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

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE, ROBERT FLYING HAWK, CHAIRMAN OF THE YANKTON TRIBE BUSINESS AND CLAIMS COMMITTEE; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

and

CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee,

and

DAKOTA ACCESS LLC,

Intervenor for Defendant-Appellant.

No. 20-5197

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# ***AMICI CURIAE*** **BRIEF OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN LINE PIPE PRODUCERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF APPELLANTS**

## CORPORATE DISCLOSURE STATEMENT

The *Amici Curiae* state that they have no parent corporations and no publicly held company owns 10% or more of any amicus's stock.

/s/ David H. Coburn
David H. Coburn

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## GLOSSARY

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| AFPM | American Fuel & Petrochemical Manufacturers |
| ALPPA | American Line Pipe Producers Association |
| API | American Petroleum Institute |
| AOPL | Association of Oil Pipe Lines |
| Chamber | Chamber of Commerce of the United States of America |
| Corps | U.S. Army Corps of Engineers |
| Dakota Access | Dakota Access, LLC |
| DAPL | Dakota Access Pipe Line |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EPA | U.S. Environmental Protection Agency |
| NACS | National Association of Convenience Stores |
| NEPA | National Environmental Policy Act |
| PHMSA | Pipeline and Hazardous Materials Safety Administration |

## INTRODUCTION

*Amici Curiae* the American Fuel & Petrochemical Manufacturers, American Line Pipe Producers Association, American Petroleum Institute, Association of Oil Pipe Lines, Chamber of Commerce of the United States of America, and the National Association of Convenience Stores (together, the "Amici"), representing the interests of pipelines, petroleum product manufacturers/refiners, retailers, and other companies participating in all sectors of the economy, submit this Amicus Brief in support of Appellants the U.S. Army Corps of Engineers ("Corps") and Dakota Access, LLC ("Dakota Access").

Amici agree with Appellants that the District Court erred in its March 25, 2020 opinion ("EIS Opinion") by requiring that an Environmental Impact Statement ("EIS") be prepared to further analyze spill-related issues pertaining to the operation of the Dakota Access Pipeline ("DAPL"). Appellants correctly argue that the DAPL spill risk is so remote that no EIS is warranted and that virtually all of the factors to be balanced in the relevant NEPA regulation weigh against preparation of an EIS. Amici write separately to highlight that the pipeline questions that the District Court found to be "highly controversial" are uncontroversially answered and governed by the pipeline safety and spill regulations administered by the Pipeline and Hazardous Materials Safety

Administration ("PHMSA"), which have applied to DAPL's safe, spill-free operations for the past several years.

Even assuming that an EIS were required, Amici agree with Appellants that the District Court's July 6, 2020 opinion ("Vacatur Opinion") vacating the DAPL easement should be reversed. The District Court misapplied the two-factor *Allied-Signal* test. First, the "seriousness" of the Corps' NEPA violation must be considered in light of the fact that it is reasonable to assume the Corps will, following the EIS, decide to reissue the DAPL easement. PHMSA's enforcement of its safety standards and emergency response requirements makes it highly probable that the Corps' EIS will support a conclusion that DAPL will not result in significant impacts, or even if significant impacts will result, they will be fully mitigated through Dakota Access's operation of DAPL in conformity with federal regulation. *See* A661-665.

Second, the District Court failed to sufficiently consider the severe and far-reaching consequences of disrupting service on DAPL, which clearly outweigh the "seriousness" of any NEPA violation by the Corps. Ceasing DAPL operations for any period of time, let alone the thirteen months or more that it may take the Corps to prepare an EIS and complete further permitting decisions, would lead to extremely disruptive and adverse consequences to innocent third parties that are

contrary to the public and national interest.[1] Substantial financial loss and uncertainty would result, with a primary impact being borne by the employees of the many energy and other companies who could very well lose their jobs. No alternative pipelines or transportation modes are designed to provide the very specific transportation function that DAPL is designed to provide or that can do so at comparable cost or efficiency. The nation relies on the critical and essential service provided by DAPL, including a network of companies comprised of producers, other pipeline companies, shippers, downstream refiners, manufacturers, and retailers.

