No. 20-5197

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 Sioux Tribe Business and Claims Committee; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVEN VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee,

DAKOTA ACCESS, LLC,

Intervenor for Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:16-cv-1534

PETITION FOR REHEARING EN BANC OF DAKOTA ACCESS, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

GLOSSARY vi

RULE 35(b) STATEMENT AND INTRODUCTION 1

BACKGROUND 3

REASONS FOR GRANTING REHEARING EN BANC 7

I. The Panel's Heightened Standard Of Review For NEPA Decisions Conflicts With Decisions By The Supreme Court And Other Circuits 7

II. The Panel's *Per Se* Rule That Procedural Errors Compel Vacatur Conflicts With Decisions From Other Circuits 13

CONCLUSION 17

ADDENDUM:

Panel Decision (Jan. 26, 2021) A.1

Statutory and Regulatory Provisions A.37

Certificate of Parties and *Amici* A.47

Rule 26.1 Corporate Disclosure Statement A.50

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Signal, Inc. v. NRC,
988 F.2d 146 (D.C. Cir. 1993) 3, 13

Am. Bankers Ass'n v. NCUA,
934 F.3d 649 (D.C. Cir. 2019) 14

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,
781 F.3d 1271 (11th Cir. 2015) 14, 15

Cent. & S.W. Servs., Inc. v. EPA,
220 F.3d 683 (5th Cir. 2000) 15

Cent. Maine Power Co. v. FERC,
252 F.3d 34 (1st Cir. 2001) 15

City of Oberlin v. FERC,
937 F.3d 599 (D.C. Cir. 2019) 17

Coliseum Square Ass'n, Inc. v. Jackson,
465 F.3d 215 (5th Cir. 2006) 9

DOT v. Pub. Citizen,
541 U.S. 752 (2004) 1, 2, 8, 9, 12

Gee v. Boyd,
471 U.S. 1058 (1985) 11

Heartland Reg'l Med. Ctr. v. Sebelius,
566 F.3d 193 (D.C. Cir. 2009) 13

Highway J Citizens Grp. v. Mineta,
349 F.3d 938 (7th Cir. 2003) 12

Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs,
702 F.3d 1156 (10th Cir. 2012) 9, 12

TABLE OF AUTHORITIES *(continued)*

Page(s)

Ind. Forest All., Inc. v. U.S. Forest Serv.,
325 F.3d 851 (7th Cir. 2003) 12

Int'l Union, United Mine Workers of Am. v. MSHA,
920 F.2d 960 (D.C. Cir. 1990) 14

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 10, 12

Marsh v. Oregon Nat. Res. Council,
490 U.S. 360 (1989) 8, 10, 12

McGuinness v. U.S. Forest Serv.,
741 F. App'x 915 (4th Cir. 2018) 9

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 10

Nat'l Archives & Records Admin. v. Favish,
541 U.S. 157 (2004) 16

Nat'l Parks Conservation Ass'n v. Semonite,
916 F.3d 1075 (D.C. Cir. 2019) 2

North Carolina v. FAA,
957 F.2d 1125 (4th Cir. 1992) 12

Oglala Sioux Tribe v. NRC,
896 F.3d 520 (D.C. Cir. 2018) 16

Perez v. Mortg. Bankers Ass'n,
575 U.S. 92 (2015) 14

Roanoke River Basin Ass'n v. Hudson,
940 F.2d 58 (4th Cir. 1991) 12

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 1

TABLE OF AUTHORITIES *(continued)*

Page(s)

Save Our Cumberland Mountains v. Kempthorne,
453 F.3d 334 (6th Cir. 2006) 12

Sierra Club v. U.S. Forest Serv.,
828 F.3d 402 (6th Cir. 2016) 9

Soc'y Hill Towers Owners' Ass'n v. Rendell,
210 F.3d 168 (3d Cir. 2000) 9

Town of Marshfield v. FAA,
552 F.3d 1 (1st Cir. 2008) 9

United States v. Chemical Found. Inc.,
272 U.S. 1 (1926) 16

U.S. Postal Serv. v. Postal Regulatory Comm'n,
963 F.3d 137 (D.C. Cir. 2020) 8

WildEarth Guardians v. Conner,
920 F.3d 1245 (10th Cir. 2019) 12

Williston Basin Interstate Pipeline Co. v. FERC,
519 F.3d 497 (D.C. Cir. 2008) 13

STATUTES

5 U.S.C. § 702 14

42 U.S.C. § 4332(C) 1, 4, 7, 8

RULES

Fed. R. App. P. 35(b)(1)(A)-(B) 7, 13

REGULATIONS

33 C.F.R. pt. 325, App. B(7) 4

40 C.F.R. § 1508.27 ..... 7, 8

TABLE OF AUTHORITIES *(continued)*

Page(s)

40 C.F.R. § 1508.27(b)(4).....5, 7

GLOSSARY

APA:	Administrative Procedure Act
DAPL:	Dakota Access Pipeline
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FONSI:	Finding of No Significant Impact
NEPA:	National Environmental Policy Act
PHMSA:	Pipeline and Hazardous Materials Safety Administration
the Corps:	the U.S. Army Corps of Engineers

RULE 35(b) STATEMENT AND INTRODUCTION

The National Environmental Policy Act ("NEPA") "requir[es] agencies to" analyze "the environmental impact" of any major federal action. *DOT v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). The statute "imposes only procedural requirements"; it does not "'mandate particular results.'" *Id.* at 756 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

In this case, the U.S. Army Corps of Engineers (the "Corps") complied with NEPA. It thoroughly reviewed the environmental effects of granting an easement to install a 1.73-mile segment of the Dakota Access Pipeline ("DAPL") deep beneath Lake Oahe in North Dakota. Taking into account DAPL's state-of-the-art design and response plans, the Corps determined that the likelihood of a large spill into Lake Oahe was "extremely low." Indeed, data from the Pipeline and Hazardous Materials Safety Administration ("PHMSA") show that the probability of a spill into Lake Oahe larger than what the Corps extensively modeled is once in almost 200,000 years. A1152-53. The Corps thus concluded that granting the easement would not "significantly" affect the "quality of the human environment," 42 U.S.C. § 4332(C). NEPA accordingly allowed the Corps to prepare an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), rather than an Environmental Impact Statement ("EIS").

Notwithstanding the Corps' extensive analysis, a panel of this Court held that

NEPA required an EIS. It reasoned that criticisms by those opposing the pipeline rendered the environmental effects "highly controversial" under *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019)—a decision *post-dating* all of the challenged agency work. Add. 6, 12-26. Contrary to NEPA's "rule of reason," *Public Citizen*, 541 U.S. at 767, the panel concluded that the presence of this one intensity factor "trigger[s] the need to produce an EIS," Add. 6. It then held that the Corps could avoid that result only by "convinc[ing] the court" that it had "resolved" these criticisms—an inquiry that required the panel to "delve into the details" of those objections. Add. 14. Rather than analyzing how *the agency* addressed those objections, or weighing the quality of *its* reasoning, or the extensive administrative record on these issues—the hallmarks of arbitrary-and-capricious review—the panel parsed the objections to determine whether *the panel* was "convinced" an EIS was unnecessary.

For good measure, the panel relied on the after-issued *Semonite* decision to bar the agency from assessing, in the first instance, whether the panel's criticisms required an EIS when viewed in light of the entire record: Since the court was *not* "convinced" that an EIS is unnecessary, one must be prepared. Add. 27-28. This analysis transgresses settled limitations on APA review, impermissibly transforms NEPA from a procedural statute into one requiring particular results, and is inconsistent with decisions from the Supreme Court and other circuits.

The panel also affirmed the easement's vacatur under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). It reasoned that when agency decisonmaking omits a procedural step, the agency can avoid vacatur only by "justify[ing] its decision to skip that procedural step." Add. 31. That compelled remand with vacatur, regardless of whether "the ultimate action"—the easement—"could be justified," because the agency's *error* requiring remand was that it skipped the procedural step. Add. 31. That reasoning essentially collapses the analyses of error and vacatur into one, effectively imposes a *per se* rule of vacatur for procedural errors, and conflicts with decisions of this and other circuits. It makes little sense, especially where, as here, the agency likely can support its underlying decision and vacatur could impose devastating consequences.

The questions presented are: (1) whether an agency has satisfied its NEPA obligations if it prepares an EA and FONSI that carefully considers all criticisms of the agency's environmental analysis but does not "resolve the controversy" to the court's satisfaction, and (2) whether procedural error under NEPA *per se* warrants remand with vacatur.

BACKGROUND

Since 2017 DAPL has safely transported approximately 200 million barrels of crude oil annually from North Dakota to Illinois, for further pipeline delivery to the Gulf Coast, without a single spill on its mainline. A1174, 1619. DAPL is among

the safest crude oil pipelines in the country, A1165, 1170, and brings to market about 40% of the oil produced in North Dakota, the second largest oil-producing State, A1500, 1742-43.

Plaintiffs challenge the Corps' decision to grant DAPL an easement for the narrow strip of federally owned lands at Lake Oahe without preparing an EIS. NEPA requires an EIS only if the Corps' initial environmental review—which is expected to be abbreviated, 33 C.F.R. pt. 325, App. B(7)—finds that federal action will "significantly affec[t]" the environment, 42 U.S.C. § 4332(C).

The Corps' EA—completed during the Obama administration—spanned 163 pages, plus extensive appendices, A448-610, comprehensively addressing historical and cultural resource preservation, environmental justice, A476, 527-39, 557, and the likelihood and consequences of a hypothetical worst-case spill at Lake Oahe, including through project-specific models designed in accordance with PHMSA regulations, A1929-30, 1960-61. The Corps determined that the *likelihood* of a large spill into Lake Oahe was "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans," A539, and that any impacts would be "temporary" and "limited," A1818, 2033-34. The Corps thus issued a FONSI, making an EIS unnecessary.

Before the Corps issued the easement, though, Plaintiffs sought to halt DAPL's construction via injunctive relief; highly politicized, violent protests; and

lobbying. A101, 164, 279-80. Both the district court and this Court denied Plaintiffs' injunction efforts. Add. 9. Plaintiffs' lobbying of political appointees temporarily succeeded in late 2016. A101. But the next administration removed those political impediments, and let stand the Corps' original conclusion that no EIS was necessary. The Corps announced on February 3, 2017 that it would deliver the easement. A18-19. Pipeline construction finished, with operations beginning June 1, 2017. A19.

In June 2017, the district court held that the Corps "substantially complied with NEPA," A4, and affirmed the Corps' ultimate "conclusion that the risk of a spill is low," A32. It remanded for the Corps to address three discrete issues it believed "not adequately consider[ed]" in the EA. A4, 441. The one relevant here is "the degree to which" the project's effects are "highly controversial"—one of many factors that "should be considered" in assessing whether environmental impacts will be significant. 40 C.F.R. § 1508.27(b)(4). "Aside from the discrete issues that" were "the subject of the remand, the [c]ourt conclude[d] that the Corps complied with its statutory responsibilities," A92, and declined to vacate the easement pending remand, A441. On remand, the Corps went far beyond NEPA's requirements, adding 280 pages of analysis revalidating the EA and FONSI. A1958-2097.

Plaintiffs again challenged the Corps' conclusions. In March 2020, the district court ordered the Corps to prepare an EIS because "the pipeline's 'effects on the

quality of the human environment'" were "'highly controversial.'" A131. It relied on "new" and "significant guidance" from *Semonite*—a decision *post-dating* the remand's completion, A442—to hold it insufficient that the Corps "'consider[ed]'" Plaintiffs' objections to its analysis and methodologies. A97, 110. The court instead required the Corps to "'succeed' in resolving the points of scientific controversy" that Plaintiffs' consultants raised. A112-13. As a remedy, the court vacated the easement notwithstanding "the serious effects that a DAPL shutdown could have for many states, companies, and workers," A156-57—including up to $10.23 billion in lost revenues to North Dakota oil producers, residents, and the State itself, and up to 7,063 lost North Dakota jobs, A1542, 1544-45, 1557, 1769—because considering these consequences would "subvert the structure of NEPA," A156-57.

