No. 21-560

IN THE

Supreme Court of the United States

DAKOTA ACCESS, LLC,

Petitioner,

v.

STANDING ROCK SIOUX TRIBE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES AND NATIONAL ASSOCIATION OF CONVENIENCE STORES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER DAKOTA ACCESS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amici are trade associations whose members have a significant interest in the reliable and consistent application of the National Environmental Policy Act ("NEPA") to assess impacts resulting from pipeline and other infrastructure projects advanced by Amici's members. Collectively, Amici represent entities that account for, among other things, the vast majority of petroleum products that are transported, manufactured, and sold in the United States, including crude oil and other hydrocarbons that are transported by pipelines and other modes in interstate and foreign commerce.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM's member refineries and petrochemical facilities receive crude oil and other liquids products via the midstream sector, which includes pipelines, rail roads, barges, tankers, and trucks. AFPM's member companies have an interest in ensuring that they consistently and reliably receive the North American crude oil

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[1] Amici provided timely notice of their intention to file this brief to the parties, each of which consented. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than amicus curiae, its members, and its counsel make a monetary contribution intended to fund its preparation or submission. Petitioner Dakota Access, LLC's parent company, Energy Transfer, is a member of AOPL and API, but apart from the dues it pays as a member, did not contribute money intended to fund preparation or submission of this brief.

volumes that are necessary to meet U.S. energy consumption demand.

The American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API's approximately 600 corporate members, from the largest major oil companies to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry.

The Association of Oil Pipe Lines ("AOPL") is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 225,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 22 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by the Pipeline and Hazardous Materials Safety Administration ("PHMSA").

Founded in 1961, the National Association of Convenience Stores ("NACS") is a non-profit trade association representing more than 1,900 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. In 2019, the convenience and fuel retailing industry

employed approximately 2.46 million workers and generated $647.8 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Of those sales, approximately $395.9 billion came from fuel sales alone.

The issues addressed in the Petition reach well beyond this particular case. The decision here affects the ability of Amici's members, from a timing, business, and cost perspective, to reliably construct and operate new and replacement pipeline (or other) energy-related projects. The unpredictable "convince the court" standard applied by the D.C. Circuit could thwart companies' potential to secure necessary project approvals and funding. It may also subject them to untenable costs and risks, harming not only Amici's members, but also third-parties and consumers that rely on the petroleum and other energy products that are transported by pipelines throughout the United States.

The fundamental question here is whether the extensive environmental analyses set forth in an agency's Environmental Assessment ("EA") should be deemed insufficient, and an Environmental Impact Statement ("EIS") ordered, because a so-called "controversy" has not been fully resolved to the satisfaction of a reviewing court. Such "controversy" may have no bearing on reasonably-foreseeable environmental impacts, and may be manufactured by commenters with the sole intent of stopping a pipeline or other infrastructure project through delay or otherwise. Pipelines are critical to our nation's energy security and provide products vital to the public and consumers. The safety of pipelines, including

measures to prevent spills, are extensively and exhaustively regulated by PHMSA. Yet, the D.C. Circuit's decision can be wielded as a weapon to stop pipeline and any major energy or other infrastructure projects in their tracks. Because the consequences are so far reaching through the industry and this nation, this Court should grant the Petition to review the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Curiae the AFPM, API, AOPL, and NACS (together, the "Amici"), representing the interests of pipelines, petroleum product manufacturers/refiners, retailers, and other companies participating in all sectors of the economy, submit this Amicus Brief in support of Petitioner, Dakota Access, LLC ("Dakota Access").

Amici agree that this Court should grant the Petition to address important questions of NEPA law that the D.C. Circuit erroneously decided, to resolve a conflict of law among the lower courts, and to harmonize a body of NEPA law that lower courts have struggled to consistently apply. The decision below is manifestly wrong on a legal issue of substantial public importance. The U.S. Army Corps of Engineers ("Corps"), the expert agency charged by Congress to evaluate the environmental impacts resulting from the construction and operation of the Dakota Access Pipeline ("DAPL"), reasonably concluded, based on a full assessment of impacts in its initial and supplemental EAs, that DAPL's construction and operation will not result in significant environmental impacts sufficient to warrant the preparation of an

EIS. Yet, instead of deferring to the agency's fact-finding, the DC Circuit broke with at least six other Circuit Courts by imposing a heightened standard, requiring that the Corps resolve so-called "controversy" to the court's satisfaction. This "convince the court" standard contradicts this Court's precedents under which courts apply an "arbitrary and capricious" standard to determine whether an agency took a "hard look" at potential impacts, deferring to the informed discretion of the agency regarding whether impacts may be significant. Further, in failing here to accord appropriate deference to the Corps, the D.C. Circuit erroneously elevated to dispositive status one of the ten intensity factors used to determine whether an EIS is necessary when it found that the presence of controversy alone is sufficient to warrant an EIS.

