

REPORT OF THE LEGISLATION COMMITTEE

This report provides a summary of the energy legislative activities occurring during the 2nd Session of the 112th Congress, from May 1, 2011 through July 1, 2012.

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I. BUDGET CONTROL ACT

In August 2011, President Obama signed the Budget Control Act of 2011 (BCA).¹ The BCA initially raised the debt ceiling by \$900 billion (and allowed the President to raise the debt limit further in incremental steps under certain conditions)² and mandated a total \$2.1 trillion (\$900 million in initial cuts and then an additional \$1.2 trillion through reduced caps) in deficit reduction between 2012 and 2021.³ The BCA included several parts aimed at reducing the budget deficit. First, the BCA set limits on discretionary spending (caps) on annual appropriations for 2012-2021.⁴ Second, the BCA established the Joint Select Committee (JSC), which was tasked with recommending a proposal by November 23, 2011, to cut the deficit by at least an additional \$1.2 trillion between 2012 and 2021 through reductions to non-exempt direct and discretionary spending.⁵ The JSC was unable to achieve its target, and therefore the budget enforcement mechanisms (reduced spending caps and sequestration) that impose further reductions on non-exempt discretionary and direct spending will go into effect (pending any further action by Congress).⁶ Reductions would generally be achieved by reducing and capping annual appropriations.⁷ The specific programs affected by the spending cuts will be determined by the budget process of Congress. Under the BCA, cuts would be spread between defense

1. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011).

2. *Id.* at sec. 301.

3. *Id.* at tit. I.

4. *Id.* at sec. 101(c) (amending § 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985).

5. *Id.* at tit. IV.

6. *Id.* at sec. 302(a) (adding § 251A of the Balanced Budget and Emergency Deficit Control Act of 1985).

7. *Id.*

and non-defense accounts (including some limited number of mandatory programs), starting in January 2013.⁸

II. PIPELINE SAFETY

After being unanimously approved by Congress, President Obama signed the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (“2011 Act”) on January 3, 2012.⁹ The 2011 Act includes changes that affect operators of all types of facilities, including natural gas gathering lines, hazardous liquid lines, gas transmission pipelines, and local distribution systems. Of particular interest to gas transmission operators, the 2011 Act requires certain gas transmission pipelines closer to populated areas to report which of the lines have records that are insufficient to confirm the established Maximum Allowable Operating Pressure (MAOP).¹⁰ The 2011 Act also directs the Pipeline and Hazardous Materials Safety Administration (PHMSA) to require that such pipelines reconfirm MAOP and take interim safety measures.¹¹ In addition, the 2011 Act requires PHMSA to re-examine many of its regulations and, as appropriate, revise, expand, and strengthen them. For example, the 2011 Act requires that PHMSA study whether to expand its gas and hazardous liquid Integrity Management programs to more pipelines and whether to require the use of automatic or remote-controlled valves on new gas and liquid transmission pipelines.¹² The 2011 Act also requires PHMSA to review existing federal and state regulations for gathering lines and make recommendations to Congress on whether they are sufficient and whether federal regulation should be expanded.¹³ The 2011 Act also doubles PHMSA’s administrative civil penalty authority to \$200,000 per violation per day, up to \$2,000,000 for a related series of violations.¹⁴

III. OVERSIGHT OF DEPARTMENT OF ENERGY TITLE XVII LOAN GUARANTEE PROGRAM

Title XVII of the Energy Policy Act of 2005 established a loan guarantee program within the Department of Energy (DOE) authorizing the Secretary of Energy to issue loan guarantees for projects that “(1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service . . . at the time the guarantee is issued.”¹⁵ President Obama’s February 2009 stimulus package amended Title XVII by adding section 1705 to include projects that use commercial technology for renewable energy systems, electric power transmission systems, and leading-edge biofuels

8. *Id.* at sec. 302(a) (adding § 251A(4) of the Balanced Budget and Emergency Deficit Control Act of 1985).

9. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904 (2011).

10. *Id.* at sec. 23(a) (adding 49 U.S.C. § 60139(b)(1)).

11. *Id.* at sec. 23(a) (adding 49 U.S.C. § 60139(c)).

12. *Id.* at secs. 5(a), 4 (adding 49 U.S.C. § 60109(a), and 49 U.S.C. § 60102(n)(1)).

13. *Id.* at sec. 21.

14. *Id.* at sec. 2(a).

15. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1703, 119 Stat. 594 (2005).

projects¹⁶ and by appropriating \$6 billion in funding to pay the credit subsidy costs for section 1705 loan guarantees.¹⁷ Section 1705 expired on September 30, 2011.¹⁸

In February 2011, based on media reports in late 2010 and early 2011, the House Committee on Energy and Commerce opened an investigation of the Solyndra loan guarantee and the Title XVII program.¹⁹ Over the course of the 18-month investigation, the Committee identified several shortcomings in the loan guarantee process, many of which are applicable not only to the Solyndra guarantee but to the DOE loan guarantee program generally.²⁰ Upon concluding its investigation, Members of the Committee on Energy and Commerce introduced H.R. 6213, the No More Solyndras Act, which passed the House and is pending in the Senate Committee on Energy and Natural Resources.²¹

IV. CLEAN ENERGY STANDARD

On March 1, 2012, Senator Jeff Bingaman (D-NM), Chairman of the Senate Energy and Natural Resources Committee and retiring at the end of this Congress, introduced S. 2146, the Clean Energy Standard Act of 2012 (CESA), which would create a national clean energy standard applicable to the nation's largest utilities.²² CESA would require covered utilities to comply with the clean energy standard either by (a) supplying a certain percentage of their power from qualifying clean energy sources or (b) making alternative compliance payments that would fund state energy efficiency programs.²³ CESA sets an initial target for covered utilities of 24% of electricity from clean energy sources in 2015, and the target escalates by 3% annually to 84% in 2035.²⁴ CESA also sets initial alternative compliance payments at 3 cents/kWh in 2015, thereafter increasing at an inflation-adjusted rate of 5% per year.²⁵ While similar in many respects to earlier renewable and clean energy mandate proposals, CESA makes a broader array of clean energy resources eligible for credit than its predecessors. Under CESA, the following resources qualify for a clean energy credit: qualifying renewable, biomass, natural gas, hydropower, nuclear, waste-to-energy,

16. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 406, 123 Stat. 115 (2009).

17. *Id.* at tit. 17 (Innovative Technology Loan Guarantee Program).

18. *Id.* § 406.

19. MAJORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE, 112TH CONG., THE SOLYNDRA FAILURE 6 (Aug. 2, 2012).

Solyndra was the first recipient of a DOE loan guarantee in September 2009. Within one year of receiving the loan guarantee, the company experienced significant financial problems that resulted in the layoff in November 2010 of approximately 135 temporary and 40 full-time employees. Less than one year later, the company filed for Chapter 11 bankruptcy and laid off its remaining workforce of approximately 1,800 individuals.

Id.

20. *Id.* at 128-44.

21. No More Solyndras Act, H.R. 6213, 112th Cong. (2012).

22. Clean Energy Standard Act of 2012, S. 2146, 112th Cong., sec 2 (2012) (adding § 610 to the Public Utility Regulatory Policies Act of 1978).

23. *Id.* (adding § 610(d) to the Public Utility Regulatory Policies Act of 1978).

24. *Id.* (adding § 610(c)(2) to the Public Utility Regulatory Policies Act of 1978).

25. *Id.* (adding §§ 610(d)(2), 610(m) to the Public Utility Regulatory Policies Act of 1978).

combined heat and power, and supercritical coal-fired power generating facilities, as well as facilities utilizing carbon capture.²⁶

V. FARM BILL

Approximately every five years, Congress passes legislation that is commonly called the "Farm Bill" that sets national agriculture, nutrition, conservation, and forestry policy. The last Farm Bill was passed in 2008, and expires in 2012.²⁷ On May 24, 2012, Senator Stabenow (D-MI), Chairwoman of the Committee on Agriculture, Nutrition, and Forestry, introduced S. 3240, the Agriculture Reform, Food, and Jobs Act of 2012.²⁸ Included among the many issues in S. 3240 is an energy title that provides funding for programs focused on biobased markets; biorefinery assistance; biodiesel education; rural energy; biomass research and development; and biomass crop assistance.²⁹

On June 21, 2012, the Senate passed S. 3240 with a vote of 64-35.³⁰ On July 12, 2012, the House Agriculture Committee reported H.R. 6083, the Federal Agriculture Reform and Risk Management Act of 2012, but (as of July 2012) it is unclear whether H.R. 6083 will get a vote on the House floor.³¹ It is unclear whether Congress will enact a Farm Bill in 2012 or only provide an extension of key programs.

