IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Intervenor Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

and

DAKOTA ACCESS, LLC,

Intervenor Defendant.

Civil Action No. 16-1534-JEB
(consolidated with Case Nos. 16-1796 & 17-267)

CONSOLIDATED RESPONSE BY DAKOTA ACCESS, LLC TO (i) CHEYENNE RIVER SIOUX TRIBE'S REQUEST TO REQUIRE MEANINGFUL CONSULTATION ON REMAND AND (ii) STANDING ROCK SIOUX TRIBE'S MOTION TO CLARIFY

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INTRODUCTION

Clare Boothe Luce once famously lamented that "no good deed goes unpunished."[1] The United States Army Corps of Engineers surely can relate. Its remand process after this Court's June 14, 2017 Opinion and Remand Order goes far beyond what the law requires. As relevant here, for example, the Corps has asked all parties for various categories of information even though this Court's October 11, 2017 Opinion rejecting vacatur plainly states that the Remand Order does not *obligate* the Corps to gather *any* additional information before it decides what explanations are needed to comply with that Order. Indeed, this Court deemed it quite likely that the pre-remand record already has everything the Corps needs on the three discrete remand topics.

Plaintiffs insist, though, on inhabiting an alternate universe. They refuse to accept this Court's determination, and they ask the Court to turn the Corps's above-and-beyond efforts against it. That is, their motions insist that if the Corps wants to gather more information about tribal uses of hunting and fishing resources, the Corps must not only *give Plaintiffs* other additional information but also initiate formal government-to-government consultation. The very premise of these demands is Plaintiffs' erroneous view that the remand order requires the Corps to "draft an Environmental Impact Statement that fully addresses the three issues remanded by the court." D.E. 327-1 at Exh. A, page 2 (July 7, 2017 Letter from Chairman Frazier to Army and Corps); *see also* D.E. 336-2 at 2 (June 29, 2017 Letter from Chairman Archambault to Army and Corps) ("In light of Judge Boasberg's findings, the proper course for the Corps on remand is to undertake an Environmental Impact Statement process that the agency previously started and then abandoned.").

[1] The origin of this adage is subject to some debate, but Ms. Luce is most frequently credited with coining it. William Safire, On Language; Good-Deed Dungeon, N.Y. Times (1994) https://www.nytimes.com/1994/01/09/magazine/on-language-good-deed-dungeon.html.

That view is erroneous, because this Court clearly rejected the argument that remand must culminate in an EIS. *See, e.g.,* D.E. 284 at 5 (explaining that the June 14 Opinion "upheld the majority of the Corps' determinations under NEPA – including the agency's 'top-line conclusion' that the risk of an oil spill was sufficiently low so as not to require an EIS"); *id*. at 11.

Apart from this insurmountable factual obstacle (*i.e.*, Plaintiffs' mistake about the required scope of the remand), the law is clear that *whenever* a court remands to an agency after deciding an Administrative Procedure Act challenge, "the court's inquiry is at an end." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). Thus, there is neither a factual nor a legal basis for ordering the Corps to conduct its proceedings on remand in the manner Plaintiffs urge, especially when it would extend the remand process and this lawsuit by many more months.

Standing Rock Sioux Tribe's other demands—directed at two remand conditions from this Court's December 4, 2017 Order—are similarly grounded in misstatements of both fact and law. First, Standing Rock's Motion fails to mention the detailed and well-documented timeline of events showing that each Tribe has outright refused to participate in emergency response planning meetings. Both Tribes declined an invitation to meet with Dakota Access and the Corps in December. Both also chose not to attend a response planning meeting held in January in Bismarck, North Dakota. Both came to the February meeting (also in Bismarck), but only long enough to insist that future meetings be held at each of their reservations where the discussions would be about Plaintiffs' informational demands, and *not* how to plan an emergency spill response. Both Tribes left the February meeting before Dakota Access and the Corps could provide and discuss much of the information that the Tribes claim they want. And they skipped the March meeting despite agreement yet again by both the Corps and Dakota Access to share at that meeting much of what the Tribes demanded, including the results of recent supplemental spill modeling.

Plaintiffs' months of refusal to sit down for face-to-face response-planning meetings isn't the only problem. Despite repeated opportunities for Plaintiffs to submit any concerns by email or letter, they *still* have not revealed the alleged "oversights and errors" in existing response plans that they told this Court they identified more than seven months ago. D.E. 272 at 37. Moreover, their insistence that they need access to more information before even sitting down at the meeting table is wrong for four reasons: (1) they have received each new version of the Geographic Response Plan since even before this Court's December 4 Order; (2) much of the relevant information Plaintiffs seek is *in* the same response planning materials they refuse to discuss or comment upon; (3) they have been offered the chance to go over the rest of the relevant information they seek if only they would sit down with response planning personnel for the Corps and Dakota Access; and (4) this Court has already rejected Plaintiffs' insistence that they need access to the other irrelevant information they request as a precondition to participating in response planning.

That leaves the second requirement in the December 4 Order: "Dakota Access, with input from the Tribes, shall select a third-party independent expert engineering company to review easement conditions and regulations, and to assess compliance with all such conditions as well as other integrity threats." D.E. 303 at 1-2. This language needs no "clarification." To assess compliance with easement conditions, regulations, and other integrity threats, a third-party firm need *not* go back and second-guess whether, as Standing Rock puts it, the Corps correctly concluded that "the risks of spills are low and the impacts insignificant." D.E. 336 at 15. Nor does the Order require Plaintiffs' involvement in developing a "protocol" for the audit. *Id.* Dakota Access did what the Order *does* require: It considered Plaintiffs' input on the selection of the third-party firm. Dakota Access rejected Standing Rock's recommended firm, which was plainly unsuited to the task; and it chose a firm that was not criticized by Standing Rock for its "ties" to Dakota Access or its parent.

The third-party firm that Dakota Access selected is on track to have its results ready to "be filed with the Court by April 1, 2018." D.E. 303 at 2.

Plaintiffs' motions, which seek to extend by several more months (if not longer) both the remand process and any follow-on litigation, should be denied.

BACKGROUND

A. Previous Rulings Relevant to Plaintiffs' Motions

Statements this Court has already made in three of its earlier rulings are directly relevant to the two pending Motions.

1. On June 14, 2017, this Court remanded for the Corps to address three discrete items related to the Dakota Access Pipeline's crossing beneath Lake Oahe in North Dakota: (1) the degree to which the project's effects are likely to be highly controversial; (2) the consequences of a spill for the Tribes' fishing and hunting rights; and (3) the environmental-justice impacts of the project. D.E. 239 at 34, 42-43, & 54. The Court placed no conditions on how the Corps will address each topic during remand.

2. On October 11, 2017, the Court issued an Opinion explaining why the remand would be without vacatur. D.E. 284. That Opinion provides valuable additional insight into how the Corps is capable of addressing the three remand topics without the conditions now demanded by Plaintiffs.

The Court determined that in conducting the analysis dictated by D.C. Circuit law on vacatur, it "must assess the likelihood that, on remand, the Corps will be able to justify its prior decision to issue an EA and FONSI, rather than preparing a full EIS." *Id.* at 8. Applying that test to the three remand topics, the Court rejected Plaintiffs' views as to the seriousness of the Corps's

shortcomings and the steps needed to remedy them. The Court reminded plaintiffs that it "previously found that the Corps 'largely complied' with NEPA's requirements, and it granted remand on only a narrow subset of the Tribes' NEPA claims. See Standing Rock III, 2017 WL 2573994, at *28." D.E. 284 at 17. And rather than criticize the Corps's earlier efforts to consult with Plaintiffs, the Court ultimately concluded that these three shortcomings fell into the category of decisions that were "potentially lawful but insufficiently or inappropriately explained." *Id*.

a. On the first topic, the Court explained that the Corps already has Plaintiffs' input in the form of their experts' critiques of the pipeline. The Court reasoned that "[a]lthough the Corps must give careful consideration to the expert critiques, it is well positioned to provide such explanation on remand." *Id.* at 10. "Correcting this flaw does not require that Defendants begin anew, but only that they better articulate their reasoning below." *Id.* at 9.

b. As for the second topic—spill effects on hunting and fishing resources—the Court again disagreed with Plaintiffs, explaining that "Defendants' task on remand is a narrow one." *Id.* at 10. "Although the Tribes assert that the record on remand will support the need for an EIS because it 'is replete with evidence of the significance of these rights to the Tribe[s],' Tribes Brief at 20, the Court already held that NEPA does not require any such 'existential-scope analysis.' Standing Rock III, 2017 WL 2573994, at *15." D.E. 284 at 11. Adding that the Corps "already has the data it needs to determine the impact of a spill on fish and game," *id.*, and that the Corps's spill-effects assessment will be conducted "in light of its prior determination that the risk of rupture under Lake Oahe is low," *id*. at 11-12, the Court concluded from the record that "the Corps 'may be able readily to cure a defect in its explanation of [the prior] decision.'" *Id*. at 12 (citation omitted).

c. Finally, on the topic of environmental justice, once again the Court found "reason

to think that," in "provid[ing] a more robust analysis on remand," the Corps "has a substantial possibility of validating its prior conclusion." D.E. 284 at 13. Indeed, "multiple aspects of the record suggest that the Corps is likely to justify issuing an EA, rather than completing an EIS." *Id.* at 14. These include: "the minimal risk of an oil spill under Lake Oahe" which "reduces the likelihood that the project will have a significant impact on the surrounding communities," *id.*, "the relocation of the Standing Rock water-intake structure," *id.*, and "the Corps' already-conducted assessment of the alternative pipeline route through Bismarck" which "increases the likelihood that the agency will find that DAPL's environmental-justice impacts do not require an EIS," *id*. at 15.

