rights, oil spill risks, habitat, and wildlife. AR_400-01; AR_448-55; AR_2548-54; AR_380-84; AR_2546-47. Further, Plaintiffs cite comments that focus generally on impacts along the pipeline's route. ECF No. 65 at 18 (citing AR101141; AR151570; AR151676).

[3] *See also* AR_462-63 (requesting that Tribes submit comments on whether the methods, investigations, level of effort, fieldwork, reporting was appropriate; and whether they agree with findings and recommendations in the cultural resources survey).

Although Tribes had access to detailed maps of the pipeline corridor and the opportunity to walk the entire pipeline route,[4] Plaintiffs' brief does not provide any information to show that such Tribal impacts will occur within the area of the permitted activities. *Standing Rock*, 205 F. Supp. 3d at 30 (absent a "specific showing involving a site within the Corps' jurisdiction," the court could find "no ground" to find the Corps' conclusion was unreasonable). Plaintiffs' focus on impacts to resources "elsewhere along the pipeline" (*id.*) does not render the Corps' NEPA determinations arbitrary, capricious, an abuse of discretion or contrary to law. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

3. Tribal Rights to Hunt, Fish, and Gather Natural Resources

The Corps reasonably concluded that that impacts from the agency actions are not likely to significantly reduce the overall availability of resources that are typically part of the Tribes' subsistence activities. AR_401; *see also* ECF No. 62 at 25-27 (discussing consultations, Tribal cultural resources survey, Avoidance Plan, natural resources recommendations from the Tribes, and other record documents, and incorporating protective measures in the Permit); AR_6-8; AR_400-01; AR_456-472; AR_5954; AR146987-89; AR147002-03; AR_2548-54. The Corps did take the required hard look. Plaintiffs cite Tribal comments submitted by the White Earth Band and contend the Corps failed to consider potential impacts "beyond harm to historic resources." ECF No. 65 at 21 (citing AR_1245-50 (commenting on specific Tribal use of Upper River Lake, Lower Rice Lake, Big Sandy Lake, and Straight River)). But the record shows that these comments were considered and that avoidance and minimization measures were implemented in response. For example, the Tribal cultural resources survey led to a pipeline

[4] AR_400-01; AR_458; AR_460; AR146987; AR147003 (alerting Red Lake Band that the Corps had "received very few, if any, comments of sufficient specificity" on impacts to off-reservation hunting, fishing, and gathering rights).

reroute north and east of the Upper River Lake Watershed near White Earth Reservation. AR_460-61. Enbridge also recommended the route to the state agency to address the concerns raised by White Earth Band regarding Lower Rice Lake. AR144870 (state agency approval based, in part, on "White Earth's preference for adopting the alternative"); AR157053. The potential impacts of oil releases into Mosquito Creek, which flows into Lower Rice Lake were assessed. AR57187-481. Replacement Line 3 does not cross Big Sandy Lake, AR155143, but concerns about construction activities causing releases of phosphorus into the lake were considered and avoiding by using horizontal directional drilling. AR155151. Tribal concerns regarding Straight River were also examined and protective measures were adopted.[5] Plaintiffs also argue that the Corps relies too heavily on mitigation. ECF No. 65 at 21. But the decisions cited by Plaintiffs have little applicability here because mitigation measures were not used as a proxy for baseline data, and the effectiveness of the avoidance and minimization measures has not been questioned. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997). The Corps considered Tribal concerns about potential effects on Tribal hunting, fishing, and gathering, and the fact that Plaintiffs weigh such impacts differently (*see* ECF No. 65 at 20-21) does not mean that the Corps' determinations are arbitrary or capricious. *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (agency decision cannot be considered arbitrary or capricious if it "minimally contains a rational connection between the facts found and choice made" (internal quotations and citation omitted)).

[5] *See, e.g.*, AR_64146 (White Earth interviewee comment regarding Straight River); AR155150 (discussing potential difficulties at Straight River and that a site-specific plan for this crossing is required); AR_7095 (horizontal directional drilling will be used to avoid potential impacts at Straight River); AR_382 (seasonal construction window implemented for Straight River to minimize times when fish would be most susceptible to impacts).

4. Biodiversity and Animal Species

The Corps also analyzed the potential impacts to biodiversity and animal species and concluded that effects are anticipated but would be minor. AR_384; AR_392; AR_2546. Plaintiffs compare this case to *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). But this not a situation where the Corps' EAs contain "virtually no references to any material in support of or in opposition to its conclusions." *Id.* at 1214. The Corps' conclusion is well-explained and took into account its findings regarding wildlife habitat, species displacement, and protective measures.[6] The Corps' analysis is also supported by the Biological Assessment and its consultation with the U.S. Fish and Wildlife Service. AR_380-381; AR_402; AR_2547; AR_63090-63092; AR_95575-97459. Plaintiffs cannot establish that the Corps should have given more attention to impacts on local populations of wildlife species. ECF No. 65 at 22-23. Plaintiffs focus on potential impacts that may occur generally along the pipeline. *Id*. at 23 (citing AR151765–66). But they have not shown that the Corps ignored localized wildlife impacts connected to the Permit and Permission. *Standing Rock*, 205 F. Supp. 3d at 30. Indeed, the comments at issue declined to identify any specific locations of species. AR151718. Plaintiffs also cite comments from the state Department of Natural Resources, but the Corps coordinated closely with this state agency and discussed its comments as part of its wildlife analysis. AR_382-85; AR_455; AR10185-1139. The Corps and the state worked together to