VI. HYDROCARBON EXPORTS

With the advent of increased natural gas production, mainly from shale resources, there is an increased interest in exporting liquefied natural gas. According to the Energy Information Administration, the "United States is projected to become a net exporter of liquefied natural gas (LNG) in 2016, a net pipeline exporter in 2025, and an overall net exporter of natural gas in 2021."³² Several bills and amendment attempts on the House side, led mainly by Congressman Edward Markey (D-MA), proposed to ban the export of natural gas (and sometimes oil) and stop the development of infrastructure related to export facilities.³³ These kinds of efforts failed to make it to the House floor, but are likely to continue throughout 2012. In the Senate, Senator Wyden (D-OR), who could be the Chairman of the Senate Energy and Natural Resources Committee if the Democrats maintain control of the Senate, expressed reservations about exporting natural gas.³⁴ As of July 2012, a number of applications are pending at the Department of Energy seeking approval to export

26. *Id.* (adding § 610(b)(1) to the Public Utility Regulatory Policies Act of 1978).

27. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008).

28. Agriculture Reform, Food, and Jobs Act of 2012, S. 3240, 112th Cong. (2012).

29. *Id.* at tit. IX.

30. 158 CONG. REC. S4397 (daily ed. June 21, 2012) (Rollcall Vote No. 164 Leg.).

31. Federal Agriculture Reform and Risk Management Act, H.R. 6083, 112th Cong. (2012).

32. U.S. ENERGY INFO. ADMIN., DEP'T OF ENERGY, AEO2012 EARLY RELEASE OVERVIEW 2 (2012), available at <http://www.eia.gov/forecasts/aeo/er/pdf/0383er%282012%29.pdf>.

33. *See, e.g.*, North America Natural Gas Security and Consumer Protection Act, H.R. 4024, 112th Cong. (2012); Keep American Natural Gas Here Act, H.R. 4025, 112th Cong. (2012); Reaffirming Constitutional Property Rights Act, H.R. 3913, 112th Cong. (2012).

34. *See, e.g.*, Tyler Graf, *Wyden Stands Firm on No LNG Exports at Town Hall Meeting*, THE DAILY ASTORIAN (Mar. 19, 2012), http://www.dailyastorian.com/free/wyden-stands-firm-on-no-lng-exports-at-town-hall/article_0aad2b82-71f5-11e1-ba48-001871e3ce6c.html.

natural gas as well as at the Federal Energy Regulation Commission (FERC) seeking authorization to site, construct, and operate LNG terminals.³⁵

VII. CYBERSECURITY

In May 2011, President Obama provided a legislative proposal to the U.S. Congress outlining the White House's strategy for enhancing cybersecurity protections for the nation's critical infrastructure and key resources.³⁶ The President's proposal was intended to be incorporated into draft legislation being developed by the Senate.³⁷ The President's proposal, however, ran into a number of barriers that prevented it from receiving serious consideration, but it nevertheless acted as a catalyst for cyber-related Congressional action in 2011 and 2012.³⁸ In a matter of months, various competing pieces of cybersecurity legislation were introduced in the House and Senate, while dozens of hearings and oversight meetings were conducted by House and Senate leaders.³⁹

The Cybersecurity Act of 2012, S. 2105, introduced by Senators Lieberman, Collins, Rockefeller, and Feinstein, served as the primary cyber vehicle in the Senate.⁴⁰ The joint effort of the Homeland Security and Government Affairs Committee and the Commerce Committee, S. 2105 was opposed by various stakeholders, including business interests and civil liberties groups.⁴¹ Senators McCain, Hutchison, Chambliss, Murkowski, and Grassley

35. 2012 - LNG Import/Export Authorization Applications, U.S. DEP'T OF ENERGY, http://www.fossil.energy.gov/programs/gasregulation/authorizations/2012_Long_Term_Applications.html (showing sixteen export applications pending as of Oct. 2012); FERC OFFICE OF ENERGY PROJECTS, NORTH AMERICAN LNG IMPORT/EXPORT TERMINALS: PROPOSED/POTENTIAL (July 17, 2012), available at <http://ferc.gov/industries/gas/indus-act/lng/LNG-proposed-potential.pdf> (showing seven export terminals proposed to the FERC).