Nor will Plaintiffs/Appellees suffer any harm while DAPL remains operational during the EIS process. PHMSA's pipeline safety regulations are designed to ensure that a release will not occur, and in the highly unlikely event that a release does occur, federal laws ensure that the spill will be fully remediated.

Thus, the continued operation of DAPL is in both the regional and national interest, and paramount to the businesses and workers whose jobs directly and indirectly rely on the pipeline's operations. NEPA has never before been used to shut down an operating pipeline and, even if there was a NEPA deficiency here (which Amici dispute), the existing regulatory scheme provides a sound basis to

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[1] *See* Memorandum of January 24, 2017, Construction of the Dakota Access Pipeline, 82 Fed. Reg. 11,129 (Feb. 17, 2017).

avoid that extraordinary result while the deficiency is being resolved. The District Court's Decisions should be reversed.

## STATEMENT OF COUNSEL

Pursuant to Rule 29(d), amici certify that a separate brief is necessary to provide the broad and diverse perspective of these business and industry amici. Amici have filed briefs in support of Dakota Access and the Federal Government in this appeal, and also before the District Court. Amici further state that no counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

## INTEREST OF THE AMICI

Amici are trade associations whose members have a significant interest in the reliable, safe, and continued transportation of North American-produced crude oil, including Bakken-produced crude oil transported by DAPL. Collectively, Amici represent entities that account for, among other things, the vast majority of petroleum products that are transported, manufactured, and sold in the United States, including crude oil and other liquid hydrocarbons that are transported by pipelines and other modes in interstate commerce.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing most U.S. refining and petrochemical manufacturing

capacity. AFPM's member refineries and petrochemical facilities receive crude oil and other liquids products via the midstream sector, which includes pipelines, rail roads, barges, tankers, and trucks. AFPM's member companies have an interest in ensuring that they consistently and reliably receive the North American crude oil volumes that are necessary to meet U.S. energy consumption demand.

The American Line Pipe Producers Association ("ALPPA") is a domestic coalition of large diameter welded pipe producers, specifically, American Cast Iron Pipe Company, Berg Pipe Panama City Corp. / Berg Pipe Mobile Corp., Dura-Bond Industries, JSW USA, Stupp Corporation, and Welspun Global Trade LLC. Together, its members account for the vast majority of large diameter line pipe production in the United States. Domestic oil pipelines are a significant consumer of large diameter pipe and ALPPA members produced the majority of the pipe used to construct the Dakota Access Pipeline. They therefore have a strong interest in this case and in ensuring that future pipeline construction is not inappropriately disincentivized by legal rulings that create unnecessary uncertainty over pipeline projects and upset the reasonable expectation and reliance interests of the business community that invests in construction of new pipelines.

The American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API's more than 600 corporate members, from the largest major oil company to the smallest of

independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry.

The Association of Oil Pipe Lines ("AOPL") is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by PHMSA.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Founded in 1961, the National Association of Convenience Stores ("NACS") is a non-profit trade association representing more than 1,900 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. In 2019, the convenience and fuel retailing industry employed approximately 2.46 million workers and generated $647.8 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Of those sales, approximately $395.9 billion came from fuel sales alone.

## ARGUMENT

### I. An EIS is Not Required to Further Study Issues Already Addressed by Federal Regulatory Requirements

The District Court wrongly required the Corps to prepare an EIS to address issues that do not warrant such review. To be sure, "highly controversial" issues may sometimes require an EIS and the District Court concluded that the Tribal Plaintiffs had raised "highly controversial" issues about pipeline safety – i.e., the sensitivity of the pipeline's leak detection systems; the extent to which the spill history of DAPL's operator should be considered in assessing leak detection systems; DAPL's ability to respond to spills in winter conditions; and the appropriate methodology for calculating worst-case discharges from the pipeline. These issues do not meet NEPA's "highly controversial" test.

