NO. 20-5197

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE, ROBERT FLYING HAWK; OGLALA SIOUX TRIBE,
Plaintiffs-Appellees,

and

CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE,
Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*
Defendant-Appellant,

and

DAKOTA ACCESS LLC,
Intervenor for Defendant-Appellant.

On Appeal from United States District Court for the District of Columbia
Case No. 1-16-cv-01534-JEB (Hon. James E. Boasberg)

STANDING ROCK SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, AND YANKTON SIOUX TRIBE OPPOSITION TO INTERVENOR-APPELLANT'S MOTION TO STAY ISSUANCE OF THE MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe (collectively, "Tribes") oppose the motion to stay issuance of the mandate filed by intervenor-appellant Dakota Access Pipeline, LLC ("DAPL"). The motion should be denied because it does not come close to meeting the standard for the issuance of a stay under Fed. R. App. P. 41(d). A stay would not deprive the District Court of jurisdiction to consider "other relief" as directed by this Court, nor would a stay impact the government's ability to enforce its property rights, if it so chooses, through an order to shut down the pipeline. The motion can be denied on that basis alone. While there is no reason to reach the question of whether DAPL's anticipated certiorari petition raises "substantial questions" warranting a stay, this Court need look no further than the fact that not a single judge in this Circuit called for a vote on DAPL's petition for rehearing *en banc*. DAPL's effort to manufacture a circuit split where none exists can easily be rejected. To the contrary, this is a factually unique case, in an unusual procedural posture, that is unlikely to warrant review by the U.S. Supreme Court. The motion can be denied on that basis too.

STANDARD FOR STAY OF ISSUANCE OF THE MANDATE

Under Circuit Rule 41(d), "[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion

must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay." Such motions appear to be rarely granted in this Circuit. *See, e.g., U.S. v. Microsoft Corp*., 2001 WL 931170, at *1 (D.C. Cir. 2001).

ARGUMENT

DAPL's motion is rife with factual misstatements and mischaracterizations. Its boast of an "unblemished safety record" is belied by evidence before the District Court of at least a dozen leaks, some of them significant. ECF 597-4 at 44 ("DAPL-ETCO has experienced 12 spills since the pipelines were operational in June 2017. Over 6,000 gallons (146 Bbls) of crude oil has been spilled with nearly $200,000 in property damage."). Its claim to be a "vital utility" is belied by evidence that oil production in North Dakota has sharply declined and that the pipeline could be closed with minimal disruption. *See, e.g*., S.A. 400. However, none of these factual misstatements is material to the Rule 41(d) standard used to decide this motion, on which the Tribes will focus.

I. GOOD CAUSE DOES NOT EXIST TO STAY ISSUANCE OF THE MANDATE

DAPL's motion touches only lightly on the requirement that it demonstrate "good cause" to stay issuance of the mandate under Rule 41. Its brief discussion raises more questions than it answers, and it never explains how a stay would "safeguard" its "interests" that would otherwise be threatened in the absence of a

stay. Motion at 18. Even brief scrutiny reveals that good cause for a stay does not exist.

First, a stay of the mandate would not deprive the District Court of jurisdiction to enter an injunction on the operation of the pipeline, as the Tribes have requested. Indeed, this Court expressly indicated that the District Court can rule on such a request. *Standing Rock Sioux Tribe,* Order, 2020 WL 4548123, at *1 (D.C. Cir. August 5, 2020) ("We expect appellants to clarify their positions before the district court as to whether the Corps intends to allow the continued operation of the pipeline notwithstanding vacatur of the easement and for the district court to consider additional relief if necessary."). In its briefing below, DAPL appears to recognize that the District Court has jurisdiction to issue such an injunction, ECF 577 at 24 n.6, and makes no argument to the contrary here. Moreover, since it has not yet occurred, an injunction would be outside the scope of what DAPL could present to the Supreme Court in its petition.

Second, issuance of a stay would not change the status quo that exists today with respect to the pipeline's permits. Specifically, at present, no easement authorizing the pipeline exists, and the pipeline is operating in violation of the National Environmental Policy Act ("NEPA") and the Mineral Leasing Act. The District Court vacated the easement in its July 2020 remedy order. This Court administratively stayed the effect of that remedy pending consideration of DAPL's

emergency motion for stay pending appeal, but then dissolved the stay as to vacatur. *Standing Rock Sioux Tribe,* Order, 2020 WL 4548123, at *1 (D.C. Cir. August 5, 2020) (ordering "that appellants' motion for stay of the district court's order vacating the Mineral Leasing Act easement authorizing the Dakota Access Pipeline to cross the Missouri River at Lake Oahe be denied."). A panel of this Court later upheld the vacatur remedy. Op. at 28. It is well established that the non-issuance of the mandate would not alter this status quo. *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128–29 (D.C. Cir. 1978) ("Thus coming to the fore is the question whether the Clerk's withholding of the mandate of this court itself operates to stay compliance with the District Court's enforcement orders in these cases. Appellants have foregone any request for a further stay of these orders in the apparent belief that non-issuance of the mandate, standing alone, will have that effect. We do not share that view.") In other words, without a new stay *of the vacatur order*, a stay of the issuance of the mandate would not impact the status of the pipeline.

