UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE*, et al.*,	
Plaintiffs	**Civil Action No. 16-1534(JEB)**
v.	
U.S. ARMY CORPS OF ENGINEERS*, et al.*,	
Defendants	

EXHIBIT A:

***AMICI CURIAE* BRIEF OF LAW PROFESSORS AND PRACTITIONERS IN SUPPORT OF STANDING ROCK SIOUX TRIBE ON VACATUR**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The National Environmental Policy Act (NEPA), the Nation's original 'look before you leap' mandate, cannot abide an agency making irretrievable or irreversible commitments to 'leap' before taking a hard look. NEPA would not be "law" in any sense if this was how courts applied it. There can be no point to such a statute other than the making of paperwork – which is exactly what NEPA's architects insisted it was not. We the undersigned professors and practitioners with long and deep experience with NEPA urge this court to vacate the Corps decision that purported to rest on its original environmental assessment/finding of no significant impact (EA/FONSI).

I. NEPA Does Not Work After-the-Fact: This Court Must Vacate Any Agency Decision Made from a Defective Environmental Assessment

As this court held long ago, failure to adhere to the standards required of EA/FONSIs set out in the CEQ's regulations violates NEPA. *See* Sierra Club v. Watkins, 808 F. Supp. 852, 871 (D.D.C. 1991); *see also* Andrus v. Sierra Club, 442 U.S. 347, 358-59 (1979). It is no "harmless

error" to flout the requirements for an EA/FONSI. The preparation of an EA is undertaken precisely because the "significance" of the action in question is unknown. When the special problem of inflicting environmental risk on a discrete class of citizens is at issue, the EA takes on pointed significance. *See* New York v. Nuclear Reg. Comm'n, 681 F.3d 471, 474-78 (D.C. Cir. 2012). Generally, that determination consists in focused study of the potential consequences at issue. *See, e.g.*, City of New York v. Dep't of Transp., 715 F.2d 732, 738 (2d Cir. 1983) ("'The concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence.'"). But if NEPA is to make any practical difference such a study cannot be relegated to the role of paperwork filed after the real decisions have been made.

An agency cannot be allowed to deflect attention to what might go wrong with its actions with pro forma statements that protocols have been or will be followed. *Cf*. New York, 681 F.3d at 481 (rejecting agency's reliance on agency protocols as assurances that no environmental effects will ensue in lieu of an actual assessment of the probable and possible outcomes of a failure of agency protocols). Thus, the use of a "mitigated FONSI" as was done at the Lake Oahe crossing demands a standard of care commensurate with the risks being visited upon the affected citizens. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-53 (1989). That means that proper mitigation cannot be planned from incomplete or inaccurate information just as a proper significance determination cannot be relegated to after-the-fact corrections once a reviewing court has discovered NEPA errors. That would make a mockery of a decision-procedure required by law. *See* Humane Soc'y of U.S. v. Johanns, 520 F. Supp.2d 8, 37-38 (D.D.C. 2007).

Contrary to the Government's position, it does not suffice merely to refurbish a defective NEPA document for the file, especially where the very defects had been brought to its attention by commenters before the agency proceeded to decision. *See, e.g.*, San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1027-32 (9th Cir. 2006). And it would be "Kafkaesque" for an agency to use such comments in lieu of its own sufficient NEPA analysis in any event. *See* United States v. Buzzards Bay, 644 F.3d 26, 38 (1st Cir. 2011).

By definition, an agency preparing an EA has decided that it needs a rigorous analysis first before it can make the underlying decision: it does not know whether or how its action will significantly affect the human environment. Allowing the underlying action to go forward before that analysis is prepared ignores the whole point and purpose of NEPA. *See* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864-72 (9th Cir. 2005); Anderson v. Evans, 371 F.3d 475, 489-92 (9th Cir. 2004). The essence of the Act is taking an informed look before leaping, much as the rationality of agency action more generally cannot be rescued by astute lawyering and spin after the fact. That approach to NEPA, or indeed to agency rationality more generally, has never made any sense.

