ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE, ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs-Appellees, and CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE, Intervenors for Plaintiff-Appellees, v. U.S. ARMY CORPS OF ENGINEERS, ET AL. Defendant-Appellant, and DAKOTA ACCESS LLC, Intervenor for Defendant-Appellant.	No. 20-5197

STANDING ROCK SIOUX TRIBE, ET AL.'S JOINT OPPOSITION TO EMERGENCY MOTIONS FOR STAY

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GLOSSARY

Corps:	U.S. Army Corps of Engineers
DAPL:	Dakota Access, LLC
EIS:	Environmental Impact Statement
NEPA:	National Environmental Policy Act
CEQ:	Council on Environmental Quality
WCD:	Worst-case discharge
APA:	Administrative Procedure Act

INTRODUCTION

Appellants U.S. Army Corps of Engineers ("Corps") and Dakota Access, LLC ("DAPL") are not entitled to the "extraordinary" relief of a stay pending appeal. As to the merits, the district court did not err in finding that a massive crude oil pipeline crossing one of the nation's primary river systems, at the doorstep of an Indian reservation, was significant enough to trigger a full environmental impact statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"). The district court has charted a careful path through this difficult case for over four years, and its multiple rulings reveal a deep familiarity with the facts and an extensive administrative record. As to the balance of harms, appellants' claims of economic "devastation" are gravely overstated. Oil production in North Dakota has fallen dramatically in recent months due to factors unrelated to this case. Temporarily shutting down the pipeline means that it will be marginally more expensive for some producers to ship oil out of North Dakota—nothing more. On the other side of the balancing, continued operation of the pipeline exposes the Tribes to catastrophic risks that have never been properly examined as the law requires, and compounds a history of government-sponsored dispossession of Tribal lands and resources. The district court did not abuse its discretion in balancing these harms.

For three years, DAPL has reaped the financial benefits of operating a pipeline that was never lawfully permitted. Appellants ask this Court to allow DAPL to continue doing so, balancing the equities on the backs of the Tribes as has been done so many times before. Appellees Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe (collectively, "Tribes") ask that the motions be denied.

BACKGROUND

This case pits federally recognized Indian Tribes, successors to the Great Sioux Nation, against a major crude oil pipeline crossing their unceded ancestral homelands. ER8-10. Since time immemorial, the Tribes have lived, hunted, fished, and practiced ceremonies adjacent to the Missouri River – *Mni Sose* in Lakota. Starting in the mid-1800s, the Sioux and the U.S. government entered into treaties in which a substantial portion of the Great Plains were permanently reserved for the "absolute and undisturbed use and occupation" of the Sioux. After gold was discovered in the Black Hills, the government violated the treaties, and Congress enacted statutes that stripped vast areas of land out of the Reservation. *Id.*; *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980) ("A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history…"). In the 20th century, the U.S. compounded this legacy of dispossession by building a dam on the Missouri that inundated the best lands on the Standing

Rock and Cheyenne River Reservations, forcing hundreds of families from their homes. SER 546 (Oahe Dam "destroyed more Indian land than any other single public works project in the history of the United States"). These losses devastated the Tribes' economies and culture, and their effects are still felt profoundly today. The debate over permitting the Dakota Access pipeline played out against this backdrop. DAPL proposed to traverse the Missouri River just a half mile upstream of the Standing Rock Reservation, crossing lands taken in violation of the treaties. The Oahe crossing site is rich in cultural significance, and placing a massive crude oil pipeline along and beneath the River posed a grave threat to ceremonies essential to Tribal identity as well as to Tribal health, fishing, hunting, and drinking water. SER547 ("Water is part of who we are…. We cannot survive without it.").

The district court denied two motions for preliminary injunctions blocking construction of the pipeline in the fall of 2016. However, the federal government decided not to grant the easement required under the Mineral Leasing Act, 30 U.S.C. § 185, for the pipeline to cross Lake Oahe until an EIS was completed. ER248-49. The EIS was to focus on the risks of an oil spill, impacts on the Tribes' treaty rights to hunt and fish, and "route alternatives" to the Oahe crossing site. 82 Fed. Reg. 5543 (Jan. 18, 2017) (notice of intent to prepare EIS). The Corps made the decision after the Solicitor of the U.S. Department of Interior issued a

comprehensive legal opinion finding "ample legal justification to decline to issue the proposed Lake Oahe easement," or, alternatively, to develop an EIS to "adequately evaluate[ ] the existence of and potential impacts to tribal rights and interests," "consider a broader range of alternative pipeline routes," and undertake "a catastrophic spill analysis prepared by an independent expert." ER17. Other agencies, including the Environmental Protection Agency and Advisory Council on Historic Preservation, had also criticized the Corps' initial refusal to perform an EIS. *Id.*; ER11.

