

**Honor the Earth * Sierra Club
Indigenous Environmental Network**

October 10, 2016

Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108
Joellen.darcy@us.army.mil

Chip Smith
Assistant Secretary of the Army (Civil Works)
Assistant for Environment, Tribal and Regulatory Affairs
108 Army Pentagon
Washington, D.C. 20310-0108
charles.r.smith567.civ@mail.mil

Mr. Lowry Crook
Principal Deputy Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108
lowry.a.crook.civ@mail.mil

Col. John W. Henderson
Commander and District Engineer
U.S. Army Corps of Engineers
Omaha District
1616 Capitol Avenue, Suite 9000
Omaha, NE 68102
john.w.henderson@usace.army.mil

Via email and U.S. Mail

*Re: Submission of New Information on the Environmental Impacts on the Proposed
Dakota Access Pipeline Project; Request for Additional Review under the
National Environmental Policy Act and Clean Water Act; and Request for Stay
Pending Review*

Dear Ms. Darcy, Mr. Smith, Mr. Crook, and Col. Henderson,

Sierra Club, Honor the Earth, and Indigenous Environmental Network commend the September 9, 2016 joint statement by the Army Corps of Engineers (Corps), Department of the Interior, and Department of Justice acknowledging important concerns the Standing Rock Sioux Tribe (Standing Rock) and other tribal nations raised over the streamlined approval of the Dakota Access Pipeline (DAPL). The statement indicated that the Corps would “not authorize constructing the Dakota Access Pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other laws.”¹

The purpose of this letter is to provide new and previously unconsidered information on the project’s environmental impacts and inadequacies with the approval process that have resulted in minimal opportunities for public involvement. Based on this information, we hereby makes the following requests:²

1. The Corps investigate whether DAPL intentionally destroyed sacred and culturally-significant sites as prohibited by the National Historic Preservation Act.
2. The Corps prepare an environmental impact statement (EIS) or supplemental EIS (SEIS) for the DAPL crossing of Lake Oahe and adjacent Corps property; and/or prepare an SEIS for NWP 12 as it applies to DAPL.
3. The Corps revoke or suspend its authorizations of DAPL under NWP 12 and require an individual permit review under the Clean Water Act §404.
4. The Corps and other federal agencies stay project construction in all federal jurisdictional areas pending completion of an EIS.

¹ Press Release: “Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,” September 9, 2016, available at <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

² Sierra Club, Honor the Earth, and Indigenous Environmental Network agree that the interests of Standing Rock and other tribal nations should be paramount to any approval process going forward, not only for DAPL but for other infrastructure projects proposed to be built on Native American land. The Corps’ subsequent announcement of September 23, 2016 provides some detail on forthcoming government-to-government consultations, but our understanding is that the agencies’ consideration of an additional NEPA process will proceed on a separate track. As such, this letter will focus primarily on DAPL’s environmental impacts and the review process going forward as required by the CWA and NEPA.

I. New information requires the Corps to prepare an environmental impact statement and an individual CWA §404 permit

A. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) dictates that “[a]gencies...[s]hall prepare supplements to either draft or final environmental impact statements if...[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”³ Courts have recognized that the use of the word ‘shall’ indicates that supplemental EISs are mandatory.⁴

An agency must take a “hard look” at any new information and evaluate whether or not the initial EIS and its findings should be revisited.⁵ If the new information demonstrates that the agency action will “affect the quality of the human environment in a significant manner or to a significant extent not already considered”; *i.e.* that it “provides a seriously different picture of the environmental landscape” and the agency action has not yet occurred, then the agency must prepare a supplemental environmental impact statement.⁶

As described in detail below, the Corps must prepare an EIS for DAPL due to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” and because “the purposes of [NEPA] will be furthered by doing so.”⁷

B. The Clean Water Act.

The Clean Water requires the Corps to require an individual §404 permit for DAPL if new information shows that a project may result in more than minimal environmental impacts or that an individual §404 permit review would serve the public interest.

³ 40 C.F.R. § 1502.9.

⁴ *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989) (recognizing the duty where there are significant new circumstances or information); *see also Dubois v. U.S. Dep’t. of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996) (“The use of the word ‘shall’ is mandatory, not precatory.”).

⁵ *Marsh*, 490 U.S. at 373-74 (1989).

⁶ *State of Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *see also Natural Res. Def. Council v. Lujan*, 768 F. Supp. 870, 886 (D.D.C. 1991) (a new report that contained a substantially different estimate of the amount of oil expected to be found in Alaska required the preparation of an SEIS).

⁷ 40 C.F.R. § 1502.9. While no federal agencies have yet prepared an EIS for DAPL, NEPA’s implementing regulations apply to equally to situations where agencies have prepared an EA as the Corps did for DAPL. *See, e.g.*, 40 C.F.R. § 1500.3 (“These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C)(environmental impact statements). The regulations apply to the whole of section 102(2)”).

Section 404 of the CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material, into navigable waters unless authorized by a permit issued by the Corps.⁸ In evaluating an individual §404 permit for a project, Corps guidelines require it to evaluate the project's impacts, select the least damaging practicable alternative, ensure that the project would not cause or contribute to violations of state water quality standards, and ensure that all appropriate steps have been taken to minimize potential adverse impacts.⁹ The Corps must also ensure that a project avoids wetlands destruction to the extent practicable.¹⁰ In evaluating an individual §404 permit, the Corps must provide “notice and an opportunity for public hearings” and evaluate the project's impacts pursuant to NEPA.¹¹

The Corps avoided this transparent review process for DAPL by approving each of the thousands of water crossings along the pipeline route under the fast-track Nationwide Permit 12 process.

The Corps issues nationwide §404 permits (NWP) such as NWP 12 for categories of activities it determines “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.”¹² Once the Corps issues a NWP, it can approve specific projects by simply verifying that they meet the terms and conditions of a NWP without going through the transparent process the individual §404 permit process requires (*e.g.*, a comprehensive, site-specific environmental and public interest review, an environmental impact statement, tribal consultation on the overall project pursuant to §106 of the National Historic Preservation Act).¹³ The “verification” of a project under a NWP is done entirely behind closed doors—there is no public notice upon receipt of an application or even when a project is approved, no NEPA analysis, and no hearings or other opportunity for public involvement.

In 2012, the Corps issued Nationwide Permit 12 (“NWP 12”) for minor pipeline projects that would result in up to 1/2-acre of loss of waters of the U.S.¹⁴ However, the Corps has begun segmenting massive interstate pipelines like DAPL by artificially treating the thousands of water crossings as separate projects that each qualify separately under NWP 12. In this way, the Corps has approved the 1,168-mile DAPL crude oil pipeline under NWP 12 without any project-specific §404 review process.

⁸ 33 U.S.C. § 1344.

⁹ 33 C.F.R. § 230.10.

¹⁰ *Id.* § 320.4(r)

¹¹ 33 U.S.C. § 1344(a).

¹² *Id.* § 1344(e)(1).

¹³ 33 C.F.R. § 323.3(a).

¹⁴ 77 Fed. Reg. 10,184, 10,271 (Feb.21, 2012).

However, the Corps is prohibited from approving a pipeline under NWP 12 if it would have more than minimal environmental effects. When reviewing a “pre-construction notification” (PCN) for a pipeline under NWP 12, the Corps must measure the project’s environmental effects to make sure it they would be only minimal.¹⁵ In making that determination, the Corps must consider the cumulative effects of an overall pipeline.¹⁶ If a project might have more than minimal environmental effects, the Corps must require an individual §404 permit for the pipeline.¹⁷

Even after the Corps has verified a project under NWP 12, the Corps must require an individual §404 permit if it finds a project would exceed the “minimal effects” threshold or would otherwise be contrary to the public interest. For example, Corps regulations give district and division engineers the authority to “suspend, modify, or revoke authorizations under an NWP... where they have concerns for the aquatic environment.”¹⁸ If a Corps engineer finds that a project “would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, *he shall* modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit.”¹⁹

In deciding whether to modify, suspend, or revoke a project’s NWP 12 authorization, the Corps must consider several factors, including: “Changes in circumstances relating to the authorized activity since the NWP itself was issued or since the DE confirmed authorization under the NWP by written verification”; “any significant objections to the authorization not previously considered”; “cumulative adverse environmental effects resulting from activities occurring under the NWP”; “the extent of the permittee’s compliance with the terms and conditions of the NWPs”; and “other concerns for the environment, including the aquatic

¹⁵ See, e.g., 33 U.S.C. § 1344(e)(1); 77 Fed. Reg. at 10,287 (“In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest.”).

¹⁶ 77 Fed. Reg. 10287 (“In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects... For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), *as well as the cumulative effects caused by all of the crossings authorized by NWP*”)(emphasis added).

¹⁷ See, e.g., 77 Fed. Reg. 10240 (“In response to a [PCN], district engineers may exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse effects on the aquatic environment). For example, where a pipeline proponent sought to use NWP 12 for a 149-mile oil pipeline in Ohio, the Corps district engineers determined that the impacts of the overall project would be more than minimal and declined to verify the project under NWP 12, requiring instead an individual §404 permit and a NEPA analysis that covered the entire pipeline. *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 961-63 (S.D. Ohio 2002).