The issues here are also important to the industry. The decision will cause considerable uncertainty with respect to the ability of Amici's members to pursue, finance, and timely and successfully complete new and replacement pipeline (or other) projects. The holding below invites uncertainty over when a NEPA review may be deemed to be complete and whether a project that is fully-constructed and has already been subjected to years of environmental review can lawfully continue to operate. Importantly, for all pipeline environmental reviews, the so-called "controversy" regarding spill risk is un-controversially answered and governed by the Pipeline Safety Act, 49 U.S.C. §§ 60101, *et seq*., and the regulations implementing that statute administered by PHMSA, the expert federal agency on pipeline safety. A more searching environmental review will not change the

regulatory framework in which pipelines safely operate on a daily basis to prevent spills; it will only add pointless delay.

This Court should grant certiorari.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE D.C. CIRCUIT'S HEIGHTENED NEPA STANDARD

In determining whether a federal action will "significantly affec[t]" the "human environment"—thereby potentially triggering an EIS under NEPA, 42 U.S.C. § 4332(C)—agencies must consider ten "intensity" factors." 40 C.F.R. § 1508.27. In this case, the D.C. Circuit Court of Appeals 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 court was not "convinced" that the Corps successfully resolved the project opponents' critiques.

The D.C. Circuit's approach conflicts with established precedent of this Court and multiple circuits on two fundamental points:

- First, the D.C. Circuit judged the Corps' conclusions not under the "arbitrary and capricious" standard, but instead by whether the Corps had succeeded in "convincing" the court that the agency had resolved the points of controversy.

- Second, the D.C. Circuit held that an EIS was required because *the court* found that the effects of the action

> were "highly controversial," even though the degree of controversy is only one of ten factors to make a finding of significance. By transforming this factor from one of many the *agency* considers into a dispositive factor that the *court* decides, the court usurped the responsibility assigned to the Corps under NEPA.

As noted in the Petition, the D.C. Circuit's heightened standard and its application of the highly controversial factor has created a split with at least six other circuits. Petition at 25-27. The D.C. Circuit's decision imposes a heightened standard that will be challenging for agencies to meet as they assess vital infrastructure projects like pipelines. This standard will make the D.C. Circuit the "go to" court for project opponents who will use the Circuit's less deferential standard to force agencies into preparing time-consuming EISs based only on opponents' ability to articulate continued "controversy" around the project at issue.

A. The D.C. Circuit's Requirement that the Corps Must "Convince the Court" Conflicts with Precedent of this Court and Other Circuits

1. The D.C. Circuit held that the operative standard in this case was whether the Corps had "convinced the court" that the agency had "resolved" the objections to its NEPA analysis. App. 15a-16a. Requiring an agency to "convinc[e] the court" conflicts with the deferential review this Court requires.

Under *Marsh* and its progeny, "as long as the Corps' decision [whether to prepare an EIS] was not 'arbitrary and capricious,' it should not be set aside." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-78 (1989). It is well-established that under the arbitrary and capricious standard, a court is barred 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). Yet that is exactly what occurred in this case – the D.C. Circuit "delve[d] into the details" of the technical pipeline safety issues raised by the opponents to decide for itself whether those issues "presented an unresolved controversy" and required an EIS. App. 16a. By failing to apply the "arbitrary and capricious" standard, the D.C. Circuit "substituted its judgment" for that of the Corps, violating basic tenets of administrative law and creating a split with other circuits.

The court's limited role under NEPA "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). Under the APA's "arbitrary and capricious" standard, when "specialists express conflicting views, an agency must have discretion 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." *Marsh*, 490 U.S. at 378. Yet now the D.C. Circuit has set that limited role aside, instead requiring the Corps to "convince[] the court" it has not only addressed, but also has "resolved," all material objections. App. 15a-16a.