Immediately upon assuming office, however, President Trump cancelled the EIS process, ordered the withdrawal of the Solicitor's memorandum, and directed issuance of the easement. ER18. The Tribes challenged this reversal, arguing that an EIS was required. In June 2017, a few weeks after DAPL initiated operations, the district court granted summary judgment for the Tribes in part. ER3. While the court found that the Corps had in some respects complied with NEPA, there were "substantial exceptions." ER68. In concluding that the pipeline's risks and impacts were not significant enough to warrant an EIS, the district court held, the Corps failed to consider expert critiques, raising questions about whether the project's effect on the environment was "highly controversial"—one of the criteria that triggers a full EIS. *Id*. The court also faulted the Corps' environmental justice analysis for ignoring impacts on Tribes immediately downstream of the crossing,

and the Corps' failure to assess the impacts of an oil spill on the Tribes' treaty rights. ER49-56. Characterizing these flaws as "substantial," the court remanded the matter to the Corps for additional analysis. ER1.

As to remedy, the district court declined to vacate the easement, finding a "substantial possibility" that the Corps would be able to substantiate its decision not to prepare an EIS on remand. ER386. Notably, however, the court rejected the argument that the "disruptive consequences" of shutting down the pipeline weighed in favor of remand without vacatur. ER 402 ("vacatur would be, at most, an invitation to substantial inconvenience"). Later, the court affirmed that it had the authority to impose conditions on the pipeline during remand, and found conditions warranted in light of the risk of an oil spill that could "wreak havoc on nearby communities and ecosystems." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 280 F. Supp. 3d 187, 191 (D.D.C. 2017).

The Corps completed its remand in 2019, affirming its original conclusion not to prepare an EIS, and the Tribes challenged this decision. In a March 2020 decision, the district court granted summary judgment to the Tribes, finding that the Corps failed to address multiple technical critiques of its flawed analysis of oil spill risks and that the pipeline has significant environmental impacts requiring a full EIS. ER96. After extensive additional briefing (and consideration of amici on all sides), the district court vacated the easement and ordered the pipeline shut

down and emptied until the EIS was complete and a new decision easement was made. ER138. This appeal and stay motion followed.

STANDARD FOR STAY

A stay is an "extraordinary remedy" that constitutes an "intrusion into the ordinary process of . . . judicial review." *Nken v. Holder*, 556 U.S. 418, 428 (2009). A stay is warranted only where the moving party meets "stringent requirements." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 904 F.3d 1014, 1016 (D.C. Cir. 2018). The moving party bears the burden of establishing: 1) the likelihood that it will prevail on the merits; 2) it will be irreparably injured in the absence of a stay; 3) the possibility of harm to other parties if relief is granted; and 4) the public interest. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). Appellants are not entitled to a stay under these factors.

ARGUMENT

I. APPELLANTS ARE UNLIKELY TO PREVAIL ON THE MERITS.

A. The District Court Correctly Ruled that the Corps Violated NEPA.

Under NEPA, an agency "must prepare an EIS for any project 'significantly affecting the quality of the human environment.'" *Nat'l Parks Conservation Assoc. v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). Whether a project has "significant" environmental impacts depends on a weighing of both "context" and "intensity." 40 C.F.R. § 1508.27. As to context, "[c]onsidering context is critical

because the significance of an action can vary based on the setting and surrounding circumstances." *Am. Rivers v. Fed. Elec. Reg. Comm'n*, 895 F.3d 32, 49 (D.C. Cir. 2018). As to intensity, binding Council on Environmental Quality ("CEQ") regulations list several factors that can trigger an EIS, including: "unique characteristics of the geographic area such as proximity to historic or cultural resources," the degree to which the effects are "likely to be highly controversial;" and the degree to which the effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.28(b). Overlaying the CEQ factors are the duty to consider "environmental justice" implications and impacts to Tribal treaty rights. ER99. "Implicating any one of the factors may be sufficient to require development of an EIS." *Semonite*, 916 F.3d at 1082; *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).[1]

Although the Tribes identified multiple context and intensity factors supporting a finding of significance, the district court focused on the question of "controversy," finding that the Corps had ignored key technical issues that led it to underestimate the risks of oil spills and catastrophic impacts. With "many topics to choose from," the district court focused on four illustrative problems to highlight

[1] Since the Corps does not administer NEPA, its interpretations of the CEQ regulations are not entitled to any deference from this Court. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Comms. Comm'n*, 933 F.3d 728, 738 (D.C. Cir. 2019).

the extent of "unresolved scientific controversy." ER113-145 ("even this non-extensive selection suffices to show the necessity of an EIS."). The district court did not reach several other issues, like the Corps' failure to address environmental justice concerns or the impacts on the Tribes' treaty rights, as the remedy it ordered—preparation of an EIS—would be the same for all. ER131.[2] The district court followed Circuit precedent, including *Semonite*, which held that a project is highly controversial and requires an EIS where the agency fails to address "scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions." ER108; *Semonite*, 916 F.3d at 1083. Appellants cannot demonstrate a likelihood of success on the merits of its appeal of this decision.