3. The final ruling relevant here is the December 4, 2017 Order setting three conditions during remand. The Court imposed these conditions "to keep the Court informed of the circumstances at Lake Oahe pending remand" and to "ensur[e] that the status quo at Lake Oahe is preserved" during that same period. D.E. 304 at 7-8. Standing Rock seeks "clarification" of two conditions: (1) that the parties "coordinate to finalize an oil-spill response plan affecting Tribal resources and lands at Lake Oahe," and (2) that "Dakota Access, with input from the Tribes, shall select a third-party independent expert engineering company to review easement conditions and regulations, and to assess compliance with all such conditions as well as other integrity threats." D.E. 303 at 1-2.

The status report that the Corps filed on February 1 contemplated completing the remand process with final agency action on April 2, 2018. D.E. 326 at 2.

B. The Corps seeks information from all parties for possible use on remand

Although the Corps could quite likely carry out its remand duties based solely on consideration of the pre-remand record, it has exercised its broad discretion to request various categories

of information from Dakota Access, Plaintiffs, and the other Plaintiff Tribes. On the "highly controversial" topic, for example, the Corps has asked Dakota Access to "provide a factual and technical analysis that addresses the issues raised in" nine "reports" that the Plaintiffs tendered to either the Court or the Corps after July 25, 2016. March 16, 2018 Declaration of William Scherman, Attach. 1. That request ties back to the Court's observation in its June 14 Opinion that, while Dakota Access "offers a scathing assessment of the reports' 'material flaws,'" and while it "may well be the case that the Corps reasonably concluded that these expert reports were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects," "the Corps never said as much." D.E. 239 at 34.[2]

As for Plaintiffs and the other Tribes, the Corps has sought information that might assist with its remand work on the other two topics—effects of a possible spill on the Tribes' fishing and hunting rights and environmental-justice impacts on the Tribes and their members. In particular, more than five months ago, in letters dated September 25, 2017, the Corps asked each Tribe to provide information and supporting documentation on a number of topics related to potential impacts of an oil spill on tribal resources, with emphasis on fishing and hunting (the second remand topic). D.E. 327-1 at 22-24 (exhibit E).[3] The requests addressed to Cheyenne River (which are substantially the same as requests to the other Tribes) included seven items relevant to fishing, hunting, and other tribal practices that rely on the waters of Lake Oahe:

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[2] Although the Court need not decide now whether the Corps's request was over-inclusive, Dakota Access notes that the request included documents post-dating the decision in February 2017 to issue an easement for Lake Oahe without preparing an EIS. *See, e.g.*, D.E. 239 at 33 (ruling that Corps failed to address "scientific critiques" in "[t]he expert reports submitted to the Corps after the Final EA was published but before the Corps again decided in February 2017 that an EIS was not required").

[3] Dakota Access has not been copied on the Tribes' correspondence with the Corps. Thus, there may be additional back-and-forth between those parties that the Corps is better positioned to recount for this Court.

> (1) A copy of the current Cheyenne River Sioux Tribe's Hunting, Fishing & Outdoor Recreation Code and associated policy and/or guidance.
>
> (2) A summary of the number of the game, fish, and wildlife licenses and permits that were issued by the Tribe, to both Tribal members (resident and non-resident), members of other federally recognized Tribes, and nonmembers, during 2015, 2016, and 2017[,] . . . includ[ing] a description of the activity permitted and the classification of the license or permit (e.g. Tribal Member, Big Game; Non-resident non-member Prairie Dog), the duration of the permit or license, and any other details you wish to provide.
>
> (3) A summary of the subsistence hunting or fishing licenses or permits that have been issued by the Tribe to Tribal members during 2015, 2016, and 2017. . . . [and] citations to all Tribal regulations established for permitting the taking of game, fish, wildlife, timber and plants for subsistence and ceremonial purposes.
>
> (4) A summary of harvest reports of game taken during 2015, 2016, and 2017, including the type of species taken, quantity of each species taken, location where the game was taken, and the type of the license or permit under which the game was taken.
>
> (5) Documentation of hunting or fishing permit reciprocity between the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe, during the years of 2015, 2016 and 2017.
>
> (6) Any studies or reports on game species (aquatic life, birds and mammals), estimated population, habitat within the Cheyenne River Sioux Reservation, and the designated hunting grounds for such game in relation to Lake Oahe.
>
> (7) Documentation of distinct cultural practices of the Tribe that are connected to Lake Oahe. Please describe the practice, its historical origins, and how the practice is connected to Lake Oahe. . . .

Id. at 22-23 (including an opportunity to submit information confidentially for item 7). The letter to Standing Rock also invited that Tribe to submit an eighth category relevant to environmental justice: "[a]ny additional demographic data on your Tribal reservation that you want the Corps to consider beyond what is available from the U.S. Census." D.E. 336-3 at ECF p. 3.

The Corps asked for this information by the end of October so that it might better understand the nature and extent of tribal resources potentially at risk in the unlikely event of a spill. In the meantime, the Corps asked Dakota Access to work on a separate request: preparation of a

supplemental oil spill model that "takes into account the pipeline as constructed." Scherman Decl., Attach. 1 at 1. "This scenario," the Corps explained, "would be *in addition to* the hypothetical scenario that has been used [pre-remand] that assumed that the pipeline had been constructed on the top of the lake and that any rupture would be a full guillotine break." *Id.* (emphasis added). The Corps explained that because the predicted spills generated by the pre-remand model—a model dictated by PHMSA requirements—"do not correlate with the majority of spills seen in actual releases," the supplemental model would result in modeling "that does correlate with the majority of spills and takes into account how the pipeline was actually constructed." *Id.*

The Corps devised a schedule for completing remand by April 2. It requires gathering the various requested information in a timely manner so that, among other things, the spill model results can be assessed in light of the information to be provided by the various Tribes. Thus, to give just one example, the spill model helps predict if and when oil would reach a particular spot on the shoreline of the Lake; the information from Plaintiffs will help determine the extent to which the Tribes rely on that location for fishing or hunting and thus how a spill might affect those resources (*i.e.*, remand topic two).

As noted above, the Corps requested the information from the Tribes relevant to the second and third remand topics on September 25, 2017. D.E. 327-1 exh. E. The Corps requested a response within 30 days, a timeline fully consistent with Standing Rock's observation that the request was for only "a specific and limited set of information." D.E. 336 at 3. Twenty-nine days later, Cheyenne River sent a letter stating it did not expect "to complete" its responses to the listed items "until early 2018." D.E. 327-1. exh. F (Letter dated Oct. 24, 2017 from Chairman Frazier to Corps) at 2. That letter also asserted that "Dakota Access's spill modeling is vitally important to the Tribe's assessment of, among other things, impacts on our Treaty hunting and fishing rights."

Id. Cheyenne River therefore asked for a copy of the updated spill modeling information when the Corps receives it from Dakota Access and "90 additional days" after that "to submit our remand materials and reports, as our technical team must review and analyze that data if the Tribe is to provide a complete and accurate response to your request for information regarding the impacts on the Tribe and its members." *Id.*

Standing Rock, for its part, asserted that "the information requested" by the Corps was "framed far too narrowly" but still asked for more time to provide it. D.E. 336-4 at ECF p. 2 & 4.

The Corps replied by asking each Tribe to "submit the requested materials by December 20, 2017 so that" the Corps "can maintain the schedule that [it] provided to the Court." D.E. 327-1 exh. G (letter dated November 27, 2017 from Corps to Chairman Frazier); D.E. 336-5. Colonel Hudson, in his letter to Chairman Faith, also offered to meet with Tribal representatives at the Standing Rock reservation, stating the meeting would be most productive after receiving the information relevant to hunting and fishing rights requested in the September 25 letter. D.E. 336-5. Colonel Hudson also offered to attend a meeting in the meantime "via teleconference to discuss any of your Tribe's questions." *Id.*

Two days before the new requested response date of December 20, Cheyenne River sent a letter noting that because "the Tribe's resources and personnel are limited," it was working to have "materials and documents relevant to the substance of the remand prepared by January 30, 2018 at the earliest." D.E. 327-1 exh. H (letter dated December 18, 2017 from Chairman Frazier to Corps) at 1. The letter repeated "the Tribe's position" that it "is entitled to review the results of the spill modeling currently being prepared by Dakota Access." *Id.* Standing Rock sent its own letter on December 18. It did not say when the Tribe would provide the information requested three months earlier. Instead, it complained that the Corps "seeks to unilaterally determine what

information [the Corps] will consider and when." D.E. 336-6 at ECF p. 2. It also requested a list of documents that largely relate to the risk and possible volume of a spill. *Id.* at ECF p. 3-4.