A panel of this Court affirmed, holding that, regardless of "the volume of ink spilled in response to criticism," the "highly controversial" factor of NEPA required *the court* "to delve into the details of [Plaintiffs'] criticisms," and obligated the Corps to "convinc[e] the court" that it has "resolved serious objections to its analysis." Add. 14. As to remedy, the panel affirmed vacatur of the easement because the Corps could not justify its "refusal to prepare an EIS." Add. 30. It was irrelevant whether the Corps could show "the ultimate action"—the easement—"could be justified" on remand; any other view, the panel believed, would encourage agencies to "build first" and "conduct comprehensive reviews later." Add. 31. The panel also

dismissed the risk of devastating "economic consequences"—a second and distinct *Allied-Signal* factor—reasoning that it was not an abuse of discretion to discount those consequences in view of "the seriousness of the NEPA violation." Add. 31, 33.

REASONS FOR GRANTING REHEARING EN BANC

I. The Panel's Heightened Standard Of Review For NEPA Decisions Conflicts With Decisions By The Supreme Court And Other Circuits

When determining whether a major federal action will "significantly affec[t]" the "human environment," 42 U.S.C. § 4332(C)—triggering an EIS—agencies must "conside[r]" the action's "context" and ten "intensity" factors." 40 C.F.R. § 1508.27. The panel required an EIS based on just one of those intensity factors—whether the action's environmental effects "are likely to be highly controversial," *id.* § 1508.27(b)(4)—because the panel was not "convinced" that the Corps successfully negated a handful of Plaintiffs' litany of criticisms, Add. 14.

By transforming this factor from one of many the *agency* must *consider* into a *dispositive* factor that the *court* must decide, the panel fundamentally shifted to the courts the responsibility that NEPA assigns to expert administrative agencies, undercutting NEPA's basic design. And it did so by further extending an already novel decision, *Semonite*, that the Corps had no chance to address. Rehearing is critical because the panel's novel approach conflicts with Supreme Court precedent and the decisions of multiple circuits. Fed. R. App. P. 35(b)(1)(A)-(B).

A. Supreme Court precedent is clear that NEPA reflects a "'rule of reason,'" not a rigid test. *Public Citizen*, 541 U.S. at 767. It is up to "agencies"—not courts—to "determine whether" to prepare an EIS "based on the usefulness of any new potential information." *Id*. Courts must "defer to 'the informed discretion of the responsible federal agencies'" when *they* decide whether to prepare an EIS, so long as the agencies "'consider[ed] … the relevant factors'" and did not commit "'a clear error of judgment.'" *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). Courts apply the well-settled APA standard, *id.* at 375, that "review of agency decisions based on multi-factor balancing tests" is "quite limited," leaving no room for courts to "'substitute the balance [they] would strike for that the agency reached.'" *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 963 F.3d 137, 141 (D.C. Cir. 2020).

The panel replaced this "rule of reason" with a rule that a single intensity factor suffices to "'trigge[r] the need to produce an EIS,'" Add. 6. Instead of requiring agencies to "conside[r]" the relevant factors, as the regulation and the APA prescribe, 40 C.F.R. § 1508.27; *Marsh*, 490 U.S. at 378, the panel's test effectively gives a single factor *dispositive* weight if present. This divorces NEPA review from the statutory standard—"significan[t]" environmental effects, 42 U.S.C. § 4332(C)—by compelling an EIS even though the agency found that the effects

purportedly generating "high controversy" are too unlikely to be "significant." Contrary to *Public Citizen*, this formalistic standard risks compelling an EIS even where, as here, it would "serve no purpose" because the effects to be studied are astronomically improbable. 541 U.S. at 767.

At least six other circuits squarely reject that approach, instead holding that the "factors listed in the [CEQ] regulation 'do not appear to be categorical rules that determine by themselves whether an impact is significant.'" *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 233-34 (5th Cir. 2006); *see also Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016) ("[T]he [agency] was not required independently to evaluate these factors."). These decisions recognize that "controversy" is "only one of the ten factors listed for determining if an EIS is necessary." *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000); *McGuinness v. U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018) (same). "[C]ontroversy 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). Thus, even when "a project is controversial," that "does not mean the Corps must prepare an EIS." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012).

B. The panel's standard for assessing whether agency action is highly controversial exacerbates the conflict. Requiring an agency to "convinc[e] the court"

that it had "resolved serious objections to its analysis," Add. 14, is incompatible with the deferential APA-style review required for agency decisions to forgo an EIS. *Marsh*, 490 U.S. at 375-78. That standard bars a court from "substitut[ing] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court's "only role" in NEPA cases "is to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The "agency must have discretion"—including in "decid[ing] whether to prepare an EIS"—"to rely on the reasonable opinions of its own qualified experts *even if, as an original matter, a court might find contrary views more persuasive*," especially where, as here, the decision "'requires a high level of technical expertise.'" *Marsh*, 490 U.S. at 374, 377-78 (emphasis added). There is no requirement to "convince" the court.

The panel's application of its test illustrates the problem. Its discussion of the four points of purported controversy largely ignored the Corps' analysis, found fault based on theories not before the agency, and proposed, without record support, methodologies that "might" have made the Corps' points "more forceful." Add. 22. For example, Plaintiffs challenged the effectiveness of DAPL's leak-detection system, citing a study of how certain leaks were detected. Add. 16. The Corps dismissed that study as irrelevant because it relied on older pipelines with less effective detec-

tion systems. A1990-91. The panel disagreed, citing Plaintiffs' assertions that modern systems failed at similar rates. Add. 17-18. But Plaintiffs' say-so lacked any record support and contradicted PHMSA data, cited by the Corps, confirming that since 2010, *not one* spill exceeding 5,000 barrels has escaped detection on *any* pipeline segment manufactured after 1968 that employs DAPL's leak-detection system. A1147-48. And, as the Corps found, even a large leak would follow the path of the pipe to land rather than rise to the lake through 92 feet of soil and rock, facilitating detection and minimizing any possibility of oil entering Lake Oahe. A1830. The panel's reasoning entirely ignored the Corps' contrary evidence and findings. *See* Add. 16-19.

Similarly, when Plaintiffs failed to introduce *any* evidence that the safety record of DAPL's operator Sunoco was worse than other operators under the relevant metric—spills per mile—the panel drew its *own* conclusions from data never before the Corps. Add. 20-21. Moreover, the panel characterized Sunoco's spill rate as above average by erroneously comparing Sunoco's *overall* spills per mile to the industry's rate of *significant* spills per mile. *Compare* A1612, *with* A1831-33.

The panel's requirement that agencies "convinc[e]" the court deepens this Circuit's 35-year-old split with other circuits, which apply ordinary deferential review to assess an agency's decision to forgo an EIS. *See Gee v. Boyd*, 471 U.S. 1058, 1059 & nn.3-4 (1985) (White, J., dissenting from denial of certiorari). These circuits

recognize that the highly controversial factor calls for the same limited "hard look" review as in any case, lest the factor give critics a "'heckler's veto'" over the EIS decision. *Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 857, 860-61 (7th Cir. 2003); *see also Hillsdale*, 702 F.3d at 1182 ("all NEPA requires" is a "hard look"); *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992) (similar); *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1257, 1263 (10th Cir. 2019) (similar). Courts will not "'substitute [their] judgment … for the judgment of the agency.'" *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (Sutton, J.). And the "mere fact" of "disagreement" among "experts" "does not render the [agency] out of compliance under [the "highly controversial"] factor." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 957 (7th Cir. 2003).

This is true even regarding criticisms from "other agencies," to which the reviewing agency "need not defer … when it disagrees." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991). The panel's requirement that agencies rebut critics to the court's satisfaction squarely conflicts with these decisions and the Supreme Court's repeated admonition that deferential APA review applies. *See Public Citizen*, 541 U.S. at 763; *Marsh*, 490 U.S. at 378; *Kleppe*, 427 U.S. at 412. Rehearing en banc is warranted.

II. The Panel's *Per Se* Rule That Procedural Errors Compel Vacatur Conflicts With Decisions From Other Circuits

The panel's decision to affirm vacatur of DAPL's easement pending an EIS independently warrants en banc review. This Court's *Allied-Signal* test for vacatur comprises *two* factors: (1) "'the seriousness of the order's deficiencies,'" *and* (2) "'the disruptive consequences'" of vacatur. 988 F.2d at 150. The panel, like the district court, effectively adopted a *categorical* rule that procedural error is too serious to warrant remand without vacatur. Rehearing is warranted because that *per se* rule contradicts this Court's precedent and parts with other circuits on each factor. Fed. R. App. P. 35(b)(1)(A)-(B).

The first factor addresses the "possibility" the agency "may find an adequate explanation for its actions" on remand. *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008). The panel considered the wrong "action." Rather than the "ultimate decision" to grant an easement, the panel considered whether the Corps could justify "skip[ping] th[e] procedural step" of an EIS—an impossible task given the court's antecedent finding on "error"—that the Corps *must* take that step. Add. 29, 31.

The panel erred, because the relevant decision under *Allied-Signal* is the one the court is considering "whether to vacate," *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009)—here, the decision to issue an easement, A150. The panel distinguished *Heartland* because the error there—"fail[ure] to consider

certain public comments"—was not a separate "decision to forgo a major procedural step." Add. 30–31. But "respond[ing] to significant comments" *is* a procedural requirement. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

The panel's approach unmoors *Allied-Signal* from its origins: inherent equitable authority to fashion *relief* for previously found violations, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015), an authority the APA expressly preserves, *Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 674 (D.C. Cir. 2019), by authorizing courts to "deny relief" on "equitable ground[s]" where "appropriate," 5 U.S.C. § 702. The vacatur decision thus rests on "analogous factors" to those "considered in deciding whether to grant preliminary injunction," *Int'l Union, United Mine Workers of Am. v. MSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)—except that the focus is on the disruptive consequences of vacatur (which Dakota Access proved, A156) rather than the harm from the challenged agency action (which, in any event, Plaintiffs failed to prove, Add. 33-36). Just as courts consider likely success on the merits for injunctions or stays, courts considering vacatur must address the likelihood that the "interim change … may itself be changed" by later agency action. *Int'l Union*, 920 F.2d at 967.

Other circuits have thus focused on whether the agency can justify the ultimate action to be vacated, not the antecedent procedural missteps that a court has found erroneous and, therefore, *un*justifiable. The First Circuit remanded without

vacatur a penalty imposed on electric utilities, despite the agency failing to "provid[e] even a semblance of serious discussion" of objections, because the error could "probably be mended" on remand. *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 44, 48 (1st Cir. 2001). Similarly, the Fifth Circuit declined to vacate denial of a variance from chemical use and disposal requirements, where the agency did not respond to "numerous comments," because on remand the agency might "justify its decision" to deny a variance. *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). And the Eleventh Circuit refused to vacate a nationwide mining permit, because it was "not at all clear" that the agency's erroneous NEPA analysis "incurably tainted the agency's decisionmaking process" or rendered the "ultimate decision … unlawful." *Black Warrior*, 781 F.3d at 1290. None of these courts found the procedural flaw dispositive. Instead, they considered the likelihood that the agency could support its ultimate decision using the correct process—precisely what the panel refused to consider.

The panel emphasized that its approach will better serve NEPA by discouraging a "build first" and "[comply] later" attitude. Add. 30-31. In this, the panel echoed the district court's analysis of the *second Allied-Signal* factor—the disruptive consequences of vacatur—which discounted the potentially devastating consequences of vacating the easement as a necessary by-product of preserving "the structure of NEPA." A156-57. The panel endorsed this analysis of the second factor as

an appropriate exercise of discretion. But both analyses share a common flaw: They are a recipe for *never* invoking *Allied-Signal* to remand without vacatur, since they reduce the *Allied-Signal* inquiry to the question of whether the error was serious enough to require remand, which by hypothesis the court already found. Yet the question under *Allied-Signal* is what *remedy* is equitable and appropriate for *that* error. Vacatur *always* could be said to incentivize better compliance with applicable laws, but under that reasoning vacatur never should be available. That is not, and has never been, the law.