[6] AR_382-84, AR_403, AR_435, AR_2546 (explaining the functions and benefits of wetlands and floodplains to habitat, impacts that may occur, and the return of such benefits and function); AR_383, AR_395, AR_435 (examining habitat fragmentation, disclosing where the most impacts would occur, and finding that the loss would still be small within each watershed); AR_384 (population level wildlife and bird effects are not expected because of the surrounding landscape and other suitable habitat); AR_388 (buffer zones will be used to protect sensitive wildlife species and habitat); AR_389 (six water crossings at which winter construction will be used to prevent impacts to sites of high and moderate biodiversity); AR_2546 (identifying wildlife typical to the area).

ensure that avoidance and minimization measures would be in place in "special wetland categories" with, among other things, trout streams, high or outstanding biodiversity sites, connections to lakes of state-designated biological significance, and known occurrences of state-protected wildlife species. AR_384-86 (these wetlands will also have higher compensatory mitigation). *Fund for Animals v. Norton* and *Ctr. for Biological Diversity v. Walsh* also do not support Plaintiffs' argument. In these cases, the plaintiffs challenged an agency's decision to "take" specific wildlife species and Plaintiffs have not identified any comparable impacts related to the issuance of the Permit and Permission. 281 F. Supp. 2d 209, 233-34 (D.D.C. 2003) (hundreds of mute swans would be killed); No. 18-cv-558-MSK, 2021 WL 1193190 at *8 (D. Colo. Mar. 30, 2021) (predator management project would kill up to half of the cougar population in the project area). Here, the Corps' EAs provided the required discussions of impacts to biodiversity and animal species, and NEPA's goal of informed decision-making was satisfied. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

C. The Corps Did Not Impermissibly Rely on the Minnesota State EIS.

The Corps used the Minnesota state EIS and state decisions on the certificate of need for the pipeline and route permit to inform aspects of the Corps' own review. AR_483; AR151471-72. As the Court explained, "it was appropriate for the Corps to evaluate and incorporate the State EIS into its findings, without needing to reinvent the wheel." ECF No. 40 at 25 (internal quotation marks omitted). Plaintiffs argue that, under 40 C.F.R. § 1506.5(b)(2),[7] the Corps was required to independently evaluate and verify the State's information before relying on it. ECF No. 65 at 11. But this regulation discusses the Corps' obligations with respect to information

[7] All citations to the Council on Environmental Quality's NEPA regulations refer to those regulations as codified at 40 C.F.R. Part 1500 (2018). ECF No. 62, at 3 n.1.

supplied by applicants, not state agencies. § 1506.5(b); *see also* 33 C.F.R. pt. 325 App. B ¶ 3. "If another agency has conducted a responsible analysis the Corps can rely on it in making its own decision." *Hoosier Envtl. Council, Inc. v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013); *see also Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 968 (S.D. Ohio 2002) ("Plaintiffs' position that the Corps must conduct its own independent evaluation or otherwise independently verify all data goes beyond the well-settled prohibition against an agency reflexively rubber stamping a third-party report."). Plaintiffs also allege 40 C.F.R. § 1506.2(b) and 33 C.F.R. pt. 325 App. B ¶ 4 prohibit the Corps from relying on state EIS information because the state EIS was not jointly prepared. These regulations contain no such prohibition, ECF No. 62 at 34, and Plaintiffs cite no cases indicating that joint review was a mandatory prerequisite to the Corps' use of information from the state record. *See* ECF No. 65 at 9-13. Therefore, Plaintiffs cannot show that the Corps acted arbitrarily and capriciously by relying on the state EIS. *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1222 (11th Cir. 2002) (plaintiff could not meet the heavy burden to prove that the Corps was arbitrary and capricious in its reliance on another agency's determination).

D. The Corps Considered a Reasonable Range of Alternatives.

The Corps considered a reasonable range of alternatives. ECF No. 65 at 24-26. The Corps' Section 404 EA considered "no action" alternatives that would not require a Corps permit, Replacement Line 3, and several alternatives involving Existing Line 3 and its current route. ECF No. 62 at 30-35. This analysis meets NEPA's requirements. *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (alternatives analysis in an EA "need not be as rigorous as the consideration of alternatives in an EIS"); *see also Sierra Club*, 803 F.3d at 52 ("We owe deference to the Corps's interpretation of its own NEPA regulations."). Plaintiffs argue that the Corps is not entitled to deference regarding alternatives.

ECF No. 65 at 24. But as the Court previously concluded, the Corps' "specification of the range of reasonable alternatives is entitled to deference." ECF No. 40 at 28-29 (quoting *Myersville*, 783 F.3d at 1323). The decisions cited by Plaintiffs do not support a different finding. These cases concluded that deferential review is not appropriate when an agency is determining whether a proposed action or statute is exempt from NEPA. ECF No. 65 at 24 (citing *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 226 (D.D.C. 2011); *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001)).

