

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<p>RED LAKE BAND OF CHIPPEWA INDIANS, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p> <p>UNITED STATES ARMY CORPS OF ENGINEERS, <i>et al.</i>,</p> <p>Defendants.</p>	<p>Civil Action No. 1:20 cv-03817 (CKK)</p>
<p>FRIENDS OF THE HEADWATERS,</p> <p>Plaintiff,</p> <p>v.</p> <p>UNITED STATES ARMY CORPS OF ENGINEERS, <i>et al.</i>,</p> <p>Defendants.</p>	<p>Civil Action No. 1:21 cv-00189 (CKK)</p>

PROPOSED BRIEF OF *AMICUS CURIAE*
CONGREGATIONS CARING FOR CREATION dba
MINNESOTA INTERFAITH POWER & LIGHT and YOUTH N' POWER
IN SUPPORT OF PLAINTIFFS

Table of Contents

Table of Authorities	iii
Interest of Amici Curiae.....	1
Summary of the Argument.....	2
Argument	3
I. The Line 3 expansion’s increase in GHG emissions and acceleration of climate change will harm urban communities of color in Minnesota.	3
A. Climate change: Minnesota.....	3
B. Climate change: North Minneapolis.....	5
C. Climate change: health impacts.....	7
II. The Corps’ failure to consider the environmental justice impact of increased GHG emissions on urban Minnesotans of color violated NEPA.....	9
Conclusion	12

Table of Authorities

Statutes

5 U.S.C. § 706(2)(A).....	9
42 U.S.C. §§ 4321-35.	2
42 U.S.C. § 4332.....	9

Cases

<i>Amfac Resorts, LLC v. Dept. of Interior</i> , 143 F. Supp. 2d 7 (D.D.C.2001)	3
<i>California v. Bernhardt</i> , 472 F.Supp.3d 573 (N.D. Cal. 2020)	10
<i>Pacific Shores Subd. v. U.S. Army Corps of Engineers</i> , 448 F.Supp.2d 1 (D.D.C. 2006).....	3
<i>County of Suffolk v. Sec'y of Interior</i> , 562 F.2d 1368 (2d. Cir. 1977).....	3
<i>Save Our Sonoran Inc. v. Flowers</i> , 227 F. Supp. 2d 1111 (D. Ariz. 2002)	11
<i>*Sierra Club v. Fed. Energy Regulatory Comm'n</i> 867 F.3d 1357 (D.C. Cir. 2017).....	9, 11
<i>*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 255 F. Supp. 3d 101 (D.D.C. 2017).....	9, 10, 11
<i>WildEarth Guardians v. Zinke</i> , 368 F. Supp. 3d 41 (D.D.C. 2019).....	11

Executive Orders

Exec. Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low–Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994)	9
---	---

Regulations

33 C.F.R. Part 325, Appx. B.....	12
----------------------------------	----

Other Authorities

J. Bjorhus, <i>U scientists: Minnesota is one of the nation's fastest-warming states</i> , Star Tribune (January 16, 2019)	3, 4
A. Borunda, <i>Racist housing policies have created some oppressively hot neighborhoods</i> , National Geographic (Sept. 2, 2020).	5, 7
D. Carrington, <i>Air pollution linked to far higher Covid-19 death rates, study finds</i> , The Guardian (Apr. 7, 2020).....	8
Council on Environmental Quality, <i>Environmental Justice Guidance Under the National Environmental Policy Act</i> (Dec. 10, 1997)	10
J. Hoffman, V. Shandas, and N. Pendleton, <i>The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas</i> , Climate, Vol. 8, Jan. 2020	7
Minnesota Department of Health, <i>Heat index and hot weather</i> , https://data.web.health.state.mn.us/hot_weather	7
Minnesota Department of Health, <i>Heat-related deaths</i> , https://data.web.health.state.mn.us/heat_deaths	7
Minnesota Department of Health, <i>Minnesota Climate and Health Profile Report Summary</i> , https://www.health.state.mn.us/communities/environment/climate/docs/chsummary.pdf	4
Minnesota Department of Health & Minnesota Pollution Control Agency, <i>Life and Breath</i> (June 2019), https://www.pca.state.mn.us/sites/default/files/aq1-64.pdf	8
National Aeronautics and Space Administration, <i>Climate Change: How Do We Know?</i> https://climate.nasa.gov/evidence	4
National Aeronautics and Space Administration, <i>The Causes of Climate Change</i> , https://climate.nasa.gov/causes	4
National Aeronautics and Space Administration, <i>Responding to Climate Change</i> , https://climate.nasa.gov/solutions/adaptation-mitigation/	4
M. Orfield and W. Stancil, <i>Why Are the Twin Cities So Segregated?</i> 43 Mitchell Hamline L. Rev. 1 (2017).....	5
M. C. Pinto de Moura, <i>Who Breathes the Dirtiest Air from Vehicles in Minnesota</i> , Union of Concerned Scientists (Feb. 3, 2020)	8
United States Environmental Protection Agency, <i>Heat Island Effect</i> , https://www.epa.gov/heatislands	7