Nor is it the case that agencies will fail to comply with applicable laws unless "incentivized" in this fashion. To the contrary, "[i]n the absence of clear evidence to the contrary, courts presume" that public officials and agencies "properly discharg[e] their official duties." *United States v. Chemical Found. Inc.*, 272 U.S. 1, 14-15 (1926); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). The panel's invocation of "incentives" is especially difficult to defend here, where the underlying finding of "error" is entirely driven by *Semonite*, a precedent that post-dated all of the relevant agency work—and where the record demonstrates that both the agency under two Presidential administrations and DAPL made every effort scrupulously to comply with the law as it then stood. It also contravenes established precedent allowing private entities to "reasonably rel[y]" on agency approvals. *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 538 (D.C. Cir. 2018) (denying vacatur in

part because company "reasonably relied on the NRC's ruling and settled practice that permitted the continued effectiveness of the license"). Instead of allowing the district court to sidestep *Allied-Signal*'s second factor, the panel should have required it to consider the "quite disruptive" consequences of potentially shutting down a "currently operational" pipeline by invalidating an essential easement. *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (denying vacatur).

En banc review is warranted.

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: April 12, 2021

Respectfully submitted,

/s/ Miguel A. Estrada

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ADDENDUM

ADDENDUM

Table Of Contents

Page

Panel Opinion (Jan. 26, 2021).....A.1

Statutory and Regulatory Provisions:

5 U.S.C. § 702.....A.37

42 U.S.C. § 4332.....A.38

33 C.F.R. pt. 325, App. B (2019).....A.40

40 C.F.R. § 1508.27 (2019).....A.46

Certificate of Parties and *Amici*.....A.47

Rule 26.1 Corporate Disclosure Statement.....A.50

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 4, 2020 Decided January 26, 2021

No. 20-5197

STANDING ROCK SIOUX TRIBE, ET AL.,
APPELLEES

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
APPELLANT

DAKOTA ACCESS LLC,
INTERVENOR

Consolidated with 20-5201

Appeals from the United States District Court
for the District of Columbia
(No. 1:16-cv-01534)

James A. Maysonett, Attorney, U.S. Department of Justice, argued the cause for appellant United States Army Corps of Engineers. With him on the briefs were *Jeffrey Bossert Clark*, Assistant Attorney General, *Jonathan D. Brightbill*, Principal Deputy Assistant Attorney General, *Eric A. Grant*, Deputy

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Douglas P. Hayes was on the brief for *amici curiae* Sierra Club, et al. in support of appellees.

Kenneth Rumelt and *James G. Murphy* were on the brief for *amicus curiae* Members of Congress in support of appellees.

Mary Kathryn Nagle was on the brief for *amicus curiae* National Indigenous Women's Resource Center, Inc. in support of appellees.

Before: TATEL and MILLETT, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Lake Oahe, created when the United States Army Corps of Engineers flooded thousands of acres of Sioux lands in the Dakotas by constructing the Oahe Dam on the Missouri River, provides several successor tribes of the Great Sioux Nation with water for drinking, industry, and sacred cultural practices. Passing beneath Lake Oahe's waters, the Dakota Access Pipeline transports crude oil from North Dakota to Illinois. Under the Mineral Leasing Act, 30 U.S.C. § 185, the pipeline could not traverse the federally owned land at the Oahe crossing site without an easement from the Corps. The question presented here is whether the Corps violated the National Environmental Policy Act, 42 U.S.C. § 4321, by issuing that easement without preparing an environmental impact statement despite substantial criticisms from the Tribes and, if so, what should be done about that failure. We agree with the district court that the Corps acted unlawfully, and we affirm the court's order vacating the easement while the Corps prepares an environmental impact statement. But we reverse the court's order to the extent it directed that the pipeline be shut down and emptied of oil.

I.

"In order to 'create and maintain conditions under which man and nature can exist in productive harmony,' the National Environmental Protection Act (NEPA), 42 U.S.C. § 4331(a),

requires any federal agency issuing a construction permit, opening new lands to drilling, or undertaking any other 'major' project to take a hard look at the project's environmental consequences, *id.* § 4332(2)(C) . . . ." *National Parks Conservation Association v. Semonite*, 916 F.3d 1075, 1077 (D.C. Cir. 2019). "To this end, the agency must develop an environmental impact statement (EIS) that identifies and rigorously appraises the project's environmental effects, unless it finds that the project will have 'no significant impact.'" *Id.* (quoting 40 C.F.R. § 1508.9(a)(1)). "If *any* 'significant' environmental impacts might result from the proposed agency action[,] then an EIS must be prepared *before* agency action is taken." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)). Preparing an EIS is a significant undertaking, requiring the agency to "consult with and obtain the comments of" other relevant agencies and publish a "detailed statement" about the action's environmental effects. 42 U.S.C. § 4332(2)(C).

"Whether a project has significant environmental impacts, thus triggering the need to produce an EIS, depends on its 'context' (regional, locality) and 'intensity' ('severity of impact')." *National Parks*, 916 F.3d at 1082 (quoting 40 C.F.R. § 1508.27 (2018)). The operative regulations (since amended, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020)) enumerate ten factors that "should be considered" in assessing NEPA's "intensity" element. 40 C.F.R. § 1508.27(b) (2019). "Implicating any one of the factors may be sufficient to require development of an EIS." *National Parks*, 916 F.3d at 1082. This case concerns the fourth factor—"[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4) (2019).

The Dakota Access Pipeline (DAPL), nearly 1,200 miles long, is designed to move more than half a million gallons of crude oil from North Dakota to Illinois each day. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (*Standing Rock III*), 255 F. Supp. 3d 101, 114 (D.D.C. 2017). DAPL crosses many waterways, including Lake Oahe, an artificial reservoir in the Missouri River created when the Corps constructed a dam in 1958. The dam's construction and Lake Oahe's creation flooded 56,000 acres of the Standing Rock Reservation and 104,420 acres of the Cheyenne River Sioux Tribe's trust lands. *Id.* The Tribes now rely on Lake Oahe's water for drinking, agriculture, industry, and sacred religious and medicinal practices. *Id.* As the Standing Rock Sioux Tribe explained:

> Lake Oahe is the source of life for the Tribe. It provides drinking water for over 4,200 people on the Reservation. It is the source of water for irrigation and other economic pursuits central to the Tribal economy. And it provides the habitat for fish and wildlife on the Reservation upon which tribal members rely for subsistence, cultural, and recreational purposes. Moreover, the Tribe's traditions provide that water is more than just a resource, it is sacred—as water connects all of nature and sustains life.

Letter from Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to Lowry A. Crook, Principal Deputy Assistant Secretary for Civil Works, Office of the Assistant Secretary for the Army, and Col. John Henderson, P.E., District Commander, U.S. Army Corps of Engineers—Omaha District (Mar. 24, 2016), Appendix (A.) 318.

Oil pipelines crossing federally regulated waters like Lake Oahe require federal approval. *See Standing Rock III*, 255 F. Supp. 3d at 114. In June 2014, Dakota Access, formed to construct and own DAPL, notified the Corps that it intended to construct a portion of DAPL under Lake Oahe, just half a mile north of the Standing Rock Reservation. *Id.* To do so, Dakota Access needed, among other things, a real-estate easement from the Corps under the Mineral Leasing Act (MLA), 30 U.S.C. § 185.

In December 2015, the Corps published and sought public comment on a Draft Environmental Assessment (EA) finding that the construction would have no significant environmental impact. *Standing Rock III*, 255 F. Supp. 3d at 114–15. The Tribes submitted comments voicing a range of concerns. Relevant here, the Tribes contended that the Corps had insufficiently analyzed the risks and consequences of an oil spill.

Two federal agencies also raised concerns. The Department of the Interior requested that the Corps prepare an EIS given the pipeline's potential impact on trust resources, criticizing the Corps for "not adequately justify[ing] or otherwise support[ing] its conclusion that there would be no significant impacts upon the surrounding environment and community." Letter from Lawrence S. Roberts, Acting Assistant Secretary—Indian Affairs, U.S. Department of the Interior, to Brent Cossette, U.S. Army Corps of Engineers, Omaha District (Mar. 29, 2016), A. 385–86. The Environmental Protection Agency (EPA) registered its concern that the Draft EA "lack[ed] sufficient analysis of direct and indirect impacts to water resources," though it requested additional information and mitigation in the EA rather than preparation of an EIS. Letter from Philip S. Strobel, Director, NEPA Compliance and Review Program Office of Ecosystems

Protection and Remediation, EPA, to Brent Cossette, U.S. Army Corps of Engineers, Omaha District (Jan. 8, 2016), Reply Supplemental Appendix 1. But after becoming aware of the pipeline's proximity to the Standing Rock reservation, EPA supplemented its comments to note that, while it agreed with the Corps that there was "minimal risk of an oil spill," it worried, based on its "experience in spill response," that a break or leak could nonetheless significantly affect water resources. Letter from Philip S. Strobel, Director, NEPA Compliance and Review Program, Office of Ecosystems Protection and Remediation, EPA, to Brent Cossette, U.S. Army Corps of Engineers, Omaha District (Mar. 11, 2016), A. 389–90.

On July 25, 2016, the Corps published its Final EA and a "Mitigated Finding of No Significant Impact" (Mitigated FONSI). The Mitigated FONSI explained that, given the Corps's adoption of various mitigation measures, including horizontal directional drilling, the Lake Oahe crossing would not "significantly affect the quality of the human environment" and that an EIS was therefore unnecessary.

Shortly after the Final EA's release, Standing Rock sued the Corps for declaratory and injunctive relief under NEPA (and several other federal laws not at issue in this appeal). *Standing Rock III*, 255 F. Supp. 3d at 116–17. Dakota Access and the Cheyenne River Sioux Tribe intervened on opposing sides, and Cheyenne River filed a separate complaint adding additional claims. *Id.* at 117. Though the district court denied the Tribes' request for a preliminary injunction on September 9, 2016, the Departments of Justice, Interior, and the Army immediately issued a joint statement explaining that the Corps would not issue an MLA easement and that construction would not move forward until the Army could determine whether

reconsideration of any of its previous decisions was necessary. *Id.*

Following that statement, Standing Rock submitted several letters to the Assistant Secretary of the Army for Civil Works, who oversees the portion of the Corps's mission that includes issuing permits for pipelines like DAPL. Those letters raised concerns about the EA's spill risk analysis. The tribe also submitted an expert review of the EA from an experienced pipeline consultant who concluded that the assessment was "seriously deficient and [could not] support the finding of no significant impact, even with the proposed mitigations." Accufacts Review of the U.S. Army Corps of Engineers Environmental Assessment for the Dakota Access Pipeline (Oct. 28, 2016), A. 837–46. Following the Corps's internal review, the Assistant Secretary stood by her prior decision, but nonetheless concluded that the historical relationship between the affected tribes and the federal government "merit[ed] additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments." Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (Dec. 4, 2016), A. 260; *see Standing Rock III*, 255 F. Supp. 3d at 117–18.

During the ensuing review, both Standing Rock and the Oglala Sioux Tribe submitted additional comments and analysis. The Corps solicited Interior's opinion on the pipeline, Interior's Solicitor responded with a recommendation that the Corps prepare an EIS, and the Secretary of the Army for Civil Works issued a memorandum directing the Army not to grant an easement prior to preparation of an EIS. *See Standing Rock III*, 255 F. Supp. 3d at 118–19. On January 18, 2017, the Assistant Secretary of the Army for Civil Works published in the Federal Register a notice of intent to prepare an EIS. *See*

Notice of Intent to Prepare an EIS in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5,543 (Jan. 18, 2017).

Two days later, a new administration took office, and the government's position changed significantly. In a January 24 memorandum, the President directed the Secretary of the Army to instruct the Corps and the Assistant Secretary for Civil Works to expedite DAPL approvals and consider whether to rescind or modify the Notice of Intent to Prepare an EIS. Memorandum of January 24, 2017, Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8,661 (Jan. 30, 2017). The Army in turn concluded that the record supported granting an easement and that no EIS or further supplementation was necessary.

