

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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RED LAKE BAND OF CHIPPEWA  
INDIANS, *et al.*,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF  
ENGINEERS,

Defendant,

ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP,

Defendant-Intervenor.

Civil Action No. 1:20 cv-03817 (CKK)

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FRIENDS OF THE HEADWATERS,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF  
ENGINEERS, *et al.*,

Defendants,

ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP,

Defendant-Intervenor.

Civil Action No. 1:21 cv-00189 (CKK)

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**INTERVENOR-DEFENDANT ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP'S REPLY MEMORANDUM IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Enbridge's Line 3 Replacement (the "Project") is principally a State-regulated project. The Minnesota Public Utilities Commission (the "Commission") certified the need for the Project and selected its route. The Commission directed another State agency to prepare a comprehensive environmental impact statement (EIS) to document the Project's potential environmental effects. The Minnesota Pollution Control Agency (MPCA) certified pursuant to Section 401 of the federal Clean Water Act (CWA) that the Project would not cause or contribute to a violation of State water quality standards. And State administrative and judicial tribunals have reviewed those agencies' final actions and have upheld them.<sup>1</sup>

The federal role in the Project is significantly narrower. During construction, the Project will cause mostly temporary impacts to federally regulated streams and wetlands. So Enbridge was required to obtain a permit from the U.S. Army Corps of Engineers under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act (RHA). The Project also required a permit under Section 14 of the RHA due to minor alterations of the federal Lost River Flood Control Project. These federally regulated areas comprise less than 20% of the total project area; permanently affected areas, less than 0.01%.

In situations like this, where the activities the Corps would authorize are relatively small portions of a much larger State-regulated utility line project, Corps regulations specifically direct the Corps to confine its regulatory review to the activities requiring federal authorization. The Corps' National Environmental Policy Act (NEPA) regulations limit the Corps' review to the direct and indirect effects of the discharges the Corps authorizes under CWA Section 404. 33 C.F.R. pt. 325, App. B. The Corps' regulations for evaluating whether those discharges would

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<sup>1</sup> The Minnesota Court of Appeals heard argument on the challenge to the MPCA Section 401 water quality certification on June 10. A decision is expected by September 8.

contravene the public interest similarly constrain the scope of the Corps’ review to the activity itself and its intended use. *See Center for Biol. Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299 (11th Cir. 2019) (identifying limits on the Corps’ CWA “public interest” review). And to avoid duplication of effort and analysis, NEPA regulations encourage federal agencies to rely on State analyses of a project’s environmental effects. Taken together, these regulations prevent the Corps from using the “small handle” of federal jurisdiction to become an “environmental-policy czar” for State and private projects. *Id.*

Plaintiffs here argue the Corps should have pushed beyond these limits to conduct a much broader review of the Project. They say federal law required the Corps to evaluate a range of effects associated with the extraction and use of oil. They argue, for example, that the Corps—in exercising authority under the Clean *Water* Act—was obligated to make judgments about the GHG emissions associated with using the oil the Line 3 Replacement would carry. And Plaintiffs argue that federal law required the Corps to either duplicate State agencies’ substantial analyses of the need for the Project and its environmental consequences or jump through some unspecified procedural hoop before relying on them.

Both the Corps and Enbridge have explained why Plaintiffs are wrong on these points. *See* ECF No. 61-1; ECF No. 63-1. Enbridge submits this brief to reply to three aspects of Plaintiffs’ responses: (1) their arguments concerning the scope of the Corps’ NEPA and CWA public-interest reviews; (2) their contentions regarding the procedural requirements a federal agency must satisfy before relying on State analyses; and (3) Plaintiffs’ request that the Permit be vacated should the Court grant any portion of their motions.

