

**The Rights to Public Participation and Access to
Information: The Keystone XL Oil Sands
Pipeline and Global Climate Change Under the
National Environmental Policy Act**

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This Article is dedicated to the memory of Professor Svitlana Kravchenko, who inspired and empowered dedicated public interest environmental advocates around the world. We will continue her fight for the human right to live in a healthy environment for both present and future generations.

The boreal forest in Alberta, Canada overlays one of the world’s largest deposits of crude oil, of which 99% come from oil sands,¹ and the oil industry is pushing to expand the extraction and production of this hard-to-get, dirty oil.² The development of the Athabasca oil

¹ *Facts and Statistics*, GOV’T OF ALBERTA, ENERGY, <http://www.energy.gov.ab.ca/OilSands/791.asp> (last visited Oct. 14, 2012); *see also What Is Oil Sands?*, ALBERTA ENERGY, <http://www.energy.gov.ab.ca/OilSands/793.asp> (last visited Oct. 14, 2012) (“Though they appear to be visibly similar, tar and oil sands are different; while oil sand is a naturally occurring petrochemical, tar is a synthetically produced substance . . .”).

² *See* MARC HUOT ET AL., PEMBINA INST., OILSANDS AND CLIMATE CHANGE: HOW CANADA’S OILSANDS ARE STANDING IN THE WAY OF EFFECTIVE CLIMATE ACTION (updated Oct. 14, 2011), *available at* <http://pubs.pembina.org/reports/us-oilsands-and-climate-briefing-note-201109b.pdf>; DANIELLE DROITSCH ET AL., PEMBINA INST., CANADIAN OIL SANDS AND GREENHOUSE GAS EMISSIONS: THE FACTS IN PERSPECTIVE I (Aug. 2010), *available at* <http://pubs.pembina.org/reports/briefingnoteosghg.pdf>

sands in Alberta is the largest and, some have said, one of the most environmentally destructive industrial projects in the world.³ Oil is extracted from large deposits of bitumen (a mixture of sand, clay, and heavy crude oil) in one of two ways—surface strip mining or *in situ* (in place) extraction techniques for deep oil sands.⁴ Both extraction methods adversely impact human rights and indigenous peoples' rights;⁵ disturb Alberta's ancient boreal forest,⁶ which serves as a vast

("Emissions from oil sands more than doubled, increasing by 121 per cent, between 1990 and 2008. Planned growth indicates greenhouse gas emissions from oil sands will continue to rise resulting in a near tripling of emissions between 2008 and 2020."); PEMBINA INST., MINING VS. IN SITU (May 27, 2010), available at <http://pubs.pembina.org/reports/mining-vs-in-situ.pdf>.

³ *What Is Oil Sands?*, GOV'T OF ALBERTA, ENERGY, *supra* note 1 ("[T]he Athabasca [oil sands] deposit in Alberta is the largest, most developed" in the world.); FRIENDS OF THE EARTH, DIRTY BUSINESS 5 (Apr. 2011), available at http://libcloud.s3.amazonaws.com/93/c2/f/561/Dirty_Business_TransCanada_Web.pdf (referring to Alberta's oil sands extraction project as "one of the dirtiest and most environmentally destructive projects on the planet"); see also LINDSAY FISCHER ET AL., PEMBINA INST., SUMMARY OF MAJOR ENVIRONMENTAL MANAGEMENT POLICY DEFICIENCIES IN THE CANADIAN OILSANDS: IMPLICATIONS FOR U.S. DECISION MAKERS 2 (Sept. 14, 2011), available at <http://pubs.pembina.org/reports/environmental-mgmt-briefing-note-kxl.pdf> ("In the absence of responsible environmental policy, greenhouse gas emissions from the oilsands will triple from 2005 levels by 2020, caribou could become locally extinct, water quality will deteriorate, and lack of cumulative effects management will lead to unrestrained boreal forest disturbance.").

⁴ Only 20% of Alberta's oil sands are recoverable through surface mining; the other 80% must be extracted through the much more GHG-intensive *in situ* process. *Oil Sands 101*, GOV'T OF ALBERTA, ENERGY, <http://www.energy.gov.ab.ca/OilSands/1715.asp> (last visited Oct. 10, 2012); PEMBINA INST., MINING VS. IN SITU, *supra* note 2 ("In situ operations generate two and [a] half times as much greenhouse gas per barrel of bitumen as oil sands mines."); see also JEREMY MOORHOUSE ET AL., PEMBINA INST., DRILLING DEEPER: THE IN SITU OIL SANDS REPORT CARD 17–19 (Mar. 2010), available at <http://pubs.pembina.org/reports/in-situ-report-card.pdf> (describing oil sands surface mining and the two main types of thermal *in situ* technologies used for deep oil sands).

⁵ See GABRIEL DERITA & TOM VALTIN, SIERRA CLUB, TOXIC TAR SANDS: PROFILES FROM THE FRONT LINES 2 (Oct. 2010), available at <http://www.sierraclub.org/dirtyfuels/tar-sands/faces/TarSands.pdf> ("The process leaves behind giant toxic lakes that are linked to abnormally high rates of cancer in neighboring communities and are large enough to be seen from space."); INDIGENOUS ENVTL. NETWORK, TAR SANDS AND INDIGENOUS RIGHTS 1 (Apr. 2011), available at http://www.ienearth.org/docs/IENFactsheet_2.pdf (referring to oil sands production in Canada as "the largest industrial project on Mother Earth: the Tar Sands Gigaproject. Northern Alberta is ground zero with over 20 corporations operating in the tar sands sacrifice zone, with expanded developments being planned. The cultural heritage, land, ecosystems and human health of First Nation communities . . . are being sacrificed for oil money in what has been termed a 'slow industrial genocide.' Infrastructure projects linked to the tar sands expansion such as . . .

carbon sink and home to some of the world's most productive habitat;⁷ and are incredibly greenhouse gas (GHG) and water intensive.⁸ Dr. James Hansen, one of the world's leading climate scientists, asserts "that no amount of conservation measures and a switch to alternative energy sources could offset the additional global warming that would occur if Canada's vast tar sands oil reserves are extracted and burned"⁹ and that it would be "game over for the climate."¹⁰ The public's quest for information about the role of the United States in the development of these oil sands and the ability of the public to meaningfully participate in any decisions made about oil

the Keystone XL pipeline, threaten First Nation communities in British Columbia, Canada and American Indian communities throughout the United States.").

⁶ If the mining zone is completely developed, 3,300 km² of land will be cleared. RICHARD SCHNEIDER & SIMON DYER, PEMBINA INST., DEATH BY A THOUSAND CUTS: IMPACTS OF IN SITU OIL SANDS DEVELOPMENT ON ALBERTA'S BOREAL FOREST 1 (Aug. 2006), available at <http://pubs.pembina.org/reports/1000-cuts.pdf>. Deep oil sands in Northeast Alberta cover approximately 138,000 km², an area that is roughly the size of Florida. If all of the deep oil sands in Alberta were developed, 11,454 km² of boreal forest would be cleared. PEMBINA INST., DEATH BY A THOUSAND CUTS: DEEP OIL SANDS MAY TRANSFORM 21% OF ALBERTA (Aug. 2006), available at <http://pubs.pembina.org/reports/1000-cuts-fact-sheet.pdf>.

⁷ See SCHNEIDER & DYER, *supra* note 6, at 1 ("Canada's boreal region contains one-quarter of the world's remaining original forests. It is home to a rich array of wildlife including migratory songbirds, waterfowl, bears, wolves and the world's largest caribou herds. Canada's boreal is a major part of the global boreal region that encircles the Earth's northern hemisphere, storing more freshwater in its wetlands and lakes and more carbon in its trees, soil, and peat than anywhere else on the planet."); JEFF WELLS ET AL., IMPACT ON BIRDS OF TAR SANDS OIL DEVELOPMENT IN CANADA'S BOREAL FOREST (Dec. 2008), available at <http://www.nrdc.org/wildlife/borealbirds.pdf>.

⁸ PEMBINA INST., MINING VS. IN SITU, *supra* note 2.

⁹ Monitor Staff, *No rush to make pipeline decision*, CONCORD MONITOR, Sept. 9, 2011, <http://www.concordmonitor.com/article/278649/no-rush-to-make-pipeline-decision>.

¹⁰ *Id.*; James Hansen, *Game Over for the Climate*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/10/opinion/game-over-for-the-climate.html> ("Canada's tar sands . . . contain twice the amount of carbon dioxide emitted by global oil use in our entire history. If we were to fully exploit this new oil source, and continue to burn our conventional oil, gas and coal supplies, concentrations of carbon dioxide in the atmosphere eventually would reach levels higher than in the Pliocene era, more than 2.5 million years ago, when sea level was at least 50 feet higher than it is now. That level of heat-trapping gases would assure that the disintegration of the ice sheets would accelerate out of control. Sea levels would rise and destroy coastal cities. Global temperatures would become intolerable. Twenty to 50 percent of the planet's species would be driven to extinction. Civilization would be at risk."); see also *supra* note 2; Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) ("[G]reenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations.").

sands development hinges in part on the efficacy of the National Environmental Policy Act (NEPA).

In enacting NEPA in 1970, the United States Congress

recogniz[ed] the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of . . . resource exploitation . . . and . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.¹¹

A fundamental purpose of NEPA is “to promote efforts which will prevent or eliminate damage to the environment and biosphere.”¹² Meaningful and effective public participation and access to information are the foundations of NEPA, a law meant to “ensure that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public.”¹³

NEPA applies to the permitting of the proposed Keystone XL oil sands pipeline. In 2008, TransCanada, a Canadian corporation, applied to the U.S. Department of State (State Department) for a Presidential Permit for the proposed Keystone XL project, which included the “construction, connection, operation, and maintenance” of a 1,711-mile crude oil pipeline and related facilities to transport up to 830,000 barrels of crude oil per day from Alberta, Canada, to delivery points in Oklahoma and Texas.¹⁴ In January 2012, the State

¹¹ 42 U.S.C. § 4331(a) (2012); *see also* 42 U.S.C. § 4331(b)(1) (“[I]t is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”). As part of that responsibility, federal agencies must disclose and consider the “relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.” 42 U.S.C. § 4332(2)(C)(iv) (2012).

¹² 42 U.S.C. § 4321 (2012).

¹³ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 970–71 (9th Cir. 2003) (quoting *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000)).

¹⁴ U.S. DEP’T. OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT (DOS FEIS), INTRODUCTION 1-1 to 1-2 (Aug. 26, 2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182011.pdf>. “In addition to its application to DOS, Keystone also filed a right-of-way (ROW) application under Section 28 of the Mineral Leasing Act of 1920 (MLA), as amended, with the Bureau of Land Management (BLM) for the

Department and Obama Administration denied the permit, a decision compelled by the imposition of an arbitrary and politically motivated sixty-day deadline set by Congress, which did not allow sufficient time to evaluate the impacts of the pipeline.¹⁵

In February 2012, TransCanada pushed forward with building the southern leg of the project from Oklahoma to the Gulf Coast in order to avoid a full State Department review of that segment, as it does not involve a border crossing.¹⁶ The move was welcomed by President Obama, who directed federal agencies to “expedite” the review of this project,¹⁷ “cut through the red tape, . . . and get it done.”¹⁸ In July 2012, the southern portion was approved.¹⁹ In May 2012, TransCanada reapplied for the Presidential Permit for the remaining portion of the pipeline.²⁰ The State Department now has the opportunity to fully disclose the environmental impacts of the proposed pipeline in its new review process and correct the many inadequacies in its initial review; but, with all of the indications that

proposed Project across federal lands.” *Id.* at 1-1. This Article does not address the ROW application.