Then, on January 4, 2018, Chairman Faith of Standing Rock wrote Colonel Hudson requesting government-to-government consultation and inexplicably asserted—despite Colonel Hudson's offer on November 27 to meet both in person and via teleconference—that the Tribe's "meeting request has gone unanswered." D.E. 336-7 at ECF p. 2. Chairman Faith's letter made no mention of the information requested in the Corps's September 25 letter. It appears that a January 24, 2018 meeting was scheduled, because on January 29, 2018, Colonel Hudson wrote to Chairman Faith extending his regrets about needing to cancel that meeting due to the Government shutdown. D.E. 336-8. Colonel Hudson also noted that the Corps was still waiting for the information it had requested in September and that he looked forward to a meeting on January 30. *Id.* Standing Rock's Motion includes no other correspondence with the Corps.

On January 30, Cheyenne River wrote to the Corps that it did not anticipate having anything to share in the way of "final remand materials until the end of February 2018." D.E. 327-1 exh. I (letter dated January 30, 2018 from Chairman Frazier to Corps) at 1 (also reiterating request for "spill modeling" and "to participate in this remand as a cooperating agency"). In its Motion, Cheyenne River represents that the Tribe "will produce to the Corps additional information and responses to the Corps' request for information no later than **March 2, 2018**." D.E. 327 at 4. The upshot is that when Cheyenne River complained in its motion of an "almost completely one-sided remand relationship between the Tribe and the Corps," *id.*, the Tribe had provided *none* of the information the Corps requested from Cheyenne River back in September—information the agency sought to determine potential effects of a spill on resources important to Cheyenne River

or its members, as contemplated by the second remand topic.[4]

C. Both Tribes decline to participate in Emergency Response Planning

In the meantime, both Tribes have used the emergency response planning condition in this Court's December 4 Order in much the same manner: as a tool to demand more information from Dakota Access and the Corps with no effort to provide information of their own or otherwise participate in any helpful way in the emergency response planning efforts. Standing Rock gives the Court a highly misleading, one-sided rendition of the facts relevant to response planning. The full history of how the Tribes have responded to response planning efforts follows.

The **December 4, 2017** Order states: "The parties shall coordinate to finalize an oil-spill response plan affecting Tribal resources and lands at Lake Oahe, which they shall submit to the Court by April 1, 2018." D.E. 303 at 1. On **December 8, 2017**, just four days after that Order issued, Carl (Gus) Borkland of Dakota Access's response planning team emailed all parties (the Corps and both Tribes) to propose an initial emergency response planning meeting. March 16, 2018 Declaration of Carl G. Borkland, Attach. 1. The email went to David Nelson (Cheyenne River) and Elliott Ward (Standing Rock), because the Tribes' lawyers had identified them as the proper points of contact for response planning. Borkland suggested nine possible dates (two in mid-December and seven during the first two weeks of January) for an initial response planning meeting in Bismarck, North Dakota, near the Standing Rock Reservation. Borkland Decl., Attach 1. Attached to his email was the most current draft of the GRP for the Lake Oahe crossing. *See id.* (Borkland had already provided the previous draft of the GRP and the final Facility Response Plan to Standing Rock in October 2017. In fact, both are on file with the Court. D.E. 298-1 ¶ 2

[4] According to the Corps, Cheyenne River *still* has not provided the requested information. D.E. 337 at 1.

(November 17, 2017 Borkland Declaration, with attachments).) Borkland also invited the Tribes to submit any information relevant to response planning in advance of the proposed meeting. Borkland Decl., Attach. 1.

After both of the proposed December meeting dates came and went, and having received no response from either Tribe, Borkland sent another email on **December 20**, again trying to schedule the first meeting among all parties. Borkland Decl., Attach. 2. He added that if he did not receive a response by December 29, Dakota Access and the Corps would go ahead and choose a January meeting date. *Id.* As before, he invited the Tribes in the meantime to send "input about planning including any corrections you believe are needed to the draft geographic response plan." *Id.*

On **December 31**, still having received no response from either Tribe, Borkland emailed again. He advised that the Corps and Dakota Access were both available to meet in Bismarck on January 10, 11 or 12, and he asked if any of those dates would work for the two Tribes. Borkland Decl., Attach. 3.

Cheyenne River ignored this email too. Standing Rock responded, but not to schedule a January meeting. Instead, on **January 4, 2018**, Errol D. (Doug) Crow Ghost Jr. emailed a letter to Borkland and the Corps from Standing Rock Chairman Mike Faith. Borkland Decl., Attach. 4. The letter stated that Standing Rock "will be available to meet with you in February, and willing to meet on Standing Rock." *Id.* Chairman Faith added, in the face of the need to complete some actual planning before April 1, that the meeting would be limited to a different purpose: to address "information-sharing that is necessary to comply with" the December 4 Order. *Id.* Chairman Faith asked for a copy of the existing Facility Response Plan, even though Borkland had already provided it to Elliott Ward in October, and "the data and assumptions that have been used by ETP and

the Corps of Engineers for the calculation of the maximum spill estimate for Lake Oahe." *Id.* In addition he wanted to discuss "the hazards specific to Bakken Crude" and was "interested in lessons that may be applied to Lake Oahe, from prior Energy Transfer Partners and Sunoco oil spill responses." *Id.*

Borkland replied the following day—**January 5, 2018**— copying all parties, to advise that Dakota Access and the Corps would still go ahead with the January 11 meeting due to the "time constraints" all parties were operating under to complete a plan by April 1. Borkland Decl., Attach. 5. He provided meeting details and again invited both Tribes to participate if they changed their minds. Once again he added that each Tribe should "feel free in the meantime to send me whatever information you believe is appropriate to assist in response planning," reminding them of the April 1 deadline. *Id.* Neither Tribe responded.

The response planning meeting went forward on **January 11, 2018** in Bismarck. It was attended by four representatives of Dakota Access (including its contractor), three members of the Corps, and nobody from either Tribe. Borkland Decl., Attach. 6.[5] On **January 12**, Borkland sent an email to all parties reporting that the multi-hour meeting included "very helpful input from the Corps," and that they planned to "continue to work on gathering relevant information." *Id.* He added: "We will want to go over all of it with both tribes when we meet in February to get your additional input." *Id.* Borkland included a reminder about the urgency of getting at least *some* input from the Tribes—"any information" at all—in the meantime:

[5] Two months later, David Nelson asserted in a letter to Borkland that he had missed this meeting due to "severe weather conditions" and that Dakota Access already knew this. Borkland Decl., Attach. 21. But this was the first time Nelson said anything to Dakota Access about planning to attend that meeting, despite Borkland asking him ahead of time to say if he would be there. *See* Borkland Decl. ¶ 3 & Attach. 5. Also, weather was not a problem for those at Dakota Access and the Corps who had to travel even greater distances to attend that meeting. Borkland Decl. ¶ 4; Minter Decl. ¶¶ 3-4.

> As I have said before, if there is any information that either tribe wants us to consider in the meantime based on your review of the existing drafts of the Geographic Response Plan or the Facility Response Plan, please feel free to send that to us before we meet in February. This includes any errors or relevant omissions that you have identified in either plan. One takeaway from Thursday's meeting is that we have our work cut out for us if we are going to have the best possible response plan ready by the April 1 deadline. We expect to need at least two more meetings to accomplish that. The sooner we get input from the tribes the better.

Id. He also asked for replies "as soon as possible" with availability in early February for the next meeting and suggested setting aside "several hours so that we have the opportunity to make site visits to locations" on the Standing Rock reservation "relevant to spill planning." *Id.*

Two weeks passed with still no response from either Tribe. So on **January 26, 2018**, Borkland again emailed all parties asking if the Tribes were available on one of the previously proposed dates, February 8, for a 9:00 a.m. meeting in Bismarck, since that date and time worked for both Dakota Access and the Corps. Borkland Decl., Attach. 7. It took another week for Crow Ghost to reply. On **February 2**, Crow Ghost emailed another letter from Chairman Faith. Borkland Decl., Attach. 8. Standing Rock asked for a meeting on February 8, but at a different time and location (10 a.m. at the Standing Rock Reservation), and for a different purpose: to discuss "information-sharing." *Id.* Borkland responded that they would keep Bismarck as the location for this meeting due to the travel plans others had already made and other logistics. Borkland Decl., Attach. 9. He also proposed five dates for a March meeting and offered to travel to the Reservation at that time for a review of some of the tactical response planning areas. *Id.*

Nine representatives of Standing Rock and one from Cheyenne River showed up at the **February 8** meeting location in Bismarck. March 15, 2018 Declaration of Justin D. Minter ¶ 5, & Attach. 1. A Standing Rock participant videotaped the meeting. Minter Decl. ¶ 6. Peter Capossela, who identified himself as an attorney for Standing Rock, said three things at the outset: only two of the Standing Rock representatives would speak (Virgil Taken Alive and Doug Crow

Ghost); they would not be discussing emergency planning efforts at this meeting; and they were only authorized to talk about a date and location for a later meeting. *Id.* ¶ 7. In Taken Alive's statement he expressed a desire for emergency planning meetings to be held at the Standing Rock reservation in the Tribal Council's presence. *Id.* ¶ 8. Crow Ghost then read aloud a new letter from Chairman Faith that contained a list of requests for information, including the "Most current Facility Response Plan, without redactions"; the "Most current Lake Oahe Spill Model, including scenarios analyzed and technical documentation"; and various other details about the pipeline and other Energy Transfer Partner and Sunoco pipelines. Minter Decl., Attach. 2. Chairman Faith's letter concluded by advising that the persons in attendance were "only authorized to discuss the scheduling of a more formal meeting with the Tribal government officials on the Standing Rock Indian Reservation" and that the February 8 meeting "does not constitute a consultation or negotiation with the Standing Rock Tribal government." *Id*.