36. Memorandum from Office of Mgmt. and Budget to Congress on Cybersecurity Regulatory Framework for Covered Critical Infrastructure Act (May 12, 2011), available at <http://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cybersecurity-regulatory-framework-for-covered-critical-infrastructure-act.pdf>.

37. Letter from Jacob Lew, Dir. of the Office of Mgmt. and Budget, to Joseph Biden, President of the U.S. Senate (May 12, 2011), available at <http://www.whitehouse.gov/sites/default/files/omb/legislative/letters/Cybersecurity-letters-to-congress-house-signed.pdf>.

38. ERIC A. FISCHER, CONG. RESEARCH SERV., R42114, FEDERAL LAWS RELATING TO CYBERSECURITY: DISCUSSION OF PROPOSED REVISIONS 4-6 (June 29, 2012).

39. See, e.g., *Cybersecurity: Innovative Solutions to Challenging Problems: Hearing on Cybersecurity Before the H. Comm. on the Judiciary*, 112th Cong. (May 25, 2011); *Securing America's Future: The Cybersecurity Act of 2012: Hearing on Cybersecurity Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. (Feb. 16, 2012); *Examining the Homeland Security Impact of the Obama Administration's Cybersecurity Proposal: Hearing on Cybersecurity, Infrastructure Protection, and Security Technologies Before the H. Comm. on Homeland Security*, 112th Cong. (June 24, 2011); 158 CONG. REC. 5,426, 5,428 (July 26, 2012) (statement of Sen. Joseph Lieberman) ("According to a report [from the Congressional Research Service], in the 112th Congress alone there have been 38 hearings and four markups in the House and 33 hearings in the Senate on cybersecurity.").

40. Cybersecurity Act of 2012, S. 2105, 112th Cong. (2012).

41. Michael S. Schmidt, *Senators Force Weaker Safeguards Against Cyberattacks*, N.Y. TIMES (July 27, 2012), http://www.nytimes.com/2012/07/28/us/politics/new-revisions-weaken-senate-cybersecurity-bill.html?pagewanted=all&_r=1&&pagewanted=print; Brendan Sasso, *Civil-Liberties Groups Urge Rejection of White House-Supported Cyber Bill*, THE HILL (May 10, 2012), <http://thehill.com/blogs/hillicon-valley/technology/226733-civil-liberties-groups-come-out-against-whitehouses-preferred-cybersecurity-bill>.

introduced S. 2151, the SECURE IT Act of 2012, to serve as an alternative to S. 2105.⁴²

In the House, the Majority leadership formed the House Cybersecurity Task Force to develop cybersecurity principles and priorities to guide the many House committees with jurisdiction over cyber-related matters, including the House Committee on Energy and Commerce, the Homeland Security Committee, and the Select Committee on Intelligence.⁴³

During the House's "Cyber Week," which occurred during the week of April 26, 2012, the House passed a series of narrow bipartisan cybersecurity bills. The bills passed include: (1) H.R. 3523, the Cyber Intelligence Sharing and Protection Act,⁴⁴ (2) H.R. 2096, the Cybersecurity Enhancement Act of 2012,⁴⁵ (3) H.R. 4257, the Federal Information Security Amendments Act of 2012,⁴⁶ and (4) H.R. 3834, the Advancing America's Networking and Information Technology Research and Development Act.⁴⁷ As of July 2012, these bills are now pending consideration in the Senate.

While there is near unanimous agreement in Congress that cyber-related attacks are a national security threat, there remain philosophical differences on how to address such threats. Some in Congress prefer comprehensive legislation that provides a greater role for the federal government, particularly the Department of Homeland Security, to establish regulations and cyber standards with robust enforcement and penalties to ensure compliance.⁴⁸ Others prefer a narrowly-tailored, market-driven approach that provides incentives and liability protections to private entities undertaking cybersecurity measures.⁴⁹ Underlying any legislative effort to address cybersecurity are serious privacy-related concerns that must be balanced with national security priorities. These challenges make consensus difficult.

VIII. LEGISLATIVE EFFORTS TO CURB EPA AUTHORITY/REGULATIONS

The U.S. Environmental Protection Agency (EPA) continued to be a target of Congressional oversight and legislative action during the fourth quarter of 2011 and the first half of 2012. Congress continued its focus on the EPA's suite of new and forthcoming regulations, particularly those impacting the electric power sector, including:

42. Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology Act, S. 2151, 112th Cong. (2012).