United States Environmental Protection Agency, <i>Endangerment and Cause or Contribute to Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act</i> , 74 Fed. Reg. 66,496 (Dec. 15, 2009)	4
University of Minnesota, <i>Mapping Prejudice: What are Covenants</i>	5
T. Weber, <i>Minneapolis: An Urban Biography</i> (2020).....	6
X. Wu, R. C. Nethery, M. B. Sabath, D. Braun, and F. Dominici, <i>Fine particulate matter and COVID-19 mortality in the United States</i> (2020).	8

Images

Photo 1, Aerial view of southwest Minneapolis looking south from Lake of the Isles to Lake Harriet, courtesy Minnesota Historical Society (c. 1940).....	6
Photo 2, Aerial view of St. Anthony Falls looking northwest toward north Minneapolis, courtesy Minnesota Historical Society (1938)	6

Interest of Amici Curiae

Minnesota Interfaith Power & Light is a not-for-profit organization that works to build the interfaith climate movement.¹ One of Minnesota Interfaith Power & Light's key initiatives is the Youth N' Power leadership program, which engages urban youth of color to promote environmental justice. Building on the work of North Minneapolis organizations like Environmental Justice Advocates of Minnesota, Youth N' Power scholars learn from experts in the energy field as well as Minnesota Interfaith Power & Light elders. They work to bring attention to the connection between climate change and worsening racialized environmental disparities, and to address the climate injustices in their own lives.

Youth N' Power's current cohort represents the in vivo generation whose shoulders will carry the cumulative environmental and social impacts of the Line 3 expansion. The cohort includes African American and Somali youth who reside in North Minneapolis, where the climate impacts of the Line 3 expansion will hardest fall.

¹ No counsel for any party to this case authored this brief in whole or part. No person other than amicus curiae Minnesota Interfaith Power & Light, its staff, or its counsel made any monetary contribution to the preparation or submission of this brief.

Summary of the Argument

The Enbridge Line 3 expansion is, if nothing else, ambitious. Enbridge billed the new Line 3 as a “replacement” for an existing 34-inch pipeline that currently operates at only about half-capacity. But the pipeline Enbridge began constructing on December 1, 2020 uses 36-inch pipe and does not shadow the aging 282-mile line it purports to replace. Instead, it abandons the existing corridor, rerouting the new line on a 337-mile path across Minnesota, and enlarging the line from 390,000 barrels per day to 760,000 barrels per day, AR097740, to carry one of the dirtiest fossil fuels, heavy diluted bitumen. AR097753-57.

As residents of the Twin Cities and especially of North Minneapolis, the lives of the Youth N’ Power students are daily affected by the environmental racism of past generations. Yesterday’s racial segregation created disproportionate levels of air pollution in their neighborhoods today, making them and their families more likely to suffer from asthma and other environmental health impacts than the average Minnesotan. *Amici* are representative of those urban Minnesotans—and especially those urban Minnesotans of color—who will suffer the environmental impacts of the Line 3 expansion that the Army Corps of Engineers (“Corps”) refused to take *any* look at, let alone the hard look that the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”) requires. The amici Youth N’ Power student leaders respectfully request that this Court consider the Corps’ failure to evaluate the Line 3 expansion’s foreseeable greenhouse gas (“GHG”) impact, climate-change impact, and environmental justice impact on these communities when it determines whether the Corps’ Line 3 decision making violated NEPA, and respectfully request that this court enter summary judgement against the Corps.