¹⁵ Presidential Memorandum—Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, 77 Fed. Reg. 5614 (Feb. 3, 2012); John M. Broder & Dan Frosch, *Rejecting Pipeline Proposal, Obama Blames Congress*, N.Y. TIMES, Jan. 18, 2012, <http://www.nytimes.com/2012/01/19/us/state-dept-to-put-oil-pipeline-on-hold.html>. This deadline, set by congressional Republicans, was a partisan response to the State Department’s decision to seek additional environmental review for alternative routes around sensitive grasslands and aquifers. *Id.* In response to the denial, congressional Republicans have made attempts to circumvent the NEPA and National Interest Determination processes and approve the pipeline themselves through legislation. *See, e.g.*, Ben Geman, *Senate GOP pushes for Keystone vote on highway measure*, THE HILL, Feb. 13, 2012, <http://thehill.com/blogs/e2-wire/e2-wire/210213-senate-republicans-to-push-keystone-on-highway-bill>.

¹⁶ Jeffrey Jones & Roberta Rampton, *TransCanada chops up Keystone XL to push it ahead*, REUTERS, Feb. 27, 2012, <http://ca.reuters.com/article/domesticNews/idCATRE81Q1I20120227>.

¹⁷ *Id.*; Presidential Memorandum—Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, 77 Fed. Reg. 18,891, 18,892 (Mar. 28, 2012).

¹⁸ Steven Mufson & Juliet Eilperin, *TransCanada gets key go-ahead for final southern leg of pipeline project*, WASH. POST, July 27, 2012, http://www.washingtonpost.com/business/keystone-xl-pipeline-permits-deal-blow-to-groups-trying-to-slow-construction/2012/07/26/gJQATYEnDX_story.html.

¹⁹ *Id.*

²⁰ Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit (May 4, 2012), available at <http://keystonepipeline-xl.state.gov/documents/organization/189504.pdf>; Office of the Spokesperson, *New Pipeline Application Received from TransCanada*, U.S. DEP’T OF STATE (May 4, 2012), <http://www.state.gov/r/pa/prs/ps/2012/05/189300.htm>.

the outcome of this project has been politically predetermined, it is unclear whether there is any genuine intent to do so.

Keystone XL would be the largest pipeline connecting the Canadian oil sands to the United States and “would open a new market on the Gulf Coast,” leading to increased oil sands production in Canada, which in turn would cumulatively increase greenhouse gas (GHG) emissions above levels that already threaten human health and welfare.²¹ The Environmental Protection Agency (EPA) confirms the existence of a “reasonably close causal relationship between issuing a cross-border permit for the Keystone XL project and increased extraction of oil sands crude in Canada intended to supply the pipeline” and urges the State Department to consider the increased GHG emissions from additional production in Canada.²² The EPA also underscores the importance of considering the fact that “[e]xtraction and refining of Canadian oil sands crude are GHG-intensive relative to other types of crude oil.”²³

Because the proposed Keystone XL project would drive increased oil sands production, the increased GHG emissions and resulting climate change impacts are effects that the State Department must consider in its environmental review of the proposed project under NEPA. However, in its Final Environmental Impact Statement, the State Department concluded that the project would not result in increased GHG emissions from additional oil sands extraction and refining in Canada.²⁴ This conclusion is based on the speculative assumption that GHG impacts from future projects would displace similar impacts from the proposed pipeline if it were not built, thus global emissions would remain the same, a speculation prohibited by NEPA.²⁵ To further complicate matters, the State Department’s

²¹ DANIELLE DROITSCH, PEMBINA INST., THE LINK BETWEEN KEYSTONE XL AND CANADIAN OILSANDS PRODUCTION 1–2 (Apr. 2011), available at <http://pubs.pembina.org/reports/kxl-production-backgroundunder-pembina.pdf>.

²² Letter from Cynthia Giles, EPA, to Jose W. Fernandez & Kerri-Ann Jones, U.S. Dep’t of State, at 3 (July 16, 2010) [hereinafter EPA Letter on DEIS], available at [http://yosemite.epa.gov/oeca/webeis.nsf/\(PDFView\)/20100126/\\$file/20100126.PDF](http://yosemite.epa.gov/oeca/webeis.nsf/(PDFView)/20100126/$file/20100126.PDF) (“Not only will this pipeline transport large volumes of oil sands crude for at least fifty years from a known, dedicated source in Canada to refineries in the Gulf Coast, there are no significant current export markets for this crude oil other than the U.S. Accordingly, it is reasonable to conclude that extraction will likely increase if the pipeline is constructed.”).

²³ *Id.* at 2.

²⁴ See discussion *infra* section II.A.2.

²⁵ See discussion *infra* section II.A.2.

limited resources and overreliance on third-party contractors limited its ability to conduct a fully transparent environmental review.²⁶

This Article considers whether NEPA is an appropriate tool to address GHG and climate change impacts from projects such as Keystone XL and whether public participation and access to information under NEPA have been meaningful and effective in integrating global climate change concerns into the State Department's environmental review of the proposed Keystone XL pipeline. NEPA regulations and relevant case law establish that the State Department has an obligation under NEPA to fully and transparently disclose, analyze, and consider GHG impacts of any additional oil sands production caused by the proposed Keystone XL pipeline—an obligation it has not fulfilled. The State Department's overreliance on third-party contractors and failure to disclose and consider issues of fundamental concern to the public thwart the effectiveness of public participation under NEPA and give the impression that the decision to issue a permit for the pipeline has been politically predetermined, making NEPA review compulsory but not meaningful. Finally, this Article addresses whether public involvement under the NEPA-mandated process is meaningful compared to other forms of public participation and access to information apart from NEPA.

I

NEPA CAN BE USED TO ADDRESS GLOBAL CLIMATE CHANGE

Under NEPA, federal agencies must “recognize the worldwide and long-range character of environmental problems,” which would presumably include global climate change.²⁷ NEPA provides the legal framework for public participation and access to information in the State Department's environmental review and decision-making process regarding whether to permit the proposed Keystone XL pipeline. As “our basic national charter for protection of the environment,”²⁸ NEPA presumes an informed and involved public and requires agencies to “[m]ake diligent efforts to involve the public

²⁶ See discussion *infra* section II.A.3.

²⁷ 42 U.S.C. § 4332(2)(F) (2012).

²⁸ 40 C.F.R. § 1500.1(a) (2012).

in preparing and implementing their NEPA procedures.”²⁹ NEPA further requires full disclosure of “high quality” environmental information to both public officials and citizens “before decisions are made and before actions are taken,” emphasizing that “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”³⁰ The process mandated under NEPA “is intended to help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”³¹ This section discusses relevant regulations, case law, and guidance to help delineate the State Department’s obligations under NEPA to fully disclose, analyze, and consider the impacts of GHG emissions and climate change from the proposed Keystone XL pipeline.

A. Overview of NEPA Requirements

NEPA requires all federal government agencies to prepare an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.”³² The Council on Environmental Quality’s (CEQ)³³ NEPA regulations

²⁹ 40 C.F.R. § 1506.6(a) (2012); *see also* 40 C.F.R. § 1500.2(d) (2012) (“Federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement.”).

³⁰ 40 C.F.R. § 1500.1(b) (emphasis added).

³¹ 40 C.F.R. § 1500.1(c). While NEPA “contains ‘action-forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act,” 40 C.F.R. § 1500.1(a), NEPA is only a procedural law requiring a certain process intended to prevent uninformed decisions and does not impose substantive duties mandating particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The EIS requirement “serves NEPA’s ‘action-forcing’ purpose in two important respects. . . . It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Methow Valley Citizens Council*, 490 U.S. at 349.

³² 42 U.S.C. § 4332(2)(C). The environmental assessment (EA) is the primary tool agencies use to determine whether the preparation of an EIS is required by NEPA. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9 (2012). If the agency determines that an EIS is not required, the agency must then prepare a Finding of No Significant Impact (FONSI). 40 C.F.R. §§ 1501.4(e), 1508.13.

³³ NEPA created the Council on Environmental Quality, 42 U.S.C. §§ 4332(2)(C), 4342 (2012), which has promulgated regulations detailing the procedures necessary for NEPA compliance, 40 C.F.R. §§ 1500-1518 (2012). These regulations are “binding on all Federal agencies.” 40 C.F.R. § 1500.3.

require the EIS to include a “full and fair discussion” of the significance of all “direct,” “indirect,” and “cumulative” environmental impacts of the proposed action and all reasonable alternatives to the proposed action.³⁴ In considering indirect and cumulative impacts, federal agencies must consider any delayed or incremental impacts that are “reasonably foreseeable”—such as climate change caused by GHG emissions.³⁵ In 1997, CEQ issued guidance confirming the applicability of NEPA to transboundary impacts, clarifying that NEPA requires federal agencies to analyze reasonably foreseeable effects of proposed actions in the United States, regardless of whether those impacts might occur outside the country.³⁶

NEPA requires full disclosure of “high quality” environmental information, and the scientific accuracy of the discussions and analyses in the EIS and methodologies utilized must be sound and transparent.³⁷ Further, NEPA urges a precautionary approach when there is “incomplete or unavailable information” regarding reasonably foreseeable adverse environmental effects on the human environment,

³⁴ 40 C.F.R. §§ 1502.1, 1502.16(a)–(b), 1508.25(c). Courts have found that, in the NEPA process, “the agency must take a ‘hard look’ at the impacts of its action by providing a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008) (citation and quotation omitted); *see also* *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The Supreme Court has held that these impacts must be analyzed under NEPA when there is “‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

³⁵ CEQ’s NEPA regulations define “[i]ndirect effects” as those that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable” and “may include . . . effects related to induced changes . . . on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b). “Cumulative impact” is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.” 40 C.F.R. § 1508.7.

³⁶ COUNCIL ON ENVTL. QUALITY, GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS ¶¶ 4, 6 (July 1, 1997), *available at* <http://ceq.hss.doe.gov/nepa/regs/transguide.html>; *see also* *Gov’t of the Province of Man. v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010) (relying on the CEQ Guidance and holding that defendants were required to consider the Canadian impacts of their U.S. water supply project).

³⁷ 40 C.F.R. §§ 1500.1(b), 1502.24.

including catastrophic consequences with a low probability of occurring.³⁸

When multiple agencies are involved in the proposed action, a “lead agency” will be designated to supervise the preparation of the EIS.³⁹ However, continued participation and cooperation of all involved agencies, state and local governments, and the public early in and throughout the NEPA process is required.⁴⁰ Public hearings or meetings must be held by agencies when there is “[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing” and when a cooperating agency requests a hearing.⁴¹

After issuing a draft EIS (DEIS) and prior to preparing a final EIS (FEIS), the agency must “affirmatively solicit[] comments from those persons or organizations who may be interested or affected.”⁴² The agency is also required to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”⁴³ In the FEIS, the agency must consider and respond to all comments by either modifying the EIS or “[e]xplain[ing] why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal

³⁸ CEQ NEPA regulations require that “[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.” 40 C.F.R. § 1502.22 (2012). “For the purposes of this section, ‘reasonably foreseeable’ includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” 40 C.F.R. § 1502.22(b).