The Corps granted the easement on February 8, 2017, and after the district court denied Cheyenne River's motion for a preliminary injunction and temporary restraining order, both the Tribes and the Corps moved for partial summary judgment on several claims. The district court concluded that the Corps's decision not to issue an EIS violated NEPA by failing to adequately consider three issues: whether the project's effects were likely to be "highly controversial," the impact of a hypothetical oil spill on the Tribes' fishing and hunting rights, and the environmental-justice effects of the project. *Standing Rock III*, 255 F. Supp. 3d at 111–12. It accordingly remanded the matter to the agency to address those three issues. *Id.* at 160–61.

After the Corps completed its remand analysis in February 2019, the parties again moved for summary judgment, with the Tribes arguing that the Corps failed to remedy its NEPA violations and pressing several other non-NEPA claims. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*

(*Standing Rock V*), 440 F. Supp. 3d 1, 11 (D.D.C. 2020). Based on its examination of four topics of criticism out of "many . . . to choose from," *id.* at 17, the district court concluded that "many commenters in this case pointed to serious gaps in crucial parts of the Corps'[s] analysis," demonstrating that the easement's effects were "likely to be highly controversial," *id.* at 26 (internal quotation marks omitted). It therefore remanded to the agency for it to complete an EIS but reserved the question whether the easement should be vacated during the remand. *Id.* at 29–30. Following additional briefing, the court concluded that vacatur was warranted, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (*Standing Rock VII*), 471 F. Supp. 3d 71, 87 (D.D.C. 2020), and ordered that "Dakota Access shall shut down the pipeline and empty it of oil by August 5, 2020," Order, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-cv-01534-JEB, at 2 (D.D.C. July 6, 2020), ECF No. 545.

The Corps and Dakota Access now appeal the district court's order remanding for preparation of an EIS, as well as its separate order granting vacatur of the pipeline's MLA easement and ordering that the pipeline be shut down. While this appeal was pending, a motions panel denied the Corps's request to stay the vacatur of the easement but granted its request to stay the district court's order to the extent it enjoined the pipeline's use. Order, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 20-5197, at 1 (D.C. Cir. Aug. 5, 2020) (August 5 Order).

II.

The Corps, together with Dakota Access, challenges the district court's conclusion that the effects of the Corps's easement decision were "likely to be highly controversial" under NEPA. A decision is "highly controversial," we explained in *National Parks Conservation Association v.*

Semonite, if a "substantial dispute exists as to the size, nature, or *effect* of the major federal action." 916 F.3d at 1083 (internal quotation marks omitted). But not just any criticism renders the effects of agency action "highly controversial." Rather, "*something more* is required for a highly controversial finding besides the fact that some people may be highly agitated and be willing to go to court over the matter." *Id.* (internal quotation marks omitted).

In *National Parks*, we clarified what more is required. There, we considered the Corps's decision to forgo an EIS before approving a permit authorizing an electrical infrastructure project in a historically significant area. "[T]he Corps's assessment of the scope of the Project's effects ha[d] drawn consistent and strenuous opposition, often in the form of concrete objections to the Corps's analytical process and findings, from agencies entrusted with preserving historical resources and organizations with subject-matter expertise." *Id.* at 1086. Because those criticisms reflected "the considered responses . . . of highly specialized governmental agencies and organizations" rather than "the hyperbolic cries of . . . not-in-my-backyard neighbors," we found the effects of the Corps's decision "highly controversial." *Id.* at 1085–86. "[R]epeated criticism from many agencies who serve as stewards of the exact resources at issue, not to mention consultants and organizations with on-point expertise, surely rises to more than mere passion." *Id.* at 1085. And while the Corps "did acknowledge and try to address [those] concerns," that was not enough to put the controversy to rest. *Id.* at 1085–86. "The question is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id*. Indeed, an EIS is perhaps especially warranted where an agency explanation confronts but fails to resolve serious outside criticism, leaving a project's effects uncertain. "Congress created the EIS process to provide robust information in situations . . . where, following

an environmental assessment, the scope of a project's impacts remains both uncertain and controversial." *Id.* at 1087–88.

The Corps and Dakota Access advance two arguments: that, in relying on *National Parks*, the "district court applied the wrong legal standard," Appellant's Br. 14, and that the Corps adequately addressed the four specific disputes on which the district court relied in finding the effects of the Corps's easement decision likely to be highly controversial. We disagree as to both.

The Corps offers two bases for distinguishing this case from *National Parks*. First, it argues that here, in contrast to in *National Parks*, "the Corps'[s] efforts to respond to the Tribes' criticisms were not 'superficial.'" Appellant's Br. 19. That distinction, however, rests on an inaccurate description of *National Parks*. Contrary to the Corps's claim that we deemed "superficial and inadequate" the Corps's response to criticisms, we pointedly explained that we took "no position on the adequacy of the Corps's alternatives analyses." *National Parks*, 916 F.3d at 1088. Instead, we noted only that other agencies had expressed concerns about the superficiality and inadequacy of the Corps's efforts. *Id.* Furthermore, the Corps's position that a response to criticism suffices so long as it is not "superficial" is hard to square with our statement in *National Parks* that "[t]he question is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id.* at 1085–86. The decisive factor is not the volume of ink spilled in response to criticism, but whether the agency has, through the strength of its response, convinced the court that it has materially addressed and resolved serious objections to its analysis, a matter requiring us to delve into the details of the Tribes' criticisms—to which we shall turn momentarily.

As a second basis for distinguishing *National Parks*, the Corps emphasizes that the "opposition here has come from the Tribes and their consultants, not from disinterested public officials." Appellant's Br. 20. But the Tribes are not, as Dakota Access suggested at oral argument, "quintessential . . . not-in-my-backyard neighbors." Oral Arg. Tr. 97:17–18. They are sovereign nations with at least some stewardship responsibility over the precise natural resources implicated by the Corps's analysis. "Indian tribes within Indian country are," the Supreme Court has declared, "a good deal more than private, voluntary organizations." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (internal quotation marks omitted). Rather, they are "domestic dependent nations that exercise inherent sovereign authority over their members and territories" and the resources therein. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (internal quotation marks omitted); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("We have held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers . . . ."); *Merrion*, 455 U.S. at 140 ("Indian tribes . . . . are unique aggregations possessing attributes of sovereignty over both their members and their territory." (internal quotation marks omitted)).

The Tribes' unique role and their government-to-government relationship with the United States demand that their criticisms be treated with appropriate solicitude. Of course, as the Corps points out, the Tribes are not the federal government. But in *National Parks*, we emphasized the important role played by entities other than the federal government. There, criticism came from "highly specialized governmental agencies and organizations," including the Virginia Department of Historic Resources and several conservation groups. *National Parks*, 916 F.3d at 1084–85; *see*

also North Carolina v. Federal Aviation Administration, 957 F.2d 1125, 1131–33 (4th Cir. 1992) (finding "legitimate controversy" present where "[s]tate, local and federal officials, interested individuals," and a federal agency "expressed concern"); *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982) (finding that criticism from "conservationists, biologists," two state agencies, and "other knowledgeable individuals" demonstrated the existence of "precisely the type of 'controversial' action for which an EIS must be prepared"); *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) (finding that a project was "genuinely and extremely controversial" where "three federal agencies," "one state agency," and the public "all disputed the Corps['s] evaluation"). The Tribes are of at least equivalent status.

With the proper legal framework in mind, we turn to the four disputed facets of the Corps's analysis that the district court found involved unresolved scientific controversies for purposes of NEPA's "highly controversial" factor.

DAPL's Leak Detection System

The district court found that serious unresolved controversy existed concerning the effectiveness of DAPL's leak detection system. Specifically, it found that the 2012 Pipeline and Hazardous Materials Safety Administration (PHMSA) study submitted with Standing Rock's expert report "indicated an 80% failure rate in the type of leak-detection system employed by DAPL." *Standing Rock V*, 440 F. Supp. 3d at 18. The court went on to note that "the system was not even designed to detect leaks that constituted 1% or less of the pipe's flow rate," which could amount to 6,000 barrels a day. *Id.* Because the Corps "failed entirely to respond to" those deficiencies, the court found that the Corps had not succeeded

in resolving the controversy presented by the study. *Id.* at 17–18.

On appeal, the Corps correctly points out that the 2012 PHMSA study does not reflect an 80% "failure rate." Rather, the study indicates that in 80% of all incidents where it was in use and "functional," the "computational pipeline monitoring" (CPM) system used by DAPL was not the first system to detect a leak. That the CPM system was commonly eclipsed by visual identification, however, casts serious, unaddressed doubt on the Corps's statement that the system will "detect the pressure drop from a pipeline rupture within seconds." Appellant's Br. 21 (internal quotation marks omitted). As the PHMSA study explains, "CPM systems by themselves did not appear to respond more often than personnel . . . or members of the public passing by the release incident." U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Final Report Leak Detection Study 2-11 (Dec. 10, 2012). The Corps has failed to address the apparent disconnect, suggested by the PHMSA study, between the CPM system's historic performance and the agency's representations about its future utility. Indeed, the Corps acknowledges that it "did not explicitly discuss the 2012 PHMSA report" in its review. Appellant's Br. 22. The consequences of that oversight are especially significant since DAPL is buried deep underground and visual identification is therefore unlikely to make up for deficiencies in the CPM system, as it apparently has in the incidents included in the PHMSA study.

Attempting to discount the significance of the Corps's failure to consider the 2012 PHMSA study, the Corps and Dakota Access observe that the study included older pipelines and that the type of pinhole leaks the study suggests the CPM system might initially miss are rare. But as the district court noted, the Tribes' expert observed that "more recent

investigations" corroborated the study's leak detection data. *Standing Rock V*, 440 F. Supp. 3d at 17 (internal quotation marks omitted). The Corps's failure to address the study cannot be justified by the mere fact that the study's data set includes *some* older pipelines.

As for the rarity of pinhole leaks, the Tribes pointed to "numerous examples of pipelines that leaked for hours or days after similar detection systems failed." Appellees' Br. 27. In one such instance, DAPL's own operator spilled 8,600 barrels of oil during a 12-day-long slow leak in 2016, even though the monitoring system in use there showed the exact same type of "detectable meter imbalance" that the Corps here claims will quickly alert DAPL's operators to a slow leak. *See* Supplemental Appendix (S.A.) 317–18. That same year, at another pipeline buried deep underground in North Dakota, an operator's leak detection system "registered an imbalance" and "notified the control room"—but the control room "misinterpreted its own data[.]" PHMSA, Post-Hearing Decision Confirming Corrective Action Order, Belle Fourche Pipeline Co. 5 (Mar. 24, 2017), https://primis.phmsa.dot.gov/comm/reports/enforce/documents/520165013H/520165013H_HQ%20Post%20Hearing%20Decision%20Confirming%20CAO_03242017.pdf. That led to a slow release of more than 12,600 barrels of oil into a nearby creek over at least a two-day period, until it was discovered by a rancher at the release site. *Id.* at 1–2; S.A. 711. So there is ample reason to believe that the magnitude of harm from such a leak could be substantial.

Appearing to acknowledge those troubling examples, the Corps discounts their significance by asserting that leaks will eventually be found. But how rapidly such leaks would be detected and their potential severity are key factors underlying the Corps's EA and precisely the issues called into question by the Tribes' unaddressed criticism. We also note that the volume

of a one percent spill from a pinhole leak would double if the volume of oil placed in the pipeline were itself to double. And DAPL's operator has represented to its investors that it intends to double the amount of oil it places in the pipeline as early as this coming summer. *See Illinois approves expansion of Dakota Access oil pipeline*, Reuters, Oct. 15, 2020, https://www.reuters.com/article/us-energy-transfer-oil-pipeline-illinois-idUSKBN2702DL. In any event, when asked why the EA did not evaluate the potential consequences of an undetected slow pinhole leak, the Corps responded that "there was no particular reason" it did not do so. Oral Arg. Tr. 12:8–9, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-cv-01534-JEB (D.D.C. Mar. 18, 2020), ECF No. 498. The Tribes' criticisms therefore present an unresolved controversy requiring the Corps to prepare an EIS.

