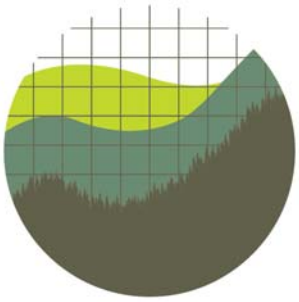

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 18, 2019

To: U.S. Department of State
Subject: Failure to Consistently Apply Substitution Analysis in the Draft Supplemental Environmental Impact Statement for the Proposed Keystone XL Pipeline, Docket No. DOS-2019-0033

The Institute for Policy Integrity at New York University School of Law[1] respectfully submits comments on the Draft Supplemental Environmental Impact Statement for the Proposed Keystone XL Pipeline.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. In furtherance of this mission, we regularly submit comments to federal agencies on the treatment of greenhouse gas emissions and economic effects in environmental impact statements.

The U.S. Department of State (the "Department") conducts this supplemental environmental impact statement after a federal district court ruled that the agency's original environmental impact statement violated the National Environmental Policy Act ("NEPA") due in part to the agency's failure to take all relevant information into account when projecting that the Keystone XL Pipeline (the "pipeline") would not affect total crude oil production.[3] The Department now projects that the pipeline will likely increase total crude oil production by only partially offsetting production that would have occurred elsewhere under a "no action" scenario, but irrationally and inconsistently fails to account for this substitution effect when projecting the pipeline's economic benefits. Accordingly, these comments argue that the Department continues to violate NEPA by its lopsized treatment of the pipeline's costs and benefits, through not only its inconsistent treatment of substitution effects but also its failure to assess the pipeline's climate-related impacts through monetization.

The Department is inflating the pipeline's economic benefits relative to its environmental effects. On the environmental side, the Department projects that the pipeline will produce over 178 million metric tons of annual greenhouse gas emissions over the lifecycle of the transported

[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] Dep't of State, Draft Supplemental Envtl. Impact Statement for the Proposed Keystone XL Pipeline (DOS-2019-0033) (Oct. 4, 2019) [hereinafter "DSEIS"].

[3] *Indigenous Envtl. Network v. United States Dep't of State*, 347 F. Supp. 3d 561, 575–77 (D. Mont. 2018).

oil (including both upstream and downstream impacts).[4] The Department states that this total represents "an upper bound" in "the change in greenhouse gas emissions under the Proposed Action relative to the No Action Alternative," due to the fact that oil production resulting from constructing the pipeline will likely "displace . . . other crude oils" that would be produced elsewhere if the pipeline were not constructed.[5] The Department models three alternative displacement scenarios—full, 80%, and 40% displacement—and projects the greenhouse gas implications of each. Under the full displacement scenario, the agency projects that the pipeline could yield as few as 2.1 million metric tons of annual net greenhouse gas emissions—less than 2% of the total emissions attributable to the oil that will actually be transported through the pipeline.[6]

In contrast, the Department projects the pipeline's total economic benefits without reference to this displacement effect. For instance, the Department projects that employment and spending from pipeline construction alone will support nearly 3,000 jobs resulting in over $928 million in additional economic output,[7] and that pipeline operation will produce over $134 million in property-tax revenues.[8] Yet if the Department is correct that much of the pipeline's oil production would be offset through increased production elsewhere under a "no action" alternative, then that substitute oil production would also produce employment income, economic output, and tax revenues. But this reality cannot be found in the Department's analysis: Unlike in its discussion of environmental costs, the Department never acknowledges that its projections of economic benefits represent "upper bound[s]," nor does it project economic benefits under alternative displacement scenarios; in fact, the Department never even mentions the possibility of displacement when discussing the pipeline's economic effects. Under the Department's logic, in other words, the pipeline is responsible for all of its economic benefits but few of its environmental harms.

The Department's inconsistent treatment of economic benefits compared to climate costs violates NEPA. In two recent cases, for instance, courts have vacated oil and gas leasing plans under NEPA after the government quantified the plans' economic benefits but not their climate costs.[9] Those cases are just the latest applications of a broader line of case law in which courts find it arbitrary and capricious to apply inconsistent protocols for analyzing some effects compared to others. The U.S. Court of Appeals for the Ninth Circuit, for instance, has explained that when an agency bases a decision on cost-benefit analysis, it is arbitrary to "put a thumb on the scale by undervaluing the benefits and overvaluing the costs."[10] Similarly, the D.C. Circuit has chastised agencies for "inconsistently and opportunistically fram[ing] the costs and benefits"

[4] DSEIS at 4-83. We use the estimates under Scenario 1 in these comments for the sake of simplicity, but our points apply equally under the Scenario 2 estimates.

[5] *Id.* at 4-79.

[6] *Id.* at 4-83.

[7] *Id.* at 4-62.

[8] *Id.* at 4-64.

[9] *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1094–99 (D. Mont. 2017); *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014).

[10] *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1998 (9th Cir. 2008).

of a rule,[11] and the Tenth Circuit has remanded an environmental impact statement because "unrealistic" assumptions "misleading[ly]" skewed comparison of the project's positive and negative effects.[12] Like in those cases, the Department here inconsistently frames the pipeline's costs and benefits by offsetting the pipeline's environmental harms using displacement assumptions without applying those same assumptions to offset its economic benefits. This violates NEPA.