For example, while the Corps touted the effectiveness of DAPL's "leak-detection systems," it "failed entirely to respond" to expert evidence that these systems were notoriously ineffective, including a federal study documenting an "80% failure rate" for such systems. ER115. Nor did the Corps respond to evidence that DAPL's leak detection system could not detect leaks below 1% of pipeline volume—potentially over 25,000 gallons of undetectable oil every day.

[2] DAPL tries to incorporate portions of its motion in the district court for stay pending appeal, and other briefs filed below. This court does not allow incorporation by reference. *UNF West, Inc. v. NLRB*, No. 14-1181, 2016 WL 6080795, at *1 (D.C. Cir. Jan. 15, 2016).

ER123. The district court found that the Corps downplayed the risk of an incident without contending with extensive evidence that the pipeline operator has "one of the lower performing safety records of any operator in the industry." ER118. While DAPL seeks to rehabilitate its record in this motion, it misses the point: it was the Corps' failure to address well-documented concerns about the company that rendered its analysis deficient.

The district court made additional findings about the Corps' failure to address the heightened spill risks and challenges to spill response in North Dakota's harsh winter conditions. ER119-21. It also found three separate ways in which the Corps significantly underestimated the potential "worst case" discharge which lay at the heart of its NEPA analysis. For example, the Tribes documented how the "detection time" for a spill should be measured in hours or days based on real-world examples, but the Corps' "worst case" estimate ignored this evidence and assumed literally instantaneous detection. ER125. While the Corps accuses the court of "flyspecking," the district court found there to be "considerably more than a few isolated comments raising insubstantial concerns" and articulated "serious gaps in crucial parts of the Corps' analysis…." ER130.

The Corps denigrates this careful scrutiny of the record as giving the Tribes a "heckler's veto," dismissing their extensive technical input as the "hyperbolic cries of highly agitated, not-in-my-backyard neighbors." Corps Motion, at 6. This

mischaracterizes what the court below did. The district court acknowledged on three separate occasions that "controversy" under the NEPA regulations did not mean mere opposition to the project. ER33; ER143; ER108. Instead, the district court followed Circuit precedent, including *Semonite*, which held that a project is highly controversial and requires an EIS where the agency fails to address "scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions." ER108, *quoting Semonite*, 916 F.3d at 1083. The Corps' argument that the district court declared that the Corps must assume that spills would last for "hours or weeks," or that "valves won't ever work" bears no resemblance to the court's actual findings. Corps Motion, at 8. Instead, the court identified undisputed evidence that the shutoff valves lacked backup power (despite their remote location), and that a failure would result in 21,000 more barrels of oil leaking into Lake Oahe, evidence that the Corps ignored completely in its assessment.

Appellants attempt to distinguish *Semonite* and argue that the Corps can ignore expert critiques made by Tribes instead of federal agencies. The district court rightfully rejected this argument. First, it misreads *Semonite*, which credited critiques from private consultants and non-profit conservation groups as well as federal agencies. *Id*. at 1084-85. Second, it ignores the fact that the Tribes are sovereign governments that bear responsibility for responding to an oil spill in

Lake Oahe and for protecting their Treaty rights and the well-being of their members. In the words of *Semonite*, they are "stewards of the exact resources at issue," 916 F.3d at 1085, and are well positioned to offer technical input. ER111; SER 538 (Tribal emergency response manager). In any event, the record does include federal agency critiques of the Corps' decision, including a lengthy analysis from the Interior Solicitor urging an EIS and greater consideration of the Tribe's treaty rights and spill impacts, as well as critiques from the EPA and other agencies. ER17. The fact that the new Administration reversed the Corps' position on the EIS and withdrew the Solicitor Memorandum only "reinforces its controversial nature." *Semonite*, 916 F.3d at 1085; ER111.

The Corps argues that the district court's review of its flawed "worst case discharge" ("WCD") cannot withstand review because "worst case" analyses are not required under NEPA. Corps Motion, at 9. This argument misses the mark. The WCD constituted the heart of all of the Corps' other findings in the remand, including its conclusions that the impacts of a spill would be limited. ER122 (WCD "formed the basis for other conclusions about the effects of a spill"). While not legally mandated, once the Corps chose this methodology for assessing oil spill risks and making a significance determination, it could not do so arbitrarily. *Sierra Club v. Sigler*, 695 F.2d 957, 965 (5th Cir. 1983); 40 C.F.R. § 1500.1 (information used in NEPA "must be of high quality"); *id*. § 1502.24 (agencies must "insure the

professional integrity, including scientific integrity" of analysis).

