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**STATEMENT TO SECRETARY OF STATE HILARY CLINTON REGARDING
APPROVAL OF THE KEYSTONE XL PIPELINE**

COMMITTEE ON INTERNATIONAL ENVIRONMENTAL LAW

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The New York City Bar Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The Committee on International Environmental Law focuses and deliberates on legal and policy issues relating to the global environment. The Committee respectfully submits this statement to Secretary of State Clinton in order to convey the New York City Bar's position, particularly with respect to international environmental law considerations, regarding the environmental impact review process of the Keystone XL Pipeline that the State Department is currently conducting.

Pursuant to Executive Order 13337, the State Department is authorized to issue a Presidential Permit for transboundary pipeline projects upon a finding that a project is in the national interest.¹ Such a finding must comply with the National Environmental Policy Act (NEPA), which requires the Administration to assess the full environmental costs and consequences of projects prior to undertaking any major federal action that significantly affects the environment.² We have had the opportunity to review the Final Environmental Impact Statement (FEIS) on the Keystone XL Pipeline, issued by the State Department on August 26th.

The Keystone XL Pipeline is one of the most significant transboundary projects to be reviewed under NEPA and Executive Order 13337. The project, if it goes forward, would facilitate the development of significant new sources of fossil fuels, along with concomitant environmental impacts in the United States, Canada and the world, and has the capability to contribute to the creation of significant numbers of new jobs both in the United States and Canada. Not surprisingly, this project has generated significant controversy with reasoned and passionate arguments in support and opposition.

As the New York City Bar Association's Committee on International Environmental Law, we are concerned that the process used to evaluate the pipeline respect and abide by applicable international treaties and relevant United States law and rules. Therefore, we urge that the State Department take the opportunity to fully evaluate pipeline environmental impacts, including cross border environmental impacts, according to applicable treaties, domestic law, case law, regulations and guidance, including but not limited to the United Nations Framework Convention on Climate Change, 771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992), Convention on Nature Protection and Wildlife in the Western Hemisphere, Oct 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force Apr. 30, 1942); Convention Between the United States and Great Britain [on behalf of Canada] for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628 (entered into force Dec. 7, 1916); NEPA and Council on Environmental Quality implementing guidance dated July 1, 1997.

Specifically, we request that the State Department consider the following prior to its determination of whether this pipeline is in the national interest:

1. Climate Change Impacts

We believe it is critical that the full climate change impacts of the Keystone XL Pipeline be sufficiently considered prior to a national interest determination for the Presidential Permit. The current FEIS acknowledges that on a life-cycle basis and when compared with conventional oil, the reliance on tar sands for transportation fuels would likely result in an incremental increase in greenhouse gas (GHG) emissions, largely from the extraction process.³ This is based on the fact that heavier crude such as tar sands takes more energy to produce and emits more GHGs than lighter crude.⁴ The projected expansion of the tar sands mine as a result of the pipeline may also

¹ Exec. Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004).

² National Environmental Policy Act of 1969, Pub. L. No. 94-83.

³ U.S. Department of State, Final Environmental Impact Statement for the Keystone XL Project. August 26, 2011. Executive Summary 15, Section 3.14-52, 55-56 (hereinafter "FEIS")

⁴ FEIS, Section 3.14-65.

affect over 1 million acres of boreal forest⁵ as well as peat land. These effects will not only increase carbon emissions, but also destroy an important carbon sink.

Yet, there is minimal discussion of climate change impacts attributable to the project.⁶ Based on guidance issued by the Council on Environmental Quality in 1997, the State Department is required to analyze reasonably foreseeable transboundary effects of proposed projects in the EIS. This has been confirmed by a recent federal court decision⁷ as well as by decisions of several international tribunals.⁸ The State Department should give the requisite hard look at the transboundary climate change impacts associated with this project. In this regard, we suggest an evaluation of the “social cost of carbon” associated with the project, as recommended by the EPA in its review of the Supplemental Draft Environmental Impact Statement (SDEIS).⁹

In addition, it is important that the Administration seriously consider alternative scenarios, including the “no action” alternative. The FEIS states that the decision whether or not to build the project will not affect the extraction and combustion of tar sands on the global market.¹⁰ One of the key reasons given is the existence of alternative markets; yet the FEIS also recognizes the presence of strong opposition to transporting to the West Coast for export to other countries.¹¹ The FEIS should fully consider all reasonably practicable clean energy and “no action” alternatives that would help meet national energy and climate objectives with minimal environmental impact.