Argument

I. The Line 3 expansion’s increase in GHG emissions and acceleration of climate change will harm urban communities of color in Minnesota.

The Youth N’ Power leaders sit at a temporal confluence. Their lives are shaped by historical forces that stretch back a century even as they consider how a new Line 3 will affect the environment of their future. And for them, that confluence is deadly because the harmful effects of climate change are most pronounced in neighborhoods like theirs—urban areas that have historically been segregated and today are still disproportionately populated by people of color.

Youth N’ Power offers this brief history of residential segregation in Minneapolis and its interaction with modern climate change as contextual background for the Court’s review of the record evidence.² Minnesota’s Environmental Impact Statement (“State EIS”) identified—but did not quantify—this environmental justice impact. AR165331-32. The Corps relied on the State EIS, but *also* not did quantify or analyze this impact. AR000473.

A. Climate change: Minnesota

Two years before construction of the Line 3 expansion began, scientists at the University of Minnesota warned that the state is one of the fastest-warming states in the country. J. Bjorhus,

² “[I]n cases arising under the National Environmental Policy Act, a court may need extra-record review to evaluate whether an agency’s analysis of potential environmental impacts of a proposed action was arbitrary and capricious.” *Pacific Shores Subd. v. United States Army Corps of Engineers*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006) (citation omitted). *See also Amfac Resorts, LLC v. DOI*, 143 F. Supp. 2d 7, 14-15 (D.D.C.2001) (“Extra-record review is appropriate . . . when the agency failed to consider factors which are relevant to its final decision . . . [and] in cases arising under the National Environmental Policy Act”); *County of Suffolk v. Sec’y of Interior*, 562 F.2d 1368, 1384 (2d. Cir. 1977) (“[I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decisionmaker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored”). This procedural safeguard is necessary in NEPA cases because “[a] suit under NEPA challenges the adequacy of part of the administrative record itself[.]” *County of Suffolk*, 562 F.2d at 1384.

U scientists: Minnesota is one of the nation's fastest-warming states, Star Tribune (January 16, 2019), available at startribune.com/u-scientists-minnesota-is-one-of-the-nation-s-fastest-warming-states/504398862/ (last visited May 26, 2021). “There was an audible murmur in the room when a committee member noted that the National Audubon Society has said warming winters would chase out Minnesota’s state bird, the common loon.” *Id.*

That GHG emissions accelerate climate change is not disputed. U.S. Env’tl. Protection Agency, *Endangerment and Cause or Contribute to Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,506 (Dec. 15, 2009). Indeed, the Corps agrees: “Greenhouse gas emissions have been shown to contribute to climate change.” AR00398. Other federal agencies, too, agree that “Scientific evidence for warming of the climate system is unequivocal.” NASA, *Climate Change: How Do We Know?* <https://climate.nasa.gov/evidence/> (last visited May 26, 2021). This warming is a direct result of burning oil and other fossil fuels, which produce carbon dioxide and other “greenhouse gasses” that trap heat in our atmosphere. NASA, *The Causes of Climate Change*, <https://climate.nasa.gov/causes/> (last visited May 26, 2021); Minn. Dept. of Health, *Minnesota Climate and Health Profile Report Summary*, at <https://www.health.state.mn.us/communities/environment/climate/docs/chsummary.pdf> (last visited May 26, 2021).

Scientific leaders are also clear that the first line of defense against this climate change is “reducing emissions and stabilizing the levels of heat-trapping greenhouse gases[.]” NASA, *Responding to Climate Change*, <https://climate.nasa.gov/solutions/adaptation-mitigation/> (last visited May 26, 2021). But building the new Line 3 would do the opposite. Whereas the existing Line 3 pipeline emits 80.5 million tons of GHG, the new “replacement” Line 3 would *more than*

triple that annual output to 273.5 million tons. AR148697. By dramatically increasing the emission of GHGs, the Line 3 expansion will accelerate climate change.