Moreover, consistent treatment of costs and benefits under NEPA also requires the Department to use readily available metrics, like the social cost of greenhouse gases, to meaningfully assess the significance of the pipeline's environmental impacts, especially when the Department touts the pipeline's economic benefits by monetizing them. Specifically, NEPA requires a "hard look" at the beneficial and adverse effects of major federal government actions, and the Supreme Court has held that agencies must "consider and disclose the *actual environmental effects*" of a proposed action in a way that "brings those effects to bear on [the agency's] decisions."[13] In the case of greenhouse gas emissions, the "actual environmental effects" are not the volumetric emissions totals, but rather the incremental climate impacts caused by those emissions such as sea-level rise, property damage, and human health impacts.[14] And to best assess those impacts, the Department should use the social cost of greenhouse gases protocol, which was developed by the federal Interagency Working Group on the Social Cost of Greenhouse Gases and continues to reflect the best available data and methodologies.[15] The

[11] *Bus. Roundtable v. SCC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

[12] *Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983).

[13] *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 96 (1983) (emphasis added); *see also* 40 C.F.R. § 1508.8(b) (requiring assessment of the "ecological," "economic," "social," and "health" "*effects*") (emphasis added); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (holding that merely quantifying the acres of timber to be harvested or the miles of road to be constructed does not constitute a "description of *actual* environmental effects," even when paired with a qualitative "list of environmental concerns such as air quality, water quality, and endangered species," when the agency fails to assess "the degree that each factor will be impacted").

[14] For additional discussion of the climate impacts caused by greenhouse gas emissions, see Intergovernmental Panel on Climate Change, *Global Warming of 1.5 ℃: Summary for Policymakers* 9–12 (Valérie Masson-Delmotte et al. eds., 2018), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf.

[15] The Interagency Working Group's ("IWG") methodology has been repeatedly endorsed by reviewers. In 2014, the U.S. Government Accountability Office concluded that IWG had followed a "consensus-based" approach, relied on peer-reviewed academic literature, disclosed relevant limitations, and adequately planned to incorporate new information through public comments and updated research. Gov't Accountability Office, *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates* 12–19 (2014). In 2016 and 2017, the National Academies of Sciences, Engineering, and Medicine issued two reports that, while recommending future improvements to the methodology, supported the continued use of the existing IWG estimates. Nat'l Acad. Sci., Engineering & Med., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* 3 (2017); Nat'l Acad. Sci., Engineering & Med., *Assessment of Approaches to Updating the Social Cost of Carbon: Phase 1 Report on a Near-Term Update* 1–2 (2016). And in 2016, the U.S. Court of Appeals for the Seventh Circuit held that the Department of Energy's reliance on IWG's social cost of carbon was reasonable. *Zero Zone, Inc. v. U.S. Dep't of Energy,* 832 F.3d 654, 678 (7th Cir. 2016). And many leading economists and climate policy experts have endorsed the IWG's values as the best available estimates. *See, e.g.*, Richard Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 357 Science 655 (2017); Michael Greenstone et al., *Developing a Social Cost of Carbon for U.S. Regulatory Analysis: A Methodology and Interpretation*, 7 Rev. Envtl. Econ. & Pol'y 23, 42 (2013).

Department's failure to assess the pipeline's actual climate effects in this fashion—especially when it monetizes the pipeline's economic benefits—violates its obligations under NEPA.[16]

Indeed, the social cost of greenhouse gases captures the factors that actually affect public welfare and assesses the degree of impact of each factor in ways that just estimating the volume of emissions cannot, providing decision-makers with sufficient informational context as NEPA requires. For instance, applying the social cost of greenhouse gases to the pipeline shows that the use of the oil transported through the pipeline each year would result in approximately $10 billion in climate-related damages, far surpassing the pipeline's other economic effects.[17] For further information on the need to monetize greenhouse gas emissions under NEPA, we attach our October 2019 comments—filed jointly with six other organizations—to the Federal Energy Regulatory Commission on its environmental impact statement for a different pipeline project: the Alaska Gasline Development Corporation's Alaska LNG Project.

As the Department continues to assess the pipeline's impacts, it must consistently evaluate the pipeline's costs and benefits without putting its thumb on the scale—including by both using the social cost of greenhouse gases to assess the pipeline's climate-related impacts and consistently applying substitution analysis to both the pipeline's environmental and economic effects. If it fails to do so, it will continue to violate NEPA.

Sincerely,

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Attached: Joint Comments on the Failure to Use the Social Cost of Greenhouse Gases in the Alaska LNG Project Draft Environmental Impact Statement (FERC Docket No. CP17-178-000)

[16] *See supra* notes 9–12 and accompanying text.

[17] The 2016 Interagency Working Group's central estimate of the social cost of carbon for year 2025 emissions is $46 in 2007$; adjusted for inflation using the CPI Inflation Calculator, that equals approximately $57 in 2019$. *See* Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* (2016) (calculating the central estimate at a 3% discount rate). 178 million * $57 = $10.146 billion. Note that in a proper cost-benefit analysis, the social cost of carbon corresponding to each respective year would be used to calculate the damages from that year's emissions, with each yearly estimate discounted back to present value.