¹⁸ 33 C.F.R. § 330.1(d).

¹⁹ *Id.* (emphasis added).

environment under the section 404(b)(1) Guidelines, and other relevant factors of the public interest.”²⁰

As set forth below, many of these factors are met by DAPL, which indicates the verifications of the project under NWP 12 should be modified, revoked, or suspended and the Corps should require an individual §404 permit.

II. New Information regarding historic and cultural sites

New information provided to the Corps detailing historic sites require further NEPA and NHPA review as well as an investigation into whether DAPL intentionally destroyed any sites.

Section 106 of the National Historic Preservation Act (NHPA) regulates the obligation of federal agencies to consider the impacts to historic and culturally-significant sites and to ensure that prior to permitting or construction of a project there is identification of traditional cultural or historical properties and that through tribal consultation, these properties can be evaluated for qualification to the National Register of Historic Places or otherwise determined eligible for protection and conservation. In the case of DAPL, the Corps used a narrow interpretation of its §106 obligations to consult only on its claimed narrow jurisdictional areas and ignore the vast majority of the pipeline where historic sites and artifacts are likely located.

On Friday, September 2, Standing Rock submitted to the court detailed findings of its archaeologist and former Tribal Historic Preservation Officer (THPO) Tim Mentz, Sr., describing the construction area as unusually dense in rare cultural sites, which included human burial sites, stone prayer rings, and other sacred artifacts directly in the path of the proposed pipeline that he discovered through a survey.²¹ These included five stone features that may have met criteria for National Register of Historic Places criteria and 27 grave sites within a concentrated area next to the proposed pipeline route. According to the Sacred Stone Camp, of the 380 archeological sites that face desecration along the entire pipeline route, from North Dakota to Illinois, 26 of them are located at the confluence of the Missouri and Cannonball Rivers. This area is a historic trading ground, a place held sacred not only by the Sioux Nations, but also the Arikara, the Mandan, and the Northern Cheyenne. Mr. Mentz described one of the sites as “one of the most significant archeological finds in North Dakota in many years.”²²

²⁰ *Id.* § 330.5(d); *See also Id.* § 330.4(2) (“a DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires.”).

²¹ Plaintiff’s Motion for Leave to File Supplemental Declaration (and attachments), Case No. 1:16-cv-1534-JEB (Sept. 2, 2016), *available at* <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/DAPL%20Legal%202.pdf>.

²² *Id.*

This is significant new information that the Corps must consider in an EIS or SEIS and subsequent review process under the NHPA.

In addition, Section 110(k) of the NHPA actually *prohibits* the Corps from issuing the final permit/easement for DAPL at Lake Oahe if it determines that the company engaged in anticipatory demolition; that is, if DAPL intentionally destroyed or adversely affected potential historic sites along the pipeline's path.²³ The events described below suggest that DAPL's actions constitute anticipatory demolition and thus warrants an investigation by the Corps.

Standing Rock submitted its motion and accompanying Mentz declaration identifying specific sites on September 2, 2016, the Friday afternoon before the Labor Day weekend. Early the next morning, DAPL responded by bringing in construction crews and bulldozing the specific areas described by Standing Rock in their filing. When protectors of the site entered the construction area, private security guards attacked them with dogs and pepper spray. According to Standing Rock, most of the stone features described in the declaration and potentially undisturbed for centuries are now gone. "This demolition is devastating," Tribal Chairman David Archambault II said. "These grounds are the resting places of our ancestors. The ancient cairns and stone prayer rings there cannot be replaced. In one day, our sacred land has been turned into hollow ground."²⁴

In light of these events, Standing Rock filed a motion for a temporary restraining order on Sunday, September 4, 2016, including details that suggest DAPL destroyed these sites intentionally.²⁵ For example, DAPL work crews arrived to raze the specific 2-mile area containing the sites the next morning immediately following their identification; the work crews did not ordinarily work on weekends or holiday weekends; while pipeline construction usually proceeds in a linear fashion, the destroyed sites were approximately 20 miles from where work crews had been working to date; the crews arrived with private security guards wielding attack dogs, pepper spray, and a helicopter hovering overhead, which suggests they anticipated some amount of controversy.

Thomas F. King, Ph.D., an archaeologist with extensive qualifications, wrote to the Corps on September 4, 2016 and further explained in a declaration September 9, 2016 that Mentz "possesses all the qualifications necessary to perform the studies that inform his declarations,"

²³ 54 U.S.C. § 306113 ("the agency will not grant a . . . permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur...").

²⁴ Press Release: "Standing Rock Sioux Tribe condemns destruction and desecration of burial grounds by Energy Transfer Partners," September 3, 2016, *available at* http://standingrock.org/data/upfiles/media/Press%20Release_Standing%20Rock%20Sioux_%2009032016.pdf.

²⁵ Declaration of Tim Mentz, Sr. in Support of Temporary Restraining Order, Case No. 1:16-cv-1534-JEB (Sept 4, 2016), *available at* <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Mentz%20Declaration.pdf>.

and that his observations were derived from knowledge only obtained from a lifelong immersion in the traditional culture of the Standing Rock Sioux Tribe.²⁶ King's declaration also corroborates Standing Rock's theory that the construction work done by DAPL, less than 24-hours after the Mentz declaration was filed, was a willful effort to destroy the recorded culturally significant sites in order to circumvent review under NHPA §106.

On October 4, 2016, the National Trust for Historic Preservation (the Trust) sent a "Notice of Possible Anticipatory Demolition Regarding Dakota Access Pipeline" to the Corps in regards to DAPL's destruction of culturally significant sites on the pipeline route and to urge the Corps to take action pursuant to §110 of the NHPA.²⁷ The Trust is a non-profit organization chartered by Congress in 1949 for the purpose of protecting significant historic sites and advocating for historic preservation through compliance with the NHPA. In its letter, the Trust discussed the declarations of Tim Mentz that describe the religious and cultural sites he discovered on the pipeline route just west of Lake Oahe and DAPL's immediate destruction of those specific areas the morning after their identification to the court. The Trust acknowledged Mr. Mentz's particular expertise in identifying Standing Rock historic sites, based on his 39 years of experience working in historic preservation with Standing Rock and his appointment as the country's first Tribal Historic Preservation Officer. The Trust expressed its opinion that "the Army Corps may be required by Section 110(k) of the NHPA to refrain from granting the [Lake Oahe] easements, or reauthorizing any permits relating to the Dakota Access Pipeline, because it appears that intentional actions may have been taken by the applicant to destroy cultural resources within the pipeline corridor. At the very least, it is imperative that the federal agencies conduct a thorough investigation of the facts alleged by the Tribes in order to determine whether the prohibitions of Section 110(k) have been triggered."²⁸

In fact, this is not the first time DAPL has been accused of anticipatory demolition in its haste to build the pipeline. In a letter of May 6, 2016, the Advisory Council for Historic Preservation (ACHP) critiqued the Corps' §106 review process and recommended "further steps the Corps should take to adequately consider effects to historic properties" from DAPL.²⁹ In addition, ACHP explained that the Iowa Utility Board recently ruled that DAPL had violated a recent order "by engaging in prohibited activities prior to obtaining all its permits and approvals by engaging in activities within the ROW including tree clearing within the Corps' jurisdictional

²⁶ Letter of Thomas F. King, Ph.D, to Army Corps (September 4, 2016) and Declaration of Thomas F. King, Ph.D in Support of Plaintiff's Motion for Stay Pending Appeal, Case No. 1:16-cv-1534-JEB (Sept 9, 2016), *available at* <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/DAPL%20Legal.pdf>.

²⁷ *Available at*

<https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/National%20Trust%20110%28k%29%20ltr%20to%20Army%20Corps%20re%20DAPL%20Oct%204%202016.pdf>.

²⁸ *Id.*

²⁹ *Available at* <https://turtletalk.files.wordpress.com/2016/05/achpdakota-access-pipeline-con-06may16.pdf>.

PCN's for the purpose of eliminating Indiana Brown bat habitat prior to the start of the April 1 breeding season.”³⁰ ACHP concluded:

Since this activity may have caused harm to, or precluded, the appropriate identification of historic properties in those locations, the Corps should investigate this issue and consult with the ACHP regarding the applicability of Section 110(k) before it proceeds with the Section 106 review.³¹

Therefore, the Corps must investigate these events before issuing any additional permits for DAPL. If it determines DAPL intentionally destroyed any sites, *Section 110(k) prohibits it from approving the Lake Oahe crossing.*

Finally, in a letter released on September 21st, more than 1,400 archeologists, museum directors, anthropologists and historians appealed to President Obama, the Department of Justice, the Department of the Interior, and the Army Corps of Engineers asking for further study of land involved in the pipeline project, around the Missouri River near the border of South Dakota.³² In the letter, they highlight that the burial desecration that occurred near the Standing Rock Sioux reservation was in direct conflict with the Native American Grave Protection and Repatriation Act, which was put in place to prevent burial desecration of this type. The Corps must prepare an EIS and/or an SEIS with a robust cultural resources survey and proper tribal consultation in order to better identify sacred cultural and historical sites and artifacts and take proper measures to preserve these areas in close consultation with the Standing Rock Sioux and other tribes in the region.