Cheyenne River's representative, David Nelson, hand-delivered two letters from Chairman Frazier at this February 8 meeting. Minter Decl. ¶ 10. The first started: "I am inviting Energy Transfer Partners to the Cheyenne River Sioux Tribe on February 8, 2018 which you have identified as an available date for ETP" and advised that they were "in Council in Green Grass, SD," about 150 miles away. Minter Decl., Attach. 3. Although the letter bore a date of February 7, it was being delivered for the first time that morning in Bismarck—at the February 8 meeting that Borkland had announced by email to Nelson and the other parties on January 26. Cheyenne River's letter, like that from Standing Rock, wanted "information sharing" that, according to the letter, was "mandated by judge Boasberg's December 4, 2017 order." *Id.* Cheyenne River's second letter, also dated February 7 and also addressed from Chairman Frazier to Borkland, "request[ed] that at least one additional consultation between" ETP and "the Tribe with regard to

Dakota Access Pipeline ('DAPL') Emergency Response Planning must occur on the Tribe's territory, the Cheyenne River Sioux Reservation." Minter Decl., Attach. 4.

Although Chairman Faith's letter authorized the Standing Rock attendees to discuss another meeting date (and nothing more), all tribal representatives left without engaging in even that discussion. Minter Decl. ¶¶ 11-13. The Corps and Dakota Access used the remaining meeting time to review the latest draft of the GRP. *Id.* ¶ 12. Because the tribal representatives had left, it was not possible to get their input on anything in that document, which is more than 225 pages long (including the detailed appendices). *Id.* ¶¶ 12-16.

Had the Tribes remained, they would have learned several things relevant to their demands for information. *First*, the new draft of the GRP, which contains no redactions, had been updated to contain the relevant portions of the FRP document that the Tribes asked about. *Second*, remote monitoring and use of the SCADA system that the Tribes asked about is discussed in the GRP. *Third*, the composition of Bakken Crude, including flammability and toxicity, that the Tribes asked about is included in the Safety Data Sheet appended to the draft GRP that was available at the meeting. *Fourth*, Dakota Access was prepared to discuss the location and operation of shut-off valves near Lake Oahe that the Tribes asked about, as Dakota Access already has included information about them in its filings in this case. *Fifth*, Dakota Access conducted a "no notice" emergency response equipment deployment exercise in October 2017 with an initial response of just one hour and a full response within 3½ hours (nearly twice as quick as PHMSA's 6-hour response requirement). *Sixth*, Dakota Access was prepared to discuss the approximate number and locations of personnel who would respond to a spill or leak at Lake Oahe, as the Tribes had requested. All of this is documented. *Id.* ¶¶ 12-16.

On **February 24, 2018**, still without a response from the two Tribes on their availability to

meet in March, Borkland emailed the parties reiterating the need to have a meeting that could include a visit to Standing Rock as part of the response planning. Borkland Decl., Attach. 13. He also stated that, as was planned for the February 8 meeting, the parties would use the March meeting to review the latest draft of the GRP, at which time Dakota Access would "provid[e] information relevant to response planning that the tribes requested in their earlier letters." Borkland Decl., Attach. 18.

On **February 27**, Crow Ghost replied complaining that "[n]one of the information requested by the Tribe has been provided to Chairman Faith," and asked for "the documentation requested on all prior reported spills from ETP/Sunoco pipelines and the maximum spill estimate prior to the meeting." Borkland Decl., Attach. 15. He also stated that Dakota Access had no permission to "go to potential clean-up sites on the Reservation"; rather, "the only permission granted to ETP to enter the Reservation is Chairman Faith's invitation" for a "meeting between senior ETP/Sunoco officials and Chairman Faith in the Tribal Council chambers." *Id.* The next day, **February 28**, Borkland received another letter, via email, from Chairman Faith that largely repeated these points. D.E. 336-10 (February 28, 2018 letter from Chairman Faith to ETP). Crow Ghost's email and Chairman Faith's letter also stated that the Tribe was available to meet on March 7. *Id.*; *see also* Borkland Decl., Attach. 17.

The February 28 letter from Chairman Faith was the first time, in all of the response planning efforts, that either Tribe shared information that might be relevant to response planning. That is, Chairman Faith mentioned "numerous historic properties of Lakota and Dakota origin in low-lying areas along the Missouri River" and urged "an evaluation of the potential impacts of an oil spill and clean-up activities on these properties." D.E. 336-10 at ECF p. 3. But his letter included

no map, no GPS coordinates, and no other information that might help show *where* these "numerous" properties are.

Borkland replied the next morning—**March 1**—asking for the location and nature of these sites (including those that Chairman Faith's letter referred to as "Mad Bear I and II") as well as any other information that should be incorporated into the response planning. Borkland Decl., Attach. 18. Borkland's email also: (i) answered some of the Tribe's questions about spill scenarios; (ii) explained how some of the information that the Tribes seek is already in the GRP or would be discussed at the March 7 meeting; and (iii) stated that Dakota Access was willing to revisit at the meeting its view that other requested information was neither relevant nor necessary to response planning. *Id.* In addition, Borkland informed the Tribes that Dakota Access agreed to share the results of the recent spill modeling at the next meeting on March 7 and explain how the results have factored into the response planning. *Id.*

Neither Tribe responded to the March 1 email. And neither showed up at the **March 7** meeting. Had the Tribes participated in the March 7 meeting, they would have again been provided copies of the latest draft of the GRP. The Tribes also would have received the promised presentation summarizing the results of Dakota Access's new spill modeling. Dakota Access and the Corps spent that meeting discussing changes to the GRP since the previous meeting and reviewing the presentation of the spill model results.

Soon after the March 7 meeting started, Borkland emailed the Tribes asking if they would be attending. He also left a voicemail for Crow Ghost with the same question. Borkland Decl. ¶ 5. Crow Ghost replied to the email stating: "I'm in tribal council this morning waiting on a resolution that I will be sending to you after it passes." Borkland Decl., Attach. 20. Soon after, Crow Ghost sent the resolution and a cover letter, both of which bear the previous day's date of

March 6. The resolution includes a lengthy set of "whereas" clauses, culminating in "**NOW THEREFORE BE IT RESOLVED,** due to the disrespectful, patronizing and unproductive communications of ETP, the Standing Rock Sioux Tribal Council directs that no meeting be held with Energy Transfer Partners at this time." Borkland Decl., Attach. 22. Despite the "no meeting . . . at this time" directive, the cover letter nonetheless invites ETP to a meeting at Standing Rock Tribal chambers on proposed dates in March. *Id.* (The resolution contains a second "resolved" clause that likewise seems to contradict this directive. *Id*.).

Cheyenne River also emailed a letter after the March 7 meeting (and that letter, too, is instead dated March 6). It again requests information, much of which had previously been provided or was made available at the meetings in February and March; complains about lack of timely responses to correspondence from the Tribe; and accuses Dakota Access of "continu[ing] to focus primarily on the concerns of the Standing Rock Sioux Tribe." Borkland Decl., Attach. 21.

Standing Rock's Motion, which omits all of the detail that was just summarized, states that "some minor progress" in response planning was achieved on March 1, 2018 when the Tribe "received a letter from the Corps and a CD containing a revised spill response plan." D.E. 336 at 6 n.1. The Motion complains that Standing Rock received this document only "[t]he day before [the Tribe's current] motion was filed." *Id.* But the Tribe's Motion leaves out a material fact. This is the *same* draft GRP that the Tribes declined to discuss—or even look at—during the response planning meeting three weeks earlier (on February 8). Nor does Standing Rock mention that the Tribes have received every new draft of the GRP dating back before the December 4 Order. The letter from the Corps that is mentioned in Standing Rock's Motion explains all of this, but the Tribe omitted that letter from the exhibits to its Motion, just as the Tribe's exhibits include none

of the email correspondence summarized above between all of the parties to response planning.[6]

Dakota Access remains willing to visit the Standing Rock Reservation as part of response planning efforts so that Standing Rock can help identify any areas of particular concern and assist with planning for the staging of equipment and similar logistics in the event of a spill or leak.