B. Climate change: North Minneapolis

While climate change's threat to the loon caught Minnesota lawmakers' attention, residents of historically redlined neighborhoods like North Minneapolis experience the environmental racism of climate change. That area's climate story began in 1910 when White Minneapolitans began writing racially restrictive covenants into their deeds. This practice "changed the landscape of the city" by laying "the groundwork for our contemporary patterns of residential segregation." University of Minnesota, *Mapping Prejudice: What are Covenants*, <https://mappingprejudice.umn.edu/what-are-covenants/index.html> (last visited May 26, 2021). "As racially restrictive deeds spread, they pushed African Americans into a few small areas of the city. And even as the number of Black residents continued to climb, ever-larger swaths of the city became entirely White." *Id.* Redlining and other discriminatory governmental practices reinforced these patterns through the early and mid-20th century. A. Borunda, *Racist housing policies have created some oppressively hot neighborhoods*, National Geographic (Sept. 2, 2020), available at <https://www.nationalgeographic.com/science/article/racist-housing-policies-created-some-oppressively-hot-neighborhoods> (last visited May 26, 2021). And long after the Supreme Court declared segregation unlawful, facially neutral governmental programs "reseggregated" the Twin Cities. M. Orfield, and W. Stancil, *Why Are the Twin Cities So Segregated?* 43 Mitchell Hamline L. Rev. 1 (2017). Today's census maps of the neighborhoods with the highest percentage of non-White residents trace the same lines the racially restrictive covenants drew a century ago.

The inequality of this segregation is visible in today's landscape. "White" Southwest Minneapolis neighborhoods enjoy tree-lined parkways in a chain-of-lake landscape. But Minneapolis zoned the "Black" parts of town for industry and density, and then ran an interstate highway through residential neighborhoods. Even the Mississippi River is different in different zip codes. Southeast of St. Anthony Falls, the River's banks are lined with parkland and the Mississippi National River Recreation Area. Upstream, a Minneapolis-authored report calls the North Minneapolis riverfront "the backside of the city." Tom Weber, *Minneapolis: An Urban Biography* (2020) at 159.



Photo 1: Aerial view of southwest Minneapolis looking south from Lake of the Isles to Lake Harriet, courtesy Minnesota Historical Society (c. 1940), available at <http://collections.mnhs.org/cms/largerimage?irn=10309802&catirn=10822417> (last visited May 26, 2021).



Photo 2: Aerial view of St. Anthony Falls looking northwest toward north Minneapolis, courtesy Minnesota Historical Society (1938), available at <http://collections.mnhs.org/cms/display?irn=10721879> (last visited May 26, 2021).

The differences in these built environments impact the climate and health experiences of residents. Areas that are most urban and industrialized—like North Minneapolis—have become “heat islands” that “absorb and re-emit the sun’s heat more than natural landscapes” like the

south metro’s lakes and parks. *See* U.S. Env’tl. Protection Agency, *Heat Island Effect*, <https://www.epa.gov/heatislands> (last visited May 26, 2021). So even as cities heat faster than rural landscapes, researchers note that *within* cities (including Minneapolis), “neighborhoods located in formerly redlined areas—that remain predominantly lower income and communities of color—are at present hotter than their non-redlined counterparts.” J. Hoffman, V. Shandas, N. Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, *Climate*, Vol. 8, Jan. 2020, at 11, *available at* <https://www.mdpi.com/2225-1154/8/1/12/htm> (last visited May 26, 2021). The difference is dramatic. In Minneapolis, formerly redlined “Black” neighborhoods like those North Minneapolis are almost 11° hotter than their “White” counterparts. A. Borunda, *Racist housing policies have created some oppressively hot neighborhoods*, *National Geographic* (Sept. 2, 2020), *available at* <https://www.nationalgeographic.com/science/article/racist-housing-policies-created-some-oppressively-hot-neighborhoods> (last visited May 26, 2021).