The Corps was not required to consider pipeline routes outside the route approved by the state, which is "is the corridor within which Enbridge is legally obligated to construct the Project under Minnesota law." AR_356; AR_5954-58; Minn. Stat. § 216G.02, subd. 2. Nor does the record support Plaintiffs' description of the impacts of the route alternative that they believe the Corps should have considered. ECF No. 65 at 25; AR_97791-93 (discussing alternative route SA-04). As the Corps stated in its public notice, alternative SA-04 was considered during the state process (AR_2817) and rejected because "it would be twice as long as the Project, significantly more expensive, have twice the greenhouse gas emissions to transport the same amount of crude oil, and would require permitting in three other states." AR_6916.[8] Given the Corps' lack of authority over the pipeline route, and the extensive state process, the Corps was not arbitrary or capricious in determining its range of alternatives. *See Friends of Cap. Crescent Trail v. FTA*, 877 F.3d 1051, 1062-64 (D.C. Cir. 2017); *Friends of Cap. Crescent Trail v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 3d 804, 817-18 (D. Md. 2020), *aff'd*, No. 20-1544, 2021

[8] *See also* AR148268-71 (comparing alternatives' impacts to groundwater); AR148284, AR148292-93 (SA-04 would cross more navigable waters than the preferred route); AR148358 (potential wetlands impacts are similar).

WL 1923669 (4th Cir. May 13, 2021).

E. 40 C.F.R. § 1508.27 Does Not Require the Corps to Prepare an EIS.

Federal Defendants have also demonstrated that the Corps rationally concluded that the preparation of an EIS was not warranted. ECF No. 62 at 35-36 (explaining why the Corps concluded that impacts to the human environment would not be significant). Plaintiffs argue that, under 40 C.F.R. §1508.27(b)(4), highly controversial aspects of the project make its impact significant, but this requires a showing of a "substantial dispute" about "the size, nature, or effect of the major federal action." *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (citation omitted).

The Corps acknowledges the Plaintiff Tribes' long-standing opposition to the pipeline related to Replacement Line 3, but these circumstances do not show that the effects of the Permit and Permission satisfy § 1508.27(b)(4). Plaintiffs' assertion that the Corps was required to consider potential impacts from the pipeline's operation and transportation of oil (ECF No. 65 at 27) does not establish a "substantial dispute" which would weigh in favor of an EIS. *See Town of Cave Creek, Ariz.*, 325 F.3d at 331; *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F. 3d 395, 407 (1st Cir. 2021). Further, Plaintiffs have not identified any comments or record evidence that are sufficient to question the Corps' analysis of the Permit and Permission. *Nat'l Parks Conservation Ass'n v. U.S. Forest Service*, 177 F. Supp. 3d 1, 34 (D.D.C. 2016) (plaintiff did not identify "any scientific criticism" of the agency's methods or data). The comment cited by Plaintiffs does not present any data, methodologies, or scientific assumptions that the Corps should have considered, nor does it challenge any of the scientific findings made by the Corps. ECF No. 65, n.11 (citing AR_97776-77). Plaintiffs again point to alleged deficiencies in the state EIS and their state-level criticism regarding potential oil spill impacts on Lake Superior.

ECF No. 65 at 27-28. But the Corps considered both the revised state EIS, which specifically addressed the risk of oil spills to the Lake Superior Watershed, and Plaintiffs' comments on this issue. *See* ECF No. 62 at 37-38; AR_358-59; AR_56840 (state EIS, § 10); AR_62402-04, AR_62547 (spill risk to Lake Superior is low); AR_97686-87. And the Minnesota Court of Appeals has affirmed the state agency approval of the revised state EIS and spill modeling on the Lake Superior Watershed. *In re Enbridge Energy, L. Partnership*, No. A20-1071, 2021 WL 2407855, at *8-11 (Minn. Ct. App. June 14, 2021). Plaintiffs' continued objections to the state analysis do not show that there is "a substantial dispute" about the Permit and Permission. *Town of Cave Creek, Ariz.*, 325 F.3d at 331. The Corps engaged in consultation, provided information and detailed maps to the Tribes, requested that the Tribes provide comments, and held in-person meetings. AR_456-472; AR146987-89; AR147002-03. And while the Tribal study cited by Plaintiffs (AR151641-891) is not directly referenced by name in the Corps' EAs, the Corps did address these types of Tribal concerns.[9] These criticisms do not satisfy § 1508.27(b)(4) and thus do not "compel the production of an EIS." *Nat'l Parks Conservation Ass'n*, 177 F. Supp. 3d at 34. Nor have Plaintiffs shown that the effects of issuing a Section 404 permit and Section 408 permission are "highly uncertain or involve unique or unknown risks" under 40 C.F.R. § 1508.27(b)(5). *See WildEarth Guardians*, 368 F. Supp. 3d at 82–83 ("this factor is implicated when an action involves new science, or when an action's impact on a species is unknown"). Enbridge did not propose to discharge fill material using new construction technologies or

[9] *See, e.g.*, AR1511663 (concerns regarding impacts to groundwater quality); AR_468-69 (Corps' analysis of comment that contaminated water would disrupt Tribes' traditional lifeways); AR151664-65 (concerns regarding impacts to wild rice); AR_2548-54 (Corps' review of the risk of an oil spill on wild rice); AR151676-700 (concerns regarding Tribal treaty rights); AR_400-01 (acknowledging Tribal treaty rights and summarizing Corps' conclusions regarding Tribal rights to hunt, fish, and gather natural resources).

methodologies and the effects of horizontal directional drilling and trench construction are well known. AR_352.