The Federal Defendants and DAPL appropriately point out that the

purportedly highly controversial issues amount to impermissible “flyspecking” of the Corps’ NEPA review, particularly given the Corps’ unchallenged determination that the risk of any DAPL spill was extremely low - 1 in about 200,000 years. Dakota Access Br., ER941 ¶ 21; *see also* ECF 551-1, at 22. The Government and Dakota Access accurately argue that the District Court misread *Semonite* to require, contrary to settled law, that the Corps successfully resolve the concerns raised by the plaintiffs. Federal Government Br., 14-20; Dakota Access Br., 24-28. And they show that criticisms only rise to the level of high controversy when the record casts “substantial doubt on the adequacy of the agency’s methodology and data.” *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1275 (10th Cir. 2014). No such doubt exists here in light of PHMSA regulation of DAPL.[2]

[2] In addition, even if the District Court was correct (and it was not) that the spill-related issues raised by commenters met the “highly controversial” test, the existence of such “[c]ontroversy is only one of ten factors the Corps must consider when deciding whether to prepare an EIS” as opposed to an EA. *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1181 (10th Cir. 2012) (citing 40 C.F.R. § 1508.27(b)(4)) (emphasis added). Accordingly, even if there were controversy here, “controversy is not decisive but is merely to be weighed in deciding what documents to prepare.” *Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008). Here, the District Court disregarded the fact that the Corps found that each of the other nine factors defined in the applicable NEPA regulations, when viewed cumulatively, weighed against an EIS. *See* A620; D.E. 159, at 16-19 (summarizing EA’s discussion of each CEQ factor). That finding “is entitled to deference,” but was essentially ignored by the District Court. *TOMAC v. Norton*, No. CIV.A.01-0398 JR, 2005 WL 2375171, at *1 (D.D.C. Mar. 24,

Amici write separately to highlight that an EIS would serve no purpose where each of the allegedly controversial matters are governed by a regulatory scheme designed to address the very concerns at hand, such that detailed analysis in an EIS would contribute little or no added value to the Corps' decision-making or the safety requirements at issue. As discussed in more detail below, the Pipeline Safety Act, 49 U.S.C. §§ 60101, *et seq*., and Clean Water Act, along with PHMSA's regulations implementing these statutes at 49 C.F.R. Parts 194-195, govern the very same leak detection, operator history, spill recovery and worst-case discharge deficiencies identified by the District Court. An EIS is particularly unwarranted in the face of these detailed federal requirements that already minimize the risks underlying the District Court's concerns. In short, an EIS would serve no useful purpose for the Corps or the public in the highly regulated setting in which DAPL already operates.[3]

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2005), *aff'd sub nom. TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (citation omitted).

[3] "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Here, DAPL has been safely operating for years; its impacts were not overlooked or underestimated, and are not different from what the Corps assessed in its EA. Much like this case, *Winter* involved the review of a decision of the Navy to allow training exercises without conducting an EIS. Rejecting injunctive relief, the court held that *Winter* was "not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment." *Winter*, 555

### A. Leak Detection Systems are Fully Regulated by PHMSA

PHMSA regulations establish requirements for leak detection on pipelines located in a high-consequence area, including sensitive water resources. 49 C.F.R. § 195.452(i)(3) (requiring that "[a]n operator must have a means to detect leaks on its pipeline system."). The Corps appropriately deferred to those requirements and PHMSA's and DAPL's expertise to establish leak detection requirements for the pipeline. But the District Court "substitute[d] [Plaintiffs'] own analysis" of DAPL's leak detection system (*Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 737 (D.C. Cir. 2000)), and ignored the Corps' sound judgment and PHMSA's role as the expert agency responsible for enforcing leak detection system requirements necessary for "protecting the environment." 49 U.S.C. § 60102(b); *see also* 49 C.F.R. § 195.452(i)(3). The record before the District Court indeed already confirms that DAPL's PHMSA-compliant leak detection system can detect a "pinhole" leak, and further study of that system through an EIS is not needed to confirm that DAPL complies with PHMSA's requirements. ER957 ¶ 9.