2. There is no requirement to "convince" the court under this Court's precedent or that of other circuits. Indeed, as set forth in the Petition, the D.C. Circuit's requirement creates a serious split with other circuits. *See, e.g.*, *Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 857, 860-61 (7th Cir. 2003) (recognizing that the "highly controversial" intensity factor calls for the limited "hard look" review); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1182 (10th Cir. 2012) ("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); *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (Sutton, J.) (courts will not "'substitute [their] judgment . . . for the judgment of the agency."). The D.C. Circuit's requirement that the Corps "convince the court" it has resolved all Plaintiffs' critiques conflicts with these decisions, as well as this Court's direction that the deferential arbitrary and capricious standard applies. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004).

The problem with the D.C. Circuit's heightened standard is clear from the opinion below, as the non-deferential standard led the court "to delve into the details" of the technical pipeline safety issues raised by Plaintiffs and decide for itself whether those issues "presented an unresolved controversy" and required an EIS. App. 16a.

B. The D.C. Circuit Erred in Ordering the Corps to Prepare an EIS Based on the Court's Finding of Controversy

1. This Court has held that agencies, rather than courts, must determine whether to prepare an EIS. *Public Citizen*, 541 U.S. at 767. Courts, in turn, must "defer to 'the informed discretion of the responsible federal agencies'" on 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*, 490 U.S. at 377-78. The degree of controversy is one of ten factors that agencies weigh, in context, to determine whether the effects of their actions are "significant." 40 C.F.R. §§ 1508.27(b)(1)–(10). The D.C. Circuit replaced this established framework with a new standard: under the D.C. Circuit's rendering, a court's finding on a single intensity factor can require an EIS.

The D.C. Circuit's approach conflicts with that of other circuits, which instead have held that the controversy factor by itself is not determinative. As noted in the Petition, the D.C. Circuit's application of the highly controversial factor has created a split with at least six other circuits. Petition at 25-27. *See Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008) ("[C]ontroversy is not decisive but is merely to be weighed in deciding what documents to prepare."); *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000) (similar); *McGuinness v. U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018) (similar); *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1181 (even when "a project is controversial," that "does not mean the Corps must prepare an

EIS");*Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 233-34 (5th Cir. 2006) (intensity factors are not "categorical rules that determine by themselves whether an impact is significant");*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.").

Even assuming the record contains evidence "supporting a different scientific opinion[, that] does not render the agency's decision arbitrary and capricious." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1120-21 (9th Cir. 2000). Instead, if there is "a substantial dispute concerning the specific environmental effects of the action," the agency must "come forward with a 'well-reasoned explanation' demonstrating why" the effects of its action are not "highly controversial." *Ind. Forest All., Inc.*, 325 F.3d at 857-858. This is especially true where, as here, the issues raised by Plaintiffs "require a high level of technical expertise." *Marsh*, 490 U.S. at 374, 377-78.

2. The D.C. Circuit failed to apply this standard. By requiring the Corps not only to respond to Plaintiffs' objections, but also to "convince the court" the Corps has "successfully resolved" them, the court imposed on the agency a more burdensome standard of its own creation. The court crafted this standard largely based on *Nat'l Parks Conservation Ass'n v. Semonite,* 916 F.3d 1075 (D.C. Cir. 2019), in which the court opined that the "question is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id*. at 1085-86. But what the Corps had to do to "succeed" in "resolving the

controversy" was to assess the issues and explain whether they raised a level of controversy that triggered an EIS. Unlike in *Semonite*, the Corps in this case fully considered the issues raised by Plaintiffs and explained why the effects of its action were not "highly controversial." In addition, the low probability of an oil spill or release was a critical factor here that was not present in *Semonite*, where the aesthetic impacts of the project were undisputed. The D.C. Circuit's decision thus undermines the statutory standard by requiring an EIS even though the Corps found that the effects purportedly generating controversy are too unlikely to be "significant."

This is a critical point. Anyone can spin disaster scenarios to drum up "controversy" regarding a project or agency action. But such scenarios do not trigger additional NEPA analysis if they are highly improbable. This is a core tenet of NEPA's "rule of reason." *Public Citizen*, 541 U.S. at 763. Otherwise, every NEPA review would devolve into extensive modeling of unlikely scenarios that yield little practical information to aid the agency decision-making process. In this case the Corps' expert analysis on the highly technical issues of pipeline safety found the spill risks raised by Plaintiffs were too unlikely to trigger an EIS. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 101, 105 (D.D.C. 2017) (referencing "low" likelihood and "minimal risk" of oil spill under Lake Oahe). The court erred, and created a conflict with other circuits, by dismissing the Corps' analysis and making its own finding of significance.