In short, the Corps did not "rationally conclude" that the Tribes' critiques of the WCD failed to trigger an EIS, as it argues here, it ignored those critiques altogether. It never explained why it relied on a WCD estimate when "EPA's own estimate for a spill from a pipeline of DAPL's size in that region was many times the size." ER111. As all parties agree, the determination of "significance" triggering an EIS depends in part on both the likelihood of an accident, and the impacts of one. *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012). As the district court explained, the risk of an oil spill may be small, but the Corps' flawed analysis increased the likelihood that one would become disastrous if it occurred. ER159. Like several other issues, the Corps' failure to grapple with sustained critiques of the WCD that lay at the heart of its decision not to prepare an EIS rendered the decision arbitrary and capricious. The district court did not "abandon the principles of administrative law," Corps Motion, at 11, it applied them exactingly. *See, e.g, Dept. of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1912 (2020) (setting aside agency decision that ignored key issues "without any consideration whatsoever").

Finally, the district court appropriately rejected DAPL's argument that it should not order an EIS, but rather remand yet again for more "explanation" for not performing one. Instead, the district court followed *Semonite*, 916 F.3d 1089,

in which this Court ordered the Corps to prepare an EIS after finding sufficient controversy over the project's effects. DAPL complains that *Semonite* was decided after the remand was complete, but the case hardly broke new ground. *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006) (court must ensure that "no arguably significant consequences have been ignored"). It applied long-standing regulations on intensity factors, 40 C.F.R. § 1508.27(b), and its observation that "[i]mplicating any one of the factors may be sufficient to require development of an EIS," *Semonite*, 916 F.3d at 1082, was not new. *Grand Canyon Trust*, 290 F.3d at 347 ("If any 'significant' environmental impacts might result from the proposed agency action[,] then an EIS must be prepared before agency action is taken."). DAPL is not likely to overturn the district court's analysis in this respect either.

"[T]hat courts must play a cardinal role in the realization of NEPA's mandate is beyond dispute." *Found. on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985). "Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's impacts *remain both uncertain and controversial*." *Semonite*, 916 F.3d at 1088 (emphasis added). If transmission towers that spoil the view in a historic area have "significant" enough impacts to warrant a court-ordered EIS, the district court did not err in ordering one for a

crude oil pipeline crossing one of the nation's primary rivers at the doorstep of an Indian Tribe.

B. The District Court Correctly Applied Precedent to Vacate the Pipeline Easement.

1. Vacatur was appropriate under the Allied-Signal factors.

Appellants are also unlikely to prevail in their challenge to the vacatur order. The Administrative Procedure Act ("APA") commands that a court "shall . . . hold unlawful and set aside" agency action that is arbitrary and capricious. 5 U.S.C. § 706 (2)(A); *FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) ("in all cases agency action must be set aside" if inconsistent with APA). Under *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), a narrow exception to this default rule can be made, based on consideration of: a) the "seriousness" of the decision's deficiencies; and b) the "disruptive consequences" of vacatur. Invocation of this exception remains appropriate only in the "rare case." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). The case for vacatur is strong where an agency's "reasoning lack[s] support in the record," *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019), or where a decision "entirely failed to consider an important aspect of the problem." *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 867 F.3d 180, 185 (D.C. Cir. 2017). Additionally, vacatur is appropriate where an agency acts without following proper

procedures. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 84-85 (D.C. Cir. 2020).

The *Semonite* court on rehearing agreed that application of the *Allied-Signal* factors is within the special province of the district court. *Nat'l Parks Conservation Assoc. v. Semonite*, 925 F.3d 500, 502 (D.C. Cir. 2019) ("*Semonite II*") (district court "best positioned to order additional briefing, gather evidence, make factual findings, and determine the remedies necessary to protect the purpose and integrity of the EIS process."). Here, after finding the Corps in violation of NEPA a second time, the district court invited additional briefing and evidence. Appellants and supporting amici availed themselves of the opportunity, as did the Tribes and their amici. The district court weighed extensive evidence on both sides before applying the "default" remedy of vacatur. ER149. Like all remedial orders, the district court's vacatur order is reviewed under an "abuse of discretion" standard. *Am. Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1166 (9th Cir. 1998); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Appellants cannot make such a showing.