D. Dakota Access Considers Plaintiffs' Input Before Selecting a Third-Party Engineering Firm

Dakota Access identified three third-party independent expert engineering companies suitable to carry out the second condition in this Court's December 4 Order: "review easement conditions and regulations," and "assess compliance with all such conditions as well as other integrity threats." D.E. 303 at 1-2. Consistent with Dakota Access's obligation to select a company "with input from the Tribes," *id.*, on January 11, 2018, Dakota Access sought both Plaintiffs' input on

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[6] The Corps's letter is dated February 23, 2018 and was copied to counsel for the Tribe. Dakota Access obtained a copy (as well as a copy of a letter to Cheyenne River bearing the same date) from the Corps. Scherman Decl., Attach. 2 & 3. Significantly, the letter to Standing Rock explains that the Corps is "in the process of finishing our review of the spill model and the results submitted by Energy Transfer Partners, as well as gathering documents related to your request." Scherman Decl., Attach. 3. It then confirms that the enclosed CD contained the same response plan that the Tribes refused to discuss on February 8:

> I am enclosing copies on a disk of the draft Geographic Response Plan and Oahe Project Irrigation/Municipal Easements list that Dakota Access and the Corps were prepared to discuss and share with your representatives at the 8 February 2018 meeting in Bismarck, North Dakota. The purpose of this meeting was to comply with the Court's order for the parties to coordinate finalization of spill response plans at Lake Oahe. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, Order (D. D.C. Dec. 4, 2017) (ECF No. 303). However, shortly after the meeting began, the Standing Rock Sioux Tribe's representatives left the meeting with a representative from the Cheyenne Rock Sioux Tribe and therefore missed the discussion on the updated Geographical Response Plan, the intakes that exist between the crossing and Mobridge, South Dakota, and what sensitive receptors can be added to the Geographic Response Plan. We look forward to continued coordination with your Tribe and Dakota Access to finalize spill response plans at Lake Oahe.

Id. Standing Rock's Motion includes none of this.

each company. D.E. 336-11 at 4 (Jan. 11 email). On January 23, Standing Rock replied, questioning the independence of the proposed companies. In particular, the Tribe objected that two of the three had previously done work with Dakota Access or ETP. As for the third—Process Performance Improvement Consultants, LLC (or P-PIC)—Standing Rock noted only that the company "appears to be involved [in] a lot of litigation support for oil and gas firms generally and pipeline service companies specifically." *Id.* at 3 (Jan. 23 email).

Standing Rock suggested that Dakota Access consider a fourth option—Gordon A. Aaker, PE, of Engineering Services, LLP. *Id.* at 4. Notably—given Standing Rock's objection to Process Performance Improvement Consultants, LLC—Aaker's firm touts its litigation support work. March 16, 2018 Declaration of Charles Frey ¶ 4. Dakota Access contacted Aaker and followed up with him to discuss the work that would be needed. Frey Decl. ¶ 5. Dakota Access also included Aaker's firm in the group of four companies from which it would solicit proposals (Aaker's plus the three firms that Dakota Access identified when seeking input from Plaintiffs). The delivery of materials to all four firms was delayed by a week, however, because Aaker did not respond to a request that he sign an agreement to keep proprietary and other information confidential. March 16, 2018 Declaration of Tom Siguaw ¶ 4. To avoid further delay, Dakota Access ultimately sent the materials to all four firms on February 19, 2018, with the understanding that a confidentiality agreement would need to be reached with Aaker. Siguaw Decl. ¶¶ 4-6; D.E. 336-11 at 2. When Aaker complained—through counsel for Standing Rock—that he could not complete a proposal by the deadline, Dakota Access reached out to give him more time. Frey Decl. ¶ 9; D.E. 336-11 at 2. Mr. Aaker did not respond to Dakota Access's calls or emails, though, until *after* he submitted his proposal. Frey Decl. ¶¶ 9, 11.

In Aaker's proposal he started by accusing Dakota Access of favoring "Energy Transfer

Partner's preferred vendor, the Wood Group." Frey Decl., Attach. 11 at 1. Aaker characterized this supposed favoritism as "'Sand Bagging' or just plain 'Bid Rigging.'" *Id.*

The content of Aaker's proposal further demonstrated that his company was not suitable for the task. As noted, the remand condition requires the third-party company to assess whether the relevant portion of the pipeline complies with the easement conditions imposed by the Corps (including the condition to comply with relevant regulations) as well as other integrity threats. But rather than submit a proposal covering this sort of compliance-based assessment, Aaker has proposed conducting a root-cause pipeline-failure analysis—the type of work appropriate to investigating such things as a pipeline spill. In fact, every phase of the proposal is based on what he calls a "Root Cause Failure Analysis (RCFA) of the DAKOTA ACCESS PIPELINE INVESTIGATION." Frey Decl., Attach. 11 at 3; *see id.* at 5-6 (discussing collection techniques for "failed components"); 6 (stating that collection of "recorded data," including "electronic dates," "is critical to the complete understanding of operating conditions at the time of failure"; discussing interview techniques used to avoid "premature discussion of the cause of failure"); 7 (analysis phase requires "build[ing] the cause chain and determine the immediate, contributing, and root causes of the failure"); & 8 ("fundamental objective of the solution phase is to break the cause chain").[7] While Aaker *may* be qualified to investigate pipeline leaks and offer an opinion as to their cause, *id.* at 2 ("Our international reputation and experience is in providing failure analysis"), that is not remotely what the Court's December 4 Order contemplates.

[7] The summary section of Aaker's proposal, *id.* at 8, likewise shows the mismatch between the remand condition and Aaker's qualifications and proposed approach:

> ***THE PREMATURE FAILURE OF A PIPELINE SUGGEST[S] BOTH TECHNICAL AND ORGANIZATIONAL FLAWS. THE OBJECTIVE OF THIS PROJECT IS TO PROVIDE A PRACTICAL APPROACH TO A [ROOT CAUSE FAILURE ANALYSIS] AND DETERMINE THE APPROPRIATE CORRECTIVE/PREVENTIVE ACTION RECOMMENDATIONS NECESSARY TO AVOID FAILURES IN THE FUTURE.***

Dakota Access chose Process Performance Improvement Consultants, LLC, to conduct the assessment, and the company is working on doing so in time to meet this Court's April 1 deadline.

E. The Tribes Delay the Remand Process

As noted above, the Corps had planned to complete the remand process by early April. Dakota Access did what it could to keep to that schedule by responding timely to the Corps's requests for information. According to the Corps's most recent filings, though, Plaintiffs have taken a different path. Standing Rock did not provide information to the Corps until March 15, 2018, more than five months after the Corps requested rather specific materials related to the Tribe's use of hunting and fishing resources. D.E. 337 at 1 n.1. And Cheyenne River *still* has made no substantive response to the same request. *Id.* at 1. Nor have the Yankton or Oglala Sioux Tribes. D.E. 338 at 2. As a result of Plaintiffs' tactics, the Corps has been forced to delay its final action following remand. D.E. 338 at 1-2.

ARGUMENT

I. Plaintiffs' Motions Are Improper Efforts to Dictate to an Agency the Manner in Which it Arrives at Final Agency Action

The APA provides for judicial review of "final" agency action. No doubt the various Plaintiffs will ask this Court to engage in such review again if the Corps reaffirms that the various approvals for the Dakota Access Pipeline project will not have a significant impact on the environment and are in the public interest. Plaintiffs asks the Court to play a different role, however. They want the Court to step in—at the tail end of the remand process and before final agency action—to tell the Corps various steps it must take in completing its remand work. Cheyenne River cites no authority for its request, and Standing Rock relies on inapt case law. The Court should deny both Motions.

A. At the status conference shortly after the Court issued its June 14, 2017 Opinion, all Plaintiffs commented on the upcoming remand process. One argued that the Corps needed to take specific steps, contending "there needs to be public participation" and that the remand order, "at least by implication, if not by requirement under the APA, would require the comment period be reopened for some reasonable period of time." TR June 21, 2017 at 23-24 (Bruce Afran: "We assumed when we saw the remand order that the Army would be, by necessity, opening this back up to public comment."). But this Court declined to require any particular process on remand, stating: "I would expect the Corps to follow the law and follow the procedures that apply, but I'm not going to confirm what Mr. Afran believes is implicit." *Id.* at 25.

The Court's approach—which left it to the Corps to determine in the first instance which steps it should take to address the three remand topics—is fully in line with D.C. Circuit precedent. "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Industries*, 52 F.3d at 365. That is because a district court reviewing final agency action under the APA "sits as an appellate tribunal[.]" *Id.* (quoting *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993)). Not only would it be "unnecessary for the court to retain jurisdiction to devise a specific remedy for [the agency] to follow," it would be "error to do so." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("Once . . . the district court held that the Secretary had misinterpreted" a statutory provision, "it should have remanded to the Secretary for further proceedings consistent with its conception of the statute.")