3. Finally, even if the D.C. Circuit were correct and the effects of the Corps' action are "highly controversial," that does not necessarily mean an EIS is required. Controversy is only one of ten factors that *agencies* must consider when deciding whether to prepare an EIS. 40 C.F.R. § 1508.27(b)(4). "The presence of one factor does not necessarily [trigger an EIS]." *Wild Wilderness v. Allen*, 871 F.3d 719, 729 (9th Cir. 2017). Thus, "if a project is controversial, this does not mean the Corps must prepare an EIS, although it would weigh in favor of an EIS." *Hillsdale*, 702 F.3d at 1181; *see also* 51 Fed. Reg. 15,618, 15,622 (Apr. 25, 1986) ("controversy does not, alone, require preparation of an EIS; rather, it is one of many factors which the responsible official must bear in mind"). The NEPA regulations assign the consideration of these factors to the agency. Once the D.C. Circuit found that the Corps had failed to adequately explain why this factor did not trigger an EIS, the D.C. Circuit should have remanded the case to the Corps to allow the agency to make a new finding in light of the court's decision. The D.C. Circuit erred in short-circuiting that process and ordering the Corps to prepare an EIS.

II. THE QUESTIONS PRESENTED IN THIS CASE ARE EXCEPTIONALLY IMPORTANT FOR INDUSTRY

Certiorari is further warranted because this case has significant and long-term ramifications for Amici and their members.

1. The D.C. Circuit's decision harms the ability of Amici's members to pursue new or replacement pipeline (or other energy) projects and threatens the operation of approved, fully-constructed projects. A

primary impediment to advancing projects is the delay, uncertainty, and increased costs resulting from the time necessary to obtain permits for project construction. This uncertainty and risk is compounded by the D.C. Circuit's holding that the federal approval for a fully-constructed and operational project can be vacated, at a much later date, if additional environmental review is ordered by a court.

2. In an attempt to provide some certainty under NEPA for project proponents, "Presidents have issued directives, and Congress has enacted legislation to reduce delays and expedite the implementation of NEPA and the CEQ regulations, including for transportation, water, and other types of infrastructure projects." 85 Fed. Reg. 43,304, 43,305 (July 16, 2020). Yet, "[d]espite these efforts, the NEPA process continues to slow or prevent the development of important infrastructure and other projects that require Federal permits or approvals, as well as rulemakings and other proposed actions." *Id*. The holding below exacerbates this problem. Namely, should the "convince the court" standard remain, requiring an EIS will become the failsafe option, resulting in significant, and perhaps unsurmountable, project delay.

3. NEPA provides that a federal agency may prepare an EA to document the environmental impacts resulting from a proposed project. If, in that EA, the agency reasonably concludes "that the action's effects would not be significant, the agency documents its reasoning in a FONSI, which completes the NEPA process." 85 Fed. Reg. at 43,323. In satisfaction of

their NEPA obligations, the Council on Environmental Quality ("CEQ") estimates that, in 2015, federal agencies prepared 11,353 EAs, as compared to only 261 EISs.[2]

The D.C. Circuit's decision (ordering an EIS based on a "convince the court" standard) will result in agencies having to prepare more EISs than have historically been required, substantially extending the environmental review period. CEQ estimates that "across all Federal agencies, the average (*i.e.*, mean) EIS completion time (from NOI to ROD) was 4.5 years."[3] CEQ calculates that the average EIS completion time for the Corps is even longer, taking on average 6.04 years to complete. *Id.* If an agency must prepare an EA, and despite that EA being acceptable to the federal agency, a reviewing court then orders the agency to prepare an EIS to resolve "controversy" to its satisfaction, this could lead to years of delay.

Over that time period, Presidential administrations and agency heads could change with dissonant views towards pipelines and fossil fuels,

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[2] Council on Environmental Quality, The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, Attachment A (Oct. 4, 2016), https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf at 1.