II. NEPA's "Hard Look" Duty Is the Essence of the Statute and Its Sequencing Is Not Discretionary with the Agency

The D.C. Circuit gave us the seminal interpretation of NEPA § 102(2)(C) requiring that an action agency take a "hard look" at any identifiable risk which may be entailed by its proposal. In Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115-17 (D.C. Cir. 1971), Comm. for Nuclear Resp., Inc. v. Seaborg, 463 F.2d 783, 786-87 (D.C. Cir. 1971), Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833-38

(D.C. Cir. 1972), Scientists' Inst. for Public Information v. Atomic Energy Comm'n, 481 F.2d 1079, 1085-93 (D.C. Cir. 1973), Ariz. Public Serv. Co. v. Federal Power Comm'n, 483 F.2d 1275, 1281-83 (D.C. Cir. 1973), and Maryland-Nat'l Cap. Park & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1039-43 (D.C. Cir. 1973), the D.C. Circuit applied this interpretation across a range of agencies and action-types notwithstanding sustained agency intransigence.

The Council on Environmental Quality (CEQ) issued a series of interpretive guidance documents in those same formative years, most of which recorded and explained the flood of early precedents construing the statute. In the forefront were those precedents just mentioned from the D.C. Circuit — which became the key to those guidance documents' influence with action agencies and subsequent courts. *See* Herbert F. Stevens, *The Council on Environmental Quality's Guidelines and their Influence on the National Environmental Policy Act*, 23 **Cath. U. L. Rev.** 547 (1974).

Most importantly, the D.C. Circuit's NEPA jurisprudence served to structure the Council on Environmental Quality's own 1978 regulations. *See* Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 **Envt'l L. Rptr.** 10287, 10306 (2015) ("Judge Skelly Wright's opinion in Calvert Cliffs is a landmark—the beginning of the NEPA canon—and is thought by some to have 'played a pivotal role in creating modern environmental law.'"). Thus, the law of this circuit and the CEQ's binding rules are part and parcel of one another. Those precedents just named were particularly influential in the rules' treatment of Section 102(2)'s mandate where no environmental impact statement was to be prepared.

First, the rules instruct action agencies that any NEPA document done must "be circulated and reviewed at the same time as other planning documents." 40 C.F.R. § 1501.2(b).

They further require that any NEPA document "accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." Id. at § 1505.1(d). This was the core of the holding in *Calvert Cliffs*. *See* Calvert Cliffs, 449 F.2d at 1114-15.

The CEQ rules further state that wherever an action agency is dealing with "an application from a non-federal entity" it is to take any and all "appropriate action to insure that the objectives and procedures of NEPA are achieved." 40 C.F.R. § 1506.1(b). Most of all, this means preserving the decision-making discretion of which the action agency is possessed under its circumstances – another motivating force in Calvert Cliffs. *See* 449 F.2d at 1123-27. An agency accepting information from applicants for their environmental assessments, for example, is to "independently evaluate" all such information submitted before it is incorporated into any NEPA document and "make its own evaluation of the environmental issues" involved. 40 C.F.R. § 1506.25(a), (b). Where the determination is made that a full impact statement is not needed, a statement of reasons detailing the information used to reach that finding is especially important, especially for purposes of judicial review. *See* Scientists' Institute, 481 F.2d at 1095; Ariz. Public Serv., 483 F.2d at 1280-83.

Finally, the CEQ's 1978 rules established an approach to the preparation and use of an EA/FONSI that had been latent in the D.C. Circuit's opinions to that point. As the court explained in Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982), the use of "mitigation" planning or other steps to minimize a proposal's expected impact implies a correspondingly detailed statement of reasons opening any such judgment up for judicial scrutiny after the fact. Id. at 681-83. This necessarily includes "sufficient evidence and analysis for

determining whether to prepare an environmental impact statement or a [FONSI]." 40 C.F.R. 1508.9(a)(1).

Because the CEQ rules are "binding on all federal agencies," Peterson, 685 F.2d at 682, those agencies are not at liberty to ignore their sequencing or their precautionary elements, grant permissions to private applicants on the basis of insufficient analysis, and just 'correct the record' after the fact in the event they are caught. As this court has previously found, the "hard look" means "considering all foreseeable direct and indirect impacts" and demands "a discussion of adverse impacts that does not improperly minimize negative side effects." Center for Food Safety v. Salazar, 898 F. Supp.2d 130, 143 (D.D.C. 2012).

