

REPORT TO CONGRESS

Under the Temporary Payroll Tax Cut Continuation Act of 2011
Section 501(b)(2)
Concerning the Presidential Permit Application of the
Proposed Keystone XL Pipeline

On December 23, 2011, the Temporary Payroll Tax Cut Continuation Act of 2011 (“the Act”) was enacted. This report to Congress is submitted under section 501(b)(2) of the Act, which provides that if the President determines that the Keystone XL pipeline is not in the national interest he shall provide a report to Congress that provides a justification for that decision, including consideration of employment, economic, energy security, foreign policy, trade, and environmental factors.¹

Executive Order (EO) 13337 delegates to the Department of State (the Department) the authority to receive applications for Presidential permits for cross-border facilities and outlines a process for the Department to determine whether granting such permits would be in the national interest. On November 10, 2011, the Department concluded that it required more information before a determination could be made regarding the Keystone XL pipeline application for a Presidential permit. The time period provided in the Temporary Payroll Tax Cut Continuation Act of 2011 is not adequate for the Department to conduct the necessary analysis to gain the additional information. The Department therefore recommended that the President determine that the permit application for the Keystone XL pipeline filed on September 19, 2008 (including amendments) be denied and that he determine the Keystone XL pipeline, as presented and analyzed at this time, does not serve the national interest. The President concurred with the Department’s recommendation and made that determination on January 18, 2012.

Background

On September 19, 2008, TransCanada Keystone Pipeline, LP (the “Applicant”) applied for a Presidential permit for the proposed Keystone XL pipeline, which would transport crude oil from Hardisty, Alberta, Canada to delivery points near Cushing, Oklahoma and Nederland, Texas. Pursuant to

¹ This report also serves as the Department of State’s record of decision consistent with 22 CFR § 161.8(d)(5) and 40 CFR §1505.2.

Executive Order (EO) 13337, which delegates to the Department the authority to receive and grant applications for Presidential permits that are in the national interest, the Department conducted a review of the pipeline's potential impacts by preparing an Environmental Impact Statement (EIS) consistent with the National Environmental Policy Act (NEPA).

The Department released a final EIS on August 26, 2011. After the final EIS was released, the Department held a public comment period under EO 13337 to obtain input for the national interest determination, which closed on October 9, 2011.

During this period, the public provided input on many issues, including job creation, negative environmental impacts from constructing the pipeline, pipeline safety issues, economic benefits of constructing the pipeline, and environmental impacts associated with oil sands extraction in Canada. Among the more commonly raised issues by commenters, particularly those from the State of Nebraska, was concern about the proposed route through the Sand Hills area of Nebraska.²

On November 10, 2011, the Department determined, in light of additional information gleaned from consultations with Nebraska state and local officials as well as public comments, that under Section 1(f) of EO 13337, it was necessary to seek additional information regarding potential alternative routes around the Sand Hills in Nebraska to inform the determination regarding whether issuing a permit for the proposed Keystone XL pipeline is in the national interest.

² As detailed in the final EIS, the Sand Hills area possesses a combination of characteristics that are not present together elsewhere along the proposed route. These characteristics include a high concentration of wetlands identified as of "special concern or value"; increased susceptibility to wind erosion if vegetation is not maintained; increased threat of invasive plant species because of the difficulty of reestablishing native vegetation; presence of shallow groundwater throughout the area, including extensive areas of "wet meadows" where plants are irrigated from the shallow water table; and presence of considerable prime habitat for an endangered species. In consultations with, and correspondence from, Nebraska's elected officials (including the Governor, both U.S. Senators, and members of the Legislature), there was nearly unanimous opposition to the proposed route through the uniquely sensitive terrain of the Nebraska Sand Hills. Concerns about the route through the Sand Hills were expressed during the environmental review process and these concerns, as expressed by Nebraska officials and echoed by citizen commenters from all areas of Nebraska, have grown significantly during the course of the Department's review of the proposed Keystone XL pipeline.

On November 14, 2011, the Applicant announced that it had reached agreement with Nebraska officials to move the proposed route out of the Nebraska Sand Hills. On November 22, 2011, Nebraska enacted a law establishing a process to approve a new route within Nebraska and directing the Nebraska Department of Environmental Quality to cooperate with the Department in reviewing potential alternative routes.