³⁹ 40 C.F.R. § 1501.5(a) (2012).

⁴⁰ 40 C.F.R. § 1501.6 (2012) (A cooperating agency is any other federal agency other than a lead agency, which has jurisdiction by law or special expertise relevant to the proposed action.); 40 C.F.R. § 1506.6 (2012); 42 U.S.C. § 4331(a) (2012).

⁴¹ 40 C.F.R. § 1506.6(c) (2012); *see also* 40 C.F.R. § 1506.6(b) (2012) (Agencies must “provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.”).

⁴² 40 C.F.R. § 1503.1(a) (2012).

⁴³ 42 U.S.C. § 4332(2)(C)(v) (2012); *see also* *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (quoting *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)).

or further response.”⁴⁴ After the FEIS is released, an agency must prepare a “concise public record of decision” that states what the agency’s decision is, all of the alternatives that the agency considered, whether all practicable means to avoid or minimize harms from the decision have been adopted, and if not, why not.⁴⁵

B. NEPA Jurisprudence Requires the State Department to Address GHG Emissions and Global Climate Change

In 1996, a U.S. Court of Appeals recognized that the “new and potentially catastrophic environmental phenomenon” of global climate change “fits squarely within the broad NEPA framework.”⁴⁶ In the following cases, courts require consideration of increased GHG emissions and climate change impacts under NEPA.

1. Border Power Plant Working Group v. Department of Energy

In *Border Power Plant Working Group v. Department of Energy*, the court held that the defendants were required to consider the transboundary impacts, and thus carbon dioxide (CO₂) emissions, of gas-fired turbines in Mexico in their EIS on whether to permit electricity transmission lines within the United States that would cross the U.S.-Mexico border and allow the importation of electricity from power plants sited in Mexico.⁴⁷ The threshold question in *Border Power Plant* was whether the operation of and emissions from the power turbines in Mexico were causally linked to—i.e., “effects” of—the transmission lines and thus within the scope of the environmental

⁴⁴ 40 C.F.R. § 1503.4(a) (2012); *see* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003) (The “agency preparing an FEIS [has] the duty to assess, consider, and respond to all comments.”); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977) (“The relevant questions under the NEPA are whether such comments are made available to decision-makers, whether the differences of opinion are readily apparent, and whether they receive *good faith attention from decision-makers.*” (emphasis added)).

⁴⁵ 40 C.F.R. § 1505.2 (2012).

⁴⁶ *City of L.A. v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 492 (D.C. Cir. 1990), *overruled on other grounds by* *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996). In a 2011 article reviewing case law under NEPA related to GHG emissions and climate change, the author concludes that “[t]he primary commonality throughout all of the cases is that effects from various projects on climate change do fit within the rubric of NEPA.” Robert Reiley, *The Evolution of NEPA in the Fight Against Climate Change*, 5 PITT. J. ENVTL. PUB. HEALTH L. 1, 38 (2011).

⁴⁷ *Border Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003). The court found organizational standing for a group with U.S. and Mexican citizens who lived near the power plants and transmission lines in question. *Id.* at 1010–11.

review required by NEPA.⁴⁸ For the turbines producing electricity primarily for export to the United States, the court found that the transmission lines were the only “current means” evidenced by the record through which the turbines could transmit power, and the turbines and transmission lines were “two links in the same chain.”⁴⁹ Thus, the emissions resulting from the operation of those turbines were “effects” of the transmission lines and must be analyzed under NEPA.⁵⁰ The court also concluded that the Environmental Assessment (EA) was inadequate as a matter of law because it did not disclose and analyze the significance of the potential environmental impacts of the power plants’ CO₂ emissions, including climate change, that were indicated in the record.⁵¹

2. *Mid States Coalition for Progress v. Surface Transportation Board*

In *Mid States Coalition for Progress v. Surface Transportation Board*, the court found that the proposed project to construct and upgrade rail lines to reach coal mines would likely result in an increase of CO₂ emissions due to the increased availability of inexpensive coal to power plants.⁵² Thus, the Board was required under NEPA to evaluate the effects of the project, including an increase in the long-term demand for coal and the effects from burning the coal, e.g., CO₂ emissions and climate change.⁵³ The court stated that NEPA requires federal agencies to consider “any adverse environmental effects,” which under the CEQ regulations includes both direct and indirect effects.⁵⁴ In response to the railroad’s assertion that effects of any increased coal use were speculative, the court reasoned that while the *extent* of the effect may be speculative, the *nature* of the effect was not; therefore, the agency could “not simply ignore the effect.”⁵⁵ The court stated that “it is reasonably foreseeable—indeed, it is almost certainly true—that the proposed

⁴⁸ *Id.* at 1012–16.

⁴⁹ *Id.* at 1017.

⁵⁰ *Id.*

⁵¹ *Id.* at 1028–29.

⁵² *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003).

⁵³ *Id.* at 549.

⁵⁴ *Id.* (quoting and citing 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1508.8).

⁵⁵ *Mid States Coal.*, 345 F.3d at 549.

project will increase the long-term demand for coal and any adverse effects that result from burning coal,” including climate change.⁵⁶

The court cited the specific procedure under CEQ regulations for “‘evaluating reasonably foreseeable significant adverse effects on the human environment’ when ‘there is incomplete or unavailable information.’”⁵⁷ The court then stated the Board had for the most part “‘completely ignored the effects of increased coal consumption,’” an impact raised in the public comments submitted on the DEIS, and that it “‘made no attempt to fulfill the requirements laid out in the CEQ regulations.’”⁵⁸ The court concluded that “‘it would be irresponsible for the Board to approve a project of this scope [and cost] without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.’”⁵⁹

3. Center for Biological Diversity v. National Highway Transportation Safety Administration

In *Center for Biological Diversity v. National Highway Transportation Safety Administration*, the Center for Biological Diversity challenged the National Highway Transportation Safety Administration’s (NHTSA) final rule on fuel economy standards for light trucks, model years 2008–2011, under the Energy Policy and Conservation Act (EPCA) and NEPA.⁶⁰ Regarding the EPCA climate change claim, the court concluded that the failure to monetize benefits from reductions in CO₂ emissions was arbitrary and capricious.⁶¹ The court also concluded that “EPCA does not limit NHTSA’s duty under NEPA to assess the environmental impacts, including the impact on climate change, of its rule”⁶² and that “[a]lthough NEPA does not demand substantive environmental outcomes . . . NHTSA clearly has statutory authority to . . . set higher standards if an EIS contained

⁵⁶ *Id.*

⁵⁷ *Id.* at 549–50 (quoting 40 C.F.R. § 1502.22).

⁵⁸ *Mid States Coal.*, 345 F.3d at 550.

⁵⁹ *Id.* Compare *id.* (\$1.4 billion estimated cost of rail project in *Mid States Coalition*), with DOS FEIS, EXECUTIVE SUMMARY ES-2 (Aug. 26, 2011), available at <http://keystone.pipeline-xl.state.gov/documents/organization/182010.pdf> (\$7 billion estimated cost of Keystone XL).

⁶⁰ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1181 (9th Cir. 2008).

⁶¹ *Id.* at 1200.

⁶² *Id.* at 1214.

evidence that so warranted.”⁶³ The court found that “the [fuel economy] standard will affect the level of the nation’s greenhouse gas emissions and impact global warming.”⁶⁴

The court determined that the EA had not adequately considered the possible consequences of the proposed agency action in concluding that the action would have no significant impact on the environment.⁶⁵ Specifically, the court concluded that the EA’s analysis of the cumulative impacts of GHG emissions on climate change and the environment was inadequate.⁶⁶ The court noted “the fact that climate change is largely a global phenomenon that includes actions that are outside of the agency’s control does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.”⁶⁷ The court concluded that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”⁶⁸

The court further concluded that NHTSA’s Finding of No Significant Impact was arbitrary and capricious, because “NHTSA’s EA shunted aside significant questions with merely conclusory statements, failed to directly address substantial questions, and most

⁶³ *Id.* at 1213. “This court has recognized that ‘NEPA’s legislative history reflects Congress’s concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply ‘to the fullest extent possible.’” *Id.* (quoting *Forelows on Bd. v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985)).

⁶⁴ *Ctr. for Biological Diversity*, 538 F.3d at 1214. “NHTSA does not dispute that light trucks account for a significant percentage of the U.S. transportation sector, that the U.S. transportation sector accounts for about six percent of the world’s greenhouse gases, and that ‘fuel economy improvements could have a significant impact on the rate of CO₂ accumulation in the atmosphere,’ which would affect climate change.” *Id.* “[T]here is no doubt that the fuel economy standards set by NHTSA will have a direct effect on greenhouse gas emissions from light trucks-and that NHTSA is thus a ‘legally relevant cause.’” *Id.* n.68 (citation omitted).

⁶⁵ *Id.* at 1215.

⁶⁶ *Id.* at 1216 (“While the EA quantifies the expected amount of CO₂ emitted from light trucks MYs 2005–2011, it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions such as other light truck and passenger automobile CAFE standards. The EA does not discuss the *actual* environmental effects resulting from those emissions or place those emissions in context of other CAFE rulemakings.”).

⁶⁷ *Id.* at 1217 (quotation marks, alterations, and citation omitted).

⁶⁸ *Id.* at 1217.

importantly, provided no foundation for the important inference NHTSA draws between a decrease in the rate of carbon emissions growth and its finding of no significant impact.”⁶⁹ Moreover, the EA did not provide a “convincing statement of reasons” for its finding of no significant impact, e.g., “the EA discusses the amount of CO₂ emissions expected from the Rule, but does not discuss the potential impact of such emissions on climate change.”⁷⁰

As these three case studies illustrate, the indirect impacts of GHG emissions and the cumulative impacts of global climate change clearly fall within the scope of impacts agencies are required to disclose, analyze, and consider in reviewing a proposed project under NEPA.

C. CEQ’s Draft NEPA Guidance Further Demonstrates that the Effects of GHG Emissions and Climate Change Must Be Considered in the EIS

In February 2010, CEQ issued “Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions.”⁷¹ According to CEQ, NEPA’s EIS requirement has two purposes. “First, it is meant to promote transparency and to ensure

⁶⁹ *Id.* at 1223–24 (quotation marks and alterations omitted).

⁷⁰ *Id.* at 1223 (“In the ‘Affected Environment’ section of the EA, NHTSA states that ‘[i]ncreasing concentrations of greenhouse gases are likely to accelerate the rate of climate change.’ The agency notes that ‘[t]he transportation sector is a significant source of greenhouse gas (GHG) emissions, accounting for approximately 28 percent of all greenhouse gas emissions in the United States.’ From this, NHTSA jumps to the conclusion that ‘[c]oupled with the effects resulting from the 2003 light truck rule, the effects resulting from the agency’s current action are expected to lessen the GHG impacts discussed above.’” (citations omitted)); *see also id.* at 1220 (“‘If an agency decides not to prepare an EIS, it must supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant. ‘The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.’ NHTSA’s EA is markedly deficient in its attempt to justify the refusal to prepare a complete EIS. . . . [T]he agency’s FONSI is based primarily on its conclusory assertion—contradicted by evidence in the record—that the Final Rule will have no significant environmental impact because it authorizes CAFE standards that will result in a very small decrease in carbon dioxide emissions.” (citations omitted)).