Plaintiffs argue that the Corps was required to prepare an EIS because the pipeline allegedly creates a material risk of grave harm. ECF No. 65 at 29-31 (citing *Standing Rock*, 985 F.3d at 1049). This argument is not based on the regulatory factors in § 1508.27. ECF No. 62 at 40. And the authority relied upon by Plaintiffs does not show that the Corps' decision was arbitrary or capricious. Unlike *Standing Rock*, Plaintiffs have not established that a scientific dispute exists regarding the effects of the Permit and Permission. *See* 985 F.3d at 1044-50 (discussing four "serious" scientific disputes that rendered the effects of the Corps' easement decision highly controversial). Nor have Plaintiffs shown that the Corps entirely failed to consider a potential consequence of the challenged actions. *See, e.g., N.Y. v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 478-82 (D.C. Cir. 2012) (the agency's EA was insufficient because it did not examine the failure to establish a future repository, risk of leaks, and "the consequences of pool fires *at all*") (emphasis added). The Corps took a hard look at oil spills and leaks. ECF No. 40 at 18 ("[T]he Court finds that the Corps adequately considered the effects of a potential oil spill to discharge its duties under NEPA and the CWA."); ECF No. 62 at 37-38; 55-57. And the record does not support Plaintiffs' allegation that the pipeline "poses a risk of grave harm." ECF No. 65 at 30. *See*, *e.g.*, AR_2548-55 (Corps' oil spill analysis and conclusion that spill prevention and leak detection measures will reduce the risk of a spill resulting in environmental and human impacts); AR_12109 ("a crucial benefit of the Project is that it would significantly reduce the risk of an accidental oil spill"); AR121111 (rail or truck transport carry higher levels of spill risk than pipeline transportation). The Corps acted reasonably in deciding not to prepare an EIS; that decision is afforded deference; and Plaintiffs have identified no basis for concluding

that the agency's analysis fell short of NEPA's requirements. Hence, Federal Defendants are entitled to summary judgment on Plaintiffs' NEPA claims. (Compl. ¶¶ 183-203, ECF No. 1, No. 1:20 cv-03817; First Am. Compl. ¶¶ 104-57, ECF No. 13, No. 1:21 cv-00189).

II. The Corps' CWA Section 404 Determinations Were Not Arbitrary or Capricious.[10]

The Corps did not act arbitrarily or capriciously when it reviewed the challenged Permit under the CWA. Consistent with the pertinent CWA Section 404 implementing regulations, the Corps (among other things) considered the proper range of project alternatives, reasonably determined that those alternatives were not practicable as that term is defined in 40 C.F.R. § 230.10(a)(2), and conducted a reasonable public interest analysis pursuant to 33 C.F.R. § 320.4(a). As the Corps and Friends of the Headwaters Plaintiffs (FOH) agree, "the language in dispute in this case is not ambiguous" (ECF No. 67, at 5), and it would have been arbitrary and capricious for the Corps to depart from the language of those regulations, either procedurally or substantively.[11] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 42-43(1983). The Corps also articulated rational connections between the facts that it found and the choices that it made. The Court therefore should uphold those decisions under the governing arbitrary and capricious standard. *Motor Vehicle Mfrs.*, 463 U.S. at 43. Moreover, Plaintiffs'

---

[10] The Corps does not share a number of factual and regulatory positions that Plaintiffs describe in the CWA portions of their briefs as commonly understood or agreed to by the parties. No such positions should be attributed to the Corps unless the Agency articulated them in the administrative record or in its briefs.

[11] The Corps has not sought *Auer* or *Skidmore* deference, and FOH's deference-related arguments are inapposite. FOH's argument that the 404 Guidelines were promulgated only by EPA and Corps constructions of ambiguous provisions (which Plaintiffs and the Corps agree are not at issue in this case) are not entitled to deference also lacks merit. *See* 40 C.F.R. § 230.2(a) (Applicability) ("These Guidelines have been developed by the Administrator of the Environmental Protection Agency *in conjunction with the Secretary of the Army acting through the Chief of Engineers* under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344).") (emphasis added). Moreover, Plaintiffs have not shown that EPA interprets any such provisions differently from the Corps.

policy-based arguments that the Court should construe the applicable regulations in a way that requires the Corps to evaluate Section 404 applications based on all conceivable environmental impacts of the projects for which dredging or fill was required, however attenuated—thereby expanding the Agency's regulatory authority far beyond that granted by Congress in 33 U.S.C. § 1344—lack merit. For all of these reasons, the challenged Permit should be upheld.

A. The Corps Performed a Reasonable Alternatives Analysis Pursuant to 40 C.F.R. § 230.10(a).

1. The Corps Properly Evaluated Project Alternatives Using the Definition of "Practicable" in 40 C.F.R. § 230.10(a)(2).

Contrary to FOH's arguments, there is no regulatory construction issue with respect to the Corps' practicability determination in this case. Instead, the Corps properly evaluated project alternatives by making detailed, fact-based determinations of whether each is "practicable" as that term is defined in 40 C.F.R. § 230.10(a)(2). *See* AR_365-74 (Sects 5.1-5.7).