Third, issuance of the mandate would not impede DAPL from filing a certiorari petition of the panel opinion. Nor would it raise any barrier to seeking emergency appellate review of an injunction issued by the District Court. If the District Court issues an injunction, DAPL can file a new appeal along with a request for immediate relief, as it did after the District Court's previous vacatur

and shutdown order. Even DAPL recognizes as much. Motion, at 8 ("The Court would of course have jurisdiction arising to address stay application [sic] in connection with any appeal that lies from any new order by the district court..."). A stay would not make the process move any more quickly or efficiently, nor does DAPL identify what potential "disputes as to the scope of that jurisdiction" might arise. *Id*. The only practical impact of a stay that the Tribes can determine is that future motions would go to the same panel that reviewed DAPL's previous motion for stay pending appeal. *Standing Rock Sioux Tribe,* Order, 2020 WL 4548123, at *1 (D.C. Cir. August 5, 2020) (ordering that "this panel retain jurisdiction over any further motions for stay pending appeal.") A preference for a particular panel of judges is not "good cause" warranting issuance of a stay.

Finally, the motion ignores a key fact: the Army Corps of Engineers (which did not seek rehearing *en banc*, and does not join this motion) can shut down the pipeline under its existing authority regardless of the status of DAPL's appeal. To the extent that DAPL implies that a stay of the mandate would restrict the Corps' exercise of enforcement discretion in the future, it is wrong. The easement states that the pipeline must be operated in accordance with all applicable laws and regulations. A.650-51. The easement provides broad discretionary authority to the Corps to suspend pipeline operations, for example, in instances of noncompliance or where a threat to public health, safety, or the environment exists. A.653-54.

Accordingly, even if vacatur were stayed by this Court or the U.S. Supreme Court, the Corps would nonetheless retain authority to suspend the pipeline under the terms of the easement it granted. DAPL never mentions this, nor explains what would be accomplished by a stay of issuance of the mandate.

In sum, a stay of the mandate would have no impact on the District Court's jurisdiction, no impact on the Corps' discretion, and no impact on DAPL's ability to seek immediate relief from this Court. In the absence of good cause, the motion must be denied.

II. DAPL'S *CERT* PETITION WILL NOT RAISE SUBSTANTIAL QUESTIONS WARRANTING SUPREME COURT REVIEW

Because DAPL's petition should be rejected for failure to show good cause for a stay, there is no reason for this Court to delve into the second question under Rule 41(d), which is whether DAPL's anticipated petition would raise a "substantial question" meriting U.S. Supreme Court attention. Fed. R. App. P. 41(d); *U.S. v. Microsoft Corp*., 2001 WL 931170, at *1 (not reaching "substantial question" prong "because Microsoft has failed to demonstrate any substantial harm that would result from" absence of stay). If this Court nonetheless addresses the second question, it should find that DAPL has fallen far short of presenting a substantial question meriting Supreme Court review. Simply put, this case presents no conflict with U.S. Supreme Court precedent, nor any conceivable Circuit split. To the contrary, this is a fact-bound case in an unusual procedural

posture, and currently on remand to the Corps awaiting a new decision. While the stakes are high for both the Tribes and for appellant-intervenor, this Court's decision is a conventional application of "arbitrary and capricious" review to a specific administrative record—and presents no issues warranting Supreme Court review.

A. This Court and the District Court Applied Conventional APA Review to Find the Corps Violated NEPA.

DAPL first misrepresents the panel's decision as applying a "heightened standard of review" in NEPA cases, implying that the panel adopted a "categorical rule" that implicating any one of the NEPA intensity factors triggers an EIS.[1] It attempts to manufacture a Circuit split by showing that other cases, under different facts, reached different outcomes. Its effort to reframe the panel's opinion as applying a "rigid test," rather than conventional APA review, is unconvincing.