⁷¹ COUNCIL ON ENVTL. QUALITY, DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS (Feb. 18, 2010), available at http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf. The purpose of the draft guidance is to help explain *how* federal agencies should, in their NEPA review of a proposed agency action, disclose and analyze the environmental effects of GHG emissions and climate change. *Id.* at 1. The guidance recognizes that “[i]t is now well established that rising global GHG emissions are significantly affecting the Earth’s climate.” *Id.* at 10.

public accountability of agency decisions with significant environmental effects. . . . Second, it is meant to ensure that agencies take account of those effects before decisions are made and as part of the agency's own decision-making process."⁷² The draft guidance concludes:

With the purpose of informing decision-making, CEQ proposes that the NEPA process should incorporate consideration of both the impact of an agency action on the environment through the mechanism of GHG emissions and the impact of changing climate on that agency action. This is not intended as a "new" component of NEPA analysis, but rather as a potentially important factor to be considered within the existing NEPA framework. Where an agency determines that an assessment of climate issues is appropriate, the agency should identify alternative actions that are both adapted to anticipated climate change impacts and mitigate the GHG emissions that cause climate change.⁷³

NEPA regulations, applicable case law, and CEQ's draft NEPA guidance demonstrate that the State Department has an obligation under NEPA to fully and transparently disclose whether the proposed Keystone XL pipeline will increase oil sands production in Canada, analyze the resulting GHG and climate change effects, and consider those effects in its environmental review and decision-making process.

II

THE STATE DEPARTMENT MINIMIZED THE EFFECTIVENESS OF PUBLIC PARTICIPATION REGARDING CLIMATE CHANGE IN THE KEYSTONE XL NEPA REVIEW PROCESS

This section assesses whether public participation and access to information in the NEPA-mandated environmental review of Keystone XL has been meaningful and effective by looking at whether the State Department fully and transparently disclosed, analyzed, and considered the reasonably foreseeable impacts of the proposed pipeline related to increased GHG emissions and climate change. Because the State Department refused to disclose and consider the GHG and climate change effects of increased oil sands production in Canada, public involvement in the NEPA process was

⁷² *Id.* at 9.

⁷³ *Id.* at 11.

thwarted. As a point of comparison to gauge how meaningful and effective the public involvement has been, this section also briefly looks at other forms of public participation and access to information outside of NEPA.

A. The State Department's NEPA Process for Keystone XL Lacks Transparency and Sidesteps Climate Change Concerns

Serving as the lead federal agency⁷⁴ for the environmental review of the proposed pipeline under NEPA, the State Department (through its contractor) prepared an EIS as part of the Presidential Permit review process.⁷⁵ The DEIS was issued in April 2010, and in response to comments on the DEIS, the State Department developed a Supplemental DEIS (SDEIS), which was issued in April 2011.⁷⁶ Comments from the public and the EPA assert multiple inadequacies in the DEIS and SDEIS related to the State Department's failure to

⁷⁴ The following agencies are cooperating agencies in the Keystone XL NEPA process: U.S. Environmental Protection Agency; U.S. Department of the Interior—Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service; U.S. Department of Agriculture—Natural Resources Conservation Service, Farm Service Agency, Rural Utilities Service; U.S. Army Corps of Engineers; U.S. Department of Energy—Office of Policy and International Affairs, Western Area Power Administration; U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety; Montana Department of Environmental Quality. DOS FEIS, INTRODUCTION, *supra* note 14, at 1-12 to 1-17.

⁷⁵ *Id.* at 1 (Applications for Presidential Permits are received and considered by the State Department for oil pipeline border crossings and associated facilities such as the proposed Keystone XL project, “pursuant to the President’s constitutional authority over foreign relations, and as Commander-in-Chief, which authority the President delegated to DOS in Executive Order (EO) 13337. . . . DOS jurisdiction to issue a Presidential Permit includes only the border crossing and the associated facilities at the border. DOS authority over the border crossing does not include the legal authority to regulate petroleum pipelines within the U.S. The Department of Transportation’s Pipelines and Hazardous Materials Safety Administration (PHMSA) is responsible for promulgating regulations regarding issues of petroleum pipeline construction, operation, and maintenance. Individual states have the legal authority to approve petroleum pipeline construction in their states, including selecting the routes for such pipelines. Different states have made different choices in how or whether to exercise that authority. Some states, such as Montana, have chosen to grant the authority to a state agency to approve pipeline routes through that state. Other states, such as Nebraska, have chosen not to grant any state agency such authority. In preparation of this EIS, DOS has consulted extensively with those federal and state agencies that possess regulatory authority over petroleum pipelines, as well as local, state, tribal and federal agencies that have jurisdiction with particular expertise regarding evaluating potential impacts of the proposed Project.”); *see also* Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, Exec. Order No. 13,337, *as amended* 69 Fed. Reg. 25,299 (Apr. 30, 2004).

⁷⁶ DOS FEIS, EXECUTIVE SUMMARY, *supra* note 59, at ES-2-ES-3.

disclose and consider GHG emissions from additional oil sands mining in Canada. In the FEIS, issued in August 2011, the State Department denied that the Keystone XL pipeline will result in any additional oil sands extraction and production in Canada, and based this finding on the speculative assumption that other oil transport projects would be built in the future that would lead to a similar increase in oil sands production if the pipeline was not permitted.⁷⁷ This conclusion ignores the expertise of the EPA and appears to be in direct contradiction with NEPA regulations and case law discussed in the previous section.

Following the publication of the FEIS, the State Department must determine whether the proposed project serves the national interest. This is referred to as a “national interest determination” and is separate from the NEPA environmental review process.⁷⁸ As mentioned in the introduction, the State Department was forced to deny the permit in response to an arbitrary deadline set by Congress, and TransCanada reapplied for the permit in May 2012. In June 2012, the State Department issued a public notice of its intent to prepare a supplemental EIS (SEIS) for the proposed Keystone XL pipeline.⁷⁹

1. Comments from the Public and EPA on the DEIS and SDEIS Assert Inadequacies in Failing to Disclose and Consider GHG Emissions from Additional Oil Sands Mining in Canada

Nearly 1,800 written and oral comments were submitted on the DEIS.⁸⁰ The State Department prepared consolidated responses to issues raised by multiple commenters, including “Concerns Regarding Greenhouse Gas Lifecycle Analyses” and “Concerns Regarding a

⁷⁷ See discussion *infra* section II.A.2.

⁷⁸ DOS FEIS, INTRODUCTION, *supra* note 14, at 1-4. The State Department held meetings along the pipeline route to “give individuals an opportunity to voice their views on whether granting or denying a Presidential Permit for the pipeline would be in the national interest and to comment on economic, energy security, environmental and safety issues relevant to that determination.” *Id.* at 1-26. See also Exec. Order No. 13,337, *supra* note 75, at 25,300.

⁷⁹ Notice of Intent To Prepare a Supplemental Environmental Impact Statement (SEIS) and To Conduct Scoping and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed TransCanada Keystone XL Pipeline, 77 Fed. Reg. 36,032 (June 15, 2012).

⁸⁰ DOS FEIS, EXECUTIVE SUMMARY, *supra* note 59, at ES-2; see DOS FEIS, APPENDIX A, DRAFT EIS COMMENT MATRIX (Aug. 26, 2011), available at <http://keystonepipeline-xl.state.gov/documents/organization/182118.pdf>.

Potential Causal Connection of Implementation of the Proposed Project and Expanded Oil Sands Production in Alberta and Increases in Refining in the Gulf Coast.”⁸¹ Large environmental organizations submitted joint comments on behalf of their members alleging procedural concerns regarding public participation.⁸² The comments also substantively asserted that the DEIS did not adequately disclose, analyze, and consider the direct, indirect, and cumulative impacts of the Keystone XL pipeline, including impacts from GHG emissions and climate change.⁸³

The EPA raised similar concerns in its review of the DEIS and gave it the lowest possible rating of adequacy, “Category 3-Inadequate Information.”⁸⁴ The EPA’s July 2010 letter to the State Department asserted that the DEIS “does not provide the scope or detail of analysis necessary to fully inform decision makers and the public, and recommend[ed] that additional information and analysis be provided.”⁸⁵ The EPA recommended “that the discussion of GHG emissions be expanded to include, in particular, an estimate of the extraction-related GHG emissions associated with long-term importation of large quantities of oil sands crude from a dedicated source.”⁸⁶ The EPA also emphasized the “causal relationship between . . . the Keystone XL project and increased extraction of oil sands crude in Canada intended to supply that pipeline.”⁸⁷

⁸¹ DOS FEIS, CONSOLIDATED RESPONSES TO COMMENTS ON THE DRAFT EIS AND THE SUPPLEMENTAL DRAFT EIS FOR THE PROPOSED KEYSTONE XL PROJECT A-41-A-44 (Aug. 26, 2011) [hereinafter CONSOLIDATED RESPONSES], *available at* <http://keystone-pipeline-xl.state.gov/documents/organization/182120.pdf>.

⁸² EARTHJUSTICE, NAT’L WILDLIFE FED’N, W. ORG. OF RES. COUNCILS, NATURAL RES. DEF. COUNCIL, PLAINS JUSTICE, & SIERRA CLUB, PUBLIC COMMENTS OF THE SIERRA CLUB, ET AL., ON THE TRANSCANADA KEYSTONE XL PIPELINE DRAFT ENVIRONMENTAL IMPACT STATEMENT 9-11 (July 2, 2010), *available at* http://docs.nrdc.org/energy/files/ene_10070201a.pdf. Specifically, “short notice before public meetings and the remote locations hindered meaningful public participation,” and “[t]he Scoping process was also defective because the Department of State Notice of Intent (“NOI”) failed to disclose all federal actions that are subject to NEPA review.” *Id.* at 9.

⁸³ *Id.* at 57–67. These comments also requested a stay of the decision to address pending matters, including the need to finalize CEQ’s draft NEPA guidance on climate change and GHG emissions before the Keystone XL EIS is finalized. *Id.* at 7.

⁸⁴ EPA Letter on DEIS, *supra* note 22, at 7.

⁸⁵ *Id.* at 1.

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 3.

In response to comments on the DEIS, the State Department developed a SDEIS, which generated over 280,000 comments,⁸⁸ many of which raised similar climate change-related concerns.⁸⁹ Large environmental organizations submitted joint comments stressing the need for further public participation, stating that the State Department “seems determined to limit meaningful participation and allow this project to proceed as soon as possible” and that the Department’s “process violates the letter and intent of NEPA’s public participation requirements.”⁹⁰ Additionally, the commenters asserted that the SDEIS is inadequate under NEPA because it fails to analyze transboundary impacts, including impacts of lifecycle GHG emissions, despite evidence in the record that shows a clear connection between the proposed Keystone XL pipeline and increased oil sands production.⁹¹ The commenters further criticized the SDEIS’s analysis of GHG emissions as “insufficient and flawed” because of its incorrect conclusions that additional extraction of oil sands in Canada is not an indirect impact of Keystone XL and that the proposed pipeline will not affect GHG emissions globally.⁹² The commenters also alleged that the SDEIS does not adequately analyze and consider the impacts of all connected actions, as required under NEPA, including reasonably foreseeable increased domestic oil production

⁸⁸ DOS FEIS, EXECUTIVE SUMMARY, *supra* note 59, at ES-3; *see* DOS FEIS, APPENDIX A, SUPPLEMENTAL DRAFT EIS COMMENT MATRIX (Aug. 26, 2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182117.pdf>.