C. Climate change: health impacts

This extreme heat is itself deadly. Minnesota recorded 68 heat-related deaths from 2000 to 2020, and recognizes that this number might undercount the true heat-related death toll. Minn. Dept. of Health, *Heat-related deaths*, at https://data.web.health.state.mn.us/heat_deaths (last visited May 26, 2021). And in 2015 alone, 652 Minnesotans visited an emergency room for heat-related illness. Minn. Dept. of Health, *Heat index and hot weather*, at https://data.web.health.state.mn.us/hot_weather (last visited May 26, 2021). Youth N’ Power students understandably worry about their elders and younger relatives, whom they know are at greatest risk during extreme heat events. *See id.*

Extreme heat, though, is not the only health threat that climate change poses. The warming atmosphere traps air pollution. In 2013 alone, Minnesota logged 500 hospital stays and 800 emergency room visits attributable to air pollution, and air pollution was a contributing factor in the early deaths of 2,000-4,000 Minnesotans. Minn. Dept. of Health & Minn. Pollution Control Agency, *Life and Breath* (June 2019), available at <https://www.pca.state.mn.us/sites/default/files/aq1-64.pdf> (last visited May 26, 2021). But like heat islands, global warming is “inequitably distributed among racial and ethnic groups in the state.” M. C. Pinto de Moura, *Who Breathes the Dirtiest Air from Vehicles in Minnesota*, Union of Concerned Scientists (Feb. 3, 2020) at <https://blog.ucsusa.org/cecilia-moura/who-breathes-dirtiest-air-from-vehicles-minnesota> (last visited May 26, 2021). Across Minnesota, “[p]eople of color experience an undeniable ‘pollution disadvantage.’” *Id.*

The COVID-19 pandemic has only exacerbated the deadly effect of this pollution disparity. A Harvard study found that long-term exposure to particulate pollution significantly increases a person’s risk of COVID-19 death twenty times. And even a slight increase in air pollution was “associated with a 15% increase in the Covid-19 death rate[.]” D. Carrington, *Air pollution linked to far higher Covid-19 death rates, study finds*, The Guardian (Apr. 7, 2020), available at <https://www.theguardian.com/environment/2020/apr/07/air-pollution-linked-to-far-higher-covid-19-death-rates-study-finds> (last visited May 26, 2021) (citing X. Wu, R. C. Nethery, M. B. Sabath, D. Braun, and F. Dominici, *Fine particulate matter and COVID-19 mortality in the United States* (2020), at <https://projects.iq.harvard.edu/covid-pm> (last visited May 26, 2021)). The new Line 3 supercharges these health inequalities with 273.5 million tons of greenhouse gasses. AR148697. But the Corps refused to consider these effects *at all*.

II. The Corps’ failure to consider the environmental justice impact of increased GHG emissions on urban Minnesotans of color violated NEPA.

Under NEPA, agencies must “take a hard look at environmental consequences” of their proposed actions, consider alternatives, and publicly disseminate such information before taking final action. *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1367 (D.C. Cir. 20217). A hard look must evaluate all “reasonably foreseeable” impacts of a proposed action before an “irretrievable commitment[] of resources” is made that would trigger those impacts. 42 U.S.C. § 4332(2)(C)(v).

The Corps, like all federal agencies, must “[t]o the greatest extent practicable and permitted by law,” make “achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.” Exec. Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low–Income Populations, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994). This Circuit allows challenges to environmental-justice analyses under NEPA and the Administrative Procedures Act. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 136 (D.D.C. 2017). *See also* 5 U.S.C. § 706(2)(B) (describing the Administrative Procedures Act’s arbitrary and capricious standard).

Regulatory guidance instructs that to satisfy NEPA, agencies “should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes”; and “should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the

natural and physical environmental effects of the proposed agency action[.]” Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at 9.