While both NEPA and CWA Section 404's implementing regulations require the Corps to evaluate project alternatives, the CWA Section 404 evaluation is cabined by 40 C.F.R. § 230.10(a). The plain language of Section 230.10(a) bars the Corps from issuing a permit "if there is a *practicable* alternative to the proposed discharge which would have less adverse impact on the *aquatic ecosystem*," (emphasis added), and the term "practicable" is defined in subsection 230.10(a)(2):

> An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

See e.g., 40 C.F.R. §§ 230.3(b), (*l*) . The Corps therefore would have acted arbitrarily and capriciously if it had *not* evaluated whether each project alternative fell within the 40 C.F.R. § 230.10(a)(2) definition of the term practicable. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 42-43 ("a reviewing court may not set aside an agency rule that is rational, *based on consideration of the*

relevant factors and within the scope of the authority delegated to the agency by the statute.") (emphasis added); *Cigar Ass'n. of Am. v. U.S. Food & Drug Admin*, Case No. 20-5266, 2021 WL 3043304 *2 (D.C. Cir. July 20, 2021) ("the court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.") (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (internal citations and quotation marks omitted)); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Consequently, FOH's largely policy-based arguments that the Corps instead should have performed a different evaluation or used a different standard lack merit and should be rejected.

2. The Corps Was Not Required to Evaluate Alternative Pipeline Routes.[12]

Plaintiffs' argument that the Corps was required to evaluate alternatives to the pipeline route that was approved by the Minnesota PUC also lacks merit. In the State of Minnesota, it is *unlawful* to build a pipeline along a route that is not approved by the PUC. Minn. Stat. § 216G.02, subd. 2; *see In re Enbridge Energy, Limited P'ship*, 2021 WL 2407855 *23; AR_356; AR_5955; *see* ECF No. 62, at 44. Clearly such a pipeline route is not "available and capable of being done," and it therefore does not fall within the regulatory definition of "practicable" in 40

[12] The Corps disputes FOH's assertions that practicable alternatives usually are alternative locations and avoid discharges altogether, or that in this particular case an alternative pipeline route would avoid protected waters, wetlands, or have less adverse impacts on the aquatic ecosystem. *See* U.S. Brief, ECF No. 62, at 44 n.13 (State rejected Plaintiffs' SA-04 alternative pipeline route due to more water body crossings, equal wetland impacts, 100 mile greater length, and high groundwater risk due to karst geology); AR_65321-23 & Tables U-11, U-14).

C.F.R. § 230.10(a)(2). [13] In this case, the only lawful—and potentially practicable—pipeline route was the one for which Enbridge sought the challenged Permit. *See* AR_368 (Sects 5.4-5.5)

This outcome is a direct result of Minnesota's pipeline laws, and it cannot be generalized to permit applications in other States or to non-pipeline projects in Minnesota. It also does not reflect a Corps position or policy that applicants may limit the scope of the Corps' review simply by obtaining state approvals prior to applying for a Section 404 permit. To the contrary, 33 C.F.R. § 320.4(j)(1) instructs that, "Processing of an application . . . normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications," and 33 C.F.R. § 320.4(j)(1) authorizes the Corps to decide permit applications even before such authorizations or certifications have issued. The Plaintiffs' contrary arguments therefore lack merit and should be rejected.

3. The Corps Considered Two "No Action" Alternatives.

Contrary to FOH's arguments, CWA Section 404 and its implementing regulations do not require that the Corps consider "no action" alternatives.[14] Nonetheless, as explained in the 404 EA (AR_366-68) and the Corps' opening brief (ECF No. 62, at 31, 42), the Corps considered *two* "no action" alternatives—transporting petroleum by rail and by tanker truck. AR_366-68. Both of those alternatives were determined not to be practicable, however. *Id.*

The Corps also fulsomely discussed the implications of simply leaving existing Line 3 in operation, because replacing it is Enbridge's primary purpose for seeking the Permit at issue.

---

[13] The *Alliance to Save the Mattaponi* case does not counsel otherwise because it involved a potential alternative that was contrary to state policy and disfavored by officials, but was not *per se* unlawful. 606 F. Supp. 2d at 130; *see* ECF No. 67, at 7-8.

[14] In the CWA Section 404 permitting context, a "no action" alternative is one that does not result in a discharge of dredged or fill material into waters of the United States. AR_366 (Sec. 5.3); *see* 42 U.S.C. § 1344(a); 40 C.F.R. §§ 230.1, 230.10(a)(1)(i).

AR_355, AR_363, AR_369-70, AR_372-73, AR_405. While the *United States v. Enbridge Energy, LP* consent decree requires that Enbridge seek the necessary approvals to replace the existing line, it does not require that Enbridge retire the line if such approvals are denied. *See* Case No. 16-cv-0914 (W.D. Mich.), ECF No. 14, at ¶ 22.a ("Enbridge shall replace. . . Line 3 . . . provided that Enbridge receives all necessary approvals to do so."). If the Permit at issue in this case had been denied, Enbridge represented that the rapidly deteriorating existing Line 3 would continue to operate. AR_363-64, AR_369-70.

Moreover, the Corps' alternatives analysis was not arbitrary or capricious simply because the Agency adopted an overall project purpose—the purpose used to evaluate practicability—that was consistent with Enbridge's stated purpose for seeking the challenged permit:

> 3.4 Overall Project purpose, as determined by the Corps
> To replace an existing crude oil pipeline to increase safety of transporting crude oil, and to ensure continued reliable crude oil transportation to the refining industry in PADD II, to meet current and forecasted demands.