In the face of this settled on-point authority, Cheyenne River cites none for doing the opposite: *i.e.*, "requir[ing] the Corps to engage in meaningful consultation by responding to the

Tribe's numerous substantive requests for information." D.E. 327 at 4. That is reason enough to deny its request.[8] That being said, at least Cheyenne River is willing to call a spade a spade. Standing Rock, on the other hand, euphemistically titles its pleading (with emphasis added here) a "Motion for *Clarification* re Remand Process and Remand Conditions." Clarification would be in order only if this Court *meant* to "direct[] the Corps to provide the Tribe with technical information it has requested relative to the remand," D.E. 336 at 1, but simply failed to make that intent clear. This Court's Order—like the underlying law—is already clear. The agency must decide how to conduct its remand, and the courts get involved again—if at all—only after final agency action. As explained below, the cases on which Standing Rock relies to urge interference with the remand process do not permit such a thing.

B. Standing Rock starts with a case from this Circuit that deals with a different issue—*i.e.*, whether a district court can vacate or instead take some intermediate step until the agency remand process has run its separate course. Standing Rock quotes here the statement in *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006), that a "district court retains some remedial discretion" when it remands to the agency. But Standing Rock leaves out the all-important context. The D.C. Circuit was sending the case back to the district court "with instructions to vacate EPA's approvals" of total maximum daily loads (or TMDLs) of pollutants for the Anacostia River. The Court recognized that "neither" side in the lawsuit "want[ed] the Anacostia River to go without" the relevant "TMDLs" during agency proceedings on remand, so it simply noted that the parties were free to "move to stay the district court's order on remand to give either the District

[8] Cheyenne River's pleading is styled a "Response" to a monthly status report from the Corps, with a "Request for Meaningful Consultation On Remand" tacked on. It fails to comply with the this Court's rules, which require Motions to be accompanied by a Statement of Points and Authorities. L.R. Civ. 7(a).

of Columbia a reasonable opportunity to establish daily load limits or EPA a chance to amend its regulation declaring 'all pollutants . . . suitable' for daily loads." *Id.* That is merely an example of a court rejecting complete vacatur if the result would be to defeat temporarily the environmental protections sought by the plaintiff's challenge. *See, e.g.,* D.E. 284 at 24 ("[T]his Circuit has recognized that, at times, a flawed agency action is better than no action at all"). *Friends of Earth* goes no further than that.

The recent decision by the Honorable John D. Bates of this Court is just as distinguishable. In fact, the question there was nearly identical to that in *Friends of Earth*: whether and under what circumstances the district court should grant an "extension of the stay of vacatur" of "EPA's Total Maximum Daily Loads ('TMDLs')" governing certain substances in the Anacostia River and its tributaries (as well as one other water body). Once again, therefore, the issue before the court was which conditions would preserve the status quo while the agency worked toward taking the final agency action required by the remand order. Further distinguishing that case, the stay of vacatur there had already been in effect for *seven* years, with the new extension pushing the stay into 2020.

The final case Standing Rock cites from this Circuit is inapt for a different reason. According to the Tribe, in *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), the Court remanded, requiring the agency to "afford a reasonable opportunity for public comment on the unredacted studies on which it relied in promulgating the rule" at issue. D.E. 336 at 10 (quoting 524 F.3d at 242). But that case dealt with a requirement unique to notice-and-comment rulemaking (524 F.3d at 236): an agency may not "rely on . . . studies in a rulemaking but hide

from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant expectations of the methodology imposed," *id.* at 239. Simply put, this is not a notice-and-comment (or any other form of) rulemaking case.[9]

C. Standing Rock's other problem is that it points to no case in this Circuit remotely like this one—where the agency will likely be able to satisfy the law's requirements without needing any further record development or outside input.

As to the first remand topic, this Court ruled that the Corps need only "demonstrate that it considered"—past tense—reports alleging scientific flaws in the Corps's analysis. D.E. 239 at 34. This Court acknowledged that "[i]t may well be the case that the Corps reasonably concluded that these expert reports were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects," in which case the only flaw is that "the Corps never said as much." *Id.* "Correcting this flaw," the Court later explained, "does not require that Defendants begin anew, but only that they better articulate their reasoning below." D.E. 284 at 9; *id*. at 10 ("Although the Corps must give careful consideration to the expert critiques, it is well positioned to provide such explanation on remand."). Thus, remand topic one does not trigger a need to "consult" further with, or provide any information to, Plaintiffs. Regardless of whether the Corps elects to go beyond what the law requires here, Plaintiffs are not entitled to an order forcing that agency to do so.

[9] Nor is there any basis for expanding the holding in that case to the different context here. As Judge Kavanaugh wrote in his concurrence and partial dissent, the doctrine that Court applied —which pre-dates *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978)—"cannot be squared with the text of § 553 of the APA" and is not consistent with *Vermont Yankee* either. 524 F.3d at 246. In fact, Judge Tatel wrote "separately to emphasize" his view that the disclosure of the redacted portions of agency studies was "particularly important" for a *different* reason—"failure to turn over the unredacted studies undermines [the] court's ability to perform the review function APA section 706 demands." *Id.* at 242-43. That concern is not present here, either, because the Tribe seeks access to materials *before* there is final agency action for a court to review.

For the Corps to satisfy its obligations on topic two—a "task on remand" that this Court called "narrow," (D.E. 284 at 10)—it likewise must simply demonstrate its "acknowledgement of" and "attention to" the effects in question (*i.e.*, "the impact of an oil spill on the Tribe's hunting and fishing rights"), D.E. 239 at 43. Again, while the Corps has requested additional information from all Plaintiffs about the extent of their reliance on hunting and fishing resources, nothing in this Court's ruling compels the Corps to do more than give attention to—*i.e.*, take a hard look at—information it *already* had when it decided to issue the easement without an EIS. Indeed, there would have been no basis for a remand on topic two if Plaintiffs hadn't already provided information about these effects. This Court relied on the fact that Standing Rock "had alerted the Corps to its fishing- and hunting- related concerns after the agency published the Draft EA." D.E. 239 at 42 (Corps "never explained . . . what those effects would be"); see also *id*. at 43 (detailing information the Corps received from the Director of Standing Rock's Department of Game, Fish, and Wildlife Conservation, "spell[ing] out the ways in which an oil spill could seriously affect game along the Oahe shoreline").

As this Court further explained in its October 11 Opinion denying vacatur, "the record shows that the agency is well situated to conduct" the "inquiry" on this second topic. D.E. 284 at 11. "It has already gathered information regarding Lake Oahe's fish and wildlife, and it has conducted a lengthy analysis of the possible toxicity arising from various spill scenarios." *Id.* Because "[t]he agency already has the data it needs to determine the impact of a spill on fish and game," "[o]n remand, the Corps must simply connect the dots." *Id.*

Finally, the Corps is under no obligation to provide more information to Plaintiffs in carrying out its work on the third topic either. This part of the Court's ruling was focused on a failure to analyze the environmental justice implications of "spill impacts," "as distinct from the risk of a

spill occurring" or "construction impacts." D.E. 239 at 53. Again, the Court noted the Corps had been "silent" on potential effects already mentioned in the record, such as Standing Rock's claim that "many of its members fish, hunt, and gather for subsistence." *Id.* at 54. And the Court added that the Corps "need not necessarily have addressed that particular issue," as long as it "offer[ed] more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill." *Id.*

All of this allowed the Court to conclude, with respect to this third topic, that "multiple aspects of the record suggest that the Corps is likely to justify issuing an EA, rather than completing an EIS." D.E. 284 at 14-15 (noting low likelihood of spill; relocation of Standing Rock's water intake; and the "already-conducted assessment of the alternative pipeline route through Bismarck"). Moreover, this Court explained, even if the Corps came to a different conclusion about environmental justice impacts, it would not require an EIS. That is because, "contrary to the Tribes' statement that a finding of disproportionate impact would necessitate an EIS, the relevant agency guidance expressly contemplates the use of an EA to address such concerns." *Id*. at 13. The Corps can therefore conduct its environmental-justice analysis without providing more information to—or commencing formal consultation with—Plaintiffs.[10]

[10] All of this distinguishes Standing Rock's out-of-circuit authority too. Notably absent from *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008), was any suggestion by the district court that the agency could likely correct its errors simply through better explanations based on the existing record. In fact, the Ninth Circuit affirmed a "novel" requirement to consult with sovereign entities to develop items to be included in a proposed action and try to narrow the issues of disagreement, *id.* at 927 & 937, in light of "the history of the litigation," *id.* at 937. Here, the items to be addressed on remand have been narrowly tailored by this Court's Remand Order. This is simply unlike the cases on which the Ninth Circuit relied, in which "specific actions" were needed to address an agency's "persistent failure" to carry out its duties. And while it may feel like this case has been pending a long time, it is nothing like the "perpetual litigation" in *National Wildlife Federation*, which dated back almost 20 years. *Id.*

Plaintiffs' arguments for a contrary outcome are based on a different—patently erroneous—view of this Court's June 14 ruling. Putting aside the factual errors (noted below) in their assertion that the Corps has engaged in "no exchange of information," the law governing this Court's Remand Order is simple: until there is final agency action to review, there is no basis for assuming that any exchange of information (much less the particular information that Plaintiffs seek) is a prerequisite to lawful agency action.