In this evaluation, the “unit of geographic analysis” for this assessment should “be chosen so as not to artificially dilute or inflate the affected minority population.” *Id.* at 26. Here, the Corps confined its analysis to the immediate area of construction crossings. AR00473 (“The Project would cross the Lost River at Mile Post 885.8, which is a federal Project and requires Section 408 permission from the Corps. Details regarding the Federal Project are included in the Section 408 Environmental Assessment, Appendix E, of this document. This crossing is not located in a Tract with meaningful higher minority populations or low-income populations.”). This court recently determined that it is arbitrary and capricious to limit an environmental-justice impacts analysis to pipeline *construction* without addressing the operative pipeline’s impact on populations protected by the environmental justice executive order. *Standing Rock*, 255 F. Supp. 3d at 139 (“The problem here . . . is that this analysis covers only *construction* impacts, not *spill* impacts.”) (emphasis is original). Here, too, it was unreasonable for the Corps to narrow its analysis to immediate construction impacts and omit discussion of other foreseeable impacts.

Downstream GHG emissions and their health effects are a reasonably foreseeable indirect impact of oil and gas projects. *See* Pls’ Br., Dkt. 53-1 at 15-17³ (citing cases); *California v. Bernhardt*, 472 F.Supp.3d 573 (N.D. Cal. 2020) (considering tribal communities’ “disproportionate health risks from oil and gas emissions”). And agencies like the Corps whose actions are a “legally relevant cause” of downstream GHG emissions must evaluate the cumulative effect of those emissions—even where the agency is not responsible for regulating

³ All docket pin citations are to ECF-header page numbers.

the project when it is operational. *Sierra Club*, 867 F.3d at 1373; *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73-74 (D.D.C. 2019) (because the Bureau of Land Management was a “legally relevant cause” of the GHG emissions from its oil and gas leases, it was “obligated to discuss downstream GHG emissions in its EAs[.]”). Under these circumstances, the Corps’ failure to even consider the effect of downstream GHG emissions on urban communities of color was arbitrary and capricious.

Indeed, the State’s EIS pointed the need to investigate this issue. In a table that “identifies areas where the Project’s operational impacts would overlap with the impacts of climate change[.]” the State EIS noted the interaction of rising temperatures and environmental justice. AR165331-32. It specifically identified the intensified air-quality impacts that can result in “heat/air quality[/] deaths/illness[.]” AR165332. And the Corps expressly relied on this State EIS in its environmental justice analysis, but did no work to quantify or otherwise analyze the environmental justice impact of rising temperatures on urban communities of color.

In the end, the Corps offered only a rote statement that “the Project would not have disproportionately high and adverse impacts to minority populations.” AR000473. Such a “bare-bones conclusion” does not satisfy NEPA. *Standing Rock*, 255 F. Supp. 3d at 139. The Corps’ refusal to consider the operational impact of the Line 3 expansion on urban communities of color and low-income communities when the “entire purpose” of the permitting was to bring fossil fuel to market for downstream use was arbitrary and capricious. *Sierra Club*, 867 F.3d at 1372; *see also Save Our Sonoran Inc. v. Flowers*, 227 F. Supp. 2d 1111, 1114 (D. Ariz. 2002) (“[T]he Corps is considered to have control and responsibility for portions of the project beyond the limits of the Corps’ jurisdiction ‘where the environmental consequences of the larger project are

essentially products of the Corps' permit action.'" (quoting 33 C.F.R. Part 325, Appendix B, Section 7(b)).

Conclusion

NEPA is more than a box to be checked. It offers robust procedural protection, especially for historically marginalized communities. But only if an agency follows those procedures. The Corps did not. Because the Corps' refusal to consider the indirect and cumulative GHG emission, climate change, and environmental justice effects for which it was a legally relevant cause was arbitrary and capricious, amici Youth N' Power respectfully request that this court grant the plaintiffs' motions for summary judgment (Dkts. 52 and 53).

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Respectfully submitted,

s/ Jessica Intermill

D.C. Bar No. MN007

The Intermill Law Office PLLC
P.O. Box 18776
Minneapolis, MN 55418
(651) 324-2838
jessica@intermilllaw.com

Counsel for Amicus Curiae