⁸⁹ The consolidated responses prepared by the State Department were in response to comments on both the DEIS and the SDEIS. *See* DOS FEIS, CONSOLIDATED RESPONSES, *supra* note 81 and accompanying text.

⁹⁰ SIERRA CLUB, SIERRA CLUB NEB. CHAPTER, NAT’L WILDLIFE FED’N, NATURAL RES. DEF. COUNCIL, CTR. FOR BIOLOGICAL DIVERSITY, W. ORG. OF RES. COUNCILS, FRIENDS OF THE EARTH, LEAGUE OF CONSERVATION VOTERS, CORPORATE ETHICS INT’L, INDIGENOUS ENVTL. NETWORK, CLEAN AIR & WATER, GLOBAL COMMUNITY MONITOR, CTR. FOR ENERGY MATTERS, BIG THICKET ASS’N, & STOP TARSANDS OIL PIPELINES, COMMENTS OF THE SIERRA CLUB, ET AL., TO THE DEPARTMENT OF STATE ON THE SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE TRANSCANADA KEYSTONE XL PIPELINE 2–3 (June 6, 2011), *available at* http://docs.nrdc.org/energy/files/ene_11060701a.pdf.

⁹¹ *Id.* at 40–52. “The transboundary impacts associated with Keystone XL [that] must be analyzed in an EIS include, but are not limited to: increased greenhouse gas emission associated with tar sands extraction, upgrading and transportation in Canada, including vast losses of boreal forest carbon sinks” *Id.* at 42.

⁹² *Id.* at 52–55.

caused by other pipeline projects that would connect to Keystone XL.⁹³

The EPA reviewed and rated the SDEIS as “Environmental Objections – Insufficient Information (EO-2).”⁹⁴ In its June 2011 letter to the State Department, the EPA stated that “additional analysis is necessary to fully respond to our earlier comments and to ensure a full evaluation of the potential impacts of [the] proposed Project, and to identify potential means to mitigate those impacts,” including an “improve[ment of] the discussion of lifecycle greenhouse gas emissions (GHGs) associated with oil sands crude.”⁹⁵ The EPA criticized the methodology used by the State Department as possibly “underestim[at]ing] the values at the high-end of the ranges cited in the lifecycle GHG emissions discussion by approximately 20 percent.”⁹⁶ The EPA also reproved the conclusion in the SDEIS that “on a global scale, emissions are not likely to change” and recommended “against comparing GHG emissions associated with a single project to global GHG emission levels.”⁹⁷

⁹³ *Id.* at 55–64; *see also* 40 C.F.R. § 1508.25(a)(1) (When agencies consider the scope of a proposed action, closely related “connected actions” must be considered in the same EIS.).

⁹⁴ Letter from Cynthia Giles, EPA, to Jose W. Fernandez & Kerri-Ann Jones, Department of State, at 8 (June 6, 2011) [hereinafter EPA Letter on SDEIS], *available at* http://www.eenews.net/assets/2011/06/07/document_gw_02.pdf.

⁹⁵ *Id.* at 1–2.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* (“Moreover, recognizing the proposed Project’s lifetime is expected to be at least fifty years, we believe it is important to be clear that under at least one scenario, the extra GHG emissions associated with this proposed Project may range from 600 million to 1.15 billion tons CO₂-e, assuming the lifecycle analysis holds over time (and using the SDEIS’ quantitative estimates as a basis). In addition, we recommend that the Final EIS explore other means to characterize the impact of the GHG emissions, including an estimate of the ‘social costs of carbon’ associated with potential increases of GHG emissions [under EO 12866]. The social cost of carbon includes, but is not limited to, *climate damages* due to changes in net agricultural productivity, human health, property damages from flood risk, and ecosystem services due to climate change. Federal agencies use the social cost of carbon to incorporate the social benefits of reducing CO₂ emissions into analyses of regulatory actions that have a marginal impact on cumulative global emissions; the social cost of carbon is also used to calculate the negative impacts of regulatory actions that increase CO₂ emissions.” (emphasis added)).

2. *The State Department's Erroneous Conclusion that Keystone XL Will Cause Neither Additional Oil Sands Mining in Canada nor an Increase in Global GHG Emissions Is Based on Flawed Assumptions, Ignores Comments of the Public and EPA, and Is Contrary to NEPA*

In August 2011, only four months after the SDEIS was issued, the State Department issued its FEIS and responses to comments on the DEIS and SDEIS. In its FEIS, the State Department concluded that

under most scenarios the proposed Project would not substantially influence the rate or magnitude of oil extraction activities in Canada, or the overall volume of crude oil transported to the United States or refined in the United States. Thus, from a global perspective, the decision whether or not to build the Project will not affect the extraction and combustion of WCSB [Western Canadian Sedimentary Basin] oil sands crude on the global market.⁹⁸

This conclusion is based solely on a report prepared by EnSys Energy, a company with many oil industry clients,⁹⁹ and rests on the assumption that if Keystone XL is not built, alternative transportation projects would be developed that would similarly allow production of oil sands in Canada to continue at a similar rate through 2030.¹⁰⁰

⁹⁸ DOS FEIS, CUMULATIVE IMPACTS, 3.14-52 (Aug. 26, 2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182069.pdf>.

⁹⁹ *About Us*, ENSYS ENERGY, <http://www.ensysenergy.com/about.php> (last visited Oct. 31, 2012) (EnSys's energy clients include industry organizations such as American Petroleum Institute and OPEC Secretariat, and oil companies such as ConocoPhillips, Koch Industries, Exxon Mobil, BP, and Royal Dutch Shell).

¹⁰⁰ DOS FEIS, CUMULATIVE IMPACTS, *supra* note 98, at 3.14-62 (“Production levels of oil sands crudes would not be affected by whether or not KXL was built. WCSB production would only be impacted . . . if there were no further pipeline expansion out of WCSB and within the USA beyond projects currently under construction.” (quoting DOS SDEIS, APPENDIX A, ENSYS REPORT: KEYSTONE XL ASSESSMENT 116 (Dec. 23, 2010) [hereinafter ENSYS REPORT], *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182275.pdf>)). The EnSys report assessed fourteen different scenarios considering seven different Canadian crude oil transportation scenarios and two separate supply and demand outlooks. “According to EnSys, all scenarios assessed resulted . . . in very similar U.S. refinery investments, expansions, throughputs, and thus total crude import levels, U.S. product import and export levels, U.S. import costs, U.S. and global refinery CO₂ emissions and global life-cycle GHG emissions.” DOS FEIS, CUMULATIVE IMPACTS, *supra* note 98, at 3.14-34. The EnSys report did find that under the “No Expansion Scenario,” there would be less cumulative refinery investments and throughputs and the quality of the crude would be higher than under the other scenarios. *Id.* at 3.14-34 to 3.14-35 (quoting ENSYS REPORT at 47). However, the No Expansion Scenario was deemed “‘essentially implausible’” by EnSys; thus, “the total emissions would be similar

Further, this report disclaims “any legal liability or responsibility for the accuracy, completeness, or usefulness of any information” in the report for the U.S. government or any agency thereof.¹⁰¹

In spite of this questionable, if not incorrect, conclusion that there would be no additional oil sands production in Canada as a result of the proposed Keystone XL project,¹⁰² the State Department nonetheless provided information on indirect cumulative impacts and life-cycle GHG emissions from the proposed project “for illustrative purposes”¹⁰³ and “as a matter of policy,”¹⁰⁴ insisting that “a life-cycle analysis is not strictly necessary for purposes of evaluating the potential environmental impacts attributable to the proposed Project under NEPA.”¹⁰⁵ In response to comments on the DEIS, the State Department hired a separate third-party contractor, ICF International, to conduct a detailed study of GHG life-cycle emissions comparing Canadian oil sands crude with other selected reference crude oils.¹⁰⁶

One of the report’s conclusions included: “WCSB crudes, as likely transported through the proposed Project, are on average more GHG-intensive than the crudes they would displace in the United States.”¹⁰⁷ This conclusion was immediately dismissed in the report and the FEIS as essentially not relevant, due to the conclusion of the EnSys report that the proposed project will not “substantially influence” mining of oil sands in Canada; therefore, global GHG emissions will be unaffected by the proposed project.¹⁰⁸ This conclusion blatantly ignores the EPA’s pertinent expertise and recommendation, in its

with or without the proposed Project.” *Id.* at 3.14-35 (quoting DOS FEIS, APPENDIX V, ENSYS ENERGY, KEYSTONE XL ASSESSMENT–NO EXPANSION UPDATE 75 (Aug. 12, 2011) [hereinafter ENSYS NO EXPANSION UPDATE], available at <http://keystonepipeline-xl.state.gov/documents/organization/182263.pdf>).

¹⁰¹ ENSYS REPORT, *supra* note 100, at iv. The report was commissioned by the Department of Energy in response to the concerns of many commenters regarding lifecycle GHG emissions of the oil sands originating in Alberta. DOS FEIS, CONSOLIDATED RESPONSES, *supra* note 81, at A-41 to A-43.

¹⁰² See DROITSCH, *supra* note 21, at 1-2; EPA Letter on DEIS, *supra* note 22, at 3.

¹⁰³ DOS FEIS, EXECUTIVE SUMMARY, *supra* note 59, at ES-15.

¹⁰⁴ DOS FEIS, CUMULATIVE IMPACTS, *supra* note 98, at 3.14-61.

¹⁰⁵ *Id.* at 3.14-52.

¹⁰⁶ *Id.* at 3.14-44; see also DOS FEIS, CONSOLIDATED RESPONSES, *supra* note 81, at A-42.

¹⁰⁷ DOS FEIS, APPENDIX V: LIFE-CYCLE GREENHOUSE GAS EMISSIONS OF PETROLEUM PRODUCTS FROM WCSB OIL SANDS CRUDES COMPARED WITH REFERENCE CRUDES 48 (July 13, 2011) [hereinafter ICF REPORT], available at <http://keystonepipeline-xl.state.gov/documents/organization/182265.pdf>

¹⁰⁸ *Id.*; DOS FEIS, CUMULATIVE IMPACTS, *supra* note 98, at 3.14-52.

comments on the SDEIS, that the State Department not “compar[e] GHG emissions associated with a single project to global GHG emission levels,” because global climate change is caused by numerous and varied sources, which each incrementally and cumulatively add to global atmospheric GHG concentrations.¹⁰⁹ The State Department is not released “from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming” simply because “climate change is largely a global phenomenon that includes actions that are outside of [its] control.”¹¹⁰

In response to concerns by commenters regarding a causal connection between Keystone XL and expanded oil sands production in Alberta, the State Department concluded that “[t]hese independent analyses [the EnSys and ICF reports] indicated that the degree and the rate of development of the Alberta oil sands is not sensitive to the proposed action assessed in the EIS and would occur whether or not the proposed Project is approved and implemented.”¹¹¹ The State Department further concluded, relying on the EnSys report, that “the delivery of Canadian crude oil to the Gulf Coast region is not dependent on the presence or absence of the proposed project,” assuming that refineries would acquire crude from other sources outside of Canada and/or that alternative transportation methods would be found to deliver the Canadian crude.¹¹²

Many of the criticisms of the SDEIS raised by environmental organizations and the EPA remain relevant for the FEIS.¹¹³ Indeed,

¹⁰⁹ EPA Letter on SDEIS, *supra* note 94, at 6; *see also* Davis v. Mineta, 302 F.3d 1104, 1123 (10th Cir. 2002) (“[A] reviewing court ‘may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.’” (quoting Sierra Club v. U.S. Army Corps of Eng’rs, 701 F.2d 1011, 1030 (2d Cir. 1983))).