CEQ's version of the 'hard look' before any decisions are made functions much like the Administrative Procedure Act's marquee mandate that courts "set aside" agency actions which are found to be arbitrary or capricious. Judicial review of this kind necessarily only occurs where the agency action in question is discretionary. *See* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 **Duke L.J.** 199, 210 ("[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality."). But that underscores precisely the nature of Congress's intentions and the CEQ's rules as to the administrative process being guided by NEPA § 102(2). The whole point was to engineer the decision-making process and to do so precisely. As the D.C. Circuit once emphasized in an appeal of a preliminary relief denial, the harm NEPA seeks to avoid

> was not solely or even primarily adverse consequences to the environment; such consequences may ensue despite the fullest compliance. Rather NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-

> makers had fully adverted to the environmental consequences of the action, and had decided that the public benefits flowing from the actions outweighed their environmental costs.

Jones v. District of Columbia Redev. Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974). This kind of harm "matures simultaneously with NEPA's requirements." Id.

This is the only understanding of § 102(2)(C) which makes sense of the NEPA duty to "look before you leap." *See* Lynton Keith Caldwell, The National Environmental Policy Act: An Agenda for the Future 23-44 (1998); *see also* Matthew J. Lindstrom & Zachary A. Smith, The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, and Executive Neglect 34-52 (2001). As the D.C. Circuit has made clear repeatedly, deviations from a decision procedure invalidate that decision and an invalid decision should be "set aside" and the status quo preserved for the decision-makers while it is made according to law. *See, e.g.*, American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001); National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

III. With NEPA, Timing is Everything: NEPA Document Completion Must Precede Decision.

The timing of NEPA compliance has always been an essential ingredient to its making a practical difference. In Scientists Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1085-91 (D.C. Cir. 1973), the D.C. Circuit analyzed this connection at length. It was at pains to make clear that NEPA's analytical duties arise at each stage of discretionary decision-making and that special care must be taken when dealing with private parties awaiting a go/no-go decision. Id. at 1090-91; *see also* Sierra Club v. Peterson, 717 F.2d 1409, 1414 (D.C. Cir. 1983). Where private applicants commence the EA/FONSI process, their participation is to

be guided carefully and the information they contribute scrutinized so that other participants are not frozen out of that process. This has been NEPA law from the beginning. *See, e.g.*, Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972); Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974).

Even applying a "rule of reason" to the defects the court found in the Corps' EA/FONSI here, because a significance determination is the "heart" of every FONSI and, especially where cooperating or commenting agencies brought unanswered questions about that determination forward, any decision grounded in a defective FONSI cannot be allowed to stand while another EA is prepared. *See* New York v. Nuclear Regulatory Comm'n, 681 F.3d 471, 479-83 (D.C. Cir. 2012); *cf*. Union Neighbors, Inc. v. Jewell, 831 F.3d 564, 576-77 (D.C. Cir. 2016) (invalidating "unreasonable" range of alternatives in EIS, the "heart" of any EIS, and vacating agency permit premised upon EIS as "arbitrary and capricious").

This emphasis on correct timing is especially necessary where the EA/FONSI serves as a "springboard" for public comment or other participation, Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246, 1260 (D.C. Cir. 1988), as was the case here. It would mock the rule of law and public participation for NEPA analyses to have been timed as they were in this case with literally no legal consequences attached to a remand of the defective EA/FONSI or the Corps' resultant permitting decision. It signals that NEPA documents can be prepared to the standards D.C. Circuit precedents and the 1978 CEQ rules demand whenever it suits the agency (or its applicant). This would indeed relegate the Act to mere paperwork, something its architects continually insisted it was never intended to be. *See* Matthew J. Lindstrom & Zachary A. Smith, The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, and Executive Neglect 57-64 (2001).

Norms like this are common to administrative law more generally. It does not suffice for purposes of review pursuant to the Administrative Procedure Act that agency lawyers draft up a statement of reasons after-the-fact justifying exercises of discretion which were otherwise inexplicable. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). The key to the legitimacy of the entire delegation is the availability of focused review of the reasoning that actually produced the decision. *See, e.g.*, Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 **Yale L.J.** 952 (2007). Because the decision-makers cannot be examined directly, *see, e.g.*, United States v. Morgan, 313 U.S. 408, 422 (1941), judicial review's "focal point" must necessarily be the integrity of the record that informed the decision-maker. Camp v. Pitts, 411 U.S. 138 (1973). NEPA's timing, and thus the defect in this case, requires the invalidation of the underlying action—here, the Corps' permit at the Lake Oahe crossing.