[3] *See* Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018) (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

further compounding uncertainty relative to the successful completion of a pipeline project. This increased political risk is real and harms Amici's members, as illustrated by President Biden's about-face to revoke the Presidential Permit for the Keystone XL Pipeline that was previously granted by President Trump.[4]

4. To ensure the ability to fund, construct, and operate a pipeline project with any degree of certainty, there must be a reasonable finishing line under NEPA; fully resolving "controversy" to the satisfaction of the reviewing court is not it. The standard imposed by the D.C. Circuit gives traction to any so-called "controversy," irrespective of whether it materially or accurately calls into question the significance of impacts resulting from a proposed activity.

This is illustrated by the "controversy" that the court below found to be unresolved so as to warrant preparation of an EIS. For example, the spill risk here was undisputedly "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." Petition at 7. Yet, the court below found that the Corps failed to fully resolve controversy with respect to environmental impacts and response preparedness resulting from this highly-remote possibility of release.

Further, the significance (or lack thereof) of impacts resulting from any pipeline release is

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[4] *See* Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

necessarily constrained by the highly-regulated setting in which pipelines like DAPL are constructed and operate. Specifically, the Pipeline Safety Act, 49 U.S.C. §§ 60101, *et seq*., and Clean Water Act, along with regulations implementing these statutes at 49 C.F.R. Parts 194-195, govern every aspect of the leak detection/spill issues that the court found to be unresolved. *See, e.g.*, 49 C.F.R. § 195.452 (establishing comprehensive integrity management requirements, including that "[a]n operator must have a means to detect leaks on its pipeline system."); 49 C.F.R. § 195.452(i)(3) (requiring an operator to have a leak detection system and provides that "[a]n operator's evaluation [of the capability of its leak detection system] must, at least, consider . . . leak history," among other factors); 33 U.S.C. §§ 1321(j)(5)(D)(iii)-(iv) (requiring operators to have an approved emergency response plan in place to ensure the removal, to the maximum extent practicable, of the largest foreseeable discharge in adverse weather conditions, and to mitigate or prevent a substantial threat of the largest foreseeable discharge in adverse weather conditions.); 49 C.F.R. § 194.105 (establishing the precise methodology for calculating the worst-case discharge for a pipeline, which is based on the largest volume that could be released between valve-to-valve segments). Such safety standards are precisely designed to provide "adequate protection against risks to life and property posed by pipeline transportation." 49 U.S.C. § 60102(a)(1).

The Corps reasonably relied on PHMSA's regulations in its EA to conclude that operational impacts from DAPL would not be significant. Yet,

notwithstanding PHMSA's extensive safety regulations and well-established framework under which all interstate liquid pipeline operators assess, prevent and respond to releases from their pipelines, the court below ordered an EIS to further study spill risk impacts for the DAPL pipeline. This is despite the fact that the District Court below expressly acknowledged that "[o]ther courts, including this Circuit, have favorably viewed similar agency reliance on applicable regulatory standards when assessing impacts as part of a NEPA-required analysis." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 126 (D.D.C. 2017) (*citing EarthReports, Inc. v. FERC*, 828 F.3d 949, 957 (D.C. Cir. 2016)) (holding agency fulfilled its NEPA obligations to evaluate ballast-water impacts by, inter alia, noting requirements of applicable regulatory agencies)); *Sierra Club v. Clinton*, 746 F. Supp.2d 1025, 1047 (D. Minn. 2010) (holding agency properly considered impacts of pipeline abandonment by referencing PHMSA regulations).

5. Beyond the implications for the DAPL project, the D.C. Circuit's decision creates a clear roadmap for future pipeline opponents to generate "controversy" in an effort to prevent or delay a new or replacement pipeline or other energy infrastructure or disrupt their operation post-construction. Opponents need only identify an alternative way, regardless of how reasonable, accurate, or nuanced, to perform a calculation to ensure that a reviewing court will find their so-called "controversy" to not be fully resolved. Where an agency implements NEPA as extensively as the Corps did here, a reviewing court should not be revisiting each and every calculation, methodology, or

piece of data raised in comments by a pipeline opponent. This is particularly true here, where PHMSA regulations provide a reasonable basis on which to conclude spill-related impacts from a pipeline will not be significant. In fact, DAPL will in all cases be subject to extensive regulations designed to reduce spill risk. Leak detection and leak sensitivity are highly-technical issues within the purview of PHMSA. Prolonging the NEPA process in this setting based on comments from entities that possess no technical knowledge of pipeline leak detection or prevention will not yield a safer pipeline. It will only yield pointless delay.