Appellants complain that the district court discounted the "serious possibility" that the Corps would be able to affirm its decision on remand. But the district court already gave the Corps an opportunity to explain its decision not to prepare an EIS. ER386. On a second review, the Corps' refusal to perform an EIS

"has been weighed, it has been measured, and it has been found wanting" and precedent "overwhelmingly dictate[d]" vacatur. ER149-50. The "seriousness" of an agency's failure under *Allied-Signal* is amplified when an agency has been given an opportunity to get it right, and failed. ER108 (the "magnitude of [the] shortcomings is even clearer here, where the Court has the benefit of a second round" of litigation); *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009) (agency "failed to heed our direction and we are again faced with the same objections…"); *In re Core Commc'ns.*, 531 F.3d 849, 861 (D.C. Cir. 2008); *Greyhound Corp v. ICC*, 668 F.2d 1354, 1364 (D.C. Cir. 1981). While DAPL fixates on the number of pages generated during the remand process, the district court had little difficulty identifying multiple, serious gaps in the agency's explanation that rendered it seriously deficient.

The Corps faults the district court for taking NEPA's purposes into account in crafting the remedy, but that is what courts must do. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (U.S. 1982). It framed a remedy that would ensure that an EIS would inform the Corps' decision on the easement, as well as avoid creating incentives for delay. It acknowledged that NEPA "does not permit an agency to act first and comply later." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 523, 536 (D.C. Cir. 2018) (a "purely procedural" violation of NEPA is a

"serious" deficiency weighing in favor of vacatur "because the point of NEPA is to require an adequate EIS before a project goes forward"). The mere possibility that the Corps could sustain the easement once the EIS is complete is not sufficient to avoid vacatur. Because NEPA is a procedural statute, "taking such an approach would vitiate it." *Id.* at 536.

As to the second prong of the *Allied-Signal* analysis, the district court carefully weighed the equities on both sides, concluding that the "disruptive effects" of vacatur—i.e., shutting down the pipeline—did not carry the day. *See supra* § II. DAPL characterizes the shutdown of a pipeline as "unprecedented," but this is neither a relevant factor under *Allied-Signal* nor an accurate characterization. *Sierra Club v. Fed. Elec. Reg. Comm'n.*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (vacating permit for gas pipeline); *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006) (shutting down pipeline pending compliance with NEPA in light of the difficulty of an agency "fulfilling its procedural obligations without favoring a predetermined outcome"). This Court specifically foreshadowed the vacatur order in *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015), when it observed that if the Corps violates NEPA when permitting an oil pipeline, shutting it down pending compliance was an available remedy.

Every application of the *Allied-Signal* factors will be uniquely adapted to the

circumstances of the case, and courts have recognized that permits can be vacated and activities undertaken pursuant to them stopped through a vacatur order—even major pipelines. *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018) (applying *Allied-Signal* analysis to vacate Corps permits for gas pipeline); *Defs. of Wildlife v. U.S. Dept. of the Interior*, 931 F.3d 339, 366 (4th Cir. 2019) (vacating endangered species authorizations for pipeline); *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 2020 WL 3638125, at *12 (D. Mont. 2020) (vacating Corps permit for Keystone XL pipeline despite costs). "The fact that [a] project is currently under construction by no means insulates it from the equity power of a court" in a NEPA case. *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). The same is true for operating projects.

2. A separate injunction was not necessary to give effect to vacatur.

Appellants contend that the district court should not have ordered the pipeline shut down, but instead only should have vacated the easement, "leaving the Corps to determine the remedy for any resulting property encroachment." DAPL Motion, at 22; Corps Motion, at 12-13. Their strategy is transparent. Unless specifically ordered to stop, DAPL will continue operating the pipeline and the Corps will simply "consent," thereby circumventing both NEPA and the Mineral Leasing Act. In essence, appellants argue that vacatur is meaningless in the absence of a separate injunction. That is obviously not the law. *Am.*

Bioscience v. Thompson, 269 F.3d 1077 (D.C. Cir. 2001) ("whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy").

Implicit in the vacatur analysis is a recognition that the activity authorized by challenged governmental action would cease. Indeed, this is the entire point of *Allied-Signal's* "disruptive-consequences" prong, which assesses what happens during cessation of some agency-authorized activity. *Allied-Signal*, 988 F.2d at 151. This Court made this clear in *Semonite*: the "disruptive consequences" of vacatur would stem from stopping construction of the electrical towers, or tearing them down altogether. *Semonite II*, 925 F.3d at 502. The district court understood "disruptive consequences" the same way. *Nat'l Parks Conservation Assoc. v. Semonite*, 422 F. Supp. 3d 92, 101 (D.D.C. 2019). Nowhere did these opinions hint that the project could continue to operate despite vacated permits.