AR_364 (Sec. 3.4); *see* 40 C.F.R. § 230.10(a)(2) (evaluate practicability "in light of overall project purpose"). This overall project purpose is eminently reasonable, given that the *United States v. Enbridge Energy* consent decree required Enbridge to seek all necessary approvals to replace the rapidly deteriorating existing Line 3 that currently facilitates said crude oil transportation. In these circumstances, it would be inappropriate for the Corps to fabricate a different purpose against which to evaluate Enbridge's application. *See La. Wildlife Fed'n, Inc. v. York,* 761 F.2d 1044, 1048 (5th Cir. 1985) ("Under th[e] Guidelines, . . . not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre . . . to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983).

4. The Corps Rebutted the Presumptions in 40 C.F.R. § 230.10(a)(3).

FOH's arguments based on 40 C.F.R. § 230.10(a)(3) also lack merit, because the presumptions established in Section 230.10(a)(3) were rebutted. Under Section 230.10(a)(3), where a project is not water dependent, two presumptions must be rebutted: (1) that other "*practicable alternatives* exist that do not involve special aquatic sites," and (2) that "*practicable alternatives* . . . which do not involve a discharge into a special aquatic site . . . are presumed to have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a)(3) (emphasis added); *Nat'l Parks Conserv. Ass'n v. Semonite*, 311 F. Supp. 3d 350, 377-78 (D.D.C. 2018), (overturned on other grounds, 925 F.3d 500 (D.C. Cir. 2019)); 45 Fed. Reg. 85,336, 85,339/2 (Dec. 24, 1980) (presumptions in Section 230.10(a)(3) are rebuttable). In this case, the Corps found that there are no practicable alternatives, thereby rebutting both presumptions. *See Nat'l Parks Conserv. Ass'n*, 311 F. Supp. 3d at 378.

B. The Corps Reasonably Found That the Requirements of 40 C.F.R. § 230.10(c) Were Satisfied.

The Corps reasonably determined that the requirements of 40 C.F.R. § 230.10(c) were satisfied because the discharges of fill authorized by the Permit would not cause or contribute to significant degradation of waters of the United States. As the Corps explained in its opening brief, the plain language of Section 230.10(c) provides, "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." (emphasis added); ECF No. 62, at 46. That plain language clearly limits the inquiry to discharges of "dredged or fill material." *See also* 40 C.F.R. § 230.1(a) ("The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States *through the control of discharges of dredged or fill material*") (emphasis added); *All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121

(D.D.C. 2009) (applied the significant degradation factors to the discharge of dredge or fill material, not operational effects); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 449 (5th Cir. 2005) ("40 C.F.R. § 230.10(c) does not . . . require the Corps to consider the effects of the Bayport terminal itself once it begins operations. Instead, Section 230.10(c) requires the Corps to consider whether 'the *discharge of dredged or fill material* [pursuant to a Section 404 permit] will cause or contribute to significant degradation of the waters of the United States'. . . not the effect of any completed project.") (emphasis added).

1. Plaintiffs and the Court Are Not Free to "Construe" Unambiguous Regulatory Language.

FOH's demands that the Court instead construe Section 230.10(c) in a manner that contradicts the regulatory text—which FOH acknowledges is unambiguous—are unavailing. The Court is not free to substitute its own judgment for the Corps' by "decid[ing] whether the Corps' interpretations are the *best* interpretations" and "pick[ing] the interpretation that best fulfills the purposes of the Clean Water Act." ECF No. 67, at 5, 16. In the D.C. Circuit "the courts cannot disregard the plain meaning of a regulation based on policy considerations" or adopt a contrary construction. *Huashan Zhang v. U.S. Citizenship & Immigr. Serv.*, 978 F.3d 1314, 1322 (D.C. Cir. 2020) (citing *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1070 (D.C. Cir. 2018) and *Kisor v Wilkie*, 139 S. Ct. 2400, 2415 (2019)). FOH nonetheless advances policy arguments in favor of a construction that would require the Corps to assess hypothetical releases of non-dredged and non-fill material after completion of the permitted activities (*e.g.,* oil spills after operations begin), and the effects of third-party activities upstream and downstream of the pipeline (*e.g,* tar sand extraction in Canada, refinery operations). The proposed construction—"that the Corps must consider any potential 'significant adverse effects' that denial of its permits would prevent"—is contrary to the language of Section 230.10(c). ECF No. 67, at 15.

2. The Court Cannot "Read" Regulations in a Manner That Grants the Corps Authority Beyond That Granted in 33 U.S.C. § 1344.

Plaintiffs' proposed construction also is inconsistent with the authority that Congress granted the Corps in CWA Section 404—the authority to approve discharges of dredged or fill material to waters of the United States through federal permitting. 33 U.S.C. § 1344(a); *see Ctr. for Biol. Diversity,* 941 F.3d at 1299. Plaintiffs clearly state that their proposed construction is designed to require the Corps to evaluate permit applications in a manner that exercises control over activities directly or indirectly linked to a project that required a Section 404 permit to construct, regardless of how attenuated that link might be. Examples raised in their briefs include increased production and consumption of Canadian tar sands, the post-construction operation of the replacement line that might (or might not) experience spills, operation and emissions at refineries that might (or might not) handle petroleum transported by the replacement line, and emissions from petroleum-fueled vehicles and devices. ECF No. 67, at 2, 11, 13-15; ECF No. 65, at 33, 35.