On December 23, 2011, the Temporary Payroll Tax Cut Continuation Act of 2011 was signed, which provides, among other things, that:

- “not later than 60 days after the enactment of this Act, the President, acting through the Secretary of State, shall grant a permit under Executive Order 13337 . . . for the Keystone XL pipeline”;
- “[t]he President shall not be required to grant the permit . . . if the President determines that the Keystone XL pipeline would not serve the national interest”;
- if no action is taken, then “not later than 60 days after the date of enactment of this Act, the permit for the Keystone XL pipeline” that meets certain conditions outlined in the Act “shall be in effect by operation of law”; and,
- if the Keystone XL pipeline were approved pursuant to the Act, then the final EIS would be deemed to satisfy requirements of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

Discussion

The Department determined on November 10, 2011, that it needed additional information about potential route alternatives that would avoid the Nebraska Sand Hills before it could make a determination as to whether issuing a permit for the proposed Keystone XL pipeline was in the national interest. Without such additional information about the potential impacts of those alternative routes, the Department lacks information about the precise environmental, socio-economic, cultural, and other impacts of a significant portion of the pipeline route in the United States. This lack of information does not allow for a meaningful comparison of the potential impacts of the Keystone XL pipeline to other crude oil transport options used in North America. Accordingly, without

such information the Department and the other agencies with which it consults on the national interest determination cannot responsibly move forward with granting the pipeline permit as directed by Section 501(a) of the Act.

When the Department announced its decision to seek additional information, it estimated, based on past projects of similar length and scope, it could complete the necessary review to make a decision by the first quarter of 2013. Consultations between the Department, the State of Nebraska, and the Applicant regarding the necessary steps in conducting a proper review continue to support that estimate. Thus, even if the Department were to operate pursuant to the provision in the Act that allows for a permit determination that circumvents the long-established NEPA process, the sixty days provided in the Act is not sufficient time to conduct the necessary analysis to gain the additional information to make an informed determination.

The final EIS contains information and analysis concerning the Keystone XL pipeline as described in the permit application regarding employment, economic, energy security, foreign policy, trade, and environmental factors. In light of the reroute of the pipeline, however, there is incomplete information regarding the potential environmental impacts of the pipeline (as well as, socioeconomic, environmental justice, and cultural impacts).³

Regarding employment, the construction of the Keystone XL pipeline would likely create several thousand temporary jobs associated with construction; however, the project would not have a significant impact on long-term employment in the United States. While some reports have suggested there could be over 100,000 direct and indirect jobs created by the pipeline, this inflated number appears to be a misinterpretation of one of the economic analyses prepared on the pipeline.⁴ Based on the amount of money the applicant projects it would

³ The final EIS includes an assessment of the potential environmental impacts associated with denying the pipeline permit.

⁴ The economic study prepared under contract to the Applicant estimated 118,000 person-years of employment could be generated over a projected 100-year operational life of the pipeline. This number appears to have been misreported by others as 118,000 jobs created; in fact in addition to the long time-frame projected in the study, it appears the study treated crude oil that would be transported by the pipeline as an increase in crude oil imported into the United States. The study then attributed the economic activity (including employment) associated with increased crude oil imports and refining to the pipeline. The economic analysis conducted for the EIS under contract to the Department of Energy, however, indicates that Keystone XL is unlikely to have any impact on the amount of crude oil imported into, or refined in, the United

spend on labor in building the pipeline, and the number of construction crews likely to be used in constructing the pipeline, the final EIS estimated there would be approximately 5,000 to 6,000 direct construction jobs in the United States that would last for the two years that it would take to build the pipeline.

Regarding economic, energy security, and trade factors, the economic analysis in the final EIS indicates that, over the remainder of this decade, even if no new cross-border pipelines were constructed, there is likely to be little difference in the amount of crude oil refined at U.S. refineries, the amount of crude oil and refined products such as gasoline imported to (or exported from) the United States, the cost of crude oil or refined products in the United States, or the amount of crude oil imported from Canada. There is currently excess cross-border pipeline capacity, but limited connections to the U.S. Gulf Coast refineries. As noted in the Keystone XL Assessment – No Expansion Update (in Appendix V to the final EIS), there is significant activity in proposals for other new domestic pipelines, expansions or reversals of existing pipelines, and other modes of transport such as rail, that could play a role in increasing imports of crude oil from Canada to the United States, including to refineries in the U.S. Gulf Coast area.

With regard to foreign policy implications and U.S. relations with Canada, the U.S.-Canada alliance is a cornerstone of both countries' national security. We believe that Canada will remain committed to the bilateral alliance whether the permit is approved or denied at this time.⁵ The United States will continue to work with Canada to ensure our shared interests in energy, environmental, and economic issues are not negatively affected by this decision.

The analysis from the final EIS, noted above, indicates that denying the permit at this time is unlikely to have a substantial impact on U.S. employment, economic activity, trade, energy security, or foreign policy over the longer term. The Department's recommendation, and the President's determination, is based on not having necessary information with respect to the Keystone XL permit application at this time. Thus, the determination does not preclude any subsequent permit application or applications for similar projects.

States. Therefore, it would not be reasonable to suggest the pipeline would cause an increase in employment or other economic activity by increasing crude oil imported into the United States.

⁵ In a December 2, 2011 press conference with President Obama, Prime Minister Harper stated that the bilateral relationship was "a marvelous relationship, and a relationship that really is a shining example to the world."