Throughout the history of this litigation, all of the parties and the district court understood that vacatur would mean pipeline operations would have to stop. ER 403; ER 153. Appellants consistently embraced this view, presenting extensive argument and evidence about the alleged harm shutting down the pipeline would cause. Here, however, appellants attempt a radical pivot, claiming vacatur means only that the easement is "deprived of legal consequences" and the question of whether the pipeline can continue to operate should be left to the *Corps*—the very

entity found to have serially violated the law. DAPL Motion, at 22. Appellants never revealed this novel view to the district court—i.e., that the disruptive effect of vacatur would be essentially zero because the Corps would allow DAPL to continue operating without an easement. Had it done so, the arguments and decision would have unfolded differently. Such "sandbagging" is impermissible on appeal. *Puckett v. U.S.*, 556 U.S. 129, 134 (U.S. 2009) (party cannot "remain[] silent about his objection and belatedly rais[e] the error only if the case does not conclude in his favor").

Appellants identify no case, from any jurisdiction, holding that it is necessary to issue a separate injunction to prevent action from going forward under a vacated agency permit. Corps Motion, at 12; *compare Allied-Signal*, 988 F.2d at 151 (agency required to take affirmative action under vacatur without separate injunction). Defendants cite *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), but the case is inapposite. There, the district court held that an agency's action completely deregulating a genetically modified crop without an EIS violated NEPA, and vacated the decision. No court entertained the notion that the agency could completely deregulate the crop without completing the EIS unless the court issued a separate injunction barring this action. Indeed, no one even challenged vacatur. The Supreme Court focused on the district court's additional order enjoining the agency from issuing *any* deregulation orders without preparing a full

EIS, and a nationwide injunction on planting the crop even if the agency issues a geographically limited deregulation regulation. It deemed the injunction overbroad since it foreclosed the possibility of a limited partial deregulation that might not need an EIS, *id*. at 162-63, and plaintiffs would have "ample opportunity to challenge" such a partial deregulation if it harmed them. *Id*. 164. But "partial deregulation" has no analogue here. The easement authorizes DAPL to use federal property for a pipeline: without one, the pipeline cannot lawfully operate. Vacatur removed that authorization, and it cannot be reissued before NEPA has been satisfied. *Monsanto* does not preclude the district court's clarification that DAPL cannot lawfully operate the pipeline without the easement.

It is axiomatic that courts have equitable discretion to shape the contours of a remedy to address the facts of the case and serve the purposes of the underlying statute. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). This Circuit demonstrated this point in *Pub. Employees for Env't. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). There, the Court did not vacate all regulatory approvals, because the purposes of NEPA could be served by requiring the agency to analyze the risks at issue "before Cape Wind may begin construction," i.e., effectively prohibiting construction activity until NEPA compliance was complete. *Id*. at 1084. The

Court did not engage in a separate injunction analysis, but rather shaped the vacatur remedy to ensure the permitted activity would not proceed until the agency complied with NEPA. *See also Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010) (issuing "partial vacatur" that blocked construction, but allowed intervenor to manage stormwater system). Here, the district court shaped the vacatur remedy to give the pipeline time to shut down safely.[3]

In any event, without labeling its remedy an injunction, the district court nonetheless made all of the requisite findings for one.[4] *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (district court need not explicitly make findings as to injunction factors). The court definitively found for the Tribes on the merits. It balanced the impacts of shutting down the pipeline with the impacts of letting it operate, finding that the risks and impacts to the Tribes outweighed the financial impacts of shutdown. ER153-62. And the Court's vacatur order is infused with consideration of the public interest, primarily

[3] DAPL argues that it would take months to empty the pipeline. The Tribes and the district court were willing to amend the vacatur order to accommodate this timeline. ER182. DAPL rejected this opportunity, choosing instead to rush into this Court. ER165.

[4] DAPL raised the argument about the need for a separate injunction for the first time in its motion for stay pending appeal to the district court. Rather than allow the Tribes an opportunity to respond, or for the Court to clarify its decision, the company demanded an immediate decision. Even in its rushed order obliging this request, the district court found that the stay factors—which are the same as the injunction factors—were "essentially subsumed" in its vacatur order. ER165.

the implications of allowing DAPL to continue to operate despite a serious NEPA violation. *Id*. Should this Court deem an injunction stopping the flow of oil necessary, the district court made the necessary findings. Appellants are unlikely to prevail on this argument.

II. THE EQUITABLE FACTORS DO NOT SUPPORT A STAY.

The Corps' claim that the district court failed to "consider" the economic harm of shutdown is unfathomable. Corps Motion, at 18. The court carefully weighed the equities as part of its vacatur analysis on two separate occasions, both times finding the impacts of shutdown to be more modest than claimed. ER153-62. Its findings were not an abuse of discretion.

