

**Statement of  
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**Before the  
House Energy and Commerce Committee  
Subcommittee on Energy and Power**

**H.R. 3548, North American Energy Access Act**

**February 3, 2012**

**Introduction**

Thank you for inviting the Department of the Interior to this hearing on H.R. 3548, the North American Energy Access Act, directing the Federal Energy Regulatory Commission (FERC) to approve the Keystone XL Pipeline Project. The Department has concerns with several provisions of this legislation.

As discussed in detail at the January 25, 2012, hearing before this Committee, the Keystone XL project is a proposed seven billion dollar, 1,704-mile oil pipeline between Hardisty, Alberta, Canada, and multiple destinations in Oklahoma and Texas. The project crosses the U.S. border with Canada, and is proposed by TransCanada Keystone Pipeline LP. Pursuant to Executive Order 13337, the State Department is empowered to receive applications for Presidential Permits for all oil infrastructure projects that cross U.S. borders and to determine whether those permits should be granted based upon whether it is in the national interest.

The State Department received the application for this project in September 2008 and, following receipt of the application, State began a process to determine whether issuance of a Presidential Permit for this pipeline was in the national interest. The Executive Order directs the Secretary of State to consult with eight other agencies, including the Department of the Interior, during its analysis.

**Department of the Interior Role in EIS**

Among other interests, of particular relevance to the Department of the Interior, the proposed 1,704 mile route of the Keystone pipeline crosses through eastern Montana for 228 miles, including approximately 42 miles of scattered and non-contiguous Bureau of Land Management (BLM)-managed parcels of land. Keystone has filed applications with the BLM for a pipeline right-of-way across these Federal lands in Montana under section 28 of the Mineral Leasing Act of 1920. The BLM was a cooperating agency with the State Department, as was the U.S. Fish and Wildlife Service and the National Park Service, in the preparation of the Environmental Impact Statement to address the environmental impacts of the proposed pipeline construction and operation activities, including identification of pipeline routes across BLM-managed lands in

Montana that would minimize environmental impacts of pipeline construction. The Final EIS, issued on August 26, 2011, incorporates input from the Department of the Interior.

The BLM has the authority under the Mineral Leasing Act to issue right-of-way grants on public lands for the construction, operation, and decommissioning of crude oil pipelines, pumping stations, access roads, and site improvements. The BLM received additional applications, under the Federal Land Policy and Management Act of 1976, for electrical transmission lines on Federal lands in Montana to supply power to the proposed pumping stations. In addition, the BLM received applications for associated temporary use permits that would allow additional work space during construction on the 42 miles of BLM-managed lands crossed by the Keystone XL project. These permit applications have not been withdrawn, but processing is on hold because they cannot be granted unless they are associated with an active project.

The total permanent right of way on BLM-managed public lands for the Keystone project would be approximately 50 feet wide and comprise a total of approximately 270 acres. Temporary right of way grants for construction purposes would comprise a few hundred additional acres dispersed on the BLM-managed tracts of land, used for a period of not more than three years, and then reclaimed by Keystone. The BLM would issue a separate Record of Decision under its permitting authority to approve or deny any applications for right of way grants on Federal lands in Montana.

### **Other Departmental Cooperation**

Section 7(a)(2) of the Endangered Species Act requires Federal agencies to consult to ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any Federally listed species nor destroy or adversely modify critical habitat. The Fish and Wildlife Service began consultation with the State Department on the Keystone XL project in April 2008, when Keystone sent initial consultation letters to the various agencies including the Service. The State Department issued a final biological assessment in May 2011. On September 23, 2011, the Service transmitted the biological opinion to the State Department concluding that the construction of the Keystone Pipeline is not likely to jeopardize the continued existence of any threatened or endangered species.

On November 14, 2011, Nebraska officials and TransCanada Keystone Pipeline, LP announced that they had reached an agreement whereby TransCanada voluntarily agreed to move its proposed route for the pipeline out of the Nebraska Sand Hills. The State of Nebraska subsequently passed a law (LB 4, signed on November 22, 2011) on the process for reviewing and approving potential routes for the Keystone XL Pipeline, and the Service withdrew its biological opinion at the request of the State Department.

As discussed at the January 25, 2012, hearing before your Committee on this issue, the President concurred with the State Department recommendation that the Keystone XL project would not serve the national interest at this time because the new route for the pipeline through Nebraska had not yet been established, making it impossible to assess the impact of that route and evaluate the associated environmental, health, safety, economic and energy security considerations.

## **H.R. 3548**

H.R. 3548, the North American Energy Access Act, appears to make the Federal Energy Regulatory Commission the sole Federal agency responsible for the project and would mandate, with very short timelines, the issuance of a permit for the construction, operation, and maintenance of the oil pipeline and related facilities by FERC, or, if FERC did not issue a permit within the time frame, a permit is deemed to have been issued. The bill would also make a permit issued under the provisions of the Act the sole authority required to construct, operate, and maintain the pipeline and related facilities.

Thus, if the legislation were enacted, it appears that FERC would become the Federal agency responsible for enforcing laws that Department of the Interior agencies – which have the expertise and authority to carry out these functions – are usually responsible for carrying out during “construction, operation, and maintenance” of a pipeline on Federal lands.

For example, unlike current law, it appears that the language in Section 4 of H.R. 3548 that confers on FERC the sole authority for “construction, operation, and maintenance” of the pipeline through its issuance of the permit would preclude the BLM from issuing any rights-of-way under the Mineral Leasing Act or the Federal Land Policy and Management Act for authorizing and managing construction, operation, maintenance, and decommissioning of the pipeline and related facilities on Federal lands. This departure from current law would also preclude the collection by BLM of rents and other cost recovery related to the pipeline and related rights-of-way on Federal lands.

Moreover, although the legislation appears to preclude issuance and administration by the BLM of these rights-of-way, the bill leaves unclear how the construction, operation, and maintenance process would be carried out on Federal lands and what role, if any, the BLM would have with regard to discharges on Federal lands from the pipeline.

With regard to the Endangered Species Act, Section 7 consultation is carried out in cases of discretionary Federal action. While the legislation notes that modifications to the EIS version of the pipeline are allowed, and the preferred agency alternative in the EIS appears to contemplate a number of variations and minor realignments in the pipeline route, it is the FERC’s determination as to whether the action taken is mandatory or discretionary and, thus, whether consultation would be triggered. We note, however, that absence of Section 7 consultation could leave the permit applicant with no “take” coverage under the ESA for impacts to listed species from construction and operation of the pipeline. Because application of the ESA is not specifically precluded by the bill, it is possible that citizen suit provisions would be available to potential litigants, who could assert take of listed species that might be impacted by the project.

## **Conclusion**

For these reasons the Department of the Interior has significant concerns with H.R. 3548 in addition to those raised by other Federal agencies. Thank you for the opportunity to testify before the Subcommittee. I would be pleased to answer any questions.