



THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

January 23, 2012

TO: Members, Subcommittee on Energy and Power

FROM: Committee Staff

RE: Hearing on “American Jobs Now: A Legislative Hearing on H.R. 3548, the ‘North American Energy Access Act’”

On Wednesday, January 25, 2012, at 8:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a hearing on “American Jobs Now: A Legislative Hearing on H.R. 3548, the North American Energy Access Act.” This hearing will focus on the Obama Administration’s recent decision that the Keystone XL pipeline is not in the national interest, thus denying its construction permit and a bill to relocate decision-making authority on the Keystone XL pipeline to the Federal Energy Regulatory Commission.

I. WITNESSES

The Honorable Kerri-Ann Jones
Assistant Secretary of State
Bureau of Oceans and International Environmental
and Scientific Affairs

Mr. Mike Linder
Director
Nebraska Department of Environmental Quality

Mr. Jeffery C. Wright
Director
Office of Energy Projects
Federal Energy Regulatory Commission

Additional witnesses may be invited.

II. BACKGROUND

The Keystone XL pipeline is the proposed 1,661 mile expansion of the existing Keystone pipeline system running from Hardisty, Alberta, Canada, to the Midwestern United States. While the current pipeline has terminus points in Patoka, IL, and Cushing, OK, the proposed XL extension would lay new pipe from Hardisty to Steele City, KS and from Cushing to Port Arthur and Houston, TX. The expansion of the system will increase the pipeline’s throughput by 830,000 barrels per day (bpd) to 1.4

million bpd. The oil transported by the pipeline will originate from Alberta's oil sands deposits and the Bakken formation in North Dakota and Montana. Some estimates project the construction of the pipeline will create up to 20,000 direct and 100,000 indirect jobs. Five major labor unions have signed Project Labor Agreements with TransCanada, the pipeline developer, to build and maintain the pipeline. These unions are:

- United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. & Canada;
- International Union of Operating Engineers;
- International Brotherhood of Teamsters;
- International Brotherhood of Electrical Workers; and,
- Laborers' International Union of North America.

Since the Keystone XL pipeline crosses an international border, TransCanada is required to obtain a Presidential Permit to build the pipeline. The process of application, review, and approval is defined under Executive Order 13337 and must conform with National Environmental Protection Act (NEPA) standards. The State Department is the lead agency in the Presidential Permit process and was charged with determining whether or not the pipeline is in the national interest. Through this determination process, the State Department was required to coordinate with and/or receive views from the following 10 federal agencies:

- Army Corps of Engineers;
- Department of Agriculture (Farm Service Agency, Natural Resource Conservation Service, and Rural Utilities Service);
- Department of Energy (Office of Policy and International Affairs and Western Area Power Administration);
- Department of Interior (Bureau of Land Management, National Park Service, Fish and Wildlife Service, and Bureau of Reclamation);
- Department of Transportation;
- Environmental Protection Agency (EPA);
- Department of Defense;
- Department of Justice;
- Department of Homeland Security; and,
- Department of Commerce.

An affirmative national interest determination is required for a Presidential Permit to be issued.

TransCanada submitted its Application for a Presidential Permit to the State Department in September 2008. In April 2010, the State Department issued its Draft Environmental Impact Statement (DEIS) for the project. In June 2010, the EPA issued the results of its technical review of the DEIS, stating that the DEIS did not provide the scope and detail of analysis necessary to fully inform decision-makers and the public, and recommended that additional information and analysis be provided. This led the State Department to produce a Supplemental Draft Environmental Impact Statement (SDEIS) to address EPA objections even though in October 2010, speaking to the Commonwealth Club of San

Francisco, Secretary of State Hillary Clinton, when asked about approval of the Keystone XL pipeline stated that, “we are inclined to do so.”

The SDEIS, released 12 months later in April 2011, found “no new issues of substance.” EPA’s technical review of the SDEIS found the SDEIS required additional analysis, and that additional analysis was incorporated into the Final Environmental Impact Statement (FEIS).

In August 2011, the State Department issued its FEIS and initiated 30-day public and 90-day agency comment periods. Through the NEPA process, the State Department found that the pipeline would have limited adverse environmental impacts if operated according to applicable laws and regulations. Additionally, the State Department declared, after reviewing several alternatives, including one to not build the pipeline at all, that its “preferred alternative” was to build the pipeline as proposed with no major route or system modifications.

While the 90-day agency comment period was scheduled to conclude on November 24, 2011, and despite public assurances from the State Department and the President’s Office of Management and Budget that a final decision on the Presidential Permit would be made no later than December 31, on November 10, the State Department announced it would seek a new route through the State of Nebraska for the Keystone XL pipeline. After identifying a new route, a comprehensive environmental review would commence which was estimated to be completed in the first quarter of 2013. Under this scenario, a total of 50 to 54 months would have elapsed from the time of application to final decision. Note that decisions regarding the issuance of similar Presidential Permits have historically been made in 18 to 24 months, making the State Department’s new timeline for the Keystone XL pipeline more than double typical expectations.