A. DAPL's Claims of "Devastation" are Significantly Exaggerated.

As it has done at previous stages of this litigation, DAPL seriously exaggerates the impacts of vacatur, favoring alarmist rhetoric over facts. DAPL Motion, at 2-3 (absence of stay will produce "devastating impacts for the country," "thousands" of unemployed, and "serious damage to national security"). During its previous vacatur analysis, the district court noted the company's lack of credibility as to such claims, finding "cause for skepticism" about its "predictions of economic devastation," ER405, and holding that the "disruptive effect" of vacatur was in fact limited. Even so, the court considered DAPL's claims anew,

and found for a second time that they did not weigh against vacatur. ER153-62.[5]

Appellants' core premise is that closing the pipeline will cause thousands of North Dakota oil wells to be "shut in" because there will be no way to ship the oil they produce. DAPL Motion, at 9. The claim is overblown, undercutting every other argument that follows. Oil production in North Dakota has plummeted for reasons having nothing to do with this case. ER155 (7,000 of state's 16,000 wells shut in prior to vacatur order). Bakken crude production has declined by roughly the same amount carried by DAPL. SER400 (production has dropped 500,000 barrels/day). Shutting down DAPL would have no "noticeable" impact on production. SER 401. And because production has fallen so sharply, the claim that producers would need to shift the pipeline's entire volume onto rail also fails. *Id*. ("it is possible that there would be no additional need to transport crude by rail or other means").[6] The claim that rail would increase transportation costs by $5-$10/barrel has also been debunked. SER465-67.

While the parties have disputed how long into the future this would last, for purposes of the short-term horizon affected by this motion, conditions are unlikely

[5] The Corps did not submit any evidence on the disruptive effect of vacatur to the district court.

[6] The two arguments are also mutually exclusive: if pipeline shutdown causes production to collapse, there would be no need to find alternative transportation. Conversely, if all of the production shifts to rail, there would be no drop in production. In reality, neither prediction is true. SER401.

to change. SER402. Moreover, the district court considered evidence that impacts to some companies will mean benefits to others. SER 401-02; ER156. Because the shutdown of the pipeline will cause neither a decline in production nor a noticeable shift to rail, appellants' attempts to show grave harm, including impacts to employment, agriculture, and state taxes, collapses. SER 402. Under the circumstances, impacts of a temporary closure will be "marginal and readily managed." SER403 ("Any impacts that could occur would be so minor as to be lost in the noise of the other factors affecting the market."); *see also* SER 96 (DAPL "shutdown analysis").

While DAPL's revenues will be affected, the district court found that the company knowingly assumed that risk, and gave these impacts less weight. The company aggressively moved this pipeline forward despite unprecedented opposition, and legal and political risks that alternative routes or additional review would be required. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 34-35 (D.D.C. 2016) ("Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has secured a permit to then build across."). It disregarded a formal request from the federal government that it cease construction in the Oahe area. SER24. Construction continued up to the edge of the Missouri River even after the Corps denied the easement and declared that it would perform an EIS that considered

"route alternatives." SER27. As the district court found, the company's unclean hands render its "*cri de coeur* over lost profits and industrial inconvenience… not fully convincing." ER405. By beginning to operate the pipeline "with full knowledge" of the Tribes' formidable legal and technical challenges, DAPL "assumed some risk of economic disruption." *Id*. Its choices undercut the claim that the equities weigh in its favor. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F. 3d 978, 998 (8th Cir. 2011) (economic impacts do not weigh against remedy where entity "repeatedly ignore[ed] administrative and legal challenges")*; Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("state defendants are largely responsible for their own harm").

The district court twice rejected the claim that shipping by rail would cause greater environmental risks than the pipeline. ER161-62; ER409. First, given the significant decline in production, there may be little or no impact on existing crude transportation at all. SER401. Second, the evidence does not support the claim. *Id*. In its recent order, the district court reviewed the federal report cited by the Corps, Corps Motion, at 17, but found no clear difference between the risks posed by pipelines and trains. ER161 ("each mode has its own unique safety risks").

Crude oil pipelines are shut down all the time for any number of "highly foreseeable" planned or unplanned reasons. SER55-56. DAPL's parent companies have repeatedly had to shut down other pipelines due to accidents and

regulatory violations. SER512. Leaving the pipeline shut down while this appeal goes forward will have far more limited impacts than claimed.

B. A Stay Will Harm the Tribes.

Appellants argue that the Tribes will not be harmed by a stay because the pipeline is safe. But the district court repeatedly found, based on both the administrative record and expert opinion, that DAPL's assurances of safety do not carry the day. SER504 (citing 12 spills on DAPL-ETCO mainline in three years). Tribal experts raised "serious doubts" about the Corps' WCD calculation. ER122. The Corps "plainly [did] not succeed" in responding to "serious" concerns about leak detection capacity. ER115. The Corps failed to consider an operator safety record that "did not inspire confidence." ER118. The district court observed "serious gaps in crucial parts of the Corps' analysis" of spill risks and impacts. ER130.