DAPL's Operator Safety Record

The district court found that the Corps's decision to rely in its risk analysis on general pipeline safety data, rather than DAPL's operator's specific safety record, rendered the effects of the Corps's decision highly controversial. We agree.

To analyze the Corps's risk assessment, Standing Rock retained as an expert "an attorney, investigator, and process safety practitioner with many decades of experience." Holmstrom Decl. ¶ 1, S.A. 79–80. The expert explained that "PHMSA data shows Sunoco," DAPL's operator, "has experienced 276 incidents in 2006–2016," which the expert described as "one of the lower performing safety records of any pipeline operator in the industry for spills and releases." *Id.* ¶ 9.

Here, as in the district court, "[t]he Corps focuse[s] its responses on defending the operator's performance record itself rather than on justifying its decision to not incorporate that record into its analysis." *Standing Rock V*, 440 F. Supp. 3d

at 19. In so doing, the Corps and Dakota Access make two arguments.

First, the Corps emphasizes that "70% of [DAPL's] operator's reported accidents on other pipelines were minor and limited to the operator's property." Appellant's Br. 31. But that does nothing to address the "[t]wo central concerns" on which the district court based its decision: "(1) the 30% of spills—about 80 of them—that were *not* limited to operator property; and (2) the criticism that the spill analysis should have incorporated the operator's record." *Standing Rock V*, 440 F. Supp. 3d at 20. For its part, Dakota Access argues that while Sunoco's number of leaks is high, its number of spills per mile of pipeline operated "is in line with industry averages." Intervenor's Br. 22. Not only has Dakota Access failed to identify record evidence supporting that assertion, the relevant evidence that does exist suggests a serious risk that Sunoco's record is worse than the industry average. The Corps's own analysis concluded that, industry-wide, there were 0.953 onshore crude oil accidents per 1,000 miles of pipeline in 2016 and 0.848 in 2017. U.S. Army Corps of Engineers, Analysis of the Issues Remanded by the U.S. District Court for the District of Columbia Related to the Dakota Access Pipeline Crossing at Lake Oahe 13 (Aug. 31, 2018). By contrast, Dakota Access's expert explained that Energy Transfer, Sunoco's parent company following a merger, experienced 1.42 "reportable incidents per 1,000 miles of pipeline"—*after* a 50% decline in incidents on Sunoco lines since 2017. Second Godfrey Decl. ¶ 7, A. 1612. If anything, comparing that figure to the industry-wide average understates the safety gap between Sunoco and other operators because, as Dakota Access and its expert observe, Sunoco is "one of the largest pipeline operators," Intervenor's Br. 22, and its own incidents are included in the average. *See* Appellant's Br. 32 ("The Corps also considered

PHMSA's historical data on oil spills, which necessarily includes this operator's safety record.").

Nor are we persuaded by the Corps's second argument, that it had no need at all to address the operator safety controversy. Though the Corps may have considered "other objective measures of the operator's safety practices," Appellant's Br. 31, the cited materials—industry-wide spill data and a questionnaire about Sunoco's safety practices—fall short of resolving the controversy. The Corps contends that its "decision to use all data on oil spills, and not just the operator's safety record, is the kind of technical judgment that is entrusted to the agency and entitled to deference from the Court." Appellant's Br. 32. That is not at all clear. For example, it would be strange indeed if we were to defer to the Federal Aviation Administration's decision to renew the operating certificate of an airline with an extremely poor safety record on the basis that the airline industry, on average, is safe. The Supreme Court, moreover, has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner," *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48 (1983), and the Corps has made no effort to do so here. To treat the Corps's unadorned plea for deference as a sufficient basis for ignoring well-reasoned expert criticism would vitiate *National Parks*.

Winter Conditions

The district court found the Corps's response insufficient to resolve criticism of the agency's "failure to consider the impact of harsh North Dakota winters on response efforts in the event of a spill." *Standing Rock V*, 440 F. Supp. 3d at 20. In particular, the Tribes' experts explained that shut-off valves might be more prone to failure and response efforts hindered by freezing conditions. Elaborating, Oglala's expert explained

that "winter conditions create significant difficulties" because, among other things, "workers require more breaks and move slower due to the bundling of clothing," "daylight hours are shorter," and "slip-trip-fall risk increases significantly." Earthfax Report at 7, A. 830.

The Corps argues that it had no need to engage in a quantitative evaluation of a winter spill scenario because its non-quantitative response was adequate. Appellant's Br. 29–30. In the Corps's view, it adequately considered winter conditions by noting that ice coverage could "have a mixed effect on efforts to contain an oil spill" and by ordering DAPL's operator to conduct winter spill response training exercises at Lake Oahe as a condition of the easement. Appellant's Br. 29. But the Corps's passing reference to winter conditions' "mixed" effects, without more, provides little comfort. The Corps's point might have been more forceful had the agency estimated just how much time during a spill would be saved by the oil-containing properties of ice and compared that to the additional time required to identify oil pockets and adjust work methods to extreme conditions. Indeed, it seems that such an analysis is precisely what the Tribes believe the Corps ought to have done, and such a reasoned weighing of the evidence would have been entitled to substantial deference. But instead, faced with serious expert criticism, the Corps simply declared the evidence "mixed" and offered no attempt at explaining its apparent conclusion that winter's countervailing effects measured out to zero. Moreover, we agree with the district court that while winter response training may be "prudent and perhaps a good avenue for producing data as to how exactly winter conditions would delay response efforts," such exercises do "not get to the point of addressing the concern that the spill model does not currently take that kind of data into account." *Standing Rock V*, 440 F. Supp. 3d at 21.

The Corps next argues that the Tribes failed to present a "specific alternative methodology" for incorporating winter conditions into its spill response modeling. Appellant's Br. 30. But the fact that an established methodology for assessing the consequences of a unique type of risk is not readily apparent to commenters hardly means an agency can discount relevant, serious criticism of its method of analysis. Although the Corps emphasizes in its brief that "no one has identified any way to calculate exactly how much more difficult" a clean-up would be during winter, Appellant's Br. 30, our review "is limited to the grounds that the agency invoked when it took the action," *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1907 (2020) (internal quotation marks omitted), and the Corps does not suggest that, during its environmental review process, it actually applied its technical expertise to consider whether it was possible to identify such a method. Had the Corps considered the problem and concluded that no comprehensive analysis was possible, that might have amounted to "successfully" resolving the controversy. But the Corps cannot foist its duty to consider such technical matters onto commenters who point out valid deficiencies.

Worst Case Discharge

The district court considered the "largest area of scientific controversy" to be "the worst-case-discharge estimate for DAPL used in the spill-impact analysis." *Standing Rock V*, 440 F. Supp 3d at 21. The regulations set forth a detailed formula for calculating the worst-case discharge, 49 C.F.R. § 194.105(b)(1), but we need not delve into its specifics here. "The idea," the district court succinctly explained, "is to calculate the maximum amount of oil that could possibly leak from the pipeline before a spill is detected and stopped." *Standing Rock V*, 440 F. Supp. 3d at 21.

According to the Corps, we need not consider the Tribes' criticisms because "an accident leading to a full-bore rupture of the pipeline is extremely unlikely" and, in any event, no statute or regulation required the Corps to calculate the worst-case discharge at all. Appellant's Br. 26. The thrust of both arguments is that because the Corps need not have calculated a worst-case discharge in the first place, it is unimportant whether it did so in a reasonable manner. But we agree with the district court that because the Corps chose to perform such a calculation and then relied on it throughout its analysis, it cannot dispel serious doubts about its methods by explaining that it could have forgone such a calculation in the first place. *See Sierra Club v. Sigler*, 695 F.2d 957, 966 (5th Cir. 1983) ("The purpose of judicial review under NEPA is to ensure the procedural integrity of the agency's consideration of environmental factors in the EIS and in its decision to issue permits. If the agency follows a particular procedure, it is only logical to review the agency's adherence to that procedure, not to some altogether different one that was not used."). We therefore turn to the Tribes' criticisms of the Corps's calculations.

The Corps estimated that, for purposes of a worst-case discharge, it would take 9 minutes to detect a leak and 3.9 minutes to close the shut-down valves. Appellant's Br. 26–27. Before the district court, the Corps suggested that its nine-minute figure included one minute of detection time, with the remaining eight minutes devoted to shutting down the mainline pumps. *Standing Rock V*, 440 F. Supp. 3d at 23. But as the district court observed, the Tribes pointed to "many experts who commented that hours, rather than minutes, were more accurate figures for the [worst-case discharge]." *Id.* The Tribes' expert explained that "[m]ajor spill incidents typically occur with multiple system causes, when people, or equipment, or systems do not function exactly as they are expected to."

Holmstrom Decl. ¶ 11, S.A. 83. The Corps's explanation that its response time estimates were mildly conservative does not begin to explain its choice to ignore the real-world possibility of significant human errors or technical malfunctions, *see supra* at 18–19, in calculating what it claimed was a worst-case estimate. Although the PHMSA formula did not require the Corps to model a complete doomsday scenario in which every possible human error and technical malfunction occurs simultaneously, we agree with the district court that the Corps's failure to explain why it declined to consider any such eventualities leaves unresolved a substantial dispute as to its worst-case discharge calculation.

The Corps also argues that, even if, as the Tribes claim, some aspects of the model are unduly optimistic, the model is nonetheless sufficiently conservative because it assumes the pipeline lies directly on top of the water rather than beneath ninety-two feet of overburden. Appellant's Br. 25–26. In effect, the Corps tries to defend its decision to develop a model that assumes away significant risks by explaining that, despite those omissions, it analyzed an imaginary pipeline of *roughly* equivalent risk to DAPL—one laying directly on top of Lake Oahe, but with superior leak detection and shut-down valve systems. The Corps, however, never explains why its one conservative assumption accurately counterbalances the particular risks the Tribes identify. Accordingly, the model's assumption that DAPL lies directly on the water fails to resolve the controversies raised by the Tribes' criticisms.

* * *

Having determined that several serious scientific disputes mean that the effects of the Corps's easement decision are likely to be "highly controversial," we turn to one other issue before considering the appropriate remedy. The Corps and

Dakota Access repeatedly urge that, whatever the merits of the Tribes' criticisms, the Corps's easement decision cannot be highly controversial because the risk of a spill is exceedingly low and because the pipeline's location deep underground provides protection against the consequences of any spill. That argument faces two major hurdles.

First, the claimed low risk of a spill rests, in part, on the Corps's use of generalized industry safety data and its optimism concerning its ability to respond to small leaks before they worsen—precisely what the Tribes' unresolved criticisms address. Second, as our court made clear in *New York v. Nuclear Regulatory Commission*, 681 F.3d 471, 478–79 (D.C. Cir. 2012), "[u]nder NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass." *Id.* at 148. A finding of no significant impact is appropriate only if a grave harm's "probability is so low as to be remote and speculative, or if the combination of probability and harm is sufficiently minimal." *Id.* at 147–48 (internal quotation marks omitted). Doing away with the obligation to prepare an EIS whenever a project presents a low-probability risk of very significant consequences would wall off a vast category of major projects from NEPA's EIS requirement. After all, the government is not in the business of approving pipelines, offshore oil wells, nuclear power plants, or spent fuel rod storage facilities that have any material prospect of catastrophic failure. In this case, although the risk of a pipeline leak may be low, that risk is sufficient "'that a person of ordinary prudence would take it into account in reaching a decision'" to approve the pipeline's placement, and its potential consequences are therefore properly considered here. *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)).

III.

This brings us to the Corps's challenge to the district court's remedy, and specifically to its orders (1) requiring that the Corps prepare an EIS, (2) vacating the easement pending preparation of an EIS, and (3) ordering that the pipeline be shut down and emptied of oil.

As already explained, "[i]mplicating any one of the [intensity] factors may be sufficient to require development of an EIS." *National Parks*, 916 F.3d at 1082. Dakota Access argues that because implicating the "highly controversial" factor does not itself *mandate* preparation of an EIS, the district court erred in ordering the Corps to prepare one. In *National Parks*, however, we ordered the Corps to prepare an EIS where, as here, it "failed to make a 'convincing case' that an EIS is unnecessary." *Id.* at 1087 (quoting *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015)). *National Parks* thus forecloses the idea that we must ordinarily remand to the agency to weigh the intensity factors anew whenever we find that it improperly analyzed one of them.