## ARGUMENT

### **I. The Corps was not obligated under NEPA or the CWA to evaluate the effects of GHG emissions from downstream uses of products shipped through the pipeline.**

Under NEPA, the Corps need only evaluate the effects of the activity it would permit. See ECF No. 63-1 at 14-21. Here, that activity is the discharge of dredge and fill material associated with the construction of the pipeline across streams and wetlands. The Corps does not authorize the construction of the entire pipeline. So it is not the Corps' job to evaluate the effects of constructing the entire pipeline or the effects that might occur when the pipeline is placed in operation. See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015) ("*Flanagan South*") (holding Corps appropriately declined to evaluate effects of entire pipeline when issuing Section 404 authorization); cf., e.g., *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) ("*Sabal Trail*") (distinguishing *Flanagan South*, which involved a Corps permit for discharges associated with construction of an oil pipeline, from *Sabal Trail*, which involved FERC's authorization for construction and operation of an interstate natural gas pipeline, due to FERC's substantially broader scope of authority).<sup>2</sup> Those effects are beyond the Corps' "control and responsibility" and thus are outside the scope of the Corps' NEPA review. See 33 C.F.R. Part 325 App. B; 40 C.F.R. § 1508.18.

The RLB Plaintiffs tacitly acknowledge this limit on the scope of the Corps' NEPA review when they disclaim any argument that the Corps should have considered the effects of the

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<sup>2</sup> See also, e.g., *Center for Biol. Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019) (rejecting claim that NEPA required the Corps to evaluate effects of processing phosphate rock to be extracted at a mine that required a Section 404 permit); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009) ("[T]he fact that the Corps' § 404 permit is central to the ... valley-filling process [as part of a coal mine] does not itself give the Corps 'control and responsibility' over the entire fill"); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (Corps' NEPA review of CWA permit need not include effects of larger project).

“entire pipeline.” *See* ECF No. 65 at 3 n.2. But they *do* contend the Corps should have considered such effects. They say the Corps should have done more to assess the effects of oil spills (ECF No. 65 18-22) and should have quantified GHG emissions from the use of oil the pipeline would carry (ECF No. 65 at 14-17). Those effects are associated with the operation of the entire pipeline. So too are the effects of the Project on Tribes and environmental justice communities the RLB Plaintiffs claim the Corps overlooked. *See* ECF No. 65 at 18-19 (describing Project effects on subsistence resources generally, not those associated with Corps-permitted discharges). Plaintiffs plainly contend that the Corps should have considered effects of the “entire pipeline.”

Indeed, the RLB Plaintiffs make that point plain a few pages later when they argue that the Corps must consider all “reasonably foreseeable” direct and indirect effects. *See* ECF No. 65 at 6. They do not attempt to distinguish the consistent D.C. Circuit authority that acknowledges and affirms the limits on the scope of the Corps’ NEPA review. *See, e.g., Flanagan South*, 803 F.3d at 39-40. Instead, they point to the regulation that requires the Corps to assess whether issuing a Section 404 permit would contravene the public interest and direct it to consider the impacts of the permitted activity and its “intended use.” ECF No. 65 at 7-8 (citing 33 C.F.R. § 320.4(a)(1)). But that regulation has been on the books for decades, and it stops well short of empowering the Corps to consider effects that lack a close nexus to the discharges it authorizes. *Ctr. for Biol. Diversity*, 941 F.3d at 1299.<sup>3</sup> *Id.*

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<sup>3</sup> The RLB Plaintiffs say the Corps has conceded that it “must consider greenhouse gas emissions from pipeline construction and operation in its public interest review.” ECF No. 65 at 8 (citing ECF No. 61-1 at 50). But the Corps stops well short of conceding that it must evaluate the effects of GHG emissions for upstream oil extraction and downstream oil uses. In fact, it specifically states that “‘upstream’ and ‘downstream’ oil extraction, refining and consumption (including tar sands that may or may not be transported by the replacement pipeline) fall outside the intended use of the proposed activity and therefore are outside the scope of the Section 320.4 public interest analysis.” ECF No. 61-1 at 50.

**II. The Corps acted well within its discretion in relying on State environmental analyses.**

As Enbridge explained in its Opening Brief, the record demonstrates that the Corps considered and relied upon State analyses quantifying effects of the Project within the Corps' regulatory purview. The Corps documented and relied upon the State's analyses of the potential effects of leaks or spills from the pipeline and potential effects on Tribal resources. That work is unquestionably part of the Corps' record here and was the product of substantial public participation during the State process. The Corps did all it needed to do to rely on it.