Here, appellants simply recycle the assurances rejected below, asserting "shipping oil by pipeline is safe" despite the district court's extensive findings of risk and potentially catastrophic impacts. Corps Motion, at 19; SER498 ("DAPL simply repeats, or expands upon, the same contested claims that the Tribe has been debunking throughout the process."). The company has one of the worst safety and compliance records in the industry, with a legacy of disasters and indifference to regulation. SER499 ("DAPL is an unusually unsafe pipeline, managed by a

corporate entity with an unusually troubled safety record"); SER500 (Energy Transfer pipelines spilled 2.9 times per month since 2012). Its assurances that a spill at Oahe would be minor is undermined by the Tribes' showing that the methods to reach that conclusion were fatally flawed. ER158 (finding for the second time that "there is no doubt" that allowing the pipeline to operate risks a catastrophic spill). The Corps argues that Tribal experts have conceded DAPL is safer now than previously, but the Tribes have refuted that argument. SER507-08. And while the Corps argues that DAPL itself has not been subject to enforcement, the evidence below revealed that its parent company has been the subject of dozens of enforcement actions and millions of dollars in fines. SER509.

The district court had ample basis to find continued operations should be suspended. SER532-36 (pipeline safety expert) (pipeline presents "unacceptable risk" and "should not be operating" due to the documented lack of surge relief systems to protect the Oahe crossing); SER543 (Tribal emergency management director) (pipeline should be shut down due to risks to Tribal first responders); SER526 (former federal safety regulator) ("it is my expert opinion that continued operation of DAPL, while an EIS is being prepared, presents untenable risks to the Standing Rock Sioux Tribe and others who rely on Lake Oahe"). The district court repeatedly credited these experts. *E.g.*, ER118. Its findings are not an abuse of discretion.

Moreover, the operation of the pipeline, on unceded lands yards upstream of the Standing Rock Sioux Reservation, compounds historical trauma and subjects the Tribes and their members to the stress of living under an existential catastrophe. SER548 ("The pipeline's ongoing presence, and the looming threat of seepage, leak, and rupture that necessarily accompanies it, inflicts ceaseless anxiety upon us that will not end until the pipeline is removed."); SER215 ("the single biggest element that assists native people in healing from government-inflicted trauma is a sense of safety and well-being" that is unavailable while DAPL remains in service). The pipeline hangs like a sword of Damocles over Tribal communities who rely on Lake Oahe for economic, spiritual, subsistence, and other purposes. SER547 ("we are in constant fear" of a spill). Allowing DAPL to continue operating despite NEPA violations would continue a generations-long pattern of balancing the impacts of resource exploitation on the backs of Native Americans. The balancing of the various impacts of vacatur is uniquely within the province of a district court. *Semonite II*, 925 F.3d at 502. This Court should not disturb that finding.

III. THE PUBLIC INTEREST DISFAVORS A STAY.

Allowing an unlawfully permitted pipeline to continue operating is inconsistent with the public interest. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily

becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 261 (D.D.C. 2003) ("Public interest weighs in favor of protecting ecosystems over avoiding economic harms.").

"The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). This process is designed to ensure that agencies "make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). The district court weighed the public interest, finding that allowing the pipeline to continue operating despite a violation of NEPA would "subvert the structure of NEPA." ER157. It emphasized that agencies must take a "hard look" at their decisions *before* taking action. *Id.*, *citing Oglala Sioux*, 896 F.3d at 532; *Sierra Club v. Fed. Elec. Reg. Comm'n*, 827 F.3d 36, 45 (D.C. Cir. 2016) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.") (internal quotations omitted). Allowing DAPL to continue to operate would mean private

parties could "build first and consider environmental consequences later," in contravention to Congress's goals. ER158. The court found—for the second time—that allowing the pipeline to continue operating would create undesirable incentives for future agency actions by encouraging others to commit to projects before compliance with NEPA. *Id*.

The public interest further weighs against a stay because it would demonstrate, yet again, that when faced with a conflict between private profit and Tribal rights, the interests of Tribes must give way. As the former chairman of the Standing Rock Sioux Tribe explained, "[i]n every era, when the United States responds to demands from those seeking to advance particular economic interests—for gold in the Black Hills, for land for non-Indian homesteaders on our Reservation, or for navigation or hydropower—it has always been the Tribe that has borne the heavy burdens, through the loss of our lands and harm to our way of life." SER65. Appellants' motions seek to continue this pattern. This Court should decline the invitation.

CONCLUSION

For the foregoing reasons, the motion for stay should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 7,183 words and complies with the type-volume limitation and typeface requirements of Federal Rule of Appellate Procedure 27(d)(2) and Federal Rule of Appellate Procedure 32(a) because it contains less than 7,200 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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