III. New and previously unconsidered information on oil spill impacts

Perhaps the most controversial issue surrounding DAPL is the potential for the pipeline to spill or leak crude oil and contaminate Lake Oahe, which provides drinking water for Standing Rock, as well as thousands of other waterways that the pipeline would cross.

Incredibly, neither the Corps nor any other agency has once ever analyzed the risks of oil spills or the potential impacts of a spill to waterways. In approving DAPL, the Corps and FWS prepared very limited environmental assessments (EAs) evaluating the impacts of project construction at discrete sites. The Corps prepared an EA that was limited to just three miles of

³⁰ *Id.* The Fish and Wildlife Service (FWS) has also raised concerns about actions by DAPL’s premature destruction of bat habitat in a letter of May 2, 2016.

³¹ *Id.*

³² Archaeologists and Museums Denounce Destruction of Standing Rock Sioux Burial Grounds, September 21, 2016, *available at* <http://thenaturalhistorymuseum.org/archaeologists-and-museums-respond-to-destruction-of-standing-rock-sioux-burial-grounds/>.

Corps jurisdiction at Lake Oahe and ignored the other 1,168 miles of the pipeline.³³ The FWS also prepared an EA that was limited to its jurisdictional footprint. And as discussed below, the Corps approved the hundreds (most likely thousands) of DAPL water crossings under NWP 12 without any project-specific NEPA review (the 2012 EA for NWP 12 also failed to address oil spills).

None of these analyses ever mentioned the potential for DAPL to spill or leak into waterways, the potential impacts of a worst-case scenario discharge, whether there are adequate personnel and resources available to respond to a spill, or whether any route alternatives exist that would avoid sensitive waterways or drinking water supplies such as Lake Oahe. Given the frequency of crude oil pipeline spills in the US and the devastating impacts that often result, this omission is an alarming violation of the Corps' NEPA obligations.

A. Recent oil spills highlight the risks posed by DAPL and the insufficiency of federal oversight

A series of oil and hazardous liquid pipeline spills, including many new incidents that have occurred since the preparation of the Corps' EA for Lake Oahe, highlight the risks of DAPL that must be considered in an EIS pursuant to NEPA. Notably, many of these spills went undetected by pipeline operators until passersby reported the incidents.

On the morning of September 9, 2016, the same day the agencies announced they would reconsider whether to prepare additional NEPA analysis for DAPL, a 36-inch pipeline ruptured in Alabama spilling an estimated 336,000 gallons of gasoline.³⁴ The spill was not detected by the pipeline's leak detection system; rather, an inspector who happened to be on a monthly check of a nearby coal mine reported the leak after noticing a strong odor of gasoline and a sheen on the water surface.

In June of 2016, a resident in the city of Ventura, California first noticed crude oil flowing in an arroyo outside his home and notified emergency responders as well as the responsible pipeline company, Crimson Pipeline.³⁵ Nearly 30,000 gallons of crude oil were

³³ See U.S. Army Corps of Engineers, "Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands," July 2016, available at <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801>.

³⁴ Dennis Pillion, *Alabama pipeline leak: What we know so far about the spill, gas shortages and more*, September 18, 2016, available at http://www.al.com/news/birmingham/index.ssf/2016/09/how_alabama_pipeline_leak_led.html.

³⁵ Matt Hamilton, Joseph Serna and Veronica Rocha, *Ventura oil spill misses the ocean, but damage on land is unclear*, June 23, 2016, available at <http://www.latimes.com/local/lanow/la-me-ln-ventura-county-oil-spill-20160623-snap-story.html>.

spilled from the pipeline and flowed half a mile down the arroyo, coating the riverbed, rocks, and plants.³⁶

In May of 2016 and September of 2015, Shell's San Pablo Bay Pipeline ruptured along the same stretch of pipeline near Tracy, California.³⁷ Both spills released about 20,000 gallons of crude oil each.

In April of 2016, a passerby along the South Dakota section of the Keystone I Pipeline noticed a leak. TransCanada's spill detection system did not detect this leak, and the company initially reported that only 187 gallons of tar sands crude had spilled. Almost a week later, TransCanada reported that in fact nearly 17,000 gallons of diluted bitumen had spilled.³⁸

In May of 2015, a pipeline owned by Plains All American Pipeline spilled 143,000 gallons of crude oil near Santa Barbara, California. The oil flowed down a culvert, onto Refugio State Beach, and into the Pacific Ocean.³⁹ The company has subsequently been indicted on 46 criminal counts including failure to provide timely notice of the leak to emergency officials. Three and a half hours passed between the time it shut down the line due to abnormalities and the time federal regulators were notified.⁴⁰

In January of 2015, the Poplar Pipeline, a pipeline operated by Bridger Pipeline Co. that runs under the Yellowstone River in Montana (as DAPL is proposed to run under Lake Oahe) spilled approximately 50,000 gallons of crude oil into the frozen river.⁴¹ The spill ended up contaminating the drinking water intake system for the city of Glendive.⁴²

³⁶ Matt Hamilton, *Feeling duped, Ventura blasts company for restarting pipeline after oil spill*, July 6, 2016, available at <http://www.latimes.com/local/lanow/la-me-ln-ventura-oil-spill-pipeline-criticism-20160705-snap-story.html>.

³⁷ Ted Goldberg, *Pipeline at Center of Altamont Pass Oil Spill Also Ruptured Last September*, May 24, 2016, available at <http://ww2.kqed.org/news/2016/05/24/pipeline-at-center-of-altamont-pass-oil-spill-also-ruptured-last-september>.

³⁸ Alan Neuhauser, *Keystone Leak Worse Than Thought*, April 8, 2016, available at <http://www.usnews.com/news/articles/2016-04-08/keystone-pipeline-leak-worse-than-thought>.

³⁹ Joseph Serna, *Refugio oil spill may have been costlier, bigger than projected*, August 5, 2015, available at <http://www.latimes.com/local/lanow/la-me-ln-refugio-oil-spill-projected-company-says-20150805-story.html>.

⁴⁰ Doug Smith and Brittny Mejia, *Pipeline company indicted in 2015 Santa Barbara County oil spill*, May 17, 2016, available at <http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-county-oil-spill-20160517-snap-story.html>.

⁴¹ Holly Yan, *After oil spilled in Yellowstone River, residents told not to drink water*, January 20, 2015, available at <http://www.cnn.com/2015/01/20/us/yellowstone-river-spill/>.

⁴² EPA Region 8 Press Release: "Bridger Pipeline Release," available at <https://www.epa.gov/region8/bridger-pipeline-release>.

In May of 2014, a pipeline operated by Belle Fourche Pipeline Co. spilled 25,000 gallons of crude oil in the Powder River Basin in Montana. The oil flowed more than two miles down a gully on BLM land and was burned as part of cleanup efforts.⁴³

In September of 2013, a farmer discovered oil gurgling up from his farm in North Dakota and reported the incident, which originated from a Tesoro Logistics pipeline. The spill released more than 865,000 gallons of crude oil over several days without being detected by the company.⁴⁴

In July of 2012, more than 50,000 gallons (1200 barrels) of crude oil spilled from Enbridge's Pipeline 14 on farmland in Grand Marsh, Wisconsin.⁴⁵

In July of 2011, another ExxonMobil pipeline that runs under the Yellowstone River in Montana spilled 63,000 gallons of crude oil into the river and floodplain. The oil flowed 85 miles downstream and impacted 11,000 acres of shoreline with little of the oil recovered in the aftermath.⁴⁶ An investigation found that it took ExxonMobil 46 minutes to completely close the key valve after discovering the rupture on the Silvertip Pipeline.⁴⁷ ExxonMobil spent \$135 million on cleanup efforts and was fined an additional \$1 million by the Pipeline and Hazardous Materials Safety Administration (PHMSA) for four violations.⁴⁸ Flooding conditions not only exacerbated the impacts of the spill but hindered response efforts and contributed to the pipeline failure.

When constructed in 2009, TransCanada's Keystone I Pipeline was described as a state-of-the-art pipeline that would "meet or exceed world class safety and environmental standards."⁴⁹ Nonetheless, it leaked 14 times in the U.S. and 21 times in Canada during its first

⁴³ Mead Gruver, *Company: Corrosion caused Wyoming oil pipe spill*, July 18, 2014, available at <http://www.washingtontimes.com/news/2014/jul/18/company-corrosion-caused-wyoming-oil-pipe-spill/>.

⁴⁴ Dan Frosch, *Oil Spill in North Dakota Raises Detection Concerns*, October 23, 2013, available at http://www.nytimes.com/2013/10/24/us/oil-spill-in-north-dakota-raises-detection-concerns.html?_r=0.

⁴⁵ Pipeline and Hazardous Safety Materials Administration, Corrective Action Order, July 30, 2016, available at http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/Corrective_Action_Order_073012.pdf and David Hasemyer, *Witness Says Enbridge's Wisconsin Pipeline 'Blew Like an Oil Well'*, August 1, 2012, available at <https://insideclimatenews.org/news/20120801/enbridge-oil-pipeline-wisconsin-phmsa-epa-water-fine-kalamazoo-dilbit-diluted-bitumen-safety>.