In the case of NEPA significance determinations, and especially in cases where a significance determination turns on the magnitude of a low probability/high impact risk (like an oil spill), NEPA simply cannot abide an agency's "take our word for it" approach to matching parts of a paper trail to its actions piecemeal. *See* New York v. Nuclear Regulatory Comm'n, 681 F.3d 471, 478-80 (D.C. Cir. 2012). Remanding with vacatur in this case is the only way to protect NEPA's practical difference as a decision procedure and not just a paper-maker.

CONCLUSION

For the reasons stated above, the district court should vacate the agency action which was based upon the Corps' defective EA/FONSI while the Corps reconsiders its actions in light of NEPA's point and purpose.

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Dinah Bear served for 25 years as General Counsel and Deputy General Counsel for both Republican and Democratic administrations at the President's Council on Environmental Quality (CEQ). CEQ has responsibility for advising the President on environmental issues, developing environmental policy and coordinating its implementation, and overseeing implementation of the National Environmental Policy Act. Ms. Bear chaired the Standing Committee on Environmental Law of the American Bar Association and the Environmental Law Section of the District of Columbia Bar Association. She received the Chairman's Award from the Natural Resources Council of America, the Distinguished Service Award from the Sierra Club, the Distinguished Achievement Award in Environmental Law and Policy from the American Bar Association. She now lives in Tucson, Arizona, where she remains professionally active in environmental law and policy with a special focus on the borderlands. She chairs the board of Humane Borders and also serves on the boards of Defenders of Wildlife and the Mt. Graham Coalition. She received a Bachelors of Journalism degree from the University of Missouri at

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Michael C. Blumm is Jeffrey Bain Faculty Scholar and Professor of Law at Lewis & Clark Law School. Blumm is a prolific scholar with well over one-hundred published articles, book chapters, and monographs on salmon, water, public lands, wetlands, environmental impact assessment, public trust law, and constitutional takings law. Blumm was visiting professor at the University of Melbourne in 1988, Fulbright Professor at the University of Athens in 1991, and visiting professor at the University of California-Berkeley in 2004. He has lectured on a variety of topics as visiting professor in in law schools in Australia, Canada, Greece, and Brazil, and has been distinguished visitor at Florida State University, the University of Calgary, Vermont Law School, and several Australian law schools. In 2005-07, he was Chair of the American Association of Law School's Natural Resources Law Section.

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Noah Hall is Professor of Law at Wayne State University. he taught at the University of Michigan Law School and was an attorney with the National Wildlife Federation, where he managed the Great Lakes Water Resources Program for the nation's largest conservation

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Jacqueline P. Hand is Professor of Law at the University of Detroit—Mercy. Professor Hand's most recent research focus has focused on tribal rights, tribal water governance and the intersection of tribal sovereignty and water rights. She has served as a visiting professor at various institutions, including the University of New Mexico, Santa Clara University and Lewis and Clark School of Law, and was the recipient of an Indo-American Fellowship for study in India through the Fulbright Association. In 1996, she founded the American Indian Law Center at Detroit Mercy Law and continues to serve as the Center's director. She is also active in numerous organizations in her field, including the Academy of the IUCN (World Conservation Union) and the Environmental and Indian Law sections of the State Bar of Michigan. She previously served as chair of the Environmental, Property and Agricultural Law sections of the American Association of Law Schools (AALS). In addition, she serves as the Secretary and Member of the Board of Directors of the Ecology Center Ann Arbor and as Co-Chair of the Southeast Michigan Fulbright Association.

Sam Kalen is Winston Howard Distinguished Professor of Law and Co-Director of the Center for Law and Energy Resources in the Rockies at the University of Wyoming. Professor Kalen arrived at Wyoming after practicing in Washington, D.C. for over 20 years, both in the private and public sectors. He practiced at an energy, environment and natural resources law firm, and worked in the Solicitor's Office at the Department of the Interior. He also has held various teaching positions at the University of Baltimore, Florida State University, Washington & Lee University, and Penn State University. Immediately after law school, Professor Kalen began his career as a law clerk for Justice Warren D. Welliver of the Missouri Supreme Court. Professor Kalen's research focuses on the fields of energy, environment, public lands and natural resources, administrative law, and constitutional law. He has published numerous law review articles and has been cited by the United States Supreme Court. Professor Kalen is active in the American Bar Association's Section on Environment, Energy, and Resources, having served as a Chair of two committees and Vice-Chair on several committees.