43. HOUSE REPUBLICAN CYBERSECURITY TASK FORCE, 112th Cong., RECOMMENDATIONS OF THE HOUSE REPUBLICAN CYBERSECURITY TASK FORCE 5 (2011), available at http://thornberry.house.gov/uploadedfiles/cstf_final_recommendations.pdf.

44. Cyber Intelligence Sharing and Protection Act, H.R. 3523, 112th Cong. (2012).

45. Cybersecurity Enhancement Act of 2012, H.R. 2096, 112th Cong. (2012).

46. Federal Information Security Amendments Act of 2012, H.R. 4257, 112th Cong. (2012).

47. Advancing America's Networking and Information Technology Research and Development Act of 2012, H.R. 3834, 112th Cong. (2012).

48. See, e.g., Cybersecurity Act of 2012, S. 2105, 112th Cong. (2012).

49. See, e.g., Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology Act of 2012, S. 2151, 112th Cong. (2012).

- Cross-State Air Pollution Rule (final rule published August 8, 2011;⁵⁰ rule vacated pending petition for rehearing en banc);⁵¹
- Utility MACT Rule (final rule published February 16, 2012);⁵²
- Standards for Power Plant Cooling Water Intake Structures under Section 316(b) of the Clean Water Act (proposed rule published April 20, 2011);⁵³ Notices of Data Availability (released June 11 and 12, 2012);⁵⁴
- Coal Combustion Residuals (proposed rule published June 21, 2010);⁵⁵ and,
- New Source Performance Standards for Greenhouse Gas Emissions for New Electric Generating Units (proposed rule published April 13, 2012).⁵⁶

The House continued its scrutiny of the EPA's new and proposed regulations impacting other sectors as well, including hydraulic fracturing in oil and gas shale plays, refineries, gasoline standards, cement manufacturing, industrial boilers, and agriculture. The House's interest in the regulatory agenda of the EPA occupied significant Committee time, resulting in dozens of oversight hearings and letters, as well as the introduction and passage of numerous bills to delay or limit the EPA's regulatory authority.⁵⁷ House lawmakers also sought to add legislative "riders" to a variety of appropriations

50. Final Rule, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97).

51. *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302 et al., 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012), *reh'g filed*, No. 11-1302 (Oct. 5, 2012).

52. Final Rule, National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial- Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60 and 63).

53. Proposed Rule, National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Apr. 20, 2011) (to be codified at 40 C.F.R. pts. 122 and 125).

54. Notice of Data Availability, National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to Impingement Mortality Control Requirements, 77 Fed. Reg. 34,315 (June 11, 2012) (to be codified at 40 C.F.R. pts. 122-125); Notice of Data Availability, National Pollutant Discharge Elimination System—Proposed Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to EPA's Stated Preference Survey, 77 Fed. Reg. 34, 927 (June 12, 2012) (to be codified at 40 C.F.R. pts. 122-125).

55. Proposed Rule, Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128 (June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, and 302).

56. Proposed Rule, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

57. *See, e.g., The American Energy Initiative: A Focus on EPA's Greenhouse Gas Regulations: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Energy and Power*, 112th Cong. (June 19, 2012); *EPA Enforcement Priorities and Practices: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Energy and Power*, 112th Cong. (June 6, 2012); *Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?: Hearing Before the H. Comm. on Small Business*, 112th Cong. (June 27, 2012); *Federal Regulation: Economic, Job and Energy Security Implications of Federal Hydraulic Fracturing Regulation: Field Hearing Before the H. Natural Resources Comm., Subcomm. on Energy and Mineral Resources Oversight*, 112th Cong. (May 2, 2012).

bills in order to limit the EPA's ability to implement or enforce certain regulations.⁵⁸

Noteworthy House-passed legislation in the 112th Congress to repeal or lessen the burden of EPA energy-related regulations include: H.R. 910, the Energy Tax Prevention Act;⁵⁹ H.R. 2401, the Transparency in Regulatory Analysis of Impacts on the Nation Act;⁶⁰ H.R. 2273, the Coal Residuals Reuse and Management Act;⁶¹ H.R. 2250, the EPA Regulatory Relief Act;⁶² and H.R. 4471, the Gasoline Regulations Act.⁶³

The Senate did not bring up for consideration any of the House-passed bills to delay EPA regulations or otherwise limit EPA authority. Senator Inhofe (R-OK) attempted to use the Congressional Review Act (CRA) to block the EPA's Utility MACT rule,⁶⁴ but this attempt failed by a vote of 46-53.⁶⁵