None of those can be characterized as a discharge of dredged or fill material, and the Court therefore must decline Plaintiffs' invitation to expand the Corps' authority beyond its lawful bounds. *See Judge Rotenberg Educ. Ctr., Inc. v. U.S. Food & Drug Admin.*, Case No. 20-1087, 2021 WL 2799891 *6 (D.C. Cir. July 6, 2021) ("Federal agencies are creatures of statute. They possess only those powers that Congress confers upon them. . . . If no statute confers authority to a federal agency, it has none.") (citing *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988)); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) ("[F]or agencies charged with administering congressional statutes . . . both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act . . . beyond their jurisdiction, what they do is ultra vires."); *Ctr. for Biol. Diversity*, 941 F.3d at 1299-1300 ("[R]egulations

cannot contradict their animating statutes or manufacture additional agency power") (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000) and *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134–35 (1936), and distinguishing *Sabal Trail,* 867 F.3d at 1363).

C. The Corps Reasonably Determined That the Challenged Permit Would Not Be Contrary to the Public Interest under 33 C.F.R. 320.4(a).

Finally, Plaintiffs fail to rebut the Corps' demonstration that the Agency conducted a reasonable public interest analysis under 33 C.F.R. § 320.4(a) for the reasons discussed below and in the Corps' opening brief.

1. The Scope of the Corps' Analysis Was Reasonably Limited to the Permitted Discharges and Their Intended Use of Supporting Construction Activities.

Public interest analyses for CWA Section 404 purposes are performed under 33 C.F.R. § 320.4(a), which requires the Corps to "evaluat[e] the probable impacts . . . of the proposed activity and its intended use on the public interest" through a general balancing of "[t]he benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." For CWA Section 404 purposes, the proposed action is the discharge of fill into wetlands and stream crossings, while the intended use of the discharge is to support *construction* of the Replacement Line 3 pipeline. ECF No. 62, at 47; *see* AR_361.[15] For the same reasons discussed *supra* at 24-25, Plaintiffs' arguments that the Corps must consider the Replacement Line 3 to be the proposed activity, and future pipeline operation to be the intended

[15] Most of the Red Lake Band Plaintiffs' arguments at pages 31-34 and footnotes 12-13 are based on isolated language on page 50 of the Corps' opening brief. The scope of the Corps' public interest analysis was accurately detailed in the 404 EA and at page 47 of the Corps' opening brief. Unfortunately, the summary of that information on page 50 was erroneous. While the scope of the Corps' analysis is clear from the 404 EA and the earlier brief text, the United States sincerely regrets any inconvenience that the error at page 50 may have caused.

use, lack merit and must be rejected because they would expand the Corps' CWA Section 404 authority beyond its lawful bounds.

2. The Corps Properly Assessed Relative Need under 33 C.F.R. § 320.4(a)(2).

As explained in the Corps' opening brief, the Agency reasonably assessed the relative need for the project under 33 C.F.R. § 320.4(a)(2). Contrary to plaintiffs' arguments, Section 320.4(a)(2) does not require the Corps to conduct an independent assessment of need. It only identifies "[t]he relative extent of the public and private need for the proposed structure or work" as one of three general criteria—which the Corps did assess. AR_394. Moreover, 33 C.F.R. § 320.4(q) provides that while the Corps "may make an independent review of the need for the project, . . . [w]hen private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place." *See also,* 51 Fed. Reg. 41,206, 41,207-08 (Nov. 13, 1986) .

Nonetheless, as described in the Corps' opening brief at 45-46, the Agency did evaluate the States' need assessments, including the Minnesota PUC's express determination that the replacement Line 3 was justified by energy needs. ECF No. 62, at 45-46; AR_363-64, AR_405, AR_95545. FOH recently lost its substantive challenge to the PUC's determination in a Minnesota Court of Appeals decision that contradicts the allegations at pages 17-18 and footnotes 14-15 of its Reply. *See In re Enbridge Energy, Lt'd P'ship*, 2021 WL 2407855 *1-2 ("In order to build, Enbridge must establish the need for replacement Line 3. That question of necessity divides state agencies—and many Minnesotans. The legislature tasked the Minnesota Public Utilities Commission to decide—after consideration of attendant environmental risks—that central question of need, and to decide (if need exists) on the appropriate pipeline route. . . .

[T[he commission heard from . . . the department of commerce, which asserted a lack of need for the replacement pipeline. . . . [W]hile reasonable minds may differ . . . , substantial evidence supports the commission's decision to issue a certificate of need . . . [and] we affirm.") (appeal pending). This case is not a proper forum to relitigate those state-level disagreements.

3. The Corps Performed Its Own Balanced Analysis of Benefits and Detriments.

While Plaintiffs disagree with the Corps' ultimate conclusion, they did not establish that the Agency failed to consider important factors under Section 320.4(a)(1). The Corps' public interest assessment is set forth in the 404 EA at AR_394-407, which includes an analysis of potential detriments as well as benefits. Contrary to FOH's arguments, the Corps reviewed and incorporated into its own analysis information submitted by Enbridge and generated by the State. *Crutchfield v. Cnty. of Hanover, Virginia*, 325 F.3d 211, 223-24 (4th Cir. 2003) ("For us to require the Corps to do such independent studies rather than reasonably relying on extensive studies given to them by applicants 'would place unreasonable and unsuitable responsibilities on the Corps,' which receives thousands of permit applications per year"); *Friends of the Earth v. Hintz*, 800 F.2d 822, 834 ("The Corps' regulations do not require the Corps to undertake an independent investigation or to gather its own information").

