



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Keystone Pipeline Alive Despite Permit Denial

By **Dietrich Knauth**

Law360, New York (January 18, 2012, 4:24 PM ET) -- President Barack Obama's politically explosive rejection of TransCanada's proposed Keystone XL pipeline on Wednesday will cause delays, but it won't doom the \$7 billion project in the long run, experts say.

Obama said the denial was not a judgment on the merits of the pipeline, and blamed congressional Republicans for forcing a conflict by legislating an unrealistic 60-day deadline to approve or deny the application. Republicans countered that the project, which has been under review since 2008, should be immediately approved in an effort to add jobs to the foundering U.S. economy.

"The president has said he'll do anything that he can to create jobs," House Speaker John Boehner said. "Today that promise was broken."

The denial was not unexpected for TransCanada. The company said it was disappointed in the decision, but intends to re-apply for permits and remains fully committed to the construction of Keystone XL.

TransCanada's president and CEO Russ Girling said he expects the new application to be processed in an expedited manner that makes use of the work done on the previous application, allowing for an in-service date of late 2014.

"Plans are already under way on a number of fronts to largely maintain the construction schedule of the project," Girling said. "This project is too important to the U.S. economy, the Canadian economy and the national interest of the U.S. for it not to proceed."

The administration's rejection didn't indicate an unwillingness to ultimately greenlight the project, according to Vermont Law School Professor Patrick A. Parenteau.

"I don't think the president and [U.S. Department of State] have varied one bit from what they've said previously," Parenteau said.

A key sticking point for the Obama administration and state of Nebraska was the project's initial plan to install part of the pipeline within Nebraska's environmentally sensitive Sand Hills region, near an underwater reservoir that provides much of the state's irrigation and drinking water.

In November, TransCanada agreed to explore a new route for the pipeline in response to a Nebraska law that ordered the company to build around the region, leading the State Department to a delay its review of the permit until the start of 2013. But Congress, seeking to speed up that timeframe, inserted a 60-day deadline for the decision into a Dec. 23 bill that temporarily extended payroll tax cuts.

White House spokesman Jay Carney called the legislated deadline a "purely partisan effort to score political points."

"As the State Department made clear, 60 days is simply not enough time," Carney said Wednesday. "We don't even have an alternate route identified yet, so how could anyone possibly review it thoroughly in the manner that is expected in this process?"

TransCanada still plans to open the pipeline by 2014, according to a statement released Wednesday. But Parenteau said that timeline was unlikely to hold up in the face of permitting uncertainty and an entrenched opposition.

"You can count on it being subject to legal challenges all along the way — the environmental community is not just going to fold up their tents and go away," Parenteau said

The decision provided ammunition for both sides of the political spectrum. Boehner said the announcement made the U.S. "look weak," while the National Resources Defense Council and Center For Biological Diversity praised the president for standing up to "bullying" tactics by the oil industry.

While the Obama administration's approval seemed to hinge on the Nebraska Sand Hill debate, environmental groups said they will continue to oppose the project on other grounds.

The Natural Resources Defense Council, Center for Biological Diversity and Sierra Club maintain that the pipeline threatens the environment through the risk of a potential spill, and contributes to global warming and U.S. dependence on fossil fuels.

The pipeline will transport oil from Canada's tar sands — a fuel that environmentalists say is dirtier than other fossil fuels because it contains diluted bitumen, a corrosive mixture that raises the risk of spills and emits more toxic fumes and greenhouse gases when burned.

Although Obama's decision won over environmentalists, the administration will have a tough time convincing regular voters that sticking to a lengthy regulatory review is preferable to moving quickly on a project that promises new American jobs and access to oil from a friendly nation, according to Frank Maisano of Bracewell & Giuliani LLP.

"The project should have been approved already," Maisano said. "Process arguments are very hard to win when gas prices are going toward \$4 a gallon this summer."

Jeff Porter, leader of the environmental practice at Mintz Levin Cohn Ferris Glovsky and Popeo PC, said most political observers have already made up their minds about the project's merits, and were unlikely to be swayed by what he characterized as a procedural squabble.

"I don't see anyone gaining a huge advantage out of this announcement," Porter said. "I don't see how they're going to change the view of an independent."

--Editing by John Quinn.