IX. KEYSTONE XL PIPELINE

Pursuant to authorizations granted by federal, state, and Canadian authorities, TransCanada Pipelines Limited constructed, and in 2010 began to operate, the Keystone crude oil pipeline beginning in Alberta and extending across the U.S.-Canadian border to Patoka, Illinois.⁶⁶ In 2011, an extension from Steele City, Nebraska to Cushing, Oklahoma went into operation.⁶⁷ The Keystone pipeline carries synthetic crude oil derived from the vast oil sands deposits in the Western Canadian Sedimentary Basin.⁶⁸

In 2008, TransCanada proposed an expansion project, the Keystone XL pipeline, which would extend from Alberta through North Dakota and Nebraska and on to the Texas Gulf Coast refinery markets.⁶⁹ Because the siting and permitting of crude oil and products pipelines is vested in the states, the proposed Keystone XL project did not require any authorization from the

58. See, e.g., Leslie Kaufman, *Republicans Seek Big Cuts in Environmental Rules*, N.Y. TIMES (July 27, 2011), <http://www.nytimes.com/2011/07/28/science/earth/28enviro.html>; Erik Wasson, *Appropriators Send Bill Slashing EPA to Floor*, THE HILL (June 28, 2012), <http://thehill.com/blogs/on-the-money/appropriations/235349-appropriators-send-bill-slashing-epa-to-floor>.

59. Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (2011).

60. Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011, H.R. 2401, 112th Cong. (2011).

61. Coal Residuals Reuse and Management Act, H.R. 2273, 112th Cong. (2011).

62. EPA Regulatory Relief Act of 2011, H.R. 2250, 112th Cong. (2011).

63. Gasoline Regulations Act of 2012, H.R. 4471, 112th Cong. (2012).

64. S.J. Res. 37, 112th Cong. (2012).

65. 158 CONG. REC. S4334 (daily ed. June 20, 2012) (Rollcall Vote No. 139 Leg.).

66. Press Release, TransCanada, *Keystone Pipeline Starts Deliveries to U.S. Midwest* (June 30, 2010), available at <http://www.transcanada.com/5407.html>.

67. *Keystone Oil Pipeline*, TRANSCANADA: UPDATE MAGAZINE (last visited Oct. 7, 2012), <http://www.transcanada.com/customers/express/update/learning-centre/keystone>.

68. PAUL W. PARFOMAK ET AL., CONG. RESEARCH SERV., R41668, *KEYSTONE OIL PIPELINE PROJECT: KEY ISSUES 4* (2012); JONATHAN L. RAMSEUR ET AL., CONG. RESEARCH SERV., R42611, *OIL SANDS AND THE KEYSTONE XL PIPELINE: BACKGROUND AND SELECTED ENVIRONMENTAL ISSUES 12-13* (2012).

69. TransCanada Keystone, L.P., *Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border* (Sept. 19, 2008) [hereinafter *2008 Keystone Application*], available at <http://keystonepipeline-xl.state.gov/documents/organization/181769.pdf>.

FERC.⁷⁰ However, because the project proposed an energy facility crossing the United States border, a Presidential permit under Executive Order 13,337 (2004) would be required to construct and operate the border facilities.⁷¹ The President has delegated this authority to make a “national interest” determination on such facilities to the Department of State.⁷² In September 2008, TransCanada submitted an application for authorization to the State Department.⁷³ In April 2010, the State Department issued a Draft Environmental Impact Statement,⁷⁴ followed by a Supplemental Environmental Impact Statement in April 2011⁷⁵ and a Final Environmental Impact Statement in August 2011.⁷⁶

The Keystone XL project drew significant public opposition for a variety of reasons. Concerns were expressed about the possibility of spills in the wake of a series of such incidents in connection with other oil pipelines over the preceding several years.⁷⁷ There were also concerns that the production of synthetic crude oil from oil sands results in significant carbon emissions, and those who believe that the nation should reduce its carbon footprint objected to the significant emissions that would occur in Canada from production of the oil sands crude.⁷⁸ Also, the original route of the proposed pipeline would have crossed the Ogallala aquifer in Nebraska, believed to be a particularly environmentally sensitive area.⁷⁹ Advocates of the project have emphasized the jobs that would be created by the construction and operation of the pipeline as well as the role that it would play in reducing the nation’s dependence upon foreign crude oil.⁸⁰

In June 2011, the House Energy and Commerce Committee approved H.R. 1938, the North American Made Energy Security (NAMES) Act, which would

70. ADAM VANN ET AL., CONG. RESEARCH SERV., R42124, PROPOSED KEYSTONE XL PIPELINE: LEGAL ISSUES 14 (2012).

71. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004).

72. *Id.* § 1(g).

73. 2008 *Keystone application*, *supra* note 69.

74. U.S. DEP’T OF STATE, DRAFT ENVTL. IMPACT STATEMENT FOR THE KEYSTONE XL OIL PIPELINE PROJECT (Apr. 16, 2010), available at http://keystonepipeline-xl.state.gov/archive/dos_docs/deis/index.htm.

75. U.S. DEP’T OF STATE, SUPPLEMENTAL DRAFT ENVTL. IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT (Apr. 22, 2011), available at http://keystonepipeline-xl.state.gov/archive/dos_docs/sdeis/index.htm.

76. U.S. DEP’T OF STATE, FINAL ENVTL. IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT (Aug. 26, 2011), available at http://keystonepipeline-xl.state.gov/archive/dos_docs/feis/index.htm.

77. See, e.g., Elana Schor, *Keystone XL Pipeline Fight Flares in Wake of Yellowstone River Oil Spill*, N.Y. TIMES (July 7, 2011), <http://www.nytimes.com/gwire/2011/07/07/greenwire-keystone-xl-pipeline-fight-flares-in-wake-of-y-82578.html>; Dan Frosch & Janet Roberts, *Pipeline Spills Put Safeguards Under Scrutiny*, N.Y. TIMES (Sept. 9, 2011), http://www.nytimes.com/2011/09/10/business/energy-environment/agency-struggles-to-safeguard-pipeline-system.html?pagewanted=all&_r=0.

78. See, e.g., Editorial, *Tar Sands and the Carbon Numbers*, N.Y. TIMES (Aug. 21, 2011), <http://www.nytimes.com/2011/08/22/opinion/tar-sands-and-the-carbon-numbers.html>; Christa Marshall, *Debate Intensifies Over Climate Change Aspects of Canada Oil Sands Pipeline*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/cwire/2011/07/25/climatewire-debate-intensifies-over-climate-change-aspec-46622.html?pagewanted=all>.

79. See, e.g., Steven Mufson, *Keystone XL Pipeline May Threaten Aquifer That Irrigates Much of the Central U.S.*, WASH. POST (Aug. 6, 2011), http://www.washingtonpost.com/national/health-science/keystone-xl-pipeline-may-threaten-aquifer-that-irrigates-much-of-the-central-us/2012/08/06/7bf0215c-d4db-11e1-a9e3-c5249ea531ca_story.html?wpisrc=nl_wonk.

80. See, e.g., Robert Samuelson, *Rejecting the Keystone Pipeline is an Act of Insanity*, WASH. POST (Jan. 19, 2012), http://www.washingtonpost.com/opinions/rejecting-the-keystone-pipeline-is-an-act-of-insanity/2012/01/19/gIQAwG6AQ_story.html.

have required the President to act on the Keystone XL application by November 1, 2011.⁸¹ In July 2011, the bill passed the House of Representatives, but no action was taken on it in the Senate.⁸²

In November 2011, the State Department announced that a decision on the project would not be made until 2013 in order to consider alternative routes through Nebraska and to assess the impact of the pipeline upon climate change.⁸³

In December 2011, however, Congress passed H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011, temporarily extending a reduction of payroll taxes set to expire at the end of 2011.⁸⁴ The act contained a mandate that the State Department and the President render a decision upon the Keystone XL application no later than February 21, 2012.⁸⁵ Citing the inability to render a considered national interest determination by that deadline, the State Department denied the application on January 18, 2012, a result that was endorsed by the President.⁸⁶ However, the denial made clear that it was without prejudice to consideration of a subsequent application.⁸⁷

In December 2011, H.R. 3548, the North American Energy Access Act, was introduced in the House of Representatives.⁸⁸ It would vest jurisdiction over the Keystone XL project in the FERC with a requirement that the Commission approve an application within thirty days if it were deemed safe.⁸⁹ H.R. 3548 was approved by the House Energy and Commerce Committee in February 2012 by a vote of 33 to 20.⁹⁰

The transportation bill became the next major vehicle for attempts to expedite approval of the Keystone XL project. On April 18, 2012, the House passed a transportation bill that included a Keystone provision.⁹¹ On the Senate side, attempts were also made to reverse the President's decision on Keystone XL through amendments to the transportation bill, but those amendments were

81. North American-Made Energy Security Act, H.R. 1938, 112th Cong. (2012).

82. 157 CONG. REC. H5538 (daily ed. July 26, 2011) (Roll No. 650).

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

84. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280 (2011).

85. *Id.* § 501.

86. Public Notice, In the Matter of the Keystone XL Pipeline, 77 Fed. Reg. 5614 (Dep't of State Feb. 3, 2012).

87. *Id.*; See also Media Note, U.S. Dep't of State, Office of the Spokesperson, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm> ("The Department's denial of the permit application does not preclude any subsequent permit application or applications for similar projects.").

88. North American Energy Access Act, H.R. 3548, 112th Cong. (2011).

89. *Id.* § 3.

90. Press Release, Energy & Commerce Comm. Approves Legislation to Save Job-Creating Keystone XL Pipeline With Bipartisan Vote (Feb. 7, 2012), available at <http://energycommerce.house.gov/press-release/energy-and-commerce-committee-approves-legislation-save-job-creating-keystone-xl>.

91. Surface Transportation Extension Act of 2012, Part II, H.R. 4348, 112th Cong. (2012); 158 CONG. REC. H1961 (daily ed. April 18, 2012) (Roll No. 170).

defeated.⁹² On July 6, 2012, the President signed the transportation bill, but it included no Keystone provision.⁹³

In light of these various developments, TransCanada announced in February 2012 that it was going forward with its Gulf Coast Project, beginning in Cushing, Oklahoma and with a terminus at Gulf Coast refinery markets.⁹⁴ As this project would not cross the U.S. border, it would not require a national interest determination and permit under the Executive Order.⁹⁵

In March 2012, the President issued Executive Order No. 13,604.⁹⁶ The order requires agencies to identify, by April 30, 2012, critical infrastructure projects under review, formulate plans to expedite those reviews, and publicly report their plans.⁹⁷ In June 2012, the President issued further guidance on implementing the Executive Order.⁹⁸ Concomitantly, the President directed agencies to expedite the permitting process for the Gulf Coast Project.⁹⁹

In May 2012, TransCanada submitted a new application for a Presidential permit for the Keystone XL project.¹⁰⁰ The revised application sought approval for the border-crossing facilities for a pipeline beginning at the Montana-Canadian border and with a terminus at Steele City, Nebraska.¹⁰¹ The revised Keystone XL project would ultimately include an alternative routing through Nebraska.¹⁰² It would also accept crude oil from the rapidly growing U.S. production in the Bakken formation in North Dakota.¹⁰³

92. 158 CONG. REC. S1530 (Mar. 8, 2012) (Rollcall Vote No. 34 Leg.); *see also* Ben Geman & Josiah Ryan, *Senate Rejects Keystone in 56-42 Vote*, THE HILL (Mar. 8, 2012), <http://thehill.com/blogs/e2-wire/e2-wire/215051-senate-blocks-keystone-pipeline-approval-plan>.

93. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012).

94. Press Release, TransCanada, TransCanada Set to Re-Apply for Keystone XL Permit Proceeding with Gulf Coast Project (February 27, 2012), *available at* <http://www.transcanada.com/5966.html>.

95. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004).

96. Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

97. *Id.* §§ 2(c), 3.

98. Exec. Order No. 13,616, 77 Fed. Reg. 36,903 (June 20, 2012).

99. Memorandum for the Heads of Executive Departments and Agencies, Expediting Review of Pipeline Projects From Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Projects, 77 Fed. Reg. 18,891 (Mar. 28, 2012).

100. Public Notice, Application for Presidential Permit To Construct, Operate and Maintain Pipeline Facilities on the Border of the United States, 77 Fed. Reg. 27,533 (Dep't of State May 10, 2012); TransCanada Keystone, L.P., *Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border* (May 4, 2012) [hereinafter *2012 Keystone Application*], *available at* <http://keystonepipeline-xl.state.gov/documents/organization/189504.pdf>.

101. *2012 Keystone Application*, *supra* note 100, at 1.

102. *Id.* at 3.

103. *Id.* at 7-8.

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