⁴⁶ Montana Dept. of Justice Natural Resource Damage Program, *Yellowstone River Oil Spill (July 2011)*, August, 2016, available at <https://dojmt.gov/lands/yellowstone-river-oil-spill/>.

⁴⁷ The Associated Press, *Feds: Delayed response worsened Yellowstone oil spill*, January 2, 2013, available at <http://www.usatoday.com/story/news/nation/2013/01/02/montana-exxon-oil-spill/1804579/>.

⁴⁸ Keith Goldberg, *Exxon Fights \$1M Oil Pipeline Spill Penalty*, February 23, 2015, available at <http://www.law360.com/articles/623871/exxon-fights-1m-oil-pipeline-spill-penalty>.

⁴⁹ TransCanada, *Keystone Pipeline Starts Deliveries to U.S. Midwest*, June 30, 2010, available at <http://www.transcanada.com/5407.html>.

year of operation beginning in 2010.⁵⁰ This includes a 20,000 gallon spill in North Dakota in 2011 that was discovered by a rancher who observed a 60-foot geyser of oil spewing from the pipeline.⁵¹ PHMSA subsequently issued a Corrective Action Order (CAO) temporarily shutting the pipeline down as an imminent threat to life, safety and the environment. This made Keystone I the newest pipeline in U.S. history to receive such an order.⁵²

Perhaps the two most devastating oil pipeline spills in recent years occurred in Marshall, Michigan in 2010, and Mayflower, Arkansas in 2013. On July 26, 2010, Enbridge (the same company with a substantial control of DAPL) reported that its 30-inch diameter 6B Pipeline had ruptured and released an estimated 840,000 gallons of crude oil near Marshall, Michigan.⁵³ The oil flowed into Talmadge Creek and then the Kalamazoo River, ultimately contaminating about 35 miles of the river before being contained. After the spill, the River flooded and stranded oil on floodplains, wetlands, backwaters, and islands.

Enbridge failed to discover or address the rupture for *over 17 hours*, during which time additional oil was pumped into the pipeline during two startups. The total release was estimated to be over 1.2 million gallons (over 28,571 barrels) of crude oil.⁵⁴ The response to this spill is far from complete, and may never be complete.⁵⁵ Enbridge recently disclosed that the cleanup costs have exceeded \$1.2 billion, making Kalamazoo by far the most expensive pipeline oil spill in U.S. history.⁵⁶

⁵⁰ State Department, Keystone XL FEIS, August 2011, 3.13-12-14; Mike De Souza, *Feds recorded 100 pipeline spills and accidents in the last two years*, July 5, 2011, available at <http://www.canada.com/business/Feds+recorded+pipeline+spills+accidents+last+years/5053005/story.html#ixzz2R64CUaXR>.

⁵¹ Elana Schor, *Who really discovered 2011 Keystone leak?*, August 9, 2013, available at <http://www.eenews.net/stories/1059985826>.

⁵² Pipeline and Hazardous Safety Materials Administration, Corrective Action Order, June 3, 2011, available at http://blog.nwf.org/wildlifepromise/files/2011/06/320115006H_CAO_06032011.pdf; Anthony Swift, *The Keystone tar sands pipeline becomes the newest hazardous liquid pipeline to be deemed an immediate threat to public safety by regulators*, June 6, 2011, available at http://switchboard.nrdc.org/blogs/aswift/the_keystone_tar_sands_pipelin.html.

⁵³ National Transportation Safety Board (NTSB), 2012, *Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan*, July 25, 2010, available at <http://www.nts.gov/doclib/reports/2012/par1201.pdf>. Pipeline Accident Report NTSB/PAR-12/01, (“NTSB REPORT”) at xii; U.S. House of Representatives, Committee on Transportation and Infrastructure, Staff Report for September 15, 2010, Hearing on Enbridge Pipeline Oil Spill in Marshall, Michigan, September 14, 2010 (House Staff Memo).

⁵⁴ Environmental Protection Agency, *EPA Response to Enbridge Spill in Michigan*, available at <https://www.epa.gov/enbridge-spill-michigan>.

⁵⁵ Sandy Smith, EHS Today, *EPA: More Work Needed to Clean up Enbridge Oil Spill in Kalamazoo River*, October 5, 2012, available at <http://ehstoday.com/environment/epa-more-work-needed-clean-enbridge-oil-spill-kalamazoo-river>.

⁵⁶ Carol Linnitt, *Official Price of the Enbridge Kalamazoo Spill, A Whopping \$1,039,000,000*, August 26, 2013, available at <http://desmog.ca/2013/08/26/official-price-enbridge-kalamazoo-spill-whopping-1-039-000-000>.

On March 29, 2013, ExxonMobil's Pegasus Pipeline ruptured in a neighborhood in Mayflower, Arkansas, spilling approximately 210,000 gallons of crude oil through the streets, into nearby wetlands and streams and may have contaminated portions of Lake Conway,⁵⁷ one of the state's most prized warm water fisheries. The incident forced twenty-two families from their homes and caused numerous health problems. As detailed in a piece in the *New Republic*, hundreds of residents experienced symptoms that included headaches of preternatural intensity, nosebleeds, hemorrhoids, rashes, severe weakness, drastic weight loss, respiratory disorders, nausea, and bowel issues.⁵⁸ Many of these symptoms were also reported after the Kalamazoo disaster.

The Kalamazoo and Mayflower spills highlight the inadequacies of federal pipeline oversight and the inability of pipeline companies to protect the public. A July 2012 report by the National Transportation Safety Board (NTSB) on the Kalamazoo spill was highly critical of Enbridge, the pipeline operator, and the existing federal regulatory framework. The NTSB found that "pervasive organizational failures by a pipeline operator along with weak federal regulations led to a pipeline rupture and subsequent oil spill in 2010."⁵⁹

Similarly, in a November 6, 2013 letter, PHMSA found nine probable violations by Exxon that showed a long-standing problem with a seam of which Exxon should have been aware.⁶⁰ PHMSA stated that information available to Exxon prior to the spill "*provided more than adequate information for the pipe to be considered susceptible to seam failure.*"⁶¹ The letter also detailed basic safety procedures Exxon failed to follow, many of which concern oversight of the seam that failed.⁶² Testing from as far back as 1991 demonstrated the existence of the defect that eventually led to the spill twenty-four years later. Thus, the problem was left unaddressed by Exxon for almost a quarter century until the line burst. As a result of these probable violations,

⁵⁷ See Jacob Kauffman, *Tar Sands in Lake Conway*, KUAR Public Radio (Apr. 23, 2013), available at <http://ualrpublicradio.org/post/tar-sands-oil-lake-conway>. There is a dispute as to whether tests in the lake were adequate, as they focused on the water itself, rather than the bottom materials. Some have reported oil contamination in the lake. Indeed, the Arkansas Attorney General stated that because a cove of Lake Conway was deemed contaminated, the lake was contaminated because "the cove is part of Lake Conway." <http://insideclimatenews.org/news/20130410/cove-where-exxon-oil-has-been-found-part-lake-conway>.

⁵⁸ Nora Caplan-Bricker, *This Is What Happens When a Pipeline Bursts in Your Town: Conflicted about Keystone? Consider the horrific impact of an oil spill in Arkansas*, *New Republic* (Nov. 18, 2013), available at <http://www.newrepublic.com/article/115624/exxon-oil-spill-arkansas-2013-how-pipeline-burst-mayflower>.

⁵⁹ NTSB Report, *supra* note 49.

⁶⁰ U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, Notice of Probable Violation and Proposed Compliance Order from R.M. Seely, Director, Southwest Region, Pipeline and Hazardous Materials Safety Administration to Mr. Gary W. Pruessing, President, ExxonMobil Pipeline Company, LLC (Nov. 6, 2013) at 2, available at http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Enforcement%20Notices/420135027_NOPV%20&%20PCO_11062013.pdf.

⁶¹ *Id.* at 2 (emphasis added).

⁶² See *id.*

Exxon incurred just a \$2.6 million fine from PHMSA for the incident, just .0003 percent of the company's \$7.8 billion profit in just the third quarter of 2013.⁶³

The NTSB account of the Kalamazoo spill is sobering and identifies key failures in the regulation of the pipeline that spilled. The NTSB cited “[i]nsufficient public awareness and education,” “weak regulation” and “ineffective oversight of pipeline integrity management programs, control center procedures, and public awareness” as factors in the Kalamazoo disaster.⁶⁴ The NTSB specifically found that the regulatory oversight for the pipeline was “inadequate.”⁶⁵ It also faulted “inadequate regulatory requirements for facility response plans,” the inadequacy of the “facility response plan to ensure adequate training of the first responders and sufficient emergency response resources allocated to respond,” and “inadequate review and approval of Enbridge’s facility response plan that failed to verify that the plan content was accurate and timely” for the spill.⁶⁶ The NTSB also concludes that it is “improbable that PHMSA would be able to perform an adequate review of facility response plans or enforce Federal requirements that pipeline operators identify and ensure that adequate response resources are available to respond to worst-case discharges.”⁶⁷ Put another way, PHMSA’s response resource regulations are unenforceable. The NTSB also found that, “[e]ssentially, the regulations allow the pipeline industry to dictate the requirements of an adequate spill response and to determine whether those requirements have been met.”⁶⁸

The NTSB additionally found that PHMSA has only 1.5 full-time employees managing about 450 response plans,⁶⁹ and that PHMSA does “not perform on-site audits to verify the content and adequacy of plans before approving them.”⁷⁰ This weak and inadequate regulatory structure – which is not currently being addressed or revised by PHMSA – is essentially all that serves to protect the people and places that will be impacted by the Dakota Access pipeline and a potentially major release of crude oil.