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U.S. at 23. Emphasizing the fact that "NEPA itself does not mandate particular results," the court noted that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures" but "in contrast, the plaintiffs [were] seeking to enjoin—or substantially restrict—training exercises that have been taking place [ ] for the last 40 years." *Id.*

### B. PHMSA Regulations Account for the Operator's Safety Record

PHMSA regulations expressly require that a pipeline operator's leak detection system must account for that operator's spill record. Specifically, 49 C.F.R. § 195.452(i)(3) requires an operator to have a leak detection system and provides that "[a]n operator's evaluation [of the capability of its leak detection system] must, at least, consider . . . leak history," among other factors. Further, the Corps specifically considered PHMSA's historical data on oil spills, which accounts for the safety record of DAPL's operator. A1831-1836. The District Court found convincing the fact that Plaintiff Tribes identified spills on other pipelines operated by DAPL's operator; however, spills on those other pipelines have no bearing on the integrity of DAPL or the effectiveness of its existing leak detection system. Additional study through an EIS is also not needed because, as explained in the section above, the DAPL leak detection system complies with PHMSA's requirements and the study of historical spills will not cause that system to become any more effective.

### C. PHMSA Already Requires Response Plans to Account for Winter Conditions

The District Court focused much of its attention on what it perceived to be the Corps' inadequate attention to spill response. But the Court overlooked that, in the unlikely event that a release does occur, PHMSA requires DAPL to have an approved emergency response plan in place "to ensure the removal, to the

maximum extent practicable, of the largest foreseeable discharge in adverse weather conditions, and to mitigate or prevent a substantial threat of the largest foreseeable discharge in *adverse weather conditions*." 33 U.S.C. § 1321(j)(5)(D)(iii)-(iv) (emphasis added).

A PHMSA-approved "response plan is the comprehensive document that details the resources and strategies for the personnel implementing the response plans under tight time constraints" as a result of a discharge at any point on an interstate pipeline. *NWF v. Secretary of the Department of Transportation, et al.*, 374 F. Supp. 3d 634 (E.D. Mich. 2019). PHMSA's regulations require that an operator's response plan identify adequate resources to address a "worst case discharge," 49 C.F.R. § 194.107(a), which is "the largest foreseeable discharge of oil, including a discharge from fire or explosion, in adverse weather conditions." 49 C.F.R. § 194.5. Under PHMSA's regulations, "adverse weather" includes "ice conditions, temperature ranges, weather-related visibility, significant wave height." *Id.*; *see also NWF*, 374 F. Supp. 3d at 650 n.12 (the PHMSA worst-case discharge "calculation 'yields a conservative estimate of the worst-case discharge volume *regardless of weather conditions*'") (emphasis added).

In approving Dakota Access's response plan, PHMSA has determined that Dakota Access has adequate resources available to effectively and quickly respond to and mitigate any release from DAPL in winter weather conditions, including

snow and ice. "PHMSA is in the best position to evaluate the sufficiency of the Response Plans and the Court must rely on its review in this regard." *NWF*, 374 F. Supp. 3d at 650. Accordingly, the Corps need only look as far as Dakota Access's extensive response plan to ensure that adequate resources are already in place, as confirmed by PHMSA's approval of that plan pursuant to the criteria enumerated under the Clean Water Act at 33 U.S.C. § 1321(j)(5)(D). Further environmental review will not provide any additional assurances or understanding of Dakota Access's response capabilities. *See also Defs. of Wildlife v. Bureau of Ocean Energy Management*, 684 F.3d 1242, 1250 (11th Cir. 2012) ("This project concerns [drilling operations], not an expected oil spill from those operations," which need not be considered under NEPA).

### D. PHMSA Regulations Establish a Methodology That Governs Calculation of Worst-Case Discharge

PHMSA's regulations establish the precise methodology for calculating the worst-case discharge for a pipeline, which is based on the largest volume that could be released between valve-to-valve segments. *See* 49 C.F.R. § 194.105.[4] The PHMSA-required spill model methodology that was used by the Corps in its

[4] Under PHMSA's regulation, an operator calculates the largest possible spill volume by taking the pipeline's maximum release time plus the maximum shutdown time and multiplying this by the maximum flow rate, plus the largest line drainage volume after shutdown of the line sections in question. 49 C.F.R. § 194.105(b)(1).

EA is entitled to "an extreme degree of deference" because it "involve[s] complex judgments about sampling methodology and data analysis that are within the agency's technical expertise." *Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 956 (D.C. Cir. 2007).

In the face of PHMSA's well-established, controlling method of determining the potential worst-case discharge, further EIS study of the sort called for by the District Court would provide no more definitive calculation to inform the Corps' decision. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994) (a model need not account for every set of facts and scenarios because "[t]o require as much would be to defeat the purpose of using a model.").