Take, for example, Standing Rock's contention that it "makes no sense for the Tribe to be evaluating outdated spill models and other information that are no longer being used, while the Corps is considering new spill models from DAPL that the Tribe has never seen." D.E. 336 at 9. That complaint assumes, without any basis in the record (because there is no remand record yet), that the earlier spill models are "outdated" and "no longer being used." Until the Corps reaches a final decision, it is not possible to conclude that such a decision even requires use of supplements to the earlier still-useful models. Plaintiffs' arguments likewise assume that the additional modeling—based on more realistic pipeline rupture scenarios—will show *more* of an effect on the environment than did the initial modeling of a guillotine cut at the surface of Lake Oahe (rather than the same effect or something less). And it assumes the Corps will find it necessary to base any findings or ultimate determinations about the effects of a spill on the post-remand information, rather than concluding, *e.g.*, that the result would be the same whether or not it considers additional information. And even if the Corps ultimately relies on new information from any source, the Tribes have no more entitlement to comment on that information than does any other interested person or entity. That is because, in contrast with *American Radio Relay League,* this is not notice-and-comment rulemaking, and nothing in the APA, NEPA, or any regulation requires an agency to preview the materials on which it chooses to base final agency action.

D. As alluded to above, Plaintiffs are also incorrect when they accuse the Corps of "consistently ignoring the requests of the Tribe for information[.]" D.E. 336 at 2. Although the Corps is better positioned to address what it has shared (and what it still plans to share before reaching final agency action), Plaintiffs have received, at a minimum: each new version of the GRP; the final Facility Response Plan; the Oahe Project Irrigation/Municipal Easements list; and a Safety Data Sheet (appended to the GRP) detailing the composition of Bakken Crude, including flammability and toxicity. Scherman Decl., Attach. 2-4. The Corps further advised the Tribes in its February 23 letter that the Corps was "in the process of finishing [its] review of the [supplemental] spill model and the results submitted by Energy Transfer Partners, as well as gathering documents related to [Standing Rock's] request." *Id*.

Separately, the Corps and Dakota Access have made other requested information available to the Tribes as part of the response planning process conducted in compliance with this Court's December 4 Order. This includes:

(1) the results of the supplemental spill model;

(2) information about remote monitoring and use of the SCADA system;

(3) the location and operation of shut-off valves near Lake Oahe;

(5) a report of a "no notice" emergency response equipment deployment exercise in October 2017 showing a full response in nearly half the time required by PHMSA; and

(6) details on the number and locations of personnel who would respond to a spill or leak at Lake Oahe.

See supra at 12-20.

In fact, at the March 7 meeting Dakota Access did exactly what it offered in its meeting invitation to the Tribes and the Corps: it presented results from the supplemental spill model and explained how those results will inform the response planning efforts. Minter Decl. ¶¶ 17-18. The Corps reviewed these results and asked questions; the Tribes chose not to show up. *Id.*

As explained earlier, once this Court found error on three discrete topics, it followed what is "ordinarily the appropriate course" in this Circuit, which is "simply to identify [the] legal error and then remand to the agency[.]" *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 861 (D.C. Cir. 2012). Given that the Corps has *already* shared information with the Tribes; advised the Tribes in February that it planned to share more; and joined Dakota Access in making even more available to the Tribes through the planning process for responding to spills and their potential effects on tribal resources, this is hardly the case to invent a different course.

II. The Only Thing Missing, as Relevant to the Court's Response Planning Remand Condition, Is Participation by the Tribes

Standing Rock's Motion omits nearly every fact this Court needs to assess the parties' various efforts to "coordinate to finalize an oil-spill response plan affecting Tribal resources and lands at Lake Oahe." D.E. 303 at 1. The Court responded to the Tribes' complaints last summer by ordering that the Corps and Dakota Access include them in response planning discussions. But because that order did not go as far as Plaintiffs asked, they have refused—time and time again—to participate in the discussions they requested. The record on that point is clear. The Corps and Dakota Access have repeatedly tried to engage the Tribes in the coordination of response planning. They have held the planning meetings near Lake Oahe and offered to go to Standing Rock's Reservation to visit locations relevant to deployment of response equipment and protection of tribal resources. They have made available to the Tribes—both before and at the planning meetings—copies of each iteration of the Geographic Response Plan and the final Facility Response Plan. They have offered the Tribes multiple opportunities to submit any information, in any format the Tribes choose, that would be helpful in protecting tribal resources from effects of a spill. The Corps and Dakota Access have also provided much of the information the Tribes have demanded, and have agreed to make even more available. But like the approach Standing Rock took when

the Corps sought its input relevant to the National Historic Preservation Act, Plaintiffs refuse even to discuss response planning unless all of their demands about the planning process are met first. That is no ground for altering the first remand condition by tacking on a requirement to turn over information unrelated to response planning, especially given that the Court *already* declined to enter such an order the first time Standing Rock insisted on one.

A. The Court imposed its emergency-response-planning condition after Plaintiffs complained they were shut out from earlier planning efforts. For example, they told the Court that "if there is a final Geographic Response Plan ('GRP') for an oil spill at the Oahe crossing, it has never been shared with the Tribes[.]" D.E. 280 at 18. Thus, both the Corps and Dakota Access have given the Tribes each iteration of the GRP since October 2017—even before the December 4 Order was entered. And the Corps and Dakota Access have made later GRP drafts available for the Tribes to review in-person, where they could ask questions and offer live input.

The Tribes' other complaint was that they had been deprived of the chance to "discuss" and "share opinions" about how a spill response would be carried out. They stated: "Nor have the Tribes ever had the opportunity to discuss or share opinions regarding staging of response equipment or mitigation measures." *Id.*; *see also* D.E. 272 at 37 ("neither the Corps nor DAPL has ever communicated with the Tribes about spill response planning"); D.E. 293 at 6 (complaining that the Tribes "had been completely excluded from the planning process—even through the Tribes have emergency planning duties and staff"). The Tribes further insisted that, as a result of being excluded from response planning discussions, even "updated drafts" of the GRP "still contained oversights and errors." D.E. 272 at 37. Yet, fully seven months after the Tribes told this Court that the GRP was based on erroneous and incomplete information, the Tribes have not participated in the response planning discussions; have refused to "discuss or share opinions regarding

staging of response equipment or mitigation measures," *see* D.E. 280 at 18; and have ignored repeated invitations to submit *any* helpful information in *any* manner the Tribes choose. *See supra* at 12-20.

In fact, the *only* time either Tribe availed itself of these many opportunities to provide information relevant to response planning, it left out the most important information: locations of sites that the Tribe claimed were in need of special protection. *See* D.E. 336-10 at ECF p. 3. When Chairman Faith urged "an evaluation of the potential impacts of an oil spill and clean-up activities" at "numerous historic properties," he only vaguely described their locations as "low-lying areas along the Missouri River." *Id.* Dakota Access promptly replied asking for location information and other details essential to incorporating these historic properties into the response planning, but was met only with more silence. Borkland Decl., Attach. 18. And Dakota Access cannot try to gather this information itself. According to Chairman Faith's letter, because "there have been no discussions or evaluation of the impacts on" these and other unspecified "cultural properties down-stream from the DAPL Lake Oahe crossing, ETP personnel are not permitted on Tribal land for the purpose of conducting any field surveys, at this time." D.E. 336-10 at ECF p. 3. It is difficult to imagine how, if a leak were to occur, the Tribal leaders and response planning staff will be able to look their fellow Tribe members in the eye and explain that despite having several months to coordinate on response planning they elected to provide no information and engage in no discussions about protecting Tribal resources because they insisted on an all-or-nothing approach.

That approach by the Tribes to response planning should end here as it did in the NHPA context. In its September 9, 2016 Opinion, this Court found a low likelihood of success on the merits of claims under that statute. When it came to Standing Rock's contention that it was inad-

equately consulted about potential impacts from construction on cultural resources, this Court observed that the Corps "documented dozens of attempts to engage Standing Rock in consultations to identify historical resources at Lake Oahe and other PCN crossings." *Standing Rock I*, D.E. 39 at 48. But "the Tribe largely refused to engage in consultations." *Id.* "It chose instead to hold out for more – namely, the chance to conduct its own cultural surveys over the entire length of the pipeline." *Id.* This Court held the Tribe to its tactical decision, concluding that—despite the ill effects of that decision on the quality of the dialogue—the Corps "gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it." *Id.* at 50.[11]

The situation here is quite similar. The Tribes refuse to discuss response planning—such things as identifying particular tribal resources and sites in need of special protection, preferred locations for staging response personnel and launching emergency equipment, and availability of tribal personnel to coordinate in response efforts including training exercises—unless their experts are first allowed to review and comment on how a supplemental spill model was constructed and have access to other documents unnecessary to such planning. Importantly, the Corps and Dakota Access have made available to the Tribes a presentation of the *results* of the supplemental spill modeling so that the parties can take those results (*e.g.*, predicted timing for the spread of oil) into account in the response planning discussions. Borkland Decl., Attach. 18; Minter Decl. ¶¶ 17-18. But the Tribes refuse to meet at all unless and until they receive even more.