B. PHMSA data on oil spills and leak detection capabilities.

These reoccurring oil pipeline disasters demonstrates the frequency with which they occur and the inability of pipeline operators to adequately detect and respond to spills, making it all the more important that the Corps and other permitting agencies evaluate the potential impacts of an oil spill *prior to* permitting a pipeline.

⁶³ Caplan-Bricker, *supra*.

⁶⁴ NTSB Report, at xii.

⁶⁵ *Id.* at xiii.

⁶⁶ *Id.* at xiii-xiv.

⁶⁷ *Id.*

⁶⁸ *Id.* at 113.

⁶⁹ *Id.*

⁷⁰ *Id.*

Incident data collected by the PHMSA provides further insight into the frequency, severity, and cost of oil pipeline spills. Examining the last ten years of PHMSA data on significant pipeline incidents⁷¹ for onshore pipelines carrying crude oil suggests that DAPL could have more than minimal adverse environmental effects. Furthermore, the PHMSA data on all pipeline incidents, including those that do not meet the “significant” threshold, indicates that smaller oil spills occur frequently. Their impacts must be considered alongside larger volume oil spills and their cumulative effects captured by the Corps’ analysis.

PHMSA Significant Pipeline Incidents (2006-2015)
For Onshore, Crude Oil Pipelines⁷²

Year	Number	Fatalities	Injuries	Total Cost	Barrels Spilled	Net Barrels Lost
2006	42	0	0	\$14,119,240	83,032	4,606
2007	40	2	0	\$20,973,629	19,205	3,363
2008	47	0	0	\$32,822,504	58,732	36,472
2009	38	1	3	\$32,189,080	23,437	8,238
2010	46	0	0	\$1,116,763,433	52,313	6,798
2011	53	0	0	\$190,118,945	34,841	16,188
2012	60	3	4	\$45,913,301	14,450	4,293
2013	77	0	6	\$195,870,868	42,505	17,649
2014	72	0	0	\$52,965,742	16,666	1,827
2015	74	0	0	\$190,519,773	19,779	4,507

PHMSA Pipeline Incidents (2006-2015)
For Onshore, Crude Oil Pipelines⁷³

Year	Number	Barrels Spilled	Net Barrels Lost
2006	159	83,851	4,946
2007	160	19,787	3,530
2008	153	59,252	36,645
2009	154	24,183	8,555
2010	152	52,710	6,901

⁷¹ Significant incidents are those including any of the following conditions: 1) Fatality or injury requiring in-patient hospitalization, 2) \$50,000 or more in total costs, measured in 1984 dollars, 3) Highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more, 4) Liquid releases resulting in an unintentional fire or explosion. See <http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends>.

⁷² Data available at <http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends>.

⁷³ *Id.*

2011	144	35,279	16,318
2012	186	15,025	4,373
2013	204	43,048	17,830
2014	229	17,521	1,947
2015	248	20,668	4,632

On September 26, 2016, a Reuters analysis revealed that Sunoco Logistics Partners LP, the future operator of DAPL, is responsible for over 200 pipeline spills and leaks since 2010 alone, which means it spills crude oil more frequently than any of its competitors.⁷⁴

On September 30, 2016, Reuters published another analysis revealing the inability of pipeline technology to detect spills and leaks. According to the Reuters analysis of PHMSA data, of the 466 pipeline leaks in the past six years, only 22% were detected by an advanced detection system, while 21% were discovered by the public. Additionally, a leak detection system to be used by DAPL, the Computational Pipeline Monitoring System, has detected leaks only 19% of the time in the past six years. Thus, “sensitive technology designed to pick up possible spills is about as successful as a random member of the public.”⁷⁵

The data discussed in the article was the result of a leak detection study PHMSA prepared in 2012 for hazardous liquid and natural gas pipelines in response to a request from Congress.⁷⁶ The Corps should consider in its analysis. The study included: 1) an assessment of past incidents to determine if additional LDS (leak detection system) may have helped to reduce the consequences of the incident; 2) a review of installed and currently available LDS technologies along with their benefits, drawbacks, and their retrofit applicability to existing pipelines; 3) a study of current LDS being used by the pipeline industry; 4) a cost benefit analysis of deploying LDS on existing and new pipelines; and 5) a study of existing LDS standards to determine what gaps exist and if additional standards are required to cover LDS over a larger range of pipeline categories.

In particular, the Corps should review the eleven hazardous liquid case studies. The Corps must also consider the study’s compilation of methods of initial identification of incidents, which looked at 197 right-of-way incidents that occurred on hazardous liquids pipelines between 2010 and 2012. The summary tables are below.

⁷⁴ *Dakota Access operator Sunoco has terrible spill record*, September 26, 2016, available at <http://www.eenews.net/greenwire/2016/09/26/stories/1060043413>.

⁷⁵ Jarrett Renshaw and Davika Krishna Kumar, *Technology designed to detect U.S. energy pipeline leaks often fails*, September 30, 2016, available at <http://www.reuters.com/article/us-usa-pipelines-colonial-analysis-idUSKCN1200FQ>.

⁷⁶ Kiefner & Associates, Inc., *Final Report on Leak Detection Study to U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration*, December 10, 2012, available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Press%20Release%20Files/Leak%20Detection%20Study.pdf>.

Method for Initial Accident Identification-Hazardous Liquid Pipelines⁷⁷

Identifier	# of Incidents	% of Incident Reports
Air Patrol	10	5%
Controller	10	5%
CPM Leak Detection System or SCADA-Based Information	23	12%
Ground Patrol by Operator or Contractor	4	2%
Local Operating Personnel	38	19%
Notification from Emergency Responder	14	7%
Notification from Public	45	23%
Notification from 3 rd Party that Caused Accident	11	6%
Static Shut-In Test or Other Pressure or Leak Test	2	1%
Other	8	4%
Blank – No Data	32	16%

Of the 165 hazardous liquid spills for which an initial identifier was reported, only 12% were detected by a leak detection or SCADA system while the public was the first to report in 23% of the cases.

Furthermore, an analysis of PHMSA data from 2002 to July 2012 by InsideClimate News found an even greater disparity with remote sensors detecting 5% of pipeline spills versus the public reporting 22%.⁷⁸ The limitations and drawbacks of leak detection systems pointed out by the PHMSA study must be considered in the Corps' impact analysis for DAPL because it is clear that they are less reliable than pipeline operators would like to claim.

Finally, the Corps must acknowledge and address the potential for small leaks that are below the typical detection limits of the SCADA systems—around 2% of the pipeline flow rate.⁷⁹ While 2% may appear minor at first glance, DAPL will transport up to 570,000 bpd of crude oil at high pressures. That means up to 11,400 barrels, or 478,800 gallons, of crude oil could leak from DAPL every day without being detected by the SCADA system. The EPA raised this concern in a letter objecting to the Corps' approval of the Flanagan South Pipeline under

⁷⁷ *Id.* at 3-39.

⁷⁸ Lisa Song, *Few Oil Pipeline Spills Detected by Much-Touted Sensors*, September 19, 2012, available at <http://www.bloomberg.com/news/articles/2012-09-19/oil-pipeline-spills-go-undetected-by-much-touted-sensors>.

⁷⁹ EPA, *Comments on the Environmental Assessment for the Proposed Issuance of Easements for the Flanagan South Pipeline Crossing of the Mississippi River*, December 23, 2013, available at <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/EPA%20Flanagan%20South%20comments.pdf>.

NWP 12, and recommended the Corps require DAPL to “establish a network of sentinel or monitoring well-s along the *entire length* of the pipeline, especially in sensitive or ecologically important areas, where water supply wells and intakes are located and at stream crossings.”⁸⁰

C. NEPA requires the Corps to evaluate this information

Courts have repeatedly held that NEPA requires the Corps to analyze the risks of oil spills in issuing § 404 permits, including the risks and impacts of worst-case scenario discharges. *See Stop The Pipeline v. White*, 233 F. Supp. 2d 957, 969 (S.D. Ohio 2002) (finding that the Corps’ EA for a pipeline 404 permit satisfied NEPA because the Corps consulted with the Office of Pipeline Safety and analyzed the risks of worst cases spills from an oil pipeline); *Sierra Club v. Sigler*, 695 F.2d 957, 969-75 (5th Cir. 1983) (in issuing a 404 permit for a dock expansion, the Corps failed to analyze the worst-case spill scenarios that could result from the increased oil tanker traffic allowed by the new dock); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 867 (9th Cir. 2005) (same).