In sum, "'[t]he NEPA process involves an almost endless series of judgment calls,' and 'the line-drawing decisions necessitated by the NEPA process are vested in the agencies, *not the courts*.'" *Wildearth Guardians v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (quoting *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008)) (emphasis added). The Corps correctly drew that line, recognizing that DAPL impacts are fully understood and that further study is unnecessary, particularly in light of PHMSA regulations.

Like the Plaintiffs, the District Court disagreed with the Corps' sound judgment, but failed to identify any material flaw with the Corps' conclusion that no factors under the NEPA regulations at Section 1508.27 warrant an EIS. *See,*

*e.g.*, *Conservation Cong. v. U.S. Forest Serv.*, 235 F. Supp. 3d 1189, 1203 (E.D. Cal. 2017), *aff'd*, 775 F. App'x 298 (9th Cir. 2019) (disagreement with the agency's chosen path "does not trigger the 'highly controversial' factor" warranting an EIS). Requiring an EIS will not result in a more informed decision because the issues which the District Court found warrant further review are not controversial given that the Corps relied on PHMSA safety standards that have long and consistently been applied to ensure the safe operation of pipelines nationwide. The District Court's EIS Decision should accordingly be reversed.

## II. Even if an EIS were Required, the DAPL Easement Should Not be Vacated

In vacating the Corps' easement for DAPL pending EIS preparation, the District Court misapplied the two-factor test established by *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F. 2d 146, 150-51 (D.C. Cir. 1993). As explained in the sections that follow, consideration of *Allied-Signal* factors dictates that the Corps' easement for DAPL remain intact throughout any EIS process that the Corps may be required to undertake. *See, e.g.*, *Ocean Advocates v. U.S. Corp of Engineers*, No. C00-1971L, 2005 WL 2035053, at *2 (W.D. Wash. Aug. 22, 2005) (vacatur of the Corps' easement while an EIS is prepared "is simply not the law.").

### A. The Deficiencies Identified by the District Court Do Not Rise to a Level of Seriousness to Support Vacatur

The District Court erred in applying *Allied-Signal* by focusing on what it perceived as the "serious" need for the Corps to prepare an EIS under NEPA. But *Allied-Signal* teaches that the District Court's task is to determine whether there is a significant possibility that the Corps would "reach the same result" on remand and reaffirm its substantive decision to reissue the DAPL easement when fully informed by an EIS. *Black Oak Energy, LLC v. F.E.R.C.*, 725 F.3d 230, 244 (D.C. Cir. 2013) (declining to vacate agency action when "plausible that [agency] can redress its failure of explanation on remand while reaching the same result").

In its Vacatur Decision, the District Court incorrectly concluded that vacatur is necessary because the Corps had previously failed to address the perceived shortcomings of the EA. But courts routinely remand without vacatur when it is reasonable to assume that the agency's ultimate decision (here granting the easement) would be re-affirmed at the conclusion of an EIS. *See, e.g.*, *Public Employees of Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1083-84 (D.C. Cir. 2016) (declining to vacate regulatory approvals or a project's lease despite vacating an EIS); *Ocean Advocates*, 2005 WL 2035053, at *2 (remanding to the Corps along with instructions to prepare an EIS to evaluate whether to "revoke the permit or place conditions on the operation of the [project] if necessary to ensure compliance with the law"); *Backcountry Against Dumps v. U.S. Dep't of*

*Energy*, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487 at *6 (S.D. Cal. Aug. 29, 2017) (declining to vacate the permit after finding the agency had prepared a deficient EIS because the errors were capable of being corrected).

Accordingly, the question before this Court is really whether the Corps can "reach[ ] the same result" after preparing that EIS. *Black Oak Energy, LLC*, 725 F.3d at 244; *see also Williston Basin Interstate Pipeline Co. v. F.E.R.C.*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an adequate explanation for its actions"). The record here squarely demonstrates that DAPL is a safely-operated pipeline that has not resulted in any release into Lake Oahe or nearby resources. Nor do any facts exist in the record to evidence that a release may occur while an EIS is prepared; rather, the record shows that the likelihood of a large spill into Lake Oahe is roughly a 1-in-200,000-year event. Together with the fact that (as explained above) DAPL spill risk is significantly reduced by PHMSA regulation, "it is at least possible" that the Corps' EIS will justify its original decision to issue the DAPL easement. *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002). That possibility weighs heavily against vacatur under the first *Allied-Signal* factor. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur.").