¹¹⁰ Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (citations and internal quotation marks omitted).

¹¹¹ DOS FEIS, CONSOLIDATED RESPONSES, *supra* note 81, at A-43.

¹¹² *Id.* at A-44.

¹¹³ While EnSys provided an update to the report prepared prior to the SDEIS, the State Department still relied primarily on the initial 2010 report in its FEIS. The 2011 update only strengthens the conclusions of the 2010 report. *See* ENSYS ENERGY NO EXPANSION UPDATE, *supra* note 100, at 75 (“As in our prior study, this update reaffirms our view that several pipeline options exist aside from Keystone XL to deliver WCSB crudes to market. . . . The update thus reinforces the view expressed in our Keystone XL Assessment report

the comments from Sierra Club *et al.* point out that the same conclusion based on the EnSys Report in both the SDEIS and FEIS—that “even if the proposed action does not proceed, production from the oil sands in Canada would likely continue at a similar rate”¹¹⁴—“is wrong, and is plainly contradicted by the data in the EnSys Report.”¹¹⁵

[T]he EnSys Report’s conclusion—that KXL will not affect oil sands production levels—depends on the assumption that if KXL is not built, some other future oil transport project would be built that would similarly allow production to increase through 2030. . . . [N]one of these alternative projects are moving forward, and many have not yet been formally proposed.¹¹⁶

The public comments clearly lay out why this flawed assumption is prohibited by NEPA, as it is based on the speculation that future projects would have similar impacts as the proposed project.¹¹⁷ In the *Border Power Plant* case, the court held that defendants were required to consider the transboundary impacts, including CO₂ emissions, of power turbines in Mexico because the transmission lines were the “only current means” through which the turbines could transmit power.¹¹⁸ Similarly, the proposed Keystone XL pipeline is the only *current* means to allow tar sands production to increase through 2030, and the possibility that future projects would be built

that . . . if [Keystone XL] were not built . . . then, *over time, broadly comparable* pipeline capacity *would evolve*.” (emphasis added)).

¹¹⁴ DOS FEIS, CUMULATIVE IMPACTS, *supra* note 98, at 3.14-62.

¹¹⁵ SIERRA CLUB ET AL., *supra* note 90, at 43; *see also* DROITSCH, *supra* note 21, at 9 (“Significantly, the EnSys report acknowledges that production is constrained without Keystone XL, but not until 2030. One of its modeled scenarios, called No Expansion, demonstrates that without new pipelines, western Canadian crude production (largely oilsands) would be curtailed by 750,000–950,000 barrels per day by 2030. Under this scenario, oilsands production would be curtailed in the event that Keystone XL does not proceed, there is no expansion of pipeline capacity between PADD II and PADD III, and no pipelines to the West Coast proceed. According to the EnSys report, “A No Expansion scenario would have significant impacts on the disposition of WCSB crudes.” Despite this finding, EnSys concludes that Keystone XL would not affect production, largely because its analysis assumes that other pipeline projects to Asia and the Gulf Coast will move ahead. The EnSys conclusion is flawed. The potential for future transport projects that would similarly increase oilsands production does not negate the fact that Keystone XL would increase oilsands production.”).

¹¹⁶ SIERRA CLUB ET AL., *supra* note 90 at 48.

¹¹⁷ *Id.*

¹¹⁸ *Border Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003).

that may have similar impacts does not change that fact.¹¹⁹ As in *Border Power Plant*, GHG emissions resulting from additional oil sands production in Canada are causally linked to the construction and operation of the pipeline and are therefore reasonably foreseeable indirect effects of the pipeline that the State Department has an obligation to disclose, analyze, and consider under NEPA.¹²⁰

In another analogous case, *Mid States Coalition*, the court stated that NEPA requires federal agencies to consider “any adverse environmental effects,” including both direct and indirect effects.¹²¹ The same reasoning employed by the court in *Mid States Coalition* is applicable to the proposed Keystone XL project. The State Department relied on the speculative assumption that impacts from future projects would displace the impacts from the proposed pipeline. Without this assumption, “it is reasonably foreseeable—indeed, it is almost certainly true—that the proposed project [by increasing the availability of oil sands crude to the market] will increase the long-term demand for [oil sands crude] and any adverse effects that result from” its production, including CO₂ emissions and climate change.¹²² The State Department “has completely ignored” the reasonably foreseeable indirect effects of expanded oil sands production in Canada, including increased GHG emissions, a concern raised by both the public and the EPA in comments on the DEIS and SDEIS.¹²³

As in *Center for Biological Diversity*, a court could find that the proposed Keystone XL pipeline would increase GHG emissions and impact global climate change,¹²⁴ and conclude that the State Department’s failure to disclose and analyze the cumulative impacts

¹¹⁹ *See id.*

¹²⁰ *See id.*; *see also* COUNCIL ON ENVTL. QUALITY, *supra* note 36, at ¶ 4 (“NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur.”).

¹²¹ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (internal quotation marks omitted).

¹²² *Id.* (The author is applying the court’s reasoning in *Mid States Coalition* to the proposed Keystone XL project.); *see also* DROITSCH, *supra* note 21 and accompanying text; EPA Letter on DEIS, *supra* note 22 and accompanying text.

¹²³ *Mid States Coal.*, 345 F.3d at 550; *see also* 40 C.F.R. § 1508.8 (2012).

¹²⁴ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1214 (9th Cir. 2008); *see supra* note 2; DROITSCH, *supra* note 21, at 1-2; EPA Letter on DEIS, *supra* note 22, at 3.

of the GHG emissions on climate change resulting from additional oil sands production renders the EIS inadequate.¹²⁵ The speculative assumption that some other future oil transport projects would be built with similar impacts to Keystone XL is needed to justify the State Department's conclusion that the proposed pipeline would not result in increased production of Canadian oil sands, and thus global GHG emissions would remain the same. This assumption and resulting denial of the existence of the causal relationship between the proposed project and expanded oil sands production help demonstrate that the State Department likely did not take the requisite "'hard look' at the environmental consequences of the action as required by NEPA."¹²⁶ An oil industry, third-party contractor's conclusion that "over time, broadly comparable pipeline capacity would evolve"¹²⁷ does not negate the reasonably foreseeable impacts of the proposed Keystone XL pipeline and does not allow the State Department to forgo its obligation under NEPA to disclose, analyze, and consider those impacts. While the public has had an opportunity to comment on the State Department's EIS, they have been denied full and transparent disclosure of the effects of the proposed pipeline and could not therefore fully comment on those effects or weigh in on alternatives. Despite numerous, well-supported comments from the public and the EPA, the State Department's refusal to fully disclose and consider the proposed pipeline's indirect effects of increased oil sands production in Canada and the resulting cumulative effects on climate change has resulted in a clear hindrance of public participation and access to information in the Department's NEPA process. In particular, for members of the public who rely upon the State Department's EIS alone for information, the EIS withholds the kind of relevant analysis and disclosure that is required by NEPA and was requested by the EPA.

3. Office of Inspector General Report Reveals Flaws in the State Department's Keystone XL NEPA Review Process

The State Department contracted a third party, Cardno Entrix, to perform the environmental review and draft the EIS on the proposed Keystone XL pipeline. This is allowed by NEPA if the contractor is "chosen solely by the lead agency" and the contractor "execute[s] a

¹²⁵ See *Ctr. for Biological Diversity*, 538 F.3d at 1216.

¹²⁶ *Id.* at 1223–24 (alterations and internal quotation marks omitted).

¹²⁷ ENSYS NO EXPANSION UPDATE, *supra* note 100, at 75.

disclosure statement,” which “specif[ies] that they have no financial or other interest in the outcome of the project.”¹²⁸ Yet the State Department allowed TransCanada, the proposed pipeline operator, to screen possible contractors to prepare the EIS and successfully recommend Cardno Entrix, despite the fact that TransCanada had financial ties with Cardno Entrix, which lists TransCanada as a “major client.”¹²⁹ Further, Cardno Entrix’s disclosure statement appeared incomplete, as it did not mention a known project done for TransCanada.¹³⁰ The National Interest Determination (NID) hearings held in September were also organized by Cardno Entrix, which accepted all of the public comments for the process.¹³¹

These revelations, among others, led fourteen members of Congress, in October 2011, to request that the Office of Inspector General (OIG) at the State Department investigate the State Department’s handling of the EIS and NID for the proposed Keystone XL pipeline.¹³²

Given the significant economic, environmental, and public health implications of the proposed pipeline, we believe that it is critical that the State Department conduct thorough, unbiased reviews of the project. Further, it is imperative that the State Department process be free of actual or apparent conflicts of interest, and that the process fully meets both the letter and spirit of all federal laws,

¹²⁸ 40 C.F.R. § 1506.5(c) (2012).

¹²⁹ Elisabeth Rosenthal & Dan Frosch, *Pipeline Review Is Faced With Question of Conflict*, N.Y. TIMES, Oct. 7, 2011, <http://www.nytimes.com/2011/10/08/science/earth/08pipeline.html>; *see also* Letter from Senators Bernard Sanders, Patrick Leahy, and Ron Wyden to Hillary Clinton, Secretary, U.S. Dep’t of State (Oct. 14, 2011), *available at* <http://sanders.senate.gov/imo/media/doc/Document3.pdf>; *see also* Letter from David S. Adams, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of State, to Senator Bernard Sanders (Oct. 31, 2011), *available at* <http://sanders.senate.gov/imo/media/doc/state%20dept%20response.pdf>.

¹³⁰ *Supra* note 129.

¹³¹ *Supra* note 129. There were additional conflict of interest allegations over the State Department’s handling of the Keystone XL application because TransCanada’s chief Washington lobbyist was a top official in Secretary of State Hillary Clinton’s 2008 presidential campaign. Elisabeth Rosenthal, *TransCanada Pipeline Foes See U.S. Bias in E-Mails*, N.Y. TIMES, Oct. 3, 2011, <http://www.nytimes.com/2011/10/04/science/earth/04pipeline.html>.