As Borkland informed the Tribes' response planning personnel, Dakota Access is willing to revisit its view that these other materials are unnecessary. But the Tribes refuse to have a face-

[11] Plaintiffs are so unwilling to live by this Court's previous findings and rulings that Standing Rock goes so far as to make the audacious claim that "this entire case arose because the Corps failed to meaningfully engage with the Tribe[.]" D.E. 336 at 8 (also complaining, inexplicably, that the Corps failed to "listen to its legitimate concerns about the siting of the pipeline at Oahe, and make a reasoned decision in light of that information").

to-face discussion at which the parties can go over what is currently available (including many items the Tribes have requested), adjust the planning based on that information, and then have a conversation about whether and how more information might be useful. The Tribe's requests for documents underlying modeling results that have been based on a worst-case discharge are simply unnecessary. Response planning includes being prepared for the worst, and the *original* spill model assumed a worst case scenario that is far beyond what might ever happen at Lake Oahe in the unlikely event of a spill or leak. In fact, the volume of oil used in that model—more than 12,000 barrels—is even greater than the volume that Plaintiffs' *own expert* hypothesizes would be released. *Compare* AR 72253 *with* AR ESMT 625-26. By planning for something worse than the worst real-world possibility, the emergency responders will be fully equipped to handle an actual spill or leak; and the Tribes are fully able to provide their own input with the information already available to them.[12]

B. Also missing from Standing Rock's motion is any acknowledgment that Plaintiffs already asked this Court to order access to the *same* categories of information as a prerequisite to participating in the *same* response planning, and this Court *declined* to include that requirement in its December 4 Order. In particular, when Plaintiffs asked this Court to require the parties to coordinate on emergency response planning, they included in their proposed order that the Corps must "initiate communications to set up an in-person meeting" to discuss response planning, with the following extra proposed condition:

> At least 15 days prior [to] that meeting, defendants shall provide the Tribes with all documentation necessary to engage in meaningful spill response planning, including the most current unredacted drafts of applicable facility response plans

[12] As noted above, to the extent the additional information sought by the Tribes is relevant to response planning, it is in the GRP that the Tribes have declined to discuss with the Corps and Dakota Access, or it was otherwise made available as part of the response planning discussions that the Tribes have yet to take part in.

> and geographic response plans, as well as documentation for any spill-related assumptions embodied in those plans, and technical documents related to worst case spill discharges and detection of low-level leaks, spill models, and emergency operations such as valve shutoffs.

D.E. 293-1 at 2 (Proposed Order).

Plaintiffs grounded this request in their assertion that they could not meaningfully participate in planning for possible spills, and that they would not be able to offer input on potential harm to hunting and fishing resources (remand topic two), without this information. For example, the Tribes insisted that they needed updated spill modeling information to participate in response planning. D.E. 293 at 8 (arguing that "an adequate GRP depends on an understanding of worst case discharges and other information developed through adequate spill modeling" and noting that "DAPL is still at work on spill models, which are not expected to be provided to the Corps for review prior to December"). Moreover, they argued that in order for their proposed response planning condition "to be effective, the Court should direct the Corps to make available to the Tribes the technical documents and assumptions underlying the facility and geographic response plans, as well as fully unredacted versions of the plans themselves." *Id.*

This Court declined to include such a requirement in its December 4 Order. D.E. 303 at 1. Plaintiffs did not seek reconsideration of that ruling. Instead, just like their approach to the Remand Order itself, *see supra* 6-11, they simply have refused to accept that this Court's ruling was not the one they sought. For the Tribes to pretend now that their requested order merely "clarifies" the earlier one is doubly disingenuous, because that's the *same* line the Tribes used when they asked the Court to include a document-production requirement in the December 4 Order in the first place. D.E. 293 at 2 ("The Tribes respectfully request that the Court impose the conditions suggested by the Tribes, as *clarified* in the proposed order submitted herewith." (Emphasis

added)). The Tribes have had no legitimate basis for refusing to engage in response planning these last four months. The Court should not reward that refusal through a *post hoc* excuse.

III. The Independent Third-Party Assessment Condition in this Court's December 4th Order Also Needs No Clarification

The Court required Dakota Access to select a third-party independent expert engineering company, "with input from the Tribes." D.E. 303 at 1-2. Dakota Access sought that input and even included Standing Rock's proposed firm when soliciting requests for proposals. The firm that Dakota Access selected will be reviewing the easement conditions and regulations, and assessing compliance with all such conditions as well as other integrity threats. That is exactly what the order requires. *Id.* ("Dakota Access, with input from the Tribes, shall select a third-party independent expert engineering company to review easement conditions and regulations, and to assess compliance with all such conditions as well as other integrity threats."). The Court need not modify its Order.

There is no dispute that Dakota Access sought Plaintiffs' input on its selection of the third-party company. Dakota Access did not select either of the firms that Standing Rock complained had ties to Dakota Access. Standing Rock complained that the firm that was selected performs litigation support work for the oil and gas industry, but that is not a basis for rejecting its independence. Were that so, accounting firms—which audit the financial results of companies—would be barred from providing defense-side litigation support. And law firms would be unable to perform monitorship functions after government enforcement actions if they represent companies in different government enforcement actions.

Although Dakota Access had no obligation to choose any firm preferred by Plaintiffs, Aaker's proposal plainly was a mismatch for the assessment needed here. Aaker's experience and the manner in which he proposed to proceed are suited for something different: root cause analysis

of pipeline failures. And there are reasons to question *his* ability to be impartial given how quickly he jumped to the erroneous conclusion that the process was "rigged" in favor of a firm that wasn't selected.

There also is no basis for Standing Rock to obtain a rewrite of the scope of the assessment ordered here. The Court ordered a third-party to look at what the easement and regulations require and assess whether Dakota Access is in compliance. The Order also requires the third-party company to include "other integrity threats" in its assessment. Integrity threats in this context are different ways in which a pipeline spill or leak might occur. This Court explained this in its June 14 Opinion: The risk analysis in the EA "addressed nine industry-recognized pipeline integrity threat categories," including such things as third-party damage, corrosion, and defects in materials or construction. *Standing Rock III*, D.E. 239 at 29 (quoting EA). The easement conditions already address those nine threat categories. In the unlikely event the third-party company identifies a different ("other") type of threat—*i.e.*, one not already identified—it will assess that threat. (Dakota Access has already been including in its bi-monthly reports whether "[a]ny new integrity threats" are "identified during the reporting period." D.E. 303 at 2. Given how thorough the list of possible threat categories is in the EA, it should come as no surprise that nothing new has been identified.)

Standing Rock misreads the reference to "other integrity threats" as a command to the third-party company to question whether the Corps got its risk assessment right in the July 2016 EA. For one thing, the Order says to assess "other" integrity threats, not threats already considered in creating the easement conditions. Moreover, and as stated above, this Court already "upheld the majority of the Corps' determinations under NEPA – including the agency's 'top-line conclusion' that the risk of an oil spill was sufficiently low so as to not require an EIS." D.E. 284 at 5.

The purpose of the conditions in the December 4 Order is to preserve the status quo during remand. D.E. 304 at 5. Standing Rock's reading would turn that purpose on its head by replacing the status quo with a chance to upend the results of that earlier ruling. And rather than have the Corps or some other federal agency conduct this re-do of the decision to grant permission, Standing Rock would delegate the task to a private party operating with no statutory or regulatory mandate. The Order should not be expanded in that improper manner.[13]

The Court also should not require Dakota Access to go back and develop assessment protocols jointly with Plaintiffs. The task here—at least the one this Court ordered as opposed to that which Standing Rock has in mind—is straight-forward. Dakota Access makes information available to the third-party company so that the latter can identify the easement conditions and determine whether Dakota Access is in compliance. P-PIC has been notified that if it has difficulty getting access to anything it believes it needs, or if it believes that maintaining independence or otherwise completing its assessment requires it to proceed in a manner that Dakota Access will not allow, it should bring the issue directly to the Court's attention.

Finally, since this Court ordered the third-party assessment, the Pipeline Safety and Hazardous Materials Administration has advised Dakota Access that it will be conducting an audit of DAPL this summer. March 16, 2018 Declaration of Todd Nardozzi. The Court can therefore be assured that, third-party assessment or not, the pipeline is receiving independent scrutiny.

[13] There also is no basis for an order that—under the guise of "clarification"—expands assessment of compliance with easement conditions or regulations to include assessment of compliance with *voluntary* practices identified by the American Petroleum Institute (API). These API practices are not required by regulation, which explains why even the API refers to them as "recommended." Siguaw Decl. ¶¶ 8-9.

CONCLUSION

For the reasons stated above, the Court should deny both Motions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2018, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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