To be clear, the impacts from pipeline oil spills are not impacts that occur outside of the Corps’ jurisdictional areas. DAPL has the potential to spill into Corps’ jurisdictional waterways, including Lake Oahe. Thus, potential oil spills into US waterways is something the Corps should consider as part of determining whether DAPL’s impacts are certain to be minimal, and thus qualify for authorization under NWP 12, or whether the project should be evaluated under an individual §404 permit process.

In fact, the U.S. EPA Region 8 office sent a letter to the Corps on March 8, 2016, voicing its concern over the pipeline’s close proximity to drinking water supplies and the potential for oil spills or leaks to contaminate them.⁸¹ Specifically, EPA noted that the pipeline would be located immediately upstream of the drinking water intakes for the Fort Yates, Standing Rock Reservation water system, the main Standing Rock Reservation drinking water system, water intakes for a tribal irrigation project, as well as individual drinking water wells located along the Missouri River. EPA further stated that the Mobridge, South Dakota and Williston, North Dakota drinking water intakes are located less than 20 miles downstream, and that the Missouri River is used as the drinking water supply for much of western South Dakota and five Tribal Nations (the Cheyenne River, Crow Creek, Oglala, Rosebud and Lower Brule Sioux Tribes) as well as the Mni Wiconi Rural Water System that provides drinking water to the Pine Ridge, Rosebud, and Lower Brule Reservations and the West River/Lyman Jones Water District. The EPA was concerned that there would be too little time to determine whether a leak was occurring and to notify the water treatment facilities, and urged the Corps to prepare a revised NEPA analysis that

⁸⁰ *Id.* (emphasis added).

⁸¹ Available at

<https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Dakota%20Access%20pipeline%20DEA%20cmts%20%281-8-16%29%20%281%29.pdf>.

discussed potential impacts to downstream water supplies and include the water systems in emergency preparedness planning.

The multiple environmental impact statements prepared for the Keystone XL Pipeline should serve as a model for the Corps oil spill analysis for DAPL.⁸² As a listed cooperating agency on these documents, the Corps should already be familiar with the large scope of a proper evaluation of potential pipeline releases from crude oil pipelines. The Corps' oil spill analysis for DAPL should include, but not be limited to, an assessment of historical pipeline incidents, potential spill impacts, the reliability of leak detection systems, and threats to pipeline integrity, and the potential impacts of worst-case scenario discharges as well as smaller leaks that may go undetected for long periods of time.

IV. New information on the climate impacts of DAPL

The Corps' EA failed to address the climate impacts of DAPL despite the urging of several commenters. Since the publication of the EA, new information has come to light that clarifies the importance of this omission.

On August 1, 2016, the Council on Environmental Quality (CEQ) released its long-anticipated Final Guidance on Greenhouse Gases and Climate Change (Guidance), which instructs agencies to take a comprehensive, big-picture approach in analyzing the climate impacts of federal actions.⁸³ The guidance interprets agencies' existing obligations to consider climate change impacts of proposed agency actions under NEPA. The Guidance recognizes "climate change is a fundamental environmental issue, and its effects fall squarely within NEPA's purview," and explains that the guidance "is intended to assist agencies in disclosing and considering the reasonably foreseeable effects of proposed actions that are relevant to their decision-making processes."⁸⁴

For example, the Guidance states that federal agencies considering resource extraction projects must consider the effects of "using the resource" in addition to the environmental consequences of the extraction itself. In other words, the Guidance reiterated what courts have already recognized— federal agencies must consider the downstream climate effects of burning the additional fossil fuels made available by an agency action.

The Guidance also recommends that federal agencies look beyond individual actions. For example, rather than considering the climate impacts of individual proposals in isolation, CEQ

⁸² Available at https://keystonepipeline-xl.state.gov/archive/dos_docs/feis/.

⁸³ Council on Environmental Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, August 1, 2016, available at

https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

⁸⁴ *Id.* at 2.

recommends a “programmatic” approach to consideration cumulative climate impacts. Similarly, CEQ reiterated that existing regulations require agencies to look beyond the narrow confines of an individual proposal, instead including both “connected” actions and “actions that may occur as a predicate for a proposed agency action.

Overall, the Guidance instructs agencies to take a broad view in order to capture the full greenhouse gas emission impact of proposed actions, which in turn will allow for informed agency decision-making as NEPA requires.

Dakota Access would transport up to 570,000 barrels per day of crude oil from the Bakken region to refineries. If not for the DAPL’s low-cost transportation option, much or all of the oil would not be capable of being developed and transported to refineries or burned. Thus, the lifecycle greenhouse gas emissions of oil transported to market from DAPL must be analyzed.

Instead, the Corps has taken the narrowest possible view of its jurisdiction over DAPL to ignore the greenhouse gas emissions altogether. The Corps EA limits its focus to the three-mile span of DAPL that crosses under Lake Oahe and adjoining Corps property, but completely ignores the other connected federal approvals. It fails to evaluate the thousands of other sections of the pipeline that cross Corps jurisdictional waterways, Corps properties, and FWS-managed properties, all of which are interdependent parts of the overall pipeline and necessary for the project to be completed (*see* section V, below). It fails to discuss the causal connection between the construction of DAPL and the 570,000 barrels per day of crude oil that will be extracted, transported to market, and consumed, for which DAPL is a predicate.

Incredibly, the only sentence in the EA in which the Corps even mentions greenhouse gas emissions or climate change impacts *at all* is: “The contribution of the Project to greenhouse gas emissions during construction would be considered a minor indirect impact to climate change.”⁸⁵ The EA for the Corps’ issuance of Nationwide Permit 12, which the Corps used to permit the thousands of individual water crossings along the pipeline route, contains not a single mention of the issue.⁸⁶

Furthermore, a new analysis shows that building the pipeline would be inconsistent with the United States’ climate goals. According to analysis by Oil Change International (OCI), the pipeline would lock in greenhouse gas emissions in an amount equivalent to the emissions of 30 coal plants.⁸⁷ By reducing shipping costs for large amounts of oil, particularly with current oil

⁸⁵ Corps’ Lake Oahe EA, at 67.

⁸⁶ U.S. Army Corps of Engineers, “Decision Document Nationwide Permit 12,” February 13, 2012, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf.

⁸⁷ Oil Change International, *The Dakota Access Pipeline will lock-in the emissions from 30 coal plants*, September 12, 2016, *available at* <http://priceofoil.org/2016/09/12/the-dakota-access-pipeline-will-lock-in-the-emissions-of-30-coal-plants/>.

prices so low, building this pipeline would significantly increase the amount of crude oil getting to market. OCI calculated that, at typical utilization rates of 95% of capacity, total lifecycle emissions from producing, transporting, processing, and burning the products derived from the oil would amount to 101.4 million metric tons of CO₂ per year. That level of emissions is equivalent to the greenhouse gas emissions from 29.5 typical U.S. coal plants or the average emissions of 21.4 million U.S. passenger vehicles.⁸⁸

On October 4, 2016, the European Union voted to ratify the the Paris Agreement on climate change, which means the accord will formally go into effect in November.⁸⁹ The Agreement establishes the goal of “holding the increase in global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels.”⁹⁰ The current U.S. long-term climate target—which may not be enough to achieve the ‘well below 2 degrees’ goal set in Paris—is an emissions cut of 83 percent from 2005 levels by 2050.⁹¹

In fact, on September 26, 2016, Nature Climate Change published a study on the anticipated gap between existing U.S. federal policies and the emission reductions required to meet our Paris commitments that made clear current policies will be insufficient to achieve our reduction goals.⁹² At stake is the attainment of U.S. climate goals. Locking in new fossil fuel pipeline infrastructure like DAPL with an economic lifespan of several decades would exceed the U.S. emissions budget.

An increasing body of scientific literature indicates that to avoid the worst consequences of climate change, the vast majority of fossil fuel reserves must stay in the ground. For example, a peer-reviewed article published in the journal *Nature* concluded that if we are to keep climate change below dangerous levels – 80 percent of global coal reserves, half of all gas reserves, and a third of oil reserves must stay in the ground through 2050.⁹³ For unconventional oil, closer to 90% of such fossil fuels must remain in the ground.

⁸⁸ *Id.*

⁸⁹ Chris Mooney and Brady Dennis, *The Paris climate agreement is entering into force. Now comes the hard part.* October 4, 2016, available at https://www.washingtonpost.com/news/energy-environment/wp/2016/10/04/the-paris-climate-agreement-is-entering-into-force-now-comes-the-hard-part/?utm_term=.3684f53292fa.

⁹⁰ United Nations Framework Convention on Climate Change (UNFCCC). Adoption of the Paris Agreement. December 12, 2015. available at <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>.

⁹¹ USA. Climate Action Tracker. September 4, 2015, available at <http://climateactiontracker.org/countries/usa.html>.

⁹² Jeffery B. Greenblatt and Max Wei, *Assessment of the climate commitments and additional mitigation policies of the United States*, September 26, 2016, available at <http://www.nature.com/nclimate/journal/vaop/ncurrent/full/nclimate3125.html>.

⁹³ Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C*, *Nature* Vol. 517, pp. 187-190, January 7, 2015, available at <http://www.nature.com/nature/journal/v517/n7533/full/nature14016.html>.