For the reasons discussed *supra*, with the exception of energy needs, the entire analysis was performed with respect to construction. Even potential benefits such as economics (tax and income) were associated with construction jobs. In other words, only 1 out of 23 relevant interest factors considered benefits from operations.

Contrary to the Red Lake Bands' arguments at pages 35-36 of their Reply, as discussed *supra* at 14-17 and in the Corps' opening brief, the Corps did evaluate information regarding potential oil spills related to the proposed dredging and filling for which the Permit was sought

and related construction activities. For the reasons discussed *supra* at 24-25, Plaintiffs' arguments that the Corps also should have considered spills during pipeline operation lack merit.

Also contrary to the Red Lake Bands' arguments at page 32 of their Reply, the Corps did consider emissions from the equipment used to discharge fill material into waters of the U.S. *See* AR_376, AR_378, AR_384, AR_389, AR_397-98, AR_2544 ("Pipeline construction causes air pollution primarily through emissions from construction equipment (i.e., non-road engines), mobile sources (i.e., vehicles), and construction-related activities (i.e., burning, blasting, and road travel). . . Air emissions from construction would result in localized minor, short-term (2 days) and temporary impacts"). This included a substantive review of the emissions assessment in the state EIS,[16] which led to the Corps' finding that "[t]he proposed activities within the Corps' federal control and responsibility likely would result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions." AR_398, AR_151741. The Corps therefore concluded that the operation of construction equipment associated with the discharge of fill material or placement of structure in waters "would have negligible to minor impacts on general environmental concerns," including greenhouse gas emissions. *Id.* Because post-construction pipeline operation is outside the scope of the CWA Section 404 public interest analysis, however, Plaintiffs' arguments that the Corps also should have evaluated operation-related impacts lack merit.

Plaintiffs' allegations that the Corps failed to assess wetland impacts, avoidance and minimization of such impacts, and mitigation also lack merit. As discussed in the Corps'

---

[16] The state EIS addresses greenhouse gas emissions from construction in Section 5.2.7. AR_56840 (https://mn.gov/eera/web/file-list/13765/), see Ch. 5, 5-445 - 5-481 (especially 5-456 – 5-458). The Corps' analysis focused on issues significant to the proposed action (*i.e.,* the discharges of fill) and was weighted by their importance and relevance to that proposal. *See* 40 C.F.R. § 1500.1(b); 33 C.F.R. § 320.4(a)(3).

opening brief, the 404 EA Corps devoted more than 25 pages to an in-depth evaluation of primary and secondary wetland impacts. AR_384-85, AR_412-34. The Corps thoroughly evaluated and discussed avoidance and minimization, even adding special Permit terms to address them. AR_353-54 (describing at least 10 avoidance and minimization measures), AR_444 (special avoidance Permit term), AR_444-46 (special minimization Permit terms 4-16), AR_6697 (discussing minimization), AR_7583 (identification of avoidance areas and more thoroughly discussing avoidance measures).

FOH's wetland mitigation arguments similarly lack merit. The Corps carefully evaluated Enbridge's proposed mitigation, and ensured both that the compensatory mitigation is adequate (AR_493-94 which responds to EPA's comment), AR_62902) and that the compensatory mitigation plan is consistent with the watershed approach. AR_407, AR_484, AR_6708-09, AR_6712, AR_7313, AR_59024, AR_64306, AR_95545; *see Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 700 (5th Cir. 2018) (the Corps is "authorized to employ out-of-kind credits *within the same watershed* if they *serve the aquatic resource needs of the watershed* . . . § 332.3(e)(1), (2)").

Moreover, the compensatory mitigation regulations themselves, and the mitigation banking instrument and assurance bond used in this case, all were expressly designed to ensure that the purchase of wetland mitigation bank credits establishes that compensatory mitigation was effective. 33 C.F.R. § 332.3(b)(2) ("Mitigation bank credits are not released for [purchase] until specific milestones associated with the mitigation bank site's protection and development *are achieved*, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful.") (emphasis added); AR_354, AR_399, AR_407-08. Due to the limited availability of bank credits, the Corps authorized Enbridge to purchase 24.66 of the 144.66 total

credits required for impacts in one watershed from another watershed. Of the 310.12 total credits required to be purchased, only 26.32 credits would be out-of-kind. AR_408.

Conclusion

For the reasons set forth above and in Federal Defendants' opening brief, Federal Defendants respectfully ask that the Court deny Plaintiffs' motions for summary judgment and grant the Federal Defendants' cross-motion for summary judgment. If the Court were to find that Federal Defendants have failed to fully comply with NEPA or the CWA, additional briefing on remedy is warranted. But in sum, the appropriate remedy would be to remand the matter to the Corps for further explanation or to remedy any errors, not to vacate the Permit or Permission. *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

Respectfully submitted this 30th day of July, 2021.

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

/s/ Sara E. Costello
SARA E. COSTELLO (KS Bar No. 20898)
MATTHEW MARINELLI
AMANDA STONER
Trial Attorneys
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Washington, DC 20044-7611
202-305-0484 (Costello)
sara.costello2@usdoj.gov

/s/ Heather E. Gange
HEATHER E. GANGE (DC Bar 452615)
Senior Counsel
MARK L. WALTERS
Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Washington, DC 20044-7611
202-532-3157 (Gange)
202-616-9190 (Walters)
Heather.Gange@usdoj.gov
Mark.Walters@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL:
MELANIE CASNER
Assistant Counsel
Office of Chief Counsel
U.S. Army Corps of Engineers