Like the District Court, this Court delved carefully into a complex administrative record to review the Tribes' claims that the Corps violated NEPA by failing to perform an EIS on the pipeline's crossing of the Missouri River. It found no fewer than four areas of major unaddressed scientific controversy around

[1] In 2020, the CEQ amended the NEPA regulations in significant ways, eliminating the concept of "controversy" in the definition of NEPA significance that applied to the easement and was the basis for the rulings in this case. 85 Fed. Reg. 43304, 43322 (July 16, 2020). Several legal challenges have been filed to the revised regulations.

the Corps' determination that the pipeline's risks and potential impacts were too insignificant to warrant an EIS. In each area, this Court examined administrative record evidence challenging the Corps' conclusions, evidence that the Corps never addressed. Criticisms raised by the Tribes and other entities raised "serious doubts about [the Corps'] methods" in analyzing the pipeline. Op. at 24. This is the hallmark of record-based "arbitrary and capricious" review under the APA. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins Co.*, 463 U.S. 29, 43 (1983) (action is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") Indeed, the panel analyzed and cited cases from both this Circuit and other circuits in affirming the District Court's finding that the impacts of the controversial pipeline were "significant" enough to warrant an EIS. Op. at 15-16.[2]

[2] DAPL's citation to a 36-year old dissent from denial of certiorari in a NEPA case is irrelevant to the issue here. *See* Motion at 11, *citing Gee v. Boyd*, 105 S. Ct. 2123, 2124 (1985). The dissent there observed a split between circuits applying the "arbitrary and capricious" standard in NEPA cases, and those applying a more robust "reasonableness" standard. That split was settled decades ago, and there is no dispute that the panel applied conventional arbitrary and capricious review to the Corps' decision not to perform an EIS. Op. at 21.

The Supreme Court is unlikely to take up the question of whether implicating a single significance factor automatically triggers an EIS because the court below never imposed any such rigid test. Instead, the panel below carefully considered a complex administrative record and found that the Corps failed to address serious expert criticisms from entities (the Tribes and other federal agencies) with relevant expertise. Op. at 14-15. That conventional application of "arbitrary and capricious" review to an administrative record does not present any substantial question warranting Supreme Court review.

B. The Court Did Not Adopt a "Per Se" Rule of Vacatur for Procedural Violations.

DAPL's next effort, arguing that the panel adopted a "*per se* rule that procedural error requires vacatur *regardless of the consequences*" is even less convincing. Motion, at 16. The panel did no such thing. Instead, properly applying an "abuse of discretion" standard to the District Court's remedy, the panel carefully balanced all of the equitable factors identified by the parties that weighed against or in favor of vacating the easement. Op. at 29-32.[3] It gave particularly careful consideration to the company's claims of economic harm, finding them worthy of scrutiny, but nonetheless insufficient to outweigh the normal remedy of

[3] In fact, in a previous phase of the litigation, the District Court balanced the factors differently, and declined to vacate despite finding "substantial" NEPA violations. A.429.

vacatur. *Id*. The panel identified four fact-specific factors to balance against the company's claim of economic harm if vacatur of the easement led to a shutdown to NEPA's statutory objectives. *Id*.

The notion that the panel adopted a "per se" or "categorical" standard requiring vacatur in all instances of procedural error is a wild mischaracterization. To the contrary, the panel emphasized that while the normal rule is to vacate unlawful agency action, "[a] court is not without discretion to leave agency action in place while the decision is remanded for further explanation." Op. at 28 (internal quotations omitted). It carefully scrutinized DAPL's arguments and the governing precedent, finding ample support for the conclusion that vacatur is the "default' remedy where an agency omits major procedural steps on the way to a decision. *Id*. Of course, by carefully balancing the factors at play, including the underlying statutory policies, and giving credence to DAPL's positions on appeal, the panel demonstrated that the "default" approach is just that—the presumed remedy that a party can overcome on the facts of a particular case. Additionally, while DAPL criticizes the panel's conclusion that the first *Allied-Signal* factor focused on the decision to withhold an EIS, rather than issue the underlying easement, it fails to mention that the panel also analyzed DAPL's preferred approach, and found that vacatur would also be warranted under that analysis. Op. at 32.

The *Allied-Signal* exception to vacatur remains appropriate only in the "rare case." *United Steel v. Mine Safety & Health Admin*., 925 F.3d 1279, 1287 (D.C. Cir. 2019); *American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (remand without vacatur is an "exceptional remedy"). Vacatur is the default remedy for NEPA violations. *Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (D.C. Circuit has "consistently affirmed" that "vacating a rule or action promulgated in violation of NEPA is the standard remedy"). Vacatur is the normal remedy for other kinds of procedural violations, like failure to undergo notice and comment. *Allina Health Serv. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (deficient notice "almost always requires vacatur"). Both the appellate panel and the District Court carefully weighed the facts at play in this "unusual" case and concluded that departure from the default remedy was not warranted. Op. at 35. That is not a "substantial question" raising the specter of Supreme Court review, it is the normal application of precedent to the facts of a case. The Rule 41(d) criteria have not been satisfied here.

CONCLUSION

For the foregoing reasons, the motion for stay of the mandate should be denied.

Dated: May 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 2,516 words and complies with the type-volume limitation and typeface requirements of Federal Rule of Appellate Procedure 27(d)(2) and Federal Rule of Appellate Procedure 32(a) because it contains less than 5,200 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman