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REPORT
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# KEYSTONE XL PIPELINE

JANUARY 12, 2015.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

# R E P O R T

together with

## MINORITY VIEWS

[To accompany S. 147]

The Committee on Energy and Natural Resources, having considered the same, reports favorably an original bill (S. 147) to approve the Keystone XL Pipeline, and recommends that the bill do pass.

### PURPOSE

The purpose of this measure is to approve the Keystone XL pipeline.

### BACKGROUND AND NEED

Although the Federal Government does not regulate the siting of oil pipelines within the United States, the President has, for more than a century, asserted authority to approve energy and telecommunication facilities that cross international borders pursuant to the President's constitutional authority over foreign affairs. *See Sierra Club* v. *Clinton,* 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010). In 1968, President Johnson delegated his authority to issue or deny applications for Presidential permits for cross-border oil pipelines to the Secretary of State, based upon the Secretary's determination of whether issuance of the permit would serve the national interest. Executive Order 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968). President George W. Bush affirmed President Johnson's delegation to the Secretary of State in 2004. Executive Order 13337, 69 Fed. Reg. 25299 (May 5, 2004).

49–010

TransCanada Keystone Pipeline, LP, ("TransCanada"), a Canadian company, proposes to build and operate an oil pipeline, known as the "Keystone XL pipeline," to transport heavy crude oil across the border between Saskatchewan, Canada, and Montana. This proposed pipeline would connect with a recently-completed pipeline that currently ends in Nebraska. In addition, the project will also provide transportation of light crude oil from the Bakken formation in North Dakota and Montana. TransCanada already operates another cross-border pipeline, known simply as the "Keystone pipeline," which runs from Hardisty, Alberta, crosses the border in North Dakota, and ends in Patoka, Illinois. It received a Presidential permit in March 2008 and began operating in June 2010. In the case of the original Keystone pipeline, the Department of State determined that the pipeline was in the national interest because it increased market access to crude oil supplies from "a stable and reliable trading partner, Canada, that is in close proximity to the United States."

In September 2008, TransCanada applied for a Presidential permit for the Keystone XL pipeline. This second pipeline would have the capacity to transport 830,000 barrels of oil per day, including 730,000 barrels per day from Canada, and 100,000 barrels per day from the Bakken formation of North Dakota and Montana. It would provide both Canadian and American oil producers greater access to the large refining center in the U.S. Gulf Coast.

The Department of State published a final environmental impact statement on the proposed project in August 2011. In November 2011, however, the Department determined that additional information was needed to act on the application.

In December 2011, Congress passed and the President signed into law the Temporary Payroll Tax Cut Continuation Act. Section 501 of that Act required the President, acting through the Secretary of State, to grant the Presidential permit for the Keystone XL pipeline "not later than 60 days" after December 23, 2011. Public Law 112–78, 501(a), 125 Stat. 1289. On January 18, 2012, the Secretary of State recommended that the President deny the permit, "based on the fact that the Department does not have sufficient time to obtain the information necessary to assess whether the project, in its current state, is in the national interest." The President accepted the Secretary of State's recommendation, stating that it was "not a judgment on the merits of the pipeline, but the arbitrary nature of a deadline that prevented the State Department from gathering the information necessary to approve the project. . . ."

In February 2012, TransCanada announced that it would proceed with the construction of the pipeline from Cushing, Oklahoma, to the Gulf Coast, for which a Presidential permit was not required (since it did not cross the border with Canada). Construction of that portion of the pipeline is now complete. It began operating in January 2014.

In May 2012, TransCanada filed a new application for a Presidential permit for the project. The new application proposed a modified route, which avoids the environmentally sensitive Sand Hills region in Nebraska and terminates near Steele City, Nebraska. From Steele City, oil would be transported through the so-called "Cushing Extension," from Steele City, Nebraska, to Cush-

ing, Oklahoma, which began operating in February 2011, and the "Gulf Coast Project," from Cushing, Oklahoma, to Nederland, Texas, which began operating in January 2014.

On January 31, 2014, the Department of State released a final supplemental environmental impact statement on the modified Keystone XL project. Pursuant to Executive Order 13337, the Department is required to solicit the views of the Departments of Energy, Defense, Transportation, Homeland Security, Justice, the Interior, and Commerce, and the Environmental Protection Agency. On April 18, 2014, the Department of State notified the eight agencies that it would provide more time for them to submit their views on the project. It cited both "the uncertainty created by the ongoing litigation in the Nebraska Supreme Court which could ultimately affect the pipeline route in that state," and the "unprecedented number of new public comments, approximately 2.5 million, received during the public comment period that closed on March 7, 2014," for giving the agencies more time. The State Department stated that it was "actively continuing" its work on the permit application, but offered no target date for bringing its review to a close and making a final decision on TransCanada's permit application.

The environmental community has expressed concern that construction of the Keystone XL pipeline would result in increased oil sands production, which would in turn increase greenhouse gas emissions in Canada. The State Department found in its Environmental Impact Statement that approval of the pipeline would be "unlikely to significantly impact the rate of extraction," concluding: "Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments. . . ."

## LEGISLATIVE HISTORY

The Committee ordered S. 2554, legislation to approve the Keystone XL pipeline, favorably reported as an original bill on June 18, 2014. Similar legislation (S. 582 and S. 2280) was introduced by Senator Hoeven on March 18, 2013 (S. 582) and on May 5, 2014 (S. 2280). S. 582 was cosponsored by 27 Senators, and S. 2280 was cosponsored by 55 Senators. Both bills were placed directly on the Calendar pursuant to rule XIV. S. 2280 was considered by the full Senate on November 18, 2014 by a vote of 59–41 but, having failed to achieve 60 votes in the affirmative, did not pass.

In addition, similar measures have been incorporated as part of more comprehensive bills that have been referred to the Committee on Energy and Natural Resources. *See* S. 17, § 309 (Mr. Vitter); S. 2170, § 2012 (Mr. Cruz). *See* also S. Con. Res. 21 (Ms. Landrieu) (expressing the sense of the Senate that "completion of the Keystone XL pipeline is in the national interest of the United States"). Similar legislation (H.R. 3) was also passed by the House of Representatives on May 22, 2013, by a vote of 241–175, and was placed on the Senate Legislative Calendar under rule XIV.

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on January 8, 2015, by a majority voice vote of a

quorum present, recommends that the Senate pass an original bill, as described herein.

The roll call vote on reporting the measure was 13 yeas, 9 nays, as follows:

| YEAS | NAYS |
|---|---|
| Ms. Murkowski | Ms. Cantwell |
| Mr. Barrasso | Mr. Wyden |
| Mr. Risch | Mr. Sanders |
| Mr. Lee | Ms. Stabenow |
| Mr. Flake | Mr. Franken |
| Mr. Daines | Mr. Heinrich |
| Mr. Manchin | Ms. Hirono |
| Mr. Cassidy | Mr. King |
| Mr. Gardner | Ms. Warren |
| Mr. Portman | |
| Mr. Hoeven | |
| Mr. Alexander | |
| Mrs. Capito * | |

* Indicates vote by proxy.

SECTION-BY-SECTION ANALYSIS

*Section 1* provides a short title for the measure.

*Section 2(a)* authorizes TransCanada to construct, connect, operate and maintain the Keystone XL pipeline and cross-border facilities described in the application TransCanada filed on May 4, 2012, including any subsequent revision to the pipeline route within the State of Nebraska required or authorized by the State of Nebraska.

Subsection (b) provides that the Final Supplemental Environmental Impact Statement on the Keystone XL Project issued by the Secretary of State in January 2014 shall be considered to satisfy the National Environmental Policy Act and any other provision of law that requires Federal agency consultation or review, including section 7(a) of the Endangered Species Act of 1973, with respect to the Keystone XL pipeline and cross-border facilities.

Subsection (c) provides that any Federal permit or authorization for the Keystone XL pipeline and cross-border facilities issued before the date of enactment of the measure shall remain in effect.

Subsection (d) gives the United States Court of Appeals for the District of Columbia Circuit original and exclusive jurisdiction, except for review in the Supreme Court of the United States, for the review of any order or action of a Federal agency regarding the Keystone XL pipeline and cross-border facilities and related facilities in the United States that are approved by the measure (including any order granting a permit or right-of-way, or any other agency action taken to construct or complete the project pursuant to Federal law).

Subsection (e) states that nothing in the measure alters any Federal, State, or local process or condition in effect on the date of enactment that is necessary to secure access from an owner of private property to construct the Keystone XL pipeline and cross-border facilities.

## COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

*Keystone XL Pipeline Approval Act*

In May 2012, a private firm submitted an application for a Presidential permit to construct the proposed Keystone XL pipeline, which would carry crude oil from Alberta, Canada, to Steel City, Nebraska. Under current law, the proposed pipeline requires a Presidential permit because it would cross international borders. That application is still under review by the Department of State, which is responsible for issuing such permits.

This legislation would specify various procedures pertaining to federal review and permitting of the proposed Keystone XL pipeline. In particular, the legislation would specifically authorize the private entity to construct, connect, operate, and maintain the proposed pipeline and related cross-border facilities described in the existing application.

Based on information from affected agencies, CBO estimates that enacting this legislation would have no significant effect on federal spending for regulatory activities related to the proposed pipeline. (Any such regulatory activities are subject to the availability of appropriated funds.) Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

The Keystone XL Pipeline Approval Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Megan Carroll. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out the bill.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of the bill, as ordered reported.

## CONGRESSIONALLY DIRECTED SPENDING

The bill, as reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

## EXECUTIVE COMMUNICATIONS

The Committee did not request the views of the Administration on the measure.

## MINORITY VIEWS

Under law existing for more than a century, any company that wishes to build an oil pipeline across our border with Canada must first obtain a permit from the President of the United States. In 1968, President Johnson delegated the President's authority to issue cross-border permits to the Secretary of State. In 2004, President George W. Bush established the current process that the Secretary must follow in issuing cross-border permits. In the executive order setting up this process, President Bush explained that it would "provide a systematic method for evaluating and permitting" cross-border pipelines, which would "expedite review" and "accelerate the completion" of cross-border projects, "while maintaining safety, public health, and environmental protections." President Bush's executive order requires the Secretary to find that the issuance of a permit "would serve the national interest," and it requires the Secretary to impose "such terms and conditions as the national interest may in the Secretary's judgment require." The State Department has previously approved presidential permits for other oil pipelines that cross the Canadian border using this process, without the need for legislative intervention.

The purpose of the Keystone XL Pipeline Approval Act is to exempt a single company, TransCanada Keystone Pipeline, L.P., a U.S. subsidiary of TransCanada Corporation, a Canadian business corporation, from the President's permitting authority, with respect to the proposed Keystone XL pipeline. The pipeline would transport oil produced from tar sands in Alberta, Canada, across the border, through Montana, South Dakota, and Nebraska. In Nebraska, the Keystone XL pipeline would connect with an existing pipeline that would then transport the oil to Port Arthur, Texas.

The Committee's bill would circumvent the President's longstanding permitting authority and bypass the need for the Secretary of State to determine if the pipeline is in the national interest. It would do so by simply authorizing TransCanada to build the pipeline, as a matter of law, without a presidential permit, without a national interest determination, and without national interest terms and conditions. The bill would also foreclose further environmental review of significant new circumstances or information and it would limit the ability of citizens directly affected by the pipeline's course through Montana, South Dakota, and Nebraska from obtaining judicial review.

The majority contends that the bill is needed because the review process established by President Bush to "expedite" and "accelerate" such projects, but still protect public health, safety, and the environment, is taking too long. They point to the fact that an earlier application for the Keystone XL pipeline was filed on September 19, 2008, and argue that the review has now taken over 6 years. In fact, more than half of that time was spent on the earlier

application, which the State Department had to deny on January 18, 2012, because a previous, ill-conceived legislative attempt to force the President to make a premature decision on the Keystone XL pipeline did not afford sufficient time to make the national interest determination.

TransCanada filed its current application less than 3 years ago, on May 4, 2012. On January 31, 2014, less than a year ago, the State Department completed a Final Supplemental Environmental Impact Statement on the project, at which point it promptly began the agency comment process required by President Bush's executive order for making the national interest determination.