¹³² Letter from Bernard Sanders et al., Members of Congress, to Honorable Harold W. Geisel, Office of Inspector General, U.S. Dep’t of State (Oct. 26, 2011), *available at* <http://sanders.senate.gov/imo/media/doc/IG20Letter%20FINAL.pdf>.

including but not limited to the National Environmental Policy Act.¹³³

The request also asked for an examination of “the full scope of the State Department process related to the EIS and NID.”¹³⁴ In particular, did the FEIS “fully incorporate the views and concerns of” the EPA in relation to “assessing the exacerbation of climate change due to increased greenhouse gas emissions from increased exploitation of tar sands oil?”¹³⁵ In response to the congressional request, the OIG initiated a “special review” of the State Department’s handling of the EIS and NID,¹³⁶ which was completed in February 2012.¹³⁷

The Inspector General’s report found that TransCanada did have influence over the selection of Cardno Entrix to perform the environmental review of TransCanada’s proposed project, but that this influence was inherent in “the third-party contracting process used by the Department.”¹³⁸ The Inspector General warned that “[a]ny potential appearance of improper influence can lead the American public to question the Department’s independence and objectivity” and recommended “modify[ing] its third-party contracting process to reduce the appearance of improper influence,” to which the Department agreed.¹³⁹ The report criticized the State Department for not reviewing and verifying Cardno Entrix’s organizational conflict of

¹³³ *Id.* The congressional request also asked: “Have all requests for materials related to the Keystone XL pipeline under the Freedom of Information Act been timely fulfilled so that the public has access to all the necessary documents and materials related to this project?” *Id.*; see also 40 C.F.R. § 1506.5(c).

¹³⁴ Bernard Sanders et al., *supra* note 132.

¹³⁵ *Id.*

¹³⁶ Memorandum from Harold W. Geisel, on Special Review of the Keystone XL Pipeline Permit Process to William Burns, Deputy Secretary, U.S. Dep’t of State (Nov. 4, 2011), available at <http://sanders.senate.gov/imo/media/doc/Special%20Review%20Keystone%20XL%20Pipeline%20Nov%2020112.pdf> (“The primary objective of the review is to determine to what extent the Department and all parties involved complied with Federal laws and regulations relating to the Keystone XL pipeline permit process.”).

¹³⁷ U.S. DEP’T OF STATE & THE BROAD. BD. OF GOVERNORS, OFFICE OF INSPECTOR GEN., SPECIAL REVIEW OF THE KEYSTONE XL PIPELINE PERMIT PROCESS, Report No. AUD/SI-12-28 (2012) [hereinafter OIG REPORT], available at <http://www.sanders.senate.gov/imo/media/doc/Keystone%20Final%20Report%20020912.pdf>.

¹³⁸ *Id.* at 13.

¹³⁹ *Id.* at 13–14; see also U.S. DEP’T OF STATE, INTERIM GUIDANCE FOR THE USE OF THIRD-PARTY CONTRACTORS IN PREPARATION OF ENVTL. DOCUMENTS (2012), available at <http://www.state.gov/documents/organization/190304.pdf>.

interest materials, but concluded that the relationship between Cardno Entrix and TransCanada was not technically a conflict of interest.¹⁴⁰

The following finding in the report may provide an explanation for some of the inadequacies discussed above in the State Department's NEPA review process:

The Department's limited technical resources, expertise, and experience impacted the implementation of the NEPA process. The Department had to rely more on outside parties, such as its third-party contractor and other Federal agencies with expertise, to address issues related to alternatives and mitigation, pipeline safety, and environmental risks throughout the EIS process. As a result, OIG believes the EIS and related processes were less effective.¹⁴¹

On a project that generated over 280,000 comments on the SDEIS and where there were only four months between the issuance of the SDEIS and the FEIS (including the comment period), the overreliance of the Department on outside parties, in particular third-party contractors, could not be more clear. Disturbingly, however, the inspector general somehow considered this issue resolved when the Department agreed to its recommendation to "fill at least *one* full-time Civil Service position . . . with staff who have experience and expertise in handling [NEPA] issues and the [EIS] process."¹⁴²

Regarding the question of whether the State Department had failed to fully address and incorporate the views and concerns of other federal agencies, the report found that some concerns of other federal agencies, in particular, "the manner in which alternative routes were considered in the Department's EIS were not completely incorporated."¹⁴³ However, the report used the following as an example where the Department "was responsive in trying to address concerns that agencies raised."¹⁴⁴

Environmental Protection Agency officials expressed concerns to Department officials of the need for additional analysis in the EIS regarding the increased greenhouse gas emissions that may result from the increased extraction of tar sands oil in Canada for Keystone XL. In response, the Department hired a third-party

¹⁴⁰ OIG REPORT, *supra* note 137, at 26.

¹⁴¹ *Id.* at 22.

¹⁴² *Id.* (emphasis added).

¹⁴³ *Id.* at 21.

¹⁴⁴ *Id.* at 18–19.

contractor to conduct additional analysis, and a full life-cycle analysis of greenhouse gas emissions was included in the FEIS.¹⁴⁵

This superficial analysis does not fully answer the question posed in the congressional request. Hiring a third-party contractor and including its report in the EIS is not responsive to the EPA's concerns if a key conclusion in the report that confirms the EPA's concerns—Canadian oil sand “crudes, as likely transported through the proposed Project, are on average more GHG-intensive than the crudes they would displace in the United States”¹⁴⁶—is dismissed in the EIS as not relevant due to a conclusion found in a separate report produced by an oil industry contractor.¹⁴⁷ Further, even if the contracting of the report is considered responsive to the concerns raised by the EPA, the “conflicting views” of the EPA, an agency with “pertinent expertise,” were in the end “apparently ignored” by the State Department in its FEIS.¹⁴⁸

4. The State Department's Decision to Seek Additional Environmental Review and Deny the Permit Was Not Due to Public Participation Under NEPA on Climate Change

In November 2011, the State Department announced a decision to seek additional information in the Keystone XL permit review process, delaying the issuance of a permit by at least a year.¹⁴⁹ The primary reason cited was the “concentration of concerns [during the National Interest Determination public process] regarding the environmental sensitivities of the current proposed route through the Sand Hills area of Nebraska.” Thus the Department “determined it need[ed] to undertake an in-depth assessment of potential alternative routes in Nebraska.”¹⁵⁰ Under the decision, after the additional information is obtained and a public comment period completed on a supplement to the FEIS, the Department would determine “whether the proposed pipeline [is] in the national interest, considering all of the relevant issues together. Among the relevant issues that would be

¹⁴⁵ *Id.* at 19.

¹⁴⁶ ICF REPORT, *supra* note 107, at 48.

¹⁴⁷ See discussion *supra* section II.A.2.

¹⁴⁸ See *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)).

¹⁴⁹ Office of the Spokesperson, *Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information*, U.S. Dep't of State (Nov. 10, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

¹⁵⁰ *Id.*

considered are environmental concerns (*including climate change*), energy security, economic impacts, and foreign policy.”¹⁵¹ This parenthetical in the last sentence of the State Department’s press release was the only mention of climate change in its decision to seek additional information for its NID, which is required under Executive Order 13,337 for transboundary permits.¹⁵²

In January 2012, the State Department and Obama Administration denied the permit, a decision compelled by the imposition of a politically motivated sixty-day deadline set by Congress in an unrelated Act on a temporary payroll tax cut.¹⁵³ The State Department reasoned that sixty days was an insufficient amount of time to evaluate the impacts of the pipeline, specifically the concerns dealing with the proposed route through the Sand Hills area of Nebraska, and make its national interest determination.¹⁵⁴ The Department’s announcement denying the permit application makes clear that its decision will not permanently stop the proposed Keystone XL pipeline, explaining that the denial “does not preclude any subsequent permit application or applications for similar projects.”¹⁵⁵

While the delay and ultimate denial of the permit were clearly victories for those opposed to the pipeline, there is little that suggests public participation under NEPA played a role in these decisions. The public concerns cited by the State Department as the basis for its decisions to delay and deny the permit were raised in the NID process, which is separate from the NEPA EIS process, and the decisions were ostensibly based primarily on concerns about water contamination in the United States. Despite the cursory mention of climate change in its press release on the decision to delay and seek additional information for its NID, there is no indication that the State Department made these decisions due to public concerns raised in the NEPA process regarding the GHG and climate change impacts of the proposed pipeline.

¹⁵¹ *Id.* (emphasis added).

¹⁵² Exec. Order No. 13,337, *supra* note 75.

¹⁵³ *See supra* note 15 and accompanying text.

¹⁵⁴ *Id.*

¹⁵⁵ Office of the Spokesperson, *Denial of the Keystone XL Pipeline Application*, U.S. Dep’t of State (Jan. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm>.

B. Public Participation and Access to Information Outside the NEPA Process have Proved Effective in Delaying Keystone XL and Revealing Flaws in the State Department's NEPA Review

The State Department's overreliance on third-party contractors and failure to fully disclose and consider GHG impacts of any additional oil sands production caused by the proposed Keystone XL pipeline stifled the ability of the public to meaningfully participate on this issue in the Department's NEPA review. Public participation outside of the NEPA process, however, has had unambiguous impacts on the State Department's decision-making process. The clearest example already discussed is the public participation in the NID process that resulted in a one-year delay to seek additional information, followed by a denial of the permit for the same reasons but in response to an arbitrary deadline imposed by Congress. Further, the OIG special review that revealed flaws in the State Department's permitting process, including its lack of resources and overreliance on third-party contractors, would not have been initiated but for a request made by public representatives.¹⁵⁶

Public use and dissemination of information gained through Freedom of Information Act (FOIA) requests brought by the environmental group Friends of the Earth have also brought attention to issues in the Keystone XL permitting process regarding potential conflicts of interest. One batch of emails in response to the request revealed that the State Department appeared to be playing the role of a facilitator and collaborator with TransCanada and not that of an oversight agency.¹⁵⁷ Another batch of documents supported the allegation "that the State Department ha[d] been unduly influenced by representatives of TransCanada" through Cardno Entrix, which the State Department denied.¹⁵⁸

In a letter sent to Secretary of State Hillary Clinton, Vermont Senator Bernard Sanders stated that a joint meeting between the State

¹⁵⁶ See Bernard Sanders et al., *supra* note 132; OIG REPORT, *supra* note 137. This request was based in part on information that was reported on in a *New York Times* article. See Rosenthal & Frosch, *supra* note 129.

¹⁵⁷ Rosenthal, *supra* note 131.

¹⁵⁸ Tom Zeller Jr., *Keystone XL: Activists Ask What State Department Is Hiding*, HUFFINGTON POST, Nov. 17, 2011, http://www.huffingtonpost.com/2011/11/17/keystone-xl-state-department_n_1100176.html (FOE suggests some of the documents provide "evidence of deference and special access granted to TransCanada executives by federal officials. . . . [O]ne email . . . suggests State Department staff held at least one meeting in which representatives of both TransCanada and Cardno ENTRIX . . . were present.").

Department, TransCanada, and Cardno Entrix revealed by the FOIA request “appear[ed] completely inappropriate.”¹⁵⁹ Senator Sanders censured the State Department, stating that if it “allows Cardno Entrix to conduct the supplement to the FEIS, it will unnecessarily taint the supplement. The State Department should not continue with TransCanada’s hand-picked contractor, and should instead select a new and truly impartial third-party contractor to conduct the supplement.”¹⁶⁰ The State Department did end up selecting a separate third-party contractor for the environmental review of the new Keystone XL pipeline permit application,¹⁶¹ and it seems likely that the OIG Report, public access to information through FOIA requests, and pressure from public representatives played a role in this shift.

