



## D.C. District Court Orders Shutdown of Dakota Access Pipeline

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On July 6, 2020, the U.S. District Court for the District of Columbia ordered the Dakota Access Pipeline (DAPL), which has successfully transported oil out of North Dakota for the past three years, to be shut down and emptied by August 5, 2020. The Court also vacated the U.S. Army Corps' (Corps) Mineral Leasing Act easement authorizing DAPL to cross under Lake Oahe. The District Court's vacatur decision is available [here](#).

This extreme remedy follows the Court's [March 25, 2020 decision](#) that the Corps violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS) for the easement. Specifically, the Court found that the Corps' easement approval was highly controversial because of unresolved expert critiques and safety questions related to the Corps' worst-case scenario discharge analysis, triggering the need for more analysis in an EIS. There, the Court also focused on the public controversy surrounding the pipeline project.

During briefing on remedy, Dakota Access provided evidence of the devastating economic impact that a shutdown would have on DAPL's owners, the North Dakota oil and gas industry, and North Dakota's economy. It estimated that a shutdown would strand up to 34.5% of North Dakota's crude production, result in significant job loss, and DAPL could lose approximately \$2 billion before the Corps completes an EIS under NEPA.

The Court weighed the seriousness of the NEPA violation against the disruptive consequences of shutting down the pipeline, including the economic impact. Ultimately, the Court found that the risk of harm from a potential oil spill outweighed the economic harm of shutting the pipeline down pending completion of an EIS. The Court stated:

*Indeed, even while the likelihood of any such rupture may be low, the impact of such spill has been one of the Court's central concerns throughout this case....Indeed, while the most recent Opinion in this case did not have cause to reach the topic of impact of a spill on tribal hunting and fishing rights, it did spend much time discussing the possibility that, in the unlikely event of a spill, systems may not be in place to prevent that spill from becoming disastrous...Even assuming the risk of a spill remains small, pausing the operation of the pipeline would mitigate even this small risk.*

Notably, the Court opined that denying vacatur based on economic harm would create undesirable incentives for future agency actions. In other words, denying vacatur for economic reasons would disincentivize future compliance with NEPA.

In the end, the Court imposed a draconian substantive remedy (easement cancellation and halting pipeline operations) for a finding of a procedural violation of a procedural statute. Rather than vacate the easement and halt pipeline operation, the Court could have simply required more analysis. Under this pragmatic approach, the Court could have allowed the easement to remain in place to afford time for the Corps to conduct additional focused analysis on the issue of concern. In the event that analysis informed the Corps on additional safeguards, conditions, and/or mitigation measures that could be added to the pipeline, then a planned temporary suspension of operations could occur so that those additional measures could be added.

This decision establishes significantly adverse legal precedent in support of arguments for substantive remedies to procedural violations of NEPA. This decision may make it more difficult for industry to use economic harm to avoid extreme substantive remedies like the one imposed against DAPL.

Moreover, this decision provides more weight to public controversy in deciding whether to conduct additional NEPA analyses on a project. As a result, the longer and more vehement public opposition to a project, the more likelihood of plaintiffs' challenging such a project to gain traction for the reviewing court to issue an adverse ruling.

The Court denied Dakota Access's request for a provisional stay, it will now seek a stay pending appeal.

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