### B. The Disruptive Consequences That Would Result from the Termination of DAPL Operations Warrant Overturning the District Court's Vacatur Decision

The District Court improperly ignored the disruptive consequences that would result from a DAPL shutdown, which clearly outweigh the "seriousness" of any NEPA violation by the Corps. The District Court's Vacatur Decision disregards the decisions by this Court which make clear that, where vacatur would cause more harm than maintaining the status quo during the remand period, agency action should *not* be vacated. *See Ctr. for Biologic Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1987) (per curiam); *accord Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) (per curiam). The District Court also ignored decisions by other courts that make clear that agency action should not be vacated where doing so prevents the operation of a much-needed energy resource, like DAPL. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (declining to vacate where "vacatur would pave the road to legal challenges to . . . construction that could well delay a much needed power plant") (applying *Allied-Signal*).

**i. Economic Harms Resulting from a DAPL Closure Would Be Extensive and Far-Reaching, Heavily Weighing Against Vacatur**

Vacating the Corps' approvals and ordering DAPL operations to cease would have serious adverse economic impacts throughout the oil industry, hitting local and regional economies harshly due to the unavailability of feasible transportation alternatives in the Bakken region and "resulting in a corresponding loss of jobs." *See* ICF Economic Impacts of a Dakota Access Pipeline Shutdown, at 2 (Aug. 14, 2020) ("ICF Report").[5] These impacts to third parties far "outstrip the consequences" that may result from ensuring that DAPL operations continue during the remand process. *North Coast Rivers Alliance v. United States Department of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *11 (E.D. Cal. Dec. 16, 2016) (granting the federal defendants' motion for voluntary remand without vacatur of the NEPA documents). This is particularly true where pipeline systems, like DAPL, are "the safest means to move these products,"[6] enabling the safe delivery of billions of tons of energy products each year.[7]

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[5] *Available at* https://www.api.org/news-policy-and-issues/energy-infrastructure/economic-impacts-of-a-dakota-access-pipeline-shutdown.
[6] *See* PHMSA FAQs, *available at* https://www.phmsa.dot.gov/faqs/general-pipeline-faqs.
[7] *See* https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-hazardous-liquid-or-carbon-dioxide-systems.

Specifically, DAPL plays an integral role in the regional economy, transporting over a third of all oil produced in the Bakken (A735-734 ¶¶ 5-7), amounting to 4.5% of all crude produced in the United States (ER1315-1316 ¶ 6), some of which is refined into jet fuel for the Department of Defense. "The startup of DAPL in 2017 was a major boost to Bakken producers, providing an efficient and low-cost transportation route to major refining centers in the Midwest and Gulf Coast regions." ICF Report, at 3. "With DAPL in place, Bakken-Williston production grew rapidly, rising from about 1.07 million [barrels per day ("b/d")] in the first quarter of 2017 to 1.51 million b/d by first quarter of 2020." *Id*. DAPL caused this abrupt growth, reliably and safely transporting substantial volumes to sought-after refinery markets that are willing to pay for higher-priced Bakken crude. A736-737 ¶ 10.

"In second quarter of 2020, COVID-19 lockdowns and a Saudi-Russian price war led to a collapse in world oil prices, leading to the short-term shut-in of a significant portion of Bakken area oil production and a sharp reduction in drilling activity." ICF Report, at 3. World oil prices have recovered from the second quarter, with prices averaging "more than $40 per barrel in recent months, and Bakken producers have already begun to restore production shut-in earlier in the year." *Id*. A DAPL shutdown while an EIS is being prepared, however, "puts this recovery at risk." *Id*.