That *National Parks* involved multiple intensity factors is at most a superficial distinction between this case and *National Parks*. For one thing, as explained above, the effects of the Corps's easement decision are "highly controversial" in *four* distinct respects, and we see no good reason for treating differently a decision that implicates multiple significance factors and a decision that implicates a single factor in several important ways. Moreover, both *National Parks* and this case present "precisely" the circumstances in which Congress intended to require an EIS, namely "where, following an environmental assessment, the scope of a project's impacts remains both uncertain and controversial." *Id.* at 1087–88. Finally, as in *National Parks*, the "context" of this case—"a

place of extraordinary importance to the Tribes, a landscape of profound cultural importance, and the water supply for the Tribes and millions of others"—weighs in favor of requiring an EIS. Appellees' Br. 40–41. And in at least one sense, the case for ordering production of an EIS is stronger here than in *National Parks* or the cases on which Dakota Access relies, Intervenor's Br. 29–30, given that, unlike in those cases, the district court has already given the Corps an opportunity to resolve the Tribes' serious criticisms and it failed to do so.

The Corps and Dakota Access next argue that, even if the district court properly ordered the Corps to prepare an EIS, the court abused its discretion by vacating the pipeline's easement in the interim. "The ordinary practice," however, "is to vacate unlawful agency action," *United Steel v. Mine Safety & Health Administration*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)), and district courts in this circuit routinely vacate agency actions taken in violation of NEPA. *See, e.g.*, *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (observing that vacatur is the "standard remedy" for an "action promulgated in violation of NEPA"); *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("[P]laintiffs . . . seek a vacatur of the permit . . . until the [agency] complies with NEPA. As a general matter, an agency action that violates the APA must be set aside. . . . Based on this authority, I shall vacate the permit . . . .").

"While unsupported agency action normally warrants vacatur, [a] court is not without discretion" to leave agency action in place while the decision is remanded for further explanation. *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (citation omitted). In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146

(D.C. Cir. 1993), our court set forth the two factors governing that exercise of discretion: "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150–51 (internal quotation marks omitted). The "seriousness" of a deficiency, we have explained, is determined at least in part by whether there is "a significant possibility that the [agency] may find an adequate explanation for its actions" on remand. *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008). "We review the district court's decision to vacate . . . for abuse of discretion." *Nebraska Department of Health & Human Services v. Department of Health & Human Services*, 435 F.3d 326, 330 (D.C. Cir. 2006).

As to the first factor, the district court concluded that the Corps was unlikely to resolve the controversies on remand because the court had previously remanded without vacatur for just that purpose and the Corps had nonetheless failed to resolve them. *Standing Rock VII*, 471 F. Supp. 3d at 79–80. The court also explained that the Corps focused on the wrong question: whether, on remand, it would be able to justify its easement decision rather than its decision to forgo an EIS. *Id.* at 81. ("Looking at the first *Allied-Signal* factor, the Court does not assess the deficiency of the ultimate decision itself—the choice to issue the permit—but rather *the deficiency of the determination that an EIS was not warranted*." (internal quotation marks omitted)).

With respect to the disruptive consequences of vacatur, the district court understood that shutting down pipeline operations would cause Dakota Access and other entities significant economic harm. But for four reasons it concluded that those effects did not justify remanding without vacatur. First, the

Corps's expedited timeline for preparing an EIS "would cabin the economic disruption of a shutdown." *Id.* at 84. Second, though economic disruption is properly considered, it is not commonly a basis, standing alone, for declining to vacate agency action. *Id.* at 84–85. Third, Dakota Access's approach would subvert NEPA's objectives. "[I]f you can build first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite." *Id.* at 85. And finally, the countervailing risk of a spill—difficult to quantify in part because of the Corps's failure to prepare an EIS—counseled in favor of vacatur. *Id.* at 85–86. The district court discounted as "inconclusive" Dakota Access's evidence that if DAPL were inoperative, more oil would be transported by rail, a riskier alternative. *Id.* at 87.

On appeal, Dakota Access takes primary responsibility for arguing against vacatur. It contends first that the Corps can "easily substantiate its easement decision on remand even if it must prepare an EIS." Intervenor's Br. 33. But that is not the question. As the district court explained, the question is whether the Corps is likely to justify its issuance of a FONSI and refusal to prepare an EIS. Dakota Access argues that *Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193 (D.C. Cir. 2009), supports its contrary view that the *Allied-Signal* factors look to whether an agency can justify the action the court is considering whether to vacate, rather than the challenged procedural decision. There, we sought to determine whether an earlier district court decision had, by declaring a regulatory requirement invalid for failing to consider certain public comments, necessarily vacated the regulation. In making that determination, we concluded that the *Allied-Signal* factors would have directed remand without vacatur. *Id.* at 197–98. But because the agency had not elected to forgo a procedural requirement (in that case, notice and comment), only one agency action—the decision to promulgate the

challenged rule—was implicated at all. *Heartland Regional* therefore says nothing one way or the other about the proper focus of the *Allied-Signal* inquiry in cases, like this one, where we confront a distinct challenge to an agency's decision to forgo a major procedural step in its path to its ultimate action. *Cf. id.* at 199 ("Failure to provide the required notice and to invite public comment—in contrast to the agency's failure here adequately to explain why it chose one approach rather than another for one aspect of an otherwise permissible rule—is a fundamental flaw that normally requires vacatur of the rule." (internal quotation marks omitted)). Besides, the district court's view is more sensible.

Consider the consequences of Dakota Access's contrary approach. If, when an agency declined to prepare an EIS before approving a project, courts considered only whether the agency was likely to ultimately justify the approval, it would subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later. If an agency were reasonably confident that its EIS would ultimately counsel in favor of approval, there would be little reason to bear the economic consequences of additional delay. For similar reasons, an agency that bypassed required notice and comment rulemaking obviously could not ordinarily keep in place a regulation while it completed that fundamental procedural prerequisite. *See Daimler Trucks North America LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) ("[T]he court typically vacates rules when an agency 'entirely fail[s]' to provide notice and comment . . . ." (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991))). When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step. Otherwise, our cases

explaining that vacatur is the default response to a fundamental procedural failure would make little sense.

Even were we to consider the Corps's odds of ultimately approving the easement, our case law still instructs that a failure to prepare a required EIS should lead us to doubt that the ultimate action will be approved. In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 896 F.3d 520 (D.C. Cir. 2018), we explained that because NEPA is a "purely procedural statute," where an agency's NEPA review suffers from "a significant deficiency," refusing to vacate the corresponding agency action would "vitiate" the statute. *Id.* at 536 (internal quotation marks omitted). As we made clear, "[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." *Id.* (internal quotation marks omitted). Put another way, *Oglala* strongly suggests that where an EIS was required but not prepared, courts should harbor substantial doubt that "'the agency chose correctly'" regarding the *substantive* action at issue—in this case, granting the easement. *Id.* at 538 (quoting *Allied-Signal*, 988 F.2d at 150–51). The Corps resists the proposition that *Oglala* cautions against applying *Allied-Signal* in NEPA cases, but that is not the point. The point is that *Oglala*'s application of those factors suggests that NEPA violations are serious notwithstanding an agency's argument that it might ultimately be able to justify the challenged action.

As for vacatur's consequences, Dakota Access contends that while the district court "acknowledged the severe economic disruption that vacatur would cause," it "wrongly discounted those severe consequences" and "credit[ed] remote, unsubstantiated harms." Intervenor's Br. 35. But in reviewing for abuse of discretion, we "consider whether the decision maker failed to consider a relevant factor, whether he [or she]

relied on an improper factor, and whether the reasons given reasonably support the conclusion." *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (alteration in original) (internal quotation marks omitted). In doing so, we may not "substitute our judgment for that of the trial court, so we cannot decide the issue by determining whether we would have reached the same conclusion." *United States v. Mathis–Gardner*, 783 F.3d 1286, 1288 (D.C. Cir. 2015) (citation omitted) (internal quotation marks omitted). Dakota Access believes that the district court's assessment of a shutdown's economic impacts was far too rosy and that the court "ignored" a shutdown's environmental consequences. But the court considered all important aspects of the issue and reasonably concluded that the harms were less severe than the Corps and Dakota Access suggested. In view of the discretion owed the district court and the seriousness of the NEPA violation, Dakota Access has given us no basis for concluding that the district court abused its discretion in applying the *Allied-Signal* factors. *See National Parks Conservation Association v. Semonite*, 925 F.3d 500, 502 (D.C. Cir. 2019) ("[The district] court is best positioned to . . . make factual findings[] and determine the remedies necessary to protect the purpose and integrity of the EIS process."); *Stand Up for California! v. U.S. Department of Interior*, 879 F.3d 1177, 1190 (D.C. Cir. 2018) ("[T]he district court acted well within its discretion in finding vacatur unnecessary to address any harm the defect had caused.").

In any event, Dakota Access's assessment of vacatur's consequences is undercut significantly by the fact that we agree that the district court's shutdown order cannot stand.

On August 5, 2020, a motions panel of this court ordered that "to the extent the district court issued an injunction by ordering Dakota Access LLC to shut down the Dakota Access

Pipeline and empty it of oil by August 5, 2020, the injunction be stayed." August 5 Order at 1. Relying on the Supreme Court's decision in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), the panel explained that "[t]he district court did not make the findings necessary for injunctive relief." August 5 Order at 1 ("[B]efore issuing an injunction in a [NEPA] case, 'a court must determine that an injunction should issue under the traditional four-factor test.'" (quoting *Monsanto*, 561 U.S. at 158)).

The Tribes argue that an injunction was unnecessary because vacatur itself "invalidat[ed] the underlying easement," thus requiring the "suspension of pipeline operations pending compliance with NEPA." Appellees' Br. 73–74. That is the view the district court appeared to adopt, *Standing Rock VII*, 471 F. Supp. 3d at 88 (requiring, after vacating the pipeline's easement, "the oil to stop flowing and the pipeline to be emptied within 30 days"), and that approach finds some support in our case law. For instance, in *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017), we vacated a pipeline authorization due to a NEPA violation and appeared to assume that vacatur encompassed an end to construction. Likewise in *National Parks*, we appeared to accept the parties' assumption that vacating Corps-issued construction permits would require ceasing construction of the challenged electrical towers or tearing them down. *See National Parks*, 925 F.3d at 502.

The Tribes' approach, however, cannot be squared with *Monsanto*, which should caution against reading too far into our tacit approval of shutdown orders in prior cases. If a district court could, in every case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* that "a court must determine that an injunction *should* issue under the traditional four-factor

test." 561 U.S. at 158. In fact, the Tribes have already moved for a permanent injunction in the district court during the pendency of this appeal, and that motion is fully briefed.

Furthermore, *Sierra Club* and *National Parks* differ from this case in a subtle but important way. Those cases involved challenges to agency authorizations of the very activities the court assumed would end. Vacating a construction permit in *National Parks*, for instance, naturally implied an end to construction. Here, in contrast, we affirm the vacatur of an easement authorizing the pipeline to cross federal lands. With or without oil flowing, the pipeline will remain an encroachment, leaving the precise consequences of vacatur uncertain. In fact, the parties have identified no other instance—and we have found none—in which the sole issue before a court was whether an easement already in use (rather than a construction or operating permit) must be vacated on NEPA grounds. That makes this case quite unusual and cabins our decision to the facts before us.