In addition, more than 120 scientists have signed an open letter in the journal *Science* calling for a halt on DAPL construction until further environmental and cultural assessments are carried out, including an assessment of the project's climate impacts.⁹⁴ The scientists agree that the current impact assessments for DAPL failed to take into account Standing Rock's environmental and cultural concerns, and in light of the Paris Agreement, the scientists have called for the "federal government to give explicit consideration to how this and any such proposed national energy strategies trade off with public health, environmental justice and biodiversity conservation." The letter states: "We as scientists are concerned about the potential local and regional impacts from the DAPL, which is symptomatic of the United States' continued dependence on fossil fuels in the face of predicted broad scale social and ecological impacts from global climate change."

Given the new CEQ climate guidance and the report on DAPL's climate impacts, the Corps must prepare an EIS that analyzes the climate impacts associated with the extraction, processing, transportation, refining, and end-use combustion of the crude oil that will be transported by Dakota Access. The Obama Administration rejected the Keystone XL pipeline after finding it would not serve the national interest because of its contribution to climate pollution. A similar test must be used in deciding whether to approve Dakota Access.

V. **The Corps and FWS should revoke and/or suspend already-issued permits in federal jurisdictional areas pending the preparation of an EIS and/or an individual §404 permit**

As set forth above, new information regarding the impacts of DAPL, as well as glaring omissions in the Corps' EA for the Lake Oahe crossing, require Corps to prepare an EIS and/or an individual §404 permit. Furthermore, NEPA and its implementing regulations require the agencies to suspend all permits or approvals in federal jurisdictional areas along DAPL while that EIS is being prepared. Otherwise, all of the 1,168-miles of the pipeline will be constructed, except the final piece at Lake Oahe, before the Corps prepares its EIS, which will unduly prejudice the outcome and limit the choice among alternatives.

NEPA has numerous interrelated regulations that prohibit this segmented approach to project approval. First, NEPA requires federal agencies to analyze a project and all of its connected federal actions together in a single EA or EIS before the project is allowed to proceed. Connected actions are defined as actions that: "(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) Are interdependent parts of a larger action and depend on the larger action for their justification."⁹⁵

⁹⁴ Stephanie Januchowski-Hartley, Anne Hilborn, Katherine Crocker and Asia Murphy, *Scientists support need for revised environmental and cultural impact assessments for the Dakota Access Pipeline Project*, October, 2016, available at https://www.dropbox.com/s/avwe4fspbdqynt/DAPL_Scientist_SignOn_Letter.pdf

⁹⁵ 40 C.F.R. § 1508.25 (a)(1).

“The justification for the rule against segmentation is obvious: it ‘prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.’”⁹⁶ The long-standing rule “was developed to insure that interrelated projects the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.”⁹⁷ Thus, agencies may analyze an individual component of an overall project in separate NEPA analysis only if it would have “independent utility.”⁹⁸

The agencies violated this long-standing rule in approving DAPL. There were several aspects of federal approval of DAPL that were improperly segmented and analyzed separately, including, but not limited to: (1) the Corps’ St. Louis District Office granted a permit application under Section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408 (commonly known as Section 408) for construction and burial of two segments of the pipeline beneath the Illinois River, Coon Run Levee, and McGee Creek Levee, and one segment beneath the Carlyle Lake flowage easement; (2) the Corps’ Omaha Office is evaluating a separate §408 permit and related easement for the pipeline to cross lands that have federal flowage easements under management by the Corps at Lake Sakakawea and Lake Oahe in North Dakota; (3) the Corps’ Omaha, Rock Island, and St. Louis districts each issued verifications under NWP 12 for the pipeline to cross hundreds of waterways along the 1,168-mile pipeline; (4) as part of the NWP 12 verification, the Corps consulted with the U.S. Fish and Wildlife Service (“FWS”) pursuant to Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a); (5) the FWS issued a special use permit (“SUP”) for the pipeline to be constructed and operate in grassland and wetland easements managed by FWS in North Dakota and South Dakota pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. § 668dd-668ee). None of these federal actions would have independent utility, and thus are connected actions that must be analyzed in a single EIS.

Similarly, if more than one federal agency is “involved in the same action” or are “involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity,” the agencies must select a lead agency that “shall supervise the preparation of an environmental impact statement.”⁹⁹ “[T]he potential lead

⁹⁶ *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)).

⁹⁷ *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987).

⁹⁸ *Delaware Riverkeeper Network*, 753 F.3d at 1308 (applying the independent utility test to a FERC EA for a 40-mile gas pipeline, and finding it was actually one of four “physically, functionally, and financially connected and interdependent” components of one project); *Hammond*, 370 F. Supp. 2d at 244 (applying the independent utility test and holding that an entire 480-mile oil pipeline must be analyzed in a single NEPA document); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (applying the independent utility test to a highway project).

⁹⁹ 40 C.F.R. § 1501.5(a)(emphasis added).

agencies *shall* determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies.”¹⁰⁰

The Fixing America’s Surface Transportation (“FAST”) ACT of 2015 reinforces this requirement by requiring a higher degree of coordination in agency pipeline reviews.¹⁰¹ Specifically, FAST requires the identification of a lead / facilitating agency to coordinate the NEPA review of pipeline projects. The lead agency must “identify all Federal and non-Federal agencies and governmental entities likely to have ... environmental review, authorization, or other responsibilities with respect to the proposed project and invite them to become participating/cooperating agencies in the environmental review/authorization management process; post links to the applications and supporting documents, and a description of any Federal agency action taken or decision made that materially affects the status of a covered project; and consult with any coordinating/participating agencies to establish a concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review/authorization for the project.”¹⁰²

In this case, there were multiple federal agencies involved in permitting or approving the same interrelated project, yet the agencies failed to choose an agency to coordinate a transparent environmental review process, as NEPA and FAST require. Therefore, the Corps must coordinate with the other permitting agencies and select a lead agency to prepare an EIS.

Finally, NEPA prohibits agencies from approving parts of an interrelated project before it has an opportunity to complete its NEPA review, as piecemeal approval and construction would limit the choice among project alternatives and presuppose the approval of the project.

The purpose of NEPA is to “insure that ... environmental amenities and values may be given appropriate consideration in decisionmaking”¹⁰³ “NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment...., [so] the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options.”¹⁰⁴ Therefore, NEPA requires agencies to comply with NEPA when the “critical agency decision” is made which results in “irreversible and irretrievable commitments of resources” to an action which will affect the environment.¹⁰⁵

¹⁰⁰ *Id.* § 1501.5(b)(emphasis added).

¹⁰¹ Available at http://transportation.house.gov/uploadedfiles/fastact_xml.pdf.

¹⁰² *Id.*

¹⁰³ 42 U.S.C. § 4332(2)(B).

¹⁰⁴ *Sierra Club v. Peterson*, 717 F.2d at 1414; 40 C.F.R. § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values...”).

¹⁰⁵ *Id.* (citing *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2d Cir.1977); see also *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 229 (D.D.C. 2003); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1094 (D.C.Cir. 1973) (in determining *when* to prepare an EIS the agency must ascertain to what extent its decision embodies an “irretrievable commitment” of resources which precludes the exercise of future options);

To that end, NEPA regulations prohibit any action on a proposal, until an agency issues a record of decision, that would either “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.”¹⁰⁶ If an agency becomes aware that a non-federal project applicant is about to take such action before the agency concludes its NEPA process, “the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.”¹⁰⁷

In *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986), the court held that where a private highway project required federal approval to cross a park, no part of the highway could begin construction until the agency completed its NEPA analysis. The court explained that if the agencies allowed construction of a private highway all the way up to the border of the park prior to completion of the NEPA process, “the completed segments would stand like gun barrels pointing into the heartland of the park.... It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent. Non-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli*.”¹⁰⁸

Therefore, the Corps, FWS, and other federal agencies should suspend or revoke all permits or approvals of DAPL in federal jurisdictional areas, and notify DAPL that it cannot proceed with construction in those areas until the agencies can select a lead agency and prepare an EIS that encompasses all federal aspects of the connected project.

VI. New information on environmental justice issues

The Corps should prepare an EIS that evaluates environmental justice concerns, including whether the pipeline would disproportionately impact Native American communities along the pipeline route.

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, requires all federal agencies to identify and address disproportionately high and adverse human health or environmental of their programs and policies on minority and low-income populations and communities.¹⁰⁹ The CEQ guidance suggests that an environmental justice population may be identified if “the minority population

Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988) (an EIS must be prepared before any irreversible and irretrievable commitment of resources).

¹⁰⁶ 40 C.F.R. § 1506.1(a).

¹⁰⁷ *Id.* § 1506.1(b).

¹⁰⁸ *Id.* at 1042 (internal quotation marks and citation omitted).