The State Department stated that its decision to pursue another route was the result of issues raised during the 30-day public comment period for the FEIS. The public comment period revealed disagreement over the proposed route traversing the Sand Hills region of Nebraska, an area of highly-permeable soil atop the Ogallala Aquifer, a major source of drinking and irrigation water for the Great Plains. Prior to the State Department’s decision to pursue another route, the FEIS had evaluated and rejected 13 alternative routes for the pipeline which would have avoided the aquifer.

With the announcement of another delay by the State Department, the State of Nebraska acted to conduct its own review of the Nebraska route. On November 22, the Governor of Nebraska signed a bill authorizing the Nebraska Department of Environmental Quality to review a new route for Keystone XL to avoid the Sand Hills within the state’s borders. Upon the review’s conclusion, the Governor could submit the new route to the State Department. While the State of Nebraska contended a new route could be selected, evaluated, and approved within 9 months, the State Department announced its previously-announced 15- to 18-month timeframe would remain unchanged.

In response to this delayed approval process and to ensure that a timely decision could be made on the Presidential Permit, the Temporary Payroll Tax Cut Continuation Act of 2011 included a provision directing the President to approve the Keystone XL pipeline within 60 days unless the President determined that it was not in the national interest. Additionally, the law included language deeming the Final Environmental Impact Statement of August 26, 2011, satisfactory of all NEPA

requirements with no further Federal environmental review required. With respect to the isolated issue of the Nebraska route, the Presidential Permit issued would contemplate a route modification upon submission by the state's governor.

On January 18, 2012, the State Department issued a recommendation to the President that the Keystone XL pipeline, as currently analyzed, did not serve the national interest. President Obama agreed with the State Department's findings and rejected the Keystone XL's application. The State Department's justification for its decision rests primarily on the contention that there was not enough time to collect and review information regarding a new route through the State of Nebraska. The State Department announced that TransCanada would be able to resubmit an application for its cross-border permit. The schedule for a new review is unknown at this time. It is unclear if an entirely new Environmental Impact Statement would need to be prepared for the entire route or if a new application would focus exclusively on the re-routed segment.

To remove authority from the State Department to review and issue Keystone XL's permit, Mr. Terry of Nebraska introduced H.R. 3548, the "North American Energy Access Act." The legislation directs the Federal Energy Regulatory Commission (FERC) to review and approve Keystone XL's application while allowing for a route modification to be performed by the State of Nebraska.

III. SECTION-BY-SECTION

H.R. 3548 was introduced on December 2, 2011. The bill includes the following provisions.

Section 1

This section provides the short title for the legislation, the "North American Energy Access Act."

Section 2

This section provides that no person may construct, operate, or maintain the oil pipeline described in the FEIS, except with a permit issued under the Act.

Section 3

Issuance of Permit. Subsection 3(a) provides that FERC is required to issue a permit for the construction of the pipeline if the application is for the pipeline described in the FEIS. FERC is required to issue a permit for the pipeline within 30 days of receiving an application. If FERC fails to act on the application within 30 days of receipt, the permit shall be deemed issued upon expiration of the 30 days.

Modifications Generally. Subsection 3(b) provides that the applicant may make a substantial modification to the pipeline only with the approval of FERC.

Nebraska Modification. Subsection 3(c) provides that FERC must enter into a memorandum of understanding with the State of Nebraska to complete a review, pursuant to the National Environmental Policy Act of 1969, of any modification to the proposed pipeline route in Nebraska. FERC is required to approve the modification within 30 days after receiving approval of the proposed modification from the

Governor of Nebraska. The modification shall be deemed approved if FERC fails to act within 30 days of receiving the application for modification.

Section 4

This section provides that the permit is the only authority necessary to construct the pipeline. This section ensures that the pipeline remains subject to pipeline safety standards and FERC rate regulation, as applicable.

IV. ISSUES

The following issues are expected to be examined at the hearing:

- The decision-making process at the State Department which led to the negative national interest determination for the Keystone XL pipeline;
- The State Department's schedule for reviewing a new Application for a Presidential Permit for the Keystone XL pipeline;
- Options to ensure timely review of the pipeline application;
- The relative merits of Nebraska's environmental review versus additional State Department reviews;
- FERC's ability to evaluate pipeline projects; and,
- Administration perspectives on implementation of H.R. 3548.

V. STAFF CONTACT

If you have any questions regarding the hearing, please contact Garrett Golding or Patrick Currier at (202) 225-2927.