It may well be—though we have no occasion to consider the matter here—that the law or the Corps's regulations oblige the Corps to vindicate its property rights by requiring the pipeline to cease operation and that the Tribes or others could seek judicial relief under the APA should the Corps fail to do so. But how and on what terms the Corps will enforce its property rights is, absent a properly issued injunction, a matter for the Corps to consider in the first instance, though we would expect it to decide promptly. To do otherwise would be to issue a *de facto* outgrant without engaging in the NEPA analysis that the Corps concedes such an action requires. *See* Oral Arg. Tr. 36:14–15 ("The Corps'[s] regulations contemplate that an outgrant would require a NEPA analysis."). Although the district court was attuned to the discretion owed the Corps, *see Standing Rock VII*, 471 F. Supp. 3d at 88 ("Not wishing to

micromanage the shutdown, [the court] will not prescribe the method by which DAPL must [make the flow of oil cease]."), we nonetheless conclude that it could not order the pipeline to be shut down without, as required by *Monsanto*, making the findings necessary for injunctive relief.

IV.

For the foregoing reasons, we affirm the district court's order vacating DAPL's easement and directing the Corps to prepare an EIS. We reverse to the extent the court's order directs that the pipeline be shut down and emptied of oil.

So ordered.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) ''agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;[1] and

(2) ''person'', ''rule'', ''order'', ''license'', ''sanction'', ''relief'', and ''agency action'' have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(a)	5 U.S.C. 1009 (introductory clause).	June 11, 1946, ch. 324, § 10 (introductory clause), 60 Stat. 243.

In subsection (a), the words ''This chapter applies, according to the provisions thereof,'' are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, which is carried into section 551 of this title.

In subsection (b)(1)(G), the words ''or naval'' are omitted as included in ''military''.

In subsection (b)(1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired on Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

REFERENCES IN TEXT

Sections 1884 and 1891–1902 of title 50, appendix, referred to in subsec. (b)(1)(H), were a part of the various Housing and Rent Acts which were classified to section 1881 et seq. of the former Appendix to Title 50, War and National Defense, and had been repealed or omitted from the Code as executed prior to the elimination of the Appendix to Title 50. See Elimination of Title 50, Appendix note preceding section 1 of Title 50. Section 1641 of title 50, appendix, referred to in subsec. (b)(1)(H), was repealed by Pub. L. 87–256, § 111(a)(1), Sept. 21, 1961, 75 Stat. 538.

AMENDMENTS

2011—Subsec. (b)(1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Subsec. (b)(1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

[1] See References in Text note below.

the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibil-

ities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter

[1] So in original. The period probably should be a semicolon.

APPENDIX B TO PART 325—NEPA IMPLEMENTATION PROCEDURES FOR THE REGULATORY PROGRAM

1. Introduction
2. General
3. Development of Information and Data
4. Elimination of Duplication with State and Local Procedures
5. Public Involvement
6. Categorical Exclusions
7. EA/FONSI Document
8. Environmental Impact Statement—General
9. Organization and Content of Draft EISs
10. Notice of Intent
11. Public Hearing
12. Organization and Content of Final EIS
13. Comments Received on the Final EIS
14. EIS Supplement
15. Filing Requirements
16. Timing
17. Expedited Filing
18. Record of Decision
19. Predecision Referrals by Other Agencies
20. Review of Other Agencies' EISs
21. Monitoring

1. *Introduction*. In keeping with Executive Order 12291 and 40 CFR 1500.2, where interpretive problems arise in implementing this regulation, and consideration of all other factors do not give a clear indication of a reasonable interpretation, the interpretation (consistent with the spirit and intent of NEPA) which results in the least paperwork and delay will be used. Specific examples of ways to reduce paperwork in the NEPA process are found at 40 CFR 1500.4. Maximum advantage of these recommendations should be taken.

2. *General*. This Appendix sets forth implementing procedures for the Corps regulatory program. For additional guidance, see the Corps NEPA regulation 33 CFR part 230 and for general policy guidance, see the CEQ regulations 40 CFR 1500–1508.

3. *Development of Information and Data*. See 40 CFR 1506.5. The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). See also 40 CFR 1502.22 regarding incomplete or unavailable information.

4. *Elimination of Duplication with State and Local Procedures*. See 40 CFR 1506.2.

5. *Public Involvement*. Several paragraphs of this appendix (paragraphs 7, 8, 11, 13, and 19) provide information on the requirements for district engineers to make available to the public certain environmental documents in accordance with 40 CFR 1506.6.

6. *Categorical Exclusions*—a. *General*. Even though an EA or EIS is not legally mandated for any Federal action falling within one of the ''categorical exclusions,'' that fact does not exempt any Federal action from procedural or substantive compliance with any other Federal law. For example, compliance with the Endangered Species Act, the Clean Water Act, etc., is always mandatory, even for actions not requiring an EA or EIS. The following activities are not considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:

(1) Fixed or floating small private piers, small docks, boat hoists and boathouses.

(2) Minor utility distribution and collection lines including irrigation;

(3) Minor maintenance dredging using existing disposal sites;

(4) Boat launching ramps;

(5) All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).

b. *Extraordinary Circumstances*. District engineers should be alert for extraordinary circumstances where normally excluded actions could have substantial environmental effects and thus require an EA or EIS. For a period of one year from the effective data of these regulations, district engineers should maintain an information list on the type and number of categorical exclusion actions which, due to extraordinary circumstances, triggered the need for an EA/FONSI or EIS. If a district engineer determines that a categorical exclusion should be modified, the information will be furnished to the division engineer who will review and analyze the actions and circumstances to determine if there is a basis for recommending a modification to the list of categorical exclusions. HQUSACE (CECW-OR) will review recommended changes for Corps-wide consistency and revise the list accordingly.

7. *EA/FONSI Document*. (See 40 CFR 1508.9 and 1508.13 for definitions)—a. *Environmental Assessment (EA) and Findings of No Significant Impact (FONSI)*. The EA should normally be combined with other required documents (EA/404(b)(1)/SOF/FONSI). ''EA'' as used throughout this Appendix normally refers to this combined document. The district engineer should complete an EA as soon as practicable after all relevant information is available (*i.e.*, after the comment period for the public notice of the permit application has expired) and when the EA is a separate document it must be completed prior to completion of the statement of finding (SOF). When the EA confirms that the impact of the applicant's proposal is not significant and there are no ''unresolved conflicts concerning alternative uses of available resources * * *'' (section 102(2)(E) of NEPA), and the proposed activity is a ''water dependent'' activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where

the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the ''no action'' alternative (*i.e.,* no activity requiring a Corps permit). The combined document normally should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district engineer may delegate the signing of the NEPA document. Should the EA demonstrate that an EIS is necessary, the district engineer shall follow the procedures outlined in paragraph 8 of this Appendix. In those cases where it is obvious an EIS is required, an EA is not required. However, the district engineer should document his reasons for requiring an EIS.

b. *Scope of Analysis.* (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

Typical factors to be considered in determining whether sufficient ''control and responsibility'' exists include:

(i) Whether or not the regulated activity comprises ''merely a link'' in a corridor type project (e.g., a transportation or utility transmission project).

(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(iii) The extent to which the entire project will be within Corps jurisdiction.

(iv) The extent of cumulative Federal control and responsibility.

A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).

B. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.

C. The district engineer should also refer to paragraphs 8(b) and 8(c) of this appendix for guidance on determining whether it should be the lead or a cooperating agency in these situations.

These factors will be added to or modified through guidance as additional field experience develops.

(3) *Examples:* If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other

Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute. The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.

For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, *i.e.,* the specific activity requiring a DA permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies).

For example, a 50-mile electrical transmission cable crossing a 1¼ mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.

Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50-mile transmission line crossed wetlands or other ''waters of the United States,'' the scope of analysis should reflect impacts of the whole 50-mile transmission line.

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

8. *Environmental Impact Statement—General*—a. *Determination of Lead and Cooperating Agencies.* When the district engineer determines that an EIS is required, he will contact all appropriate Federal agencies to determine their respective role(s), *i.e.,* that of lead agency or cooperating agency.

b. *Corps as Lead Agency*. When the Corps is lead agency, it will be responsible for managing the EIS process, including those portions which come under the jurisdiction of other Federal agencies. The district engineer is authorized to require the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix. It is permissable for the Corps to reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.

c. *Corps as Cooperating Agency*. If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.5 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority. As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of an EIS. This in no way shall be construed as lessening the district engineer's ability to request the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix.

When the Corps is a cooperating agency because of a regulatory responsibility, the district engineer should, in accordance with 40 CFR 1501.6(b)(4), ''make available staff support at the lead agency's request'' to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the EIS, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within its own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps expenses on a cost reimbursable basis. If the district engineer believes a public hearing should be held and another agency is lead agency, the district engineer should request such a hearing and provide his reasoning for the request. The district engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns.

d. *Scope of Analysis*. See paragraph 7b.

e. *Scoping Process*. Refer to 40 CFR 1501.7 and 33 CFR 230.12.

f. *Contracting*. See 40 CFR 1506.5.

(1) The district engineer may prepare an EIS, or may obtain information needed to prepare an EIS, either with his own staff or by contract. In choosing a contractor who reports directly to the district engineer, the

procedures of 40 CFR 1506.5(c) will be followed.

(2) Information required for an EIS also may be furnished by the applicant or a consultant employed by the applicant. Where this approach is followed, the district engineer will (i) advise the applicant and/or his consultant of the Corps information requirements, and (ii) meet with the applicant and/or his consultant from time to time and provide him with the district engineer's views regarding adequacy of the data that are being developed (including how the district engineer will view such data in light of any possible conflicts of interest).

The applicant and/or his consultant may accept or reject the district engineer's guidance. The district engineer, however, may after specifying the information in contention, require the applicant to resubmit any previously submitted data which the district engineer considers inadequate or inaccurate. In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a).

g. *Change in EIS Determination.* If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent. The district engineer shall notify in writing the appropriate division engineer; HQUSACE (CECW-OR); the appropriate EPA regional administrator, the Director, Office of Federal Activities (A–104), EPA, 401 M Street SW., Washington, DC 20460 and the public of the determination.

h. *Time Limits.* For regulatory actions, the district engineer will follow 33 CFR 230.17(a) unless unusual delays caused by applicant inaction or compliance with other statutes require longer time frames for EIS preparation. At the outset of the EIS effort, schedule milestones will be developed and made available to the applicant and the public. If the milestone dates are not met the district engineer will notify the applicant and explain the reason for delay.

9. *Organization and Content of Draft EISs*—a. *General.* This section gives detailed information for preparing draft EISs. When the Corps is the lead agency, this draft EIS format and these procedures will be followed. When the Corps is one of the joint lead agencies, the joint lead agencies will mutually decide which agency's format and procedures will be followed.

b. *Format*—(1) *Cover Sheet.* (a) Ref. 40 CFR 1502.11.

(b) The ''person at the agency who can supply further information'' (40 CFR 1502.11(c) is the project manager handling that permit application.

(c) The cover sheet should identify the EIS as a Corps permit action and state the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction.

(2) *Summary.* In addition to the requirements of 40 CFR 1502.12, this section should identify the proposed action as a Corps permit action stating the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction. It shall also summarize the purpose and need for the proposed action and shall briefly state the beneficial/adverse impacts of the proposed action.

(3) *Table of Contents.*

(4) *Purpose and Need.* See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, ''The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.'') If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, ''The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.'') Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, ''to construct an electric generating plant''). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, ''to meet the public's need for electric energy''). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.

(5) *Alternatives.* See 40 CFR 1502.14. The Corps is neither an opponent nor a proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the ''applicant's preferred alternative'' in the final EIS. Decision options available to the district engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions or deny the permit.

(a) Only reasonable alternatives need be considered in detail, as specified in 40 CFR 1502.14(a). Reasonable alternatives must be those that are feasible and such feasibility must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance). The alternatives analysis should be thorough enough to use for both the public interest review and the 404(b)(1) guidelines (40 CFR part 230) where applicable. Those alternatives

that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative. Such alternatives should be evaluated only to the extent necessary to allow a complete and objective evaluation of the public interest and a fully informed decision regarding the permit application.

(b) The ''no-action'' alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work under the jurisdiction of the Corps or (2) by the denial of the permit. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.

(c) The EIS should discuss geographic alternatives, e.g., changes in location and other site specific variables, and functional alternatives, e.g., project substitutes and design modifications.