¹⁰⁹ Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, February 16, 1994, available at <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>.

percentage of the affected area exceeds 50%, or if the minority population percentage of the affected area is meaningfully greater than the minority population in the general population or other appropriate unit of geographic analysis” (CEQ, 1997). The Corps’ EA, prepared by DAPL, acknowledges the importance of environmental justice concerns but dismisses them by summarily concluding: “no disproportional impacts on minority or low-income populations would occur as a result of the Proposed Action.”¹¹⁰

However, on August 18, 2016, the Bismarck Tribune revealed that DAPL had routed the pipeline through Standing Rock’s ancestral lands and under its drinking water supply to avoid jeopardizing the drinking water supply of Bismarck, ND.¹¹¹ The article reports that “early in the planning process, Dakota Access considered but eliminated an alternative that would have crossed the Missouri River about 10 miles north of Bismarck instead of the route currently under construction”; but rejected that option, in part, due to the costs associated with the “proximity to wellhead source water protection areas that are avoided to protect municipal water supply wells.” It appears that the Bismarck route alternative would have crossed through what PHMSA considers to be a “high consequence area”; whereas the current route threatening the Standing Rock water supply is not considered to be a “high consequence area.” The Corps’ EA appears to corroborate this.¹¹²

The EA fails to explain how and why DAPL would be re-routed around the drinking water supplies of Bismarck communities, yet pass directly underneath Standing Rock’s water supply and in close proximity to its drinking water intake; fails to discuss why Standing Rock’s water supply is not deserving of the same “high consequence area” designation that Bismarck enjoys; and fails to discuss whether these distinctions comport with environmental justice guidelines.

Furthermore, on September 23, 2016, the United Nations special envoy for the rights of indigenous people, Victoria Tauli-Corpuz, called on the U.S. government to halt construction due to threats to the drinking water supplies and sacred sites of Standing Rock and other indigenous nations.¹¹³ “I urge the U.S. government to undertake a thorough review of its compliance with international standards regarding the obligation to consult with indigenous peoples and obtain their free and informed consent,” Tauli-Corpuz said.¹¹⁴

¹¹⁰ Lake Oahe EA, at page 61.

¹¹¹ Amy Dalrymple, *Pipeline route plan first called for crossing north of Bismarck*, August 18, 2016, available at http://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html.

¹¹² Lake Oahe EA, at page 6.

¹¹³ Daniel J. Graeber, *U.N. steps into Dakota oil pipeline fight*, September 23, 2016, available at <http://www.upi.com/UN-steps-into-Dakota-oil-pipeline-fight/2181474632946/>.

¹¹⁴ *Id.*

VII. An EIS is the appropriate level of review for DAPL

Finally, NEPA regulations require the Corps to prepare an EIS for DAPL. In determining whether to prepare an EIS as opposed to an EA, the Corps must consider a range of factors to determine whether the impacts would be “significant” enough to warrant a full EIS rather than a limited EA.¹¹⁵ Many of those factors are met here.

For example, the “degree to which the proposed action affects public health or safety” and the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks” are two factors that the Corps must consider.¹¹⁶ As discussed above, oil pipelines such as DAPL routinely spill and leak, resulting in a long list of health problems in nearby residents and contaminating drinking water supplies.

The Corps must also consider “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”¹¹⁷ The DAPL and its potential impacts are clearly controversial, as demonstrated by the many thousands of people encamped near the Lake Oahe crossing at the “Sacred Stone Camp,” including members of Standing Rock and over two hundred other tribal nations from around the country. There have also multiple lawsuits filed over the lack of environmental review and tribal consultation and the company’s use of eminent domain, and the controversy has attracted worldwide media attention and public statements from President Obama.

Other “significance” factors are whether there are “[u]nique 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”; and “[t]he 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.”¹¹⁸ Among the most controversial aspects of DAPL is that it would cross through treaty lands of the Standing Rock Sioux Tribe and other nations and risk destroying sacred and culturally-significant sites. In fact, as described above, DAPL appears to have already destroyed some sacred and human burial sites near Lake Oahe that may have been eligible for listing on the National Register of Historic Places. Furthermore, the pipeline would cross through thousands of wetlands and waterways, major rivers such as the Missouri and Mississippi, and hundreds of miles of federally protected grasslands in North Dakota and South Dakota.

¹¹⁵ 40 C.F.R. § 1508.27.

¹¹⁶ *Id.* § 1508.27(b)(2), (5).

¹¹⁷ *Id.* § 1508.27(b)(4)

¹¹⁸ *Id.* § 1508.27(b)(3), (8).

The Corps must also consider “[t]he 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.” The agencies’ announcement of September 9 acknowledges that Standing Rock and others have raised important issues “regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally...,” and that “this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects.”¹¹⁹ Many of the problems with both the insufficient tribal consultation and lack of environmental review stem from the agencies’ segmented approval of the overall project and the use of NWP 12 to avoid a comprehensive review under the CWA, NEPA, and NHPA. Preparing an EIS for the Lake Oahe site could discourage segmented approval of overall projects in the future and promote comprehensive NEPA reviews of pipeline going forward. ***By moving forward with construction on the majority of the pipeline prior to receiving all of its federal permits (e.g., the federal easement at lake Oahe), DAPL has assumed the risk that the pipeline might not be approved and completed as planned.***

Another “significance” factor is: “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.”¹²⁰ Here, the Corps has clearly broken the project down into small component parts to avoid considering the cumulative impacts of the overall project, or even the various aspects of federal approval. An EIS would allow the Corps to consider the cumulative environmental impacts of the federal and non-federal parts of the project, as NEPA requires.

Thus, for the reasons explained above, nearly all of the NEPA “significance” factors point to the preparation of an EIS for DAPL.

Furthermore, agencies “may also prepare supplements [to previous NEPA analyses] when the agency determines that the purposes of the Act will be furthered by doing so.”¹²¹ In addition to the new information presented above that warrants an EIS, NEPA’s public participation goals would be furthered by the preparation of an SEIS for Lake Oahe crossing and/or for NWP 12, under which the verifications were issued. Upon undertaking this SEIS the Corps should stay its verifications of DAPL.

¹¹⁹ Press Release: “Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,” September 9, 2016, available at <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing-rock-sioux-tribe-v-u-s-army-corps-of-engineers>.

¹²⁰ 40 C.F.R. § 1508.27(b)(7).

¹²¹ *Id.* § 1502.9 (1978).

Public participation in the agency decision-making process is paramount to the NEPA process. One of the statute's goals is "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken"; and to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."¹²² Thus, an EIS must "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."¹²³

To that end, NEPA's implementing regulations require a give and take between an agency and members of the public. See 40 C.F.R. §§ 1500.1(b) (2010) ("public scrutiny [is] essential"), § 1500.2(d) (2010) (the agency must "encourage and facilitate public involvement"), § 1506.6 (2010) (the agency must "[m]ake diligent efforts to involve the public" in preparing environmental documents, give "public notice of ... the availability of environmental documents so as to inform those persons ... who may be interested or affected," and "solicit appropriate information from the public."). Federal agencies are required to give the public as much information as is practicable, so that the public has a sufficient basis to address those areas that the agency must consider in preparing an EA or EIS.¹²⁴

Similarly, public participation plays an important role in CWA permitting decisions. The CWA provides in its general policy section that "public participation in the development . . . of any . . . program established by the Administrator . . . under this chapter shall be provided for, encouraged, and assisted by the Administrator . . ."¹²⁵ Section 404 states: "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."¹²⁶ The applicable Corps regulations state: "[A]ny person may request, in writing, ... that a public hearing be held Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."¹²⁷

In this case, the only opportunity for the public to become involved in the Corps' approval of DAPL was to comment on the EA that covered a three-mile stretch of the 1,168-mile pipeline.¹²⁸ The Corps' preparation of an EIS for the Corps approval of DAPL at Lake Oahe,

¹²² *Id.* § 1500.1(b)-(c).

¹²³ *Id.* § 1502.1.

¹²⁴ *Id.* § 1501.4 (2010).

¹²⁵ 33 U.S.C. § 1251(e).

¹²⁶ *Id.* § 1344(a).

¹²⁷ *Id.* § 327.4(b).

¹²⁸ The comment period on NWP 12 was more than five years ago, and no one impacted by DAPL could foresee at that time it would be applied to a project like DAPL. Major interstate oil pipelines requiring federal approval had consistently undergone full individual §404 permits and associated NEPA review.

and/or the requirement of an individual §404 permit for DAPL with an attendant EIS, would further the purposes of NEPA and the CWA and would help address the lack of public participation that has occurred to date that is a main underlying cause of the massive and growing public opposition to this project.

CONCLUSION

The Corps' streamlined approval of DAPL and other massive interstate oil pipelines under NWP 12, rather than the transparent individual §404 and NEPA process that these projects deserve, has attracted increasing and widespread opposition. Chief among the concerns is that the Corps' segmented approach to approval under NWP 12 severely limits public participation, tribal consultation, and environmental review.

We thank the agencies for acknowledging the need for a serious discussion on pipeline-related decision-making, and hope that some of these concerns can be addressed in the ongoing NWP 12 reissuance process. In the meantime, we urge the Corps to prepare an EIS that evaluates all of the new and previously unconsidered information regarding the impacts of DAPL and to halt construction in federal jurisdictional areas until that EIS can be completed.

Respectfully submitted,

/s/ Douglas Hayes

Douglas Hayes
Staff Attorney
Sierra Club
1650 38th Street, Suite 102W
Boulder, CO 80301
T- (303) 449-5595 ext. 100
doug.hayes@sierraclub.org

Winona LaDuke
Executive Director
Honor the Earth

Dallas Goldtooth
Campaign Organizer
Indigenous Environmental Network