The FEIS should address the environmental impacts of greenhouse gas emissions associated with the entire lifecycle of the project. It should also give serious consideration to clean energy alternatives. This is not only consistent with NEPA, but also with recent federal investments to promote a clean energy economy as well as our international commitments under the United Nations Framework Convention on Climate Change (UNFCCC).¹²

As a party to the UNFCCC, the United States is obligated to perform in good faith the obligations stipulated in the Convention. Among these, Article 4.2(a) requires the United States to “adopt national policies and take corresponding measures on the mitigation of climate change” that “will demonstrate” it is “taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention.”¹³ This provision directly calls on the United States to show progress in achieving the Convention’s goal of stabilizing global greenhouse gas concentrations at a level that would prevent dangerous human interference with the climate system.

⁵ FEIS, Section 3.14-64.

⁶ FEIS, Section 3.14-57, 64.

⁷ *Government of the Province of Manitoba v. Salazar*, 691 F.Supp.2d 37 (2010)

⁸ See *Seabed Disputes Chamber of the Int’l Trib. for the Law of the Sea, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Feb. 1, 2011), paras. 145-147, available at http://www.itlos.org/adv_op_010211.pdf, (citing *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, para. 204 (Int’l Ct. Justice Apr. 20, 2010)).

⁹ Environmental Protection Agency, Comment on Keystone XL Oil Pipeline Project Draft Supplemental Environmental Impact Statement (June 6 2011).

¹⁰ FEIS, Section 3.14-52, 62.

¹¹ FEIS, Section 3.14-62.

¹² United Nations Framework Convention on Climate Change, 771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

¹³ UNFCCC, Article 4.2(a).

At the last Conference of the Parties to the UNFCCC, State Parties recognized “that climate change represents an urgent and potentially irreversible threat to human societies and the plants, and thus requires to be urgently addressed.”¹⁴ In fact, the devastating impacts of climate change are already being felt here and across the world, with extreme weather patterns devastating homes and food production and sea level rise threatening the survival of island nations. We were therefore very encouraged by the statement made recently by US Ambassador Susan Rice recognizing that climate change has very real implications for peace and security,¹⁵ as it demonstrated the seriousness by which the Administration is addressing this global problem.

In light of our international commitments, it is essential that we fully understand the potential climate change impacts of this pipeline prior to a decision whether or not to approve it.

2. Wildlife

We are also concerned that the Keystone XL Pipeline and the resulting expansion of the mining area may have harmful impacts on certain threatened and endangered species, including various species of migratory birds and the woodland caribou, owing to the pollution or destruction of their habitat.¹⁶ We have taken note of the concerns expressed by the EPA and others with respect to the SDEIS.¹⁷ The FEIS acknowledges that “oil sands development alters habitats through land surface alteration including: mine sites, tailings ponds, well sites, industrial roads, pipelines, powerlines, seismic cut lines, and facilities,” and reduces both “the amount and the suitability of adjacent habitat available for migratory birds.”¹⁸

These species are protected under two conventions to which the United States is a party: the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere¹⁹ protects the woodland caribou and migratory whooping crane, and the Convention Between the United States and Great Britain [on behalf of Canada] for the Protection of Migratory Birds²⁰ protects the migratory whooping crane as well as several other migratory birds that may be affected by the project. We are therefore concerned that this project may weaken the effectiveness of these international conventions in protecting threatened and endangered species. We urge the Administration to properly consult on the impacts this project may have on threatened and endangered species in order to clarify the full extent of impacts and whether alternatives are needed to ensure their protection.

¹⁴ Decision 1/CP.16, pmb1 (December 2010).

¹⁵ Remarks by Amb. Susan E. Rice, U.S. Permanent Representative to the United Nations, at a Security Council Session on the Impact of Climate Change on the Maintenance of International Peace and Security, July 20 2011, available at <http://usun.state.gov/briefing/statements/2011/168828.htm>.

¹⁶ FEIS, Executive Summary p.20; Section 3.14-66.

¹⁷ EPA Comment on SDEIS, at 7-8; FEIS Section 3.14-62 (recognizing the controversy over environmental impacts to wildlife, boreal forests, threatened and endangered species, and water resources related to oil sands production)..

¹⁸ FEIS, Section 3.14-65.

¹⁹ Convention on Nature Protection and Wildlife in the Western Hemisphere, Oct 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force Apr. 30, 1942).

²⁰ Convention Between the United States and Great Britain [on behalf of Canada] for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628 (entered into force Dec. 7, 1916).

The New York City Bar shares the commitment of the Administration to build the foundation for a clean energy economy, tackle the issue of climate change, and protect our environment. We greatly appreciate the opportunity to express our thoughts regarding the Department of State's environmental impact review and considerations of international environmental law in the Secretary's upcoming determination on whether the Keystone XL Pipeline would be in the national interest.

Respectfully,

Committee on International Environmental Law
New York City Bar Association