(d) The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit. 40 CFR 1502.23 states that the weighing of the various alternatives need not be displayed in a cost-benefit analysis and ''* * * should not be when there are important qualitative considerations.'' The EIS should, however, indicate any cost considerations that are likely to be relevant to a decision.

(e) Mitigation is defined in 40 CFR 1508.20, and Federal action agencies are directed in 40 CFR 1502.14 to include appropriate mitigation measures. Guidance on the conditioning of permits to require mitigation is in 33 CFR 320.4(r) and 325.4. The nature and extent of mitigation conditions are dependent on the results of the public interest review in 33 CFR 320.4.

(6) *Affected Environment*. See Ref. 40 CFR 1502.15.

(7) *Environmental Consequences*. See Ref. 40 CFR 1502.16.

(8) *List of Preparers*. See Ref. 40 CFR 1502.17.

(9) *Public Involvement*. This section should list the dates and nature of all public notices, scoping meetings and public hearings and include a list of all parties notified.

(10) *Appendices*. See 40 CFR 1502.18. Appendices should be used to the maximum extent practicable to minimize the length of the main text of the EIS. Appendices normally should not be circulated with every copy of the EIS, but appropriate appendices should be provided routinely to parties with special interest and expertise in the particular subject.

(11) *Index*. The Index of an EIS, at the end of the document, should be designed to provide for easy reference to items discussed in the main text of the EIS.

10. *Notice of Intent*. The district engineer shall follow the guidance in 33 CFR part 230, Appendix C in preparing a notice of intent to prepare a draft EIS for publication in the FEDERAL REGISTER.

11. *Public Hearing*. If a public hearing is to be held pursuant to 33 CFR part 327 for a permit application requiring an EIS, the actions analyzed by the draft EIS should be considered at the public hearing. The district engineer should make the draft EIS available to the public at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction as provided in 40 CFR 1506.6(c)(2), the district engineer should coordinate a joint hearing with that agency whenever appropriate.

12. *Organization and Content of Final EIS*. The organization and content of the final EIS including the abbreviated final EIS procedures shall follow the guidance in 33 CFR 230.14(a).

13. *Comments Received on the Final EIS*. For permit cases to be decided at the district level, the district engineer should consider all incoming comments and provide responses when substantive issues are raised which have not been addressed in the final EIS. For permit cases decided at higher authority, the district engineer shall forward the final EIS comment letters together with appropriate responses to higher authority along with the case. In the case of a letter recommending a referral under 40 CFR part 1504, the district engineer will follow the guidance in paragraph 19 of this appendix.

14. *EIS Supplement*. See 33 CFR 230.13(b).

15. *Filing Requirements*. See 40 CFR 1506.9. Five (5) copies of EISs shall be sent to Director, Office of Federal Activities (A–104), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The official review periods commence with EPA's publication of a notice of availability of the draft or final EISs in the FEDERAL REGISTER. Generally, this notice appears on Friday of each week. At the same time they are mailed to EPA for filing, one copy of each draft or final EIS, or EIS supplement should be mailed to HQUSACE (CECW-OR) WASH DC 20314–1000.

16. *Timing*. 40 CFR 1506.10 describes the timing of an agency action when an EIS is involved.

17. *Expedited Filing*. 40 CFR 1506.10 provides information on allowable time reductions and time extensions associated with the EIS process. The district engineer will provide the necessary information and facts to HQUSACE (CECW-RE) WASH DC 20314–1000 (with copy to CECW-OR) for consultation with EPA for a reduction in the prescribed review periods.

18. *Record of Decision*. In those cases involving an EIS, the statement of findings will be called the record of decision and shall incorporate the requirements of 40 CFR 1505.2. The record of decision is not to be included when filing a final EIS and may not be signed until 30 days after the notice of availability of the

final EIS is published in the FEDERAL REGISTER. To avoid duplication, the record of decision may reference the EIS.

19. *Predecision Referrals by Other Agencies.* See 40 CFR part 1504. The decisionmaker should notify any potential referring Federal agency and CEQ of a final decision if it is contrary to the announced position of a potential referring agency. (This pertains to a NEPA referral, not a 404(q) referral under the Clean Water Act. The procedures for a 404(q) referral are outlined in the 404(q) Memoranda of Agreement. The potential referring agency will then have 25 calendar days to refer the case to CEQ under 40 CFR part 1504. Referrals will be transmitted through division to CECW-RE for further guidance with an information copy to CECW-OR.

20. *Review of Other Agencies' EISs.* District engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise as defined in 40 CFR 1508.15 and 1508.26 and identified in Appendix II of CEQ regulations (49 FR 49750, December 21, 1984). If the district engineer determines that another agency's draft EIS which involves a Corps permit action is inadequate with respect to the Corps permit action, the district engineer should attempt to resolve the differences concerning the Corps permit action prior to the filing of the final EIS by the other agency. If the district engineer finds that the final EIS is inadequate with respect to the Corps permit action, the district engineer should incorporate the other agency's final EIS or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action. See 33 CFR 230.21 for guidance. The agency which prepared the original EIS should be given the opportunity to provide additional information to that contained in the EIS in order for the Corps to have all relevant information available for a sound decision on the permit.

21. *Monitoring.* Monitoring compliance with permit requirements should be carried out in accordance with 33 CFR 230.15 and with 33 CFR part 325.

[53 FR 3134, Feb. 3, 1988]

APPENDIX C TO PART 325—PROCEDURES FOR THE PROTECTION OF HISTORIC PROPERTIES

1. Definitions
2. General Policy
3. Initial Review
4. Public Notice
5. Investigations
6. Eligibility Determinations
7. Assessing Effects
8. Consultation
9. ACHP Review and Comment
10. District Engineer Decision
11. Historic Properties Discovered During Construction
12. Regional General Permits
13. Nationwide General Permits
14. Emergency Procedures
15. Criteria of Effect and Adverse Effect

1. Definitions

a. *Designated historic property* is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a ''designated historic property.''

b. *Historic property* is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.

c. *Certified local government* is a local government certified in accordance with section 101(c)(1) of the NHPA (See 36 CFR part 61).

d. The term ''criteria for inclusion in the National Register'' refers to the criteria published by the Department of Interior at 36 CFR 60.4.

e. An ''effect'' on a ''designated historic property'' occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on ''designated historic properties'' includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this appendix.

f. The term ''undertaking'' as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320–334.

g. Permit area.

(1) The term ''permit area'' as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the ''permit area'':

(i) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;

(ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

CERTIFICATE OF PARTIES AND *AMICI*

Pursuant to Circuit Rules 35(c) and 28(a)(1), intervenor-defendant-appellant Dakota Access, LLC (or "Dakota Access") certifies as follows:

The plaintiffs-appellees in this case are the Standing Rock Sioux Tribe; Yankton Sioux Tribe and Robert Flying Hawk, Chairman of the Yankton Sioux Tribe Business and Claims Committee; and Oglala Sioux Tribe. The intervenors-plaintiffs-appellees in this case are Cheyenne River Sioux Tribe and Steve Vance.

Defendant-appellee in this case is the United States Army Corps of Engineers. Intervenor-defendant-appellant in this case is Dakota Access.

Parties that filed *amicus* briefs at the panel stage in support of petitioners include:

- State of North Dakota;
- State of Indiana, State of Montana, State of Iowa, State of Kansas, State of Louisiana, State of Nebraska, State of Ohio, State of South Dakota, State of West Virginia, State of Wyoming, and Commonwealth of Kentucky;
- American Fuel & Petrochemical Manufacturers Association, American Line Pipe Producers, Association, the American Petroleum Institute, Association of Oil Pipe Lines, National Association of Convenience Stores, and Chamber of Commerce of the United States;

- North Dakota Farm Bureau, North Dakota Grain Dealers Association, North Dakota Grain Growers Association, South Dakota Corn Growers Association, South Dakota Farm Bureau Federation, South Dakota Grain and Feed Association, and South Dakota Soybean Association; and
- North Dakota Water Users Association.

Parties that filed *amicus* briefs at the panel stage in support of respondents include:

- Affiliated Tribes of Northwest Indians, Association on American Indian Affairs, Bay Mills Indian Community, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Confederated Tribes of the Umatilla Indian Reservation, Great Plains Tribal Chairman's Association, Hoonah Indian Association, Inter-Tribal Association of Arizona, Kickapoo Tribe of Indians of The Kickapoo Reservation in Kansas, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Brule Sioux Tribe, Lumbee Tribe of North Carolina, Lytton Rancheria of California, Miccosukee Tribe of Indians of Florida, Midwest Alliance of Sovereign Tribes, National Congress of American Indians Fund, Nez Perce Tribe, Nottawaseppi Huron Band of the Potawatomi, Ponca Tribe of Nebraska, Pueblo of Tesuque, New Mexico, Red Lake Band of Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, Stockbridge-Munsee

Community, United South and Eastern Tribes Sovereignty Protection Fund, Winnebago Tribe of Nebraska, and Yurok Tribe;

- Commonwealth of Massachusetts, State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of Nevada, State of New Jersey, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, and the District of Columbia;
- Sierra Club, Save our Illinois Land, and William Klingele;
- Ron Wyden, Elizabeth Warren, Tom Carper, Jeffrey A. Merkley, Nydia Velazquez, Jackie Speier, Darren Soto, Raul Ruiz, Chellie Pingree, Alexandria Ocasio-Cortez, Eleanor Holmes Norton, Joe Neguse and Grace Napolitano, Gwen Moore, Alan Lowenthal, Barbara Lee, Jared Huffman, Deb Haaland, Jimmy Gomez, Jesus G. Garcia, Ruben Gallego, Adriano Espaillat, Gerald Connolly, Bonnie Watson Coleman, Earl Blumenauer, Nanette Diaz Barragan, and Raul M. Grijalva; and
- National Indigenous Women's Resource Center, Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Dakota Access is a nongovernmental entity formed to construct and own the Dakota Access Pipeline. Dakota Access is owned 75% by Dakota Access Holdings, LLC and 25% by Phillips 66 DAPL Holdings LLC.

These companies are in turn owned as follows:

1. Dakota Access Holdings, LLC is wholly owned by Bakken Pipeline Investments LLC, which is owned 51% by Bakken Holdings Company, LLC, and 49% by MarEn Bakken Company LLC (a joint venture between MPLX LP and Enbridge Inc.).
2. Bakken Holdings Company LLC is owned 60% by La Grange Acquisition, L.P. and 40% by Permian Express Partners LLC, which in turn is owned 87.7% by Sunoco Pipeline L.P. and 12.3% by Mid-Point Pipeline LLC (an indirect subsidiary of Exxon Mobil Corporation).
3. Sunoco Pipeline L.P. is a wholly owned, indirect subsidiary of Energy Transfer Operating, L.P. ("ETO").
4. La Grange Acquisition, L.P. is a wholly owned, indirect subsidiary of ETO.
5. Phillips 66 DAPL Holdings LLC is owned 100% by Phillips 66 Partners Holdings LLC, which, in turn, is 100% owned by Phillips 66 Partners LP.

The following are parent companies, subsidiaries, or affiliates of Dakota Access, LLC, which have any outstanding securities in the hands of the public:

1. Phillips 66 Partner LP. Phillips 66 Partner LP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

2. ETO. ETO holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries. ETO has publicly traded preferred equity (NYSE: ETPprC, ETPprD and ETPprE), but no publicly traded common equity. ETO also owns the general partner interest and certain limited partner interests in Sunoco LP (NYSE: SUN) and USA Compression Partners, LP (NYSE: USAC).

3. Energy Transfer LP ("ET"). ET holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries. ET is a publicly traded partnership and is listed on the NYSE under the ticker symbol "ET." ET owns 100% of the limited partner interests of ETO.

4. MPLX LP, Enbridge Inc., and Exxon Mobil Corporation have several publicly traded entities.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 3,891 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

April 12, 2021

Respectfully submitted,

/s/ Miguel A. Estrada

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CERTIFICATE OF SERVICE

I hereby certify that, on April 12, 2021, I electronically filed the foregoing Petition for Rehearing En Banc of Dakota Access, LLC with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

April 12, 2021

Respectfully submitted,

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