DAPL was the first (and indeed remains the only) pipeline to provide an economic conduit to transport higher-priced Bakken crude directly to refinery markets in Illinois and the Gulf Coast that require and prefer it for production of finished products. A736-737 ¶ 10. DAPL's operation remains even more critical for Bakken producers in the current, recovering economic climate because it provides the most cost-effective transport mode out of the Bakken to ensure the feasibility of uninterrupted North Dakota production in the face of lower crude prices. A736-737 ¶¶ 10-11. If DAPL were closed, the use of rail or more indirect pipelines could cause the transportation of Bakken crude to become uneconomical. This assumes, however, that there is even excess transport capacity out of the Bakken to displace the volumes carried by DAPL, which there is not. *See* ICF Report, at 6-7 ("total effective capacity on non-DAPL pipelines out of the Bakken [is] only 500,000 b/d, well below nameplate capacity of 743,000 b/d" on other pipelines that serve the Bakken region).

Accordingly, a DAPL closure would also result in the closure of operating production wells in the Bakken region, resulting in lost revenue and jobs. In terms of lost production revenue, it is expected that a DAPL shutdown would "result in lower revenues for Bakken producers of an estimated $9.5 billion over the [next] 28-month[s]." *Id*. at 2. In terms of jobs, if DAPL were shutdown, it is expected that approximately 14.3 operating oil rigs will also shut, resulting "in an average

loss of 3,000 direct upstream jobs." *Id.* "Job losses expand to 4,900 when including indirect job losses in sectors related to oil and gas production and 7,400 when counting all direct, indirect and induced job losses." *Id.*; *see also, e.g.*, A674 ¶ 27 (Hess alone would be required to furlough or layoff some of its 1,500 person workforce). There is also no certainty that such jobs would return – closed (i.e., shut-in) wells may not ever produce at the same level if reopened and producers may choose to never reopen the wells at all for other financial reasons, leaving existing employees stranded indefinitely. A738 ¶ 14.

Further, if DAPL were shut down, "approximately 115 million barrels of crude oil are not produced over the [next] 28-month[s]." ICF Report, at 2. This would severely impact the refineries DAPL services and disrupt the distribution of product to end-users. A738-739 ¶ 15. DAPL connects to other pipelines that serve refineries located in the Midwest and the Gulf Coast, where 80% of the U.S. refining capacity is located. These refineries depend on the pipeline for the reliable shipment of crude oil to produce gasoline, diesel, and other products for consumers and to further U.S. energy security. The refineries that receive DAPL-transported crude are configured to refine the crude's unique characteristics. A738-739 ¶ 15. Given lower crude production, substitute crude may not be immediately available to these refineries and, even if available, may not be economical, resulting in refining production cuts. Accordingly, a DAPL closure

will irreparably devastate the competitiveness of numerous refineries that rely on its crude, impairing their ability to fully recover in this economic climate and putting them at risk of possible closure and concomitant job loss. For consumers, less refined product will translate into higher prices for gasoline at the pump.[8]

Further, Dakota Access is not the only pipeline company that would be adversely impacted by a DAPL shutdown. A739 ¶ 16. Pipeline companies have constructed and developed gathering lines that collect Bakken crude from production sites and feed that crude directly into the DAPL pipeline. *Id*. To the extent that DAPL were shutdown, the existing pipeline infrastructure operated by these companies would have no utility – i.e., they would transport oil to a dead-end where DAPL previously operated to transport their volumes onward to refinery destinations. *See id*. Some existing gathering lines may not be able to be reconfigured at all, thereby causing their shutdown as a result of any DAPL closure. *Id*. Their shutdown would consequently lead to job losses in a time where our country's unemployment levels are already staggering. *Id*.

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[8] There are 142 billion gallons of gasoline sold in the United States each year. *See* https://www.eia.gov/energyexplained/gasoline/use-of-gasoline.php. Given those figures, a price increase of 1 cent per gallon of gasoline across the country would cost American consumers $3,890,410.96 per day. Further, according to EIA, the transportation sector used 47.2 billion gallons of diesel in 2019. So, that is 129,315,068 gallons per day and a 1 cent increase in its price would cost $1,293,151 per day. *See* https://www.eia.gov/energyexplained/diesel-fuel/.