The process has been delayed for the understandable reason that the route of the pipeline through Nebraska had yet to be settled. TransCanada originally proposed building the pipeline through the environmentally sensitive Nebraska Sandhills in its September 2008 application, but subsequently proposed rerouting the pipeline around the Sandhills in its May 2012 application. Following the rejection of TransCanada's 2008 application, the Nebraska Legislature amended Nebraska's pipeline siting law to permit the Governor, rather than the Public Service Commission, to approve the route and enable TransCanada to take private property under Nebraska eminent domain law. The Governor of Nebraska approved TransCanada's revised route under the 2012 law. Meanwhile, a number of Nebraska landowners challenged the constitutionality of the law, and on February 14, 2014, a Nebraska district court judge held that the 2012 law violated the Nebraska Constitution by divesting the Public Service Commission of control over the routing decisions for the Keystone XL pipeline within Nebraska. On January 9, 2015, the day after the Committee ordered the Keystone XL Pipeline Approval Act reported, the Supreme Court of Nebraska vacated the district court's decision and held that the 2012 law "must stand by default." A majority of the Court, four of its seven judges, concluded that the law was unconstitutional. The other three concluded that the landowners who brought the suit lacked standing and declined to address the constitutional question. Under the Nebraska Constitution, a supermajority of five judges must concur to hold a law unconstitutional, so the 2012 siting law, and with it the Governor's routing decision, "must stand by default," even though none of the seven judges found it to be constitutional.

Simply put, the State Department could not have reasonably determined whether or not the pipeline is in the national interest as long as it did not know where the pipeline would ultimately be sited. Nor was it unreasonable for the State Department to question the validity of the Governor's approval of the proposed route, as evidenced by the fact that a majority of the Nebraska Supreme Court has now concluded the law under which the route was approved is unconstitutional.

Nor does the Nebraska Supreme Court's decision upholding the route "by default" dispense with the State Department's responsibility for making the national interest determination under President Bush's executive order. Although the executive order does not specify the factors the Department must consider in determining whether a project would serve the national interest, the Department has taken the position that the determination of national in-

terest involves consideration of "many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant state and federal regulations." Left alone, the Department will now have to consider and weigh all of these factors in arriving at its national interest determination.

The Committee bill, however, dispenses with the national interest determination. The majority simply assumes that the pipeline is in the national interest because it will create jobs and provide an additional source of Canadian oil to the U.S. market. Undoubtedly, some jobs will be created. How many, in which trades, and how long they will last is disputed. And undoubtedly, some part of the oil that would flow through the pipeline would be used in the United States. But how much will be refined in the United States and how much of it will be exported, and how much of the refined product will be used in the United States and how much of the refined product will be exported are also in dispute. These are questions best left to the objective analysis of the technical experts in the Department of State rather than answered by intuition in the political arena.

Serious questions also remain about the effect the greenhouse gas emissions associated with the production, refining, and consumption of oil produced from tar sands will have on the climate and the environmental consequences of potential oil spills from the pipeline. The State Department's Final Supplemental Environmental Impact Statement is, in fact, favorable to the proposed pipeline on these questions. But it assumed, based upon the price of oil when it was prepared, that the oil would be produced whether or not the pipeline is built, and would be shipped to market by rail or other means, even if the proposed pipeline is not built. The sharp decrease in the price of oil since the Final Supplemental Environmental Impact Statement was released has, of course, undermined that assumption. Oil prices are now approximately half what they were during the time period that the State Department was conducting its oil market analysis. The State Department observed that a number of conditions, including unexpectedly low oil prices, could result in the Keystone XL actually increasing gasoline prices to some Midwestern consumers. These factors must also be analyzed and weighed by the State Department in making its national interest determination.

Moreover, if the State Department is able to make its national interest determination, President Bush's executive order will require the permit to contain "such terms and conditions as the national interest may . . . require." Under this authority, the Secretary may be able to ensure that that construction of the pipeline does, in fact, generate jobs in this country, by requiring, for example, that the steel for the pipeline be made in this country rather than imported from abroad, or that oil be refined in this country rather than exported, or that the refined product be used in this country, to the extent permitted by our international trade agreements. Or the Secretary may ensure that TransCanada contributes its fair share to the Oil Spill Liability Trust Fund, from which tar sands oil is currently exempt. The Committee bill, in stark contrast, would authorize the pipeline without any national interest conditions.

Undoubtedly, enactment of the Committee bill and construction of the Keystone XL pipeline is in TransCanada's interest. But the proper test is, and should remain, whether it is in the national interest, not TransCanada's interest. By circumventing the requirement for a national interest determination, the Committee bill forecloses the consideration of the serious, substantive questions directly affecting the national interest, and it forecloses the Administration's ability to attach conditions to the permit that would protect the national interest.

Congress might better serve the national interest by ensuring that the State Department adheres to the established decision-making process and engages in reasoned decision-making rather than by circumventing that process and substituting its judgment for that of the agency experts.

MARIA CANTWELL.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill as ordered reported.

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