Protests and civil disobedience provided further political pressure on the Obama Administration in an election year.¹⁶² In August 2011, when the FEIS was issued, protesters held a two-week sit-in action at the White House protesting Keystone XL; between August and November 2011, 1,253 protesters were arrested at the White House, including NASA Scientist James Hansen and religious leaders.¹⁶³ On November 6, 2011, an estimated 10,000 demonstrators surrounded the White House calling on President Obama to deny TransCanada the permit for Keystone XL.¹⁶⁴ Protesters claimed victory when the Obama Administration announced its decision to seek additional information and delay the issuance of a permit four days later on

¹⁵⁹ Letter from Senator Bernard Sanders to Hillary Clinton, Sec’y, U.S. Dep’t of State (Nov. 17, 2011), available at <http://sandersonsenate.gov/imo/media/doc/Letter%20to%20Secretary%20Clinton%2011.17.2011.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ *New Keystone XL Pipeline Application*, U.S. DEP’T OF STATE, KEYSTONE XL PIPELINE PROJECT, <http://www.keystonepipeline-xl.state.gov/> (last visited Nov. 12, 2012) (“[T]he Department of State has selected Environmental Resources Management (known as “ERM”) to serve as an independent third-party contractor for its environmental review of the proposed Keystone XL pipeline project.”).

¹⁶² See Jeff Mason & Timothy Gardner, *Obama Advisers Fret Over Keystone XL Pipeline’s Political Risks*, REUTERS, Nov. 4, 2011, <http://www.reuters.com/article/2011/11/04/us-usa-politics-obama-keystone-idUSTRE7A279U20111104>.

¹⁶³ NASA Scientist, Religious Leaders Arrested in Tar Sands Protest, ENV’T NEWS SERV., Aug. 29, 2011, <http://ens-newswire.com/2011/08/30/nasa-scientist-religious-leaders-arrested-in-tar-sands-protest/>; Lucia Graves & Hunter Stuart, *Keystone XL: Thousands Gather Outside White House in Culmination of Protests*, HUFFINGTON POST, Nov. 6, 2011, http://www.huffingtonpost.com/2011/11/06/thousands-gather-in-lafay_n_1078809.html.

¹⁶⁴ Graves & Stuart, *supra* note 163.

November 10th.¹⁶⁵ At the time this Article went to press, there were demonstrations underway in Texas by landowners and environmentalists against the Keystone XL pipeline's southern leg, construction of which began in August 2012.¹⁶⁶

Local government leaders in the U.S. have also publicly pressured the Obama Administration to deny the presidential permit for the proposed Keystone XL pipeline.¹⁶⁷ In a demonstration of widespread local community support for rejecting the pipeline, 103 mayors of U.S. cities sent a joint letter to President Obama expressing their “grave[] concern[] that expansion of tar sands oil imports will increase our dependence on this high carbon fuel for decades to come.”¹⁶⁸ The mayors explained how local community efforts to “fight climate change, reduce dependence on oil, and create a clean energy future” would be undermined by the national “[e]xpansion of high carbon fuels such as tar sands” caused by the permitting of Keystone XL and urged the President to find that the proposed pipeline was not in the national interest.¹⁶⁹

Judicial challenges to the pipeline are also a form of public participation, albeit a more limited form subject to standing requirements and usually brought after the decision-making process has been completed. The pipeline is being fought in the courts on numerous fronts, including NEPA, Endangered Species Act, Administrative Procedure Act,¹⁷⁰ and eminent domain claims.¹⁷¹

¹⁶⁵ Bill McKibben, *Big News: We Won. You Won*, TAR SANDS ACTION (Nov. 10, 2011, 4:23 PM), <http://www.tarsandsaction.org/big-news-won-won/>.

¹⁶⁶ *Texas Landowners Join Environmentalists for Historic Blockade of Keystone XL Tar Sands Pipeline*, DEMOCRACY NOW! (Oct. 15, 2012), http://www.democracynow.org/2012/10/15/texas_landowners_join_environmentalists_for_historic; Dan Frosch, *Last-Ditch Bid in Texas to Try to Stop Oil Pipeline*, N.Y. TIMES, Oct. 12, 2012, <http://www.nytimes.com/2012/10/13/us/protesters-gather-at-keystone-xl-site-in-texas.html>. The permitting of the southern leg of the pipeline was embraced and expedited by the Obama Administration. See *supra* notes 16–19.

¹⁶⁷ Susan Casey-Lefkowitz, *Over 100 Mayors Voice Concern Over Keystone XL Tar Sands Pipeline*, SWITCHBOARD (Nov. 16, 2011), http://switchboard.nrdc.org/blogs/sclefkowitz/over_100_mayors_voice_concern.html.

¹⁶⁸ Letter from American Mayors to President Barack Obama (Nov. 16, 2011), available at <http://switchboard.nrdc.org/blogs/sclefkowitz/Mayors%27%20Joint%20Letter%20to%20President%20Obama%20on%20Keystone%20XL%20Pipeline%20Permit%20-%20Final%20-%20November%2016%2C%202011.pdf>.

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., First Amended Complaint in *Ctr. for Biological Diversity v. U.S. Dep't of State*, No. 11-cv-345, 2011 WL 5077848 (D. Neb. Oct. 25, 2011) (claims brought by NGOs under NEPA, ESA, and APA challenging environmental reviews of the proposed Keystone XL pipeline done by federal agencies).

Public participation through lawsuits is arguably more effective than under the NEPA review process, as courts are able to conduct serious inquiries into the facts and, with NEPA claims, the adequacy of the EIS.

III CONCLUSION

NEPA requires our government to fully and transparently disclose to the public the impacts of a proposed project. If a proposed project means “game over for the climate,”¹⁷² the public has both the right to know and the right to participate fully in the review process and have their voices heard. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA,”¹⁷³ and while corporations may sugar coat the environmental impacts and hide the ball, it is the government’s job under NEPA to open up the books and give the public the straight truth.

The State Department has a clear obligation under NEPA to disclose whether the Keystone XL pipeline will increase oil sands production in Canada, analyze the resulting GHG and climate change impacts, and consider those effects in its environmental review and decision-making process. The conclusion by the State Department—that neither additional oil sands production in Canada nor an increase of total global GHG emissions will result from Keystone XL—is not only a fundamental flaw in the EIS but a severe limitation on the ability of the public to meaningfully participate in the ultimate decisions affecting their health and welfare. Because the full effects of the pipeline were not disclosed in the EIS, the public was unable to comment fully on those effects or weigh in on alternatives.

¹⁷¹ Nathaniel Gronewold, *Keystone XL: As Texas Farm Owners Square off with TransCanada, Pipeline Opponents See an Opening*, E&E NEWS, Sept. 13, 2012, <http://eenews.net/public/energywire/2012/09/13/1>. *But see* Laurel Brubaker Calkins, *TransCanada’s Keystone Wins Right to Take Pipeline Land*, BLOOMBERG, Sept. 28, 2012, <http://www.bloomberg.com/news/2012-09-28/transcanada-s-keystone-wins-right-to-take-pipeline-land.html>.

¹⁷² James Hansen, *Game Over for the Climate*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/10/opinion/game-over-for-the-climate.html>.

¹⁷³ 40 C.F.R. § 1500.1(b) (2012) (emphasis added).

In preparing the FEIS, the State Department had “the duty to assess, consider, and respond to all comments.”¹⁷⁴ The State Department’s overreliance on third-party contractors and failure to disclose and consider the full GHG and climate change impacts of the proposed pipeline raise questions about whether the Department gave “good faith attention” to the public comments¹⁷⁵ and took a “hard look” at the impacts¹⁷⁶ during its environmental review or whether the decision to permit the pipeline was already predetermined. The possibility that some other future oil transport projects would be built that may have similar impacts to Keystone XL does not negate the fact that the proposed Keystone XL pipeline would increase oil sands production in Canada.¹⁷⁷ Nor does it relieve the State Department of its obligation under NEPA to disclose, analyze, and consider the reasonably foreseeable indirect and cumulative impacts from the increased oil sands production caused by the proposed pipeline. The State Department’s conclusion that the pipeline would not result in additional extraction and production of Canadian oil sands is in direct opposition with comments from the EPA and the public, and the speculative assumption needed to come to this conclusion further demonstrates the Department’s seeming determination to limit meaningful participation and permit the project to proceed as soon as possible. The efforts of the President to expedite the permitting of the southern leg of the pipeline support this observation.

As the EPA determined, “there is a reasonably close causal relationship between issuing a cross-border permit for the Keystone XL project and increased extraction of oil sands crude in Canada intended to supply the pipeline,”¹⁷⁸ and the environmental effects of this additional production must be analyzed under NEPA.¹⁷⁹ The State Department’s refusal to heed the EPA’s advice brings further doubt upon its review process and the adequacy of the FEIS. “[A] reviewing court ‘may properly be skeptical as to whether an EIS’s conclusions

¹⁷⁴ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003); *see* 40 C.F.R. § 1503.4(a) (2012).

¹⁷⁵ *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977); *see* 40 C.F.R. § 1503.4(a) (2012).

¹⁷⁶ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008).

¹⁷⁷ *See* DROITSCH, *supra* note 21, at 1-2; EPA Letter on DEIS, *supra* note 22, at 3.

¹⁷⁸ EPA Letter on DEIS, *supra* note 22, at 3.

¹⁷⁹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.”¹⁸⁰ The EPA, a federal agency dedicated to environmental protection, clearly possesses such “pertinent expertise.” Considering the convergence of EPA and public opposition to the State Department’s conclusion, it seems clear that public participation in the NEPA process is not capable of modifying the State Department’s position in the FEIS on GHG and climate change impacts from Keystone XL if the EPA was unable to do so.

Overall, the State Department’s Keystone XL environmental review process under NEPA clearly failed “to promote transparency and to ensure public accountability of agency decisions with significant environmental effects.”¹⁸¹ Nor did it “ensure that agencies take account of those effects *before* decisions are made and as part of the agency’s own decision-making process.”¹⁸² Due to the State Department’s failure to fully and transparently disclose, analyze, and consider GHG impacts of any additional oil sands production caused by the proposed Keystone XL pipeline, public participation and access to information has not been meaningful or effective in integrating global climate change concerns into the State Department’s NEPA environmental review process.

Even assuming, arguendo, that the State Department followed the letter of NEPA’s procedural requirements, it is certain that the spirit and purpose of NEPA were neglected, if not completely ignored. Our federal government has “the continuing responsibility . . . to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”¹⁸³ As part of that responsibility, federal agencies must “recognize the worldwide and long-range character of environmental problems” and disclose and consider “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term

¹⁸⁰ *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (quoting *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)).

¹⁸¹ COUNCIL ON ENVTL. QUALITY, *supra* note 71, at 9 (describing the two purposes of NEPA’s EIS requirement).

¹⁸² *Id.* (emphasis added).

¹⁸³ 42 U.S.C. § 4331(b)(1) (2012).

productivity.”¹⁸⁴ The federal government has utterly failed to recognize the “long-range character” of climate change, the urgent need to reduce GHG emissions dramatically, and the profound consequences for our children and future generations if we continue to do nothing. By supporting projects like the Keystone XL pipeline—the “fuse to the biggest carbon bomb on the planet”¹⁸⁵—our government is not only enabling our increasingly destructive addiction to fossil fuels, it is completely ignoring the well-founded concerns of the public and disregarding the right of future generations to inherit a livable planet.

¹⁸⁴ 42 U.S.C. §§ 4332(2)(F), 4332(2)(C)(iv) (2012).

¹⁸⁵ Elizabeth McGowan, *NASA's Hansen Explains Decision to Join Keystone Pipeline Protests*, REUTERS, Aug. 29, 2011, <http://www.reuters.com/article/2011/08/29/idUS257590805720110829>.