The RLB Plaintiffs ask the Court to disregard any reference to the State EIS because, they say, the Corps did not do enough "joint planning" with the State or document any independent analysis of the State's findings. ECF No. 65 at 9-13. But the RLB Plaintiffs cite no authority imposing such pre-requisites. The Corps' regulations specifically direct district engineers "whenever practicable, [to] incorporate by reference and rely upon the reviews of other Federal and State agencies." 33 C.F.R. pt. 325, App. B §7.b. While the Council on Environmental Quality's NEPA regulations may encourage joint planning and study, they stop well short of mandating it. *See* 40 C.F.R. § 1506.2 (2019). And those regulations dictate no specific process agencies must follow to document their independent analysis of other agencies' work.

The other regulations and cases the RLB Plaintiffs cite are not to the contrary. The RLB Plaintiffs cite authority involving an agency's responsibility with regarding to environmental documents submitted *by an applicant*. ECF No. 65 at 11 (citing, e.g., 40 C.F.R. § 1506.5(b)(2)). But Enbridge did not prepare the State EIS—it was prepared by State agencies after substantial public participation and then subjected to multiple rounds of judicial review.

And the cases the RLB Plaintiffs cite involving a federal agency's reliance on analyses prepared by other governmental agencies reveal no procedural step the Corps failed to take. Indeed, in *Stop the Pipeline v. White*, the case most directly applicable, the court rejected precisely the point the RLB Plaintiffs press here. *See* 233 F. Supp. 2d 957, 967–68 (S.D. Ohio 2002). There, as here, parties challenging a Corps Section 404 authorization accused the Corps of inappropriately deferring to a State-authored analysis of the potential effects of oil spills. *Id.* at 967. The court dismissed the argument. “An agency may fulfill its obligations under NEPA to conduct an independent evaluation of environmental impacts by reviewing and relying on the information, data and conclusions supplied by other federal or state agencies.” *Id.* at 967–68. “Here, the Corps did not abdicate its responsibilities by failing to conduct independent studies and by considering the evaluations of [the State agency] concerning the pipeline's potential adverse effects.” *Id.* at 968.

**III. If the Court grants any portion of Plaintiffs' motions, it should receive supplemental briefing on the appropriate remedy.**

The Court should deny Plaintiffs' motions in their entirety, including their requests that the Court “vacate” the Corps permits. But should the Court conclude otherwise, it should receive supplemental briefing on the question of remedy. Depending on the nature and scope of any deficiencies the Court identifies, vacatur of the permits may not be appropriate.

Enbridge has relied on the Corps permits in good faith and has conducted substantial work in reliance on them. As of this filing, Enbridge has completed 80.5% of wetland crossings and 77.02% of stream that require the Section 404 permit. Enbridge expects to complete the remaining crossings and upland work that requires the Corps permits by the end of the summer and then restore affected areas as the permits require.



Under these circumstances, remand without vacatur may be the appropriate remedy should the Court identify any deficiencies in the Corps' analysis. The D.C. Circuit employs a flexible approach when evaluating whether vacatur is appropriate. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). As the D.C. Circuit explained in *Allied-Signal*, “the decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Id.* at 150–51. To that end, a proper vacatur analysis considers, *inter alia*, whether the agency will be able to substantiate its decision on remand and “the social and economic costs of delay.” *Pub. Empls. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (internal quotations omitted).<sup>4</sup>

Because the propriety of remand without vacatur depends on the specific deficiencies the Court may identify, advocacy regarding remedy is premature at this stage. But should the Court find in Plaintiffs' favor in any respect, Enbridge respectfully submits that the Court would benefit from supplemental briefing addressing the appropriate remedy at that stage of these proceedings.

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<sup>4</sup> See also *Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 363 (D.D.C. 2012) (considering, in a NEPA case, the potential “substantial financial loss if the Court were to vacate” and determining that vacatur was not warranted); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (declining to vacate because stopping “a billion-dollar venture employing 350 workers” would be “economically disastrous” and noting that vacatur “could well delay a much needed power plant,” resulting in blackouts).

**CONCLUSION**

For the foregoing reasons, and the reasons identified in the Corps' and Enbridge's opening briefs, and the reasons identified in the Corps' reply brief, the Court should deny Plaintiffs' motions for summary judgment, and grant the Enbridge and Corps cross-motions.

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Respectfully submitted,

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