There is also no doubt that DAPL operations benefit local and regional economies up and down the supply chain. A738 ¶ 9. Over the next 28-months, it is estimated that a "DAPL [s]hutdown would result in total production tax losses of approximately $852 million and total income tax loses on oil and gas companies of $69 million in North Dakota and Montana." ICF Report, at 17. In all, it is expected that reduced taxes resulting from a DAPL closure would amount to $921 million over the next 28 months. *Id*. at 2. This tax revenue would be irreparably lost at this worst possible time of economic contraction, particularly in light of the continuing impacts of COVID-19. Without question, a DAPL closure would have a domino effect, lessening revenue and annual sales, thereby leading to "higher unemployment in these states," and less money for schools, etc. A736 ¶ 9.

These certain, extensive, and irreparable impacts at a local, regional, and industry-wide level outweigh any "seriousness" of any NEPA deficiencies, and warrant this Court reversing the District Court's Vacatur Decision. *Natl Parks Conservation Assn v. Semonite*, 422 F. Supp. 3d 92, 100 (D.D.C. Nov. 8, 2019) (declining to vacate a Corps permit while agency prepared EIS to avoid "serious, disruptive consequences").

**ii. Plaintiffs Will Not Be Harmed From Continued DAPL Operation While any EIS is Being Prepared**

Plaintiffs, by contrast, will not be harmed if this Court chooses to not vacate the Corps' easement for DAPL. The record is abundantly clear that no

environmental harm has resulted to the Plaintiffs' resources while DAPL has been in operation over the last three years, and no harm is likely while operations continue. This is because, as explained above, PHMSA safety standards ensure that DAPL continues to safely operate while the Corps prepares an EIS. Such safety standards are precisely designed to provide "adequate protection against risks to life and property posed by pipeline transportation." 49 U.S.C. § 60102(a)(1). In exercising this authority, PHMSA is intimately and continually involved in monitoring and assessing DAPL's safety. If PHMSA believes that there is any risk of release that could harm Plaintiffs, the Agency will take action pursuant to its extensive injunctive authority under the Pipeline Safety Act.[9] Aside from Dakota Access's compliance with PHMSA requirements, DAPL's compliance with easement conditions imposed by the Corps (A661-665) and its construction also "eliminate[s] any foreseeable risk of oil reaching . . . Lake Oahe" because the pipeline was installed via horizontal directional drilling more than 90 feet below the lakebed. ER663 ¶ 8; Dakota Access Br., 3.

Further, if a release occurs, the Plaintiffs' resources, if harmed, will be remediated and federal law ensures that they will be compensated for any resulting harms or damages. The U.S. Environmental Protection Agency, pursuant to its

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[9] PHMSA retains extensive authority under the PSA to issue corrective action orders (*see* 49 C.F.R. § 190.233), including emergency orders to respond to an unsafe pipeline condition that poses an "imminent hazard." *Id*. at § 190.236.

authority under the Clean Water Act, 33 U.S.C. § 1321, can issue an administrative order to require Dakota Access to fully clean-up and remediate any release, ensuring the area is returned to pre-spill conditions. Also, the Oil Spill Liability Trust Fund has been established to ensure that funds are immediately available to reimburse Plaintiffs for costs and damages, including natural resource damages, resulting from a release, thereby ensuring that no irreparable injury results. 33 C.F.R. Part 136.

Nor will Plaintiffs suffer any procedural harm under NEPA while the Corps prepares any required EIS – the Corps has already confirmed that it will conduct an impartial review regardless of whether DAPL remains operational. *See* D.E. 507, at 10. In fact, the continued impacts from DAPL's operation, which have been occurring over the last three years, will only help to inform any Corps' EIS, should one be required. Thus, because extensive irreparable harm will result to the public, state and local governments, and the energy industry resulting from any DAPL closure, and no harm will result to Plaintiffs from DAPL's continued operations, this Court should reverse the District Court's vacatur of the Corps' easement for DAPL even if it holds that an EIS is required.

## CONCLUSION

For the foregoing reasons this Court should reverse the District Court's EIS and Vacatur Decisions.

RESPECTFULLY SUBMITTED this 2nd day of September 2020.

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the brief contains 6,155 words; and

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Dated: September 2, 2020

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**CERTIFICATE OF SERVICE**

I, David H. Coburn, hereby certify that on September 2, 2020, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

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