If those commenters have concerns about the safety of a pipeline, including spill risk, there are established processes under PHMSA regulations for prompting an investigation or initiating a private action to force an operator to come into compliance with applicable PHMSA requirements.[5] Also, if PHMSA believes that there is any risk of release, the Agency would be required to take action pursuant to its extensive injunctive authority under the Pipeline Safety Act. Demanding an EIS to study these risks will not change the bottom line that PHMSA regulation effectively reduces spill risks to a level far below that of significant impacts that might justify an EIS.

6. If the D.C. Circuit's decision were to stand, Amici's members will suffer harm in the form of increased costs and project-completion risks. Such costs and risks become heightened where the

[5] *See, e.g.*, 49 U.S.C. § 60121(a).

"convince the court" standard will frequently result in the need for a lengthy and uncertain EIS process.

Pipeline projects take years of planning and cost hundreds of millions to billions of dollars to complete. Pipeline companies must typically finance project costs through one or more credit facilities or loans that are secured through private banks; or by issuing bonds sold to investors. Such credit facilities, loans, and bonds are critical to provide pipeline companies with sufficient liquidity to fund the project during project design, construction, and operation. From underwriting to lending, a new pipeline project would not happen without the support of the private sector. But, in order for a bank to provide funding, banks must first have a reasonable assurance that a proposed pipeline project will be completed in a predictable timeframe, and once completed, the pipeline will be allowed to continue its operation even if further environmental review is required.

The holding below has caused and will continue to cause doubt to ripple throughout the banking and investment community about the viability of new pipeline projects. Financing simply does not exist – or at least does not exist on commercially reasonable terms – for a pipeline project that may never be started due to never-ending environmental review. Importantly, this impacts not only Amici members' ability to fund new projects like DAPL, but also replacements of, or upgrades to, existing critical pipeline infrastructure, the continued need for which has been firmly demonstrated. Even assuming that funding can be secured for a project, the holding below will also subject project proponents to heightened risk

and potentially uncapped costs if – as a result of the "convince the court" standard – an agency's permit can be vacated and the pipeline's operations delayed pending lengthy additional reviews. These uncertain and added costs come at the expense of Amici's members without any meaningful benefit in terms of environmental review.

7. This uncertainty is not only detrimental to Amici and their members, but also third-parties, consumers, and the nation as a whole. As PHMSA has stated:

> *The arteries of the Nation's energy infrastructure, as well as one of the safest and least costly ways to transport energy products, our oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system. . . . The nation's more than 2.6 million miles of pipelines safely deliver trillions of cubic feet of natural gas and hundreds of billions of ton/miles of liquid petroleum products each year. They are essential: the volumes of energy products they move are well beyond the capacity of other forms of transportation. . . . Pipeline systems are the safest means to move these products.*[6]

Vacatur of an agency's approval(s) and ordering an operating pipeline to cease on the basis of a "convince

[6] https://www.phmsa.dot.gov/faqs/general-pipeline-faqs.

the court standard" would have serious adverse economic consequences. Pipelines like DAPL typically transport a significant percentage of regional petroleum supplies to specific refiners. Abruptly cutting off the supply of petroleum products transported by pipelines once their operations have begun causes immediate, and sometimes irreplaceable, shortages. Refineries may be required to reduce production, lay-off employees, and/or close if volumes cannot be secured through alternative means of transportation. Alternatives to an operating pipeline, however, may not be available, or may not be available without significant infrastructure development and investment, which may take years.

If a pipeline is shut down, the economic principle of supply and demand points to increased costs up and down the supply chain. Also, if a pipeline is not operating, producers may be required to shut in wells if there is a lack of available transportation. As a result, a shutdown of a pipeline and shutting in production could lead to lost tax revenue for the states, counties, and local communities, with such tax revenue typically being significant, amounting to tens or hundreds of millions of dollars (inclusive of taxes on production).

These consequences lead to economic disruption throughout the supply chain, potentially amounting to business closures and higher unemployment, while eroding our nation's energy security and independence. All because, under the "convince the court" standard, a reviewing court has determined that an EIS is needed to resolve "controversy" generated by commenters regarding the highly

remote possibility of a release from a newly-constructed pipeline.

8. For the foregoing reasons, Amici agree with the Petition that this Court should intervene to eliminate this uncertainty created by the D.C. Circuit's departure from this Court's standard of review.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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