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James R. May is Distinguished Professor of Law, and Chief Sustainability Officer, Widener University. He also serves as co-Director of the Environmental Rights Institute and co-Director of the Dignity Rights Project at Widener. May is the editor of *Principles of Constitutional Environmental Law* (American Bar Association), and co-editor of *Shale Gas and the Future of Energy* (Edward Elgar), *Global Environmental Constitutionalism* (Cambridge), *Environmental Constitutionalism in Context* (Edward Elgar), *New Frontiers in Environmental Constitutionalism* (United National Environment Programme, forthcoming), *Implementing Environmental Constitutionalism* (Cambridge, forthcoming), *Standards of Environmental Constitutionalism* (Cambridge, forthcoming), and *Human Rights and the Environment: Indivisibility, Dignity and Legality* (Edward Elgar, forthcoming). May is also author or co-author of more than 100 articles and book chapters, and numerous amicus briefs to the U.S. Supreme Court and U.S. federal courts of appeal on issues including environmental law, constitutional law, comparative constitutional, international environmental law, environmental rights, and human dignity. May is a Member of Faculty to the National Judicial College and a Fellow of the American College of Environmental Lawyers, for whom he has served as a delegate to Haiti and China. May has also served as a consultant to the U.S. Embassy on legal education in the Philippines, and to the Hungarian Embassy and the Moroccan Human Rights Council on constitutional reform.

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Patrick Parenteau is Professor of Law at Vermont Law School. Formerly director of Vermont Law School's Environmental Law Center and of the Environmental and Natural Resources Law Clinic, Parenteau is recognized for his expertise regarding endangered species and biological

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Edward P. Richards is the Clarence W. Edwards Professor of Law and the Director of the Program in Law, Science and Public Health at the Louisiana State University School of Law. Professor Richards received his undergraduate degree from Rice University, where he studied environmental science, biology, and behavioral science. He did graduate work at Baylor College of Medicine and then the University of Michigan, before receiving his J.D. from the University of Houston and his M.P.H. from the University of Texas School of Public Health. He was the Ruby M. Hulen/UMKC Professor of Law at the University of Missouri Kansas City School of Law and Director for the Center for Public Health Law. Since June 1, 2002, he has been the Harvey A. Peltier Professor of Law at the Louisiana State University Law Center, and Director of the Program in Law, Science, and Public Health. Professor Richards has worked in health and public health law for many years. Since coming to LSU, he has done extensive work in national security law. He has been a consultant to the Centers for Disease Control and Prevention and other federal agencies, and has authored more than 140 articles and five books.

Zygmunt J.B. Plater is Professor of Law at Boston College Law School, teaching and researching in the areas of environmental, property, land use, and administrative agency law. For over 30 years he has been involved with a number of issues of environmental protection and land use regulation, including service as petitioner and lead counsel in the extended endangered species litigation over the Tennessee Valley Authority's Tellico Dam, representing the endangered snail darter, farmers, Cherokee Indians, and environmentalists in the Supreme Court of the United States, federal agencies, and congressional hearings. He was chairman of the State of Alaska Oil Spill Commission’s Legal Task Force over a two-year period after the wreck of the M/V Exxon-Valdez. He was a consultant to plaintiffs in the Woburn toxic litigation, Anderson et al. v. W.R. Grace et al., the subject of the book and movie A Civil Action. Drawing upon his work for the Exxon Valdez Oil Spill Commission he researched and consulted on responses to the BP Deepwater Horizon oil spill. Professor Plater has taught on seven law faculties. While teaching public law for three years in the national university of Ethiopia, he redrafted the laws protecting parks and refuges, assisted in publication of the Consolidated Laws of Ethiopia, and helped organize the first United Nations Conference on Individual Rights in Africa. Articles Professor Plater has published include analyses of environmental law issues, private and public rights in land and resources, equitable discretion, administrative law, and related fields. Several

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Clifford Villa is Assistant Professor of Law at the University of New Mexico. Before teaching, Villa served for 22 years as legal counsel for the U.S. Environmental Protection Agency, first with EPA Headquarters in Washington, D.C., and later with EPA Regional offices in Denver, Colorado, and Seattle. For the last eight years of his practice, Professor Villa served as legal officer for the EPA's emergency response program, providing on-call legal assistance for federal responses to hazardous waste sites, oil spills, natural disasters, and other major concerns. Professor Villa received multiple service commendations from EPA and the U.S. Department of Justice. In 2008, recognizing his contributions to public service as both an attorney and educator, he received the Modelo de Excelencia award from the Latina/o Bar Association of Washington.