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VIA ELECTRONIC MAIL

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**RE: Sierra Club Comments Regarding Eversource Application for Section 401
Water Quality Certification for Pomfret to Killingly Pipeline Project, No.
202001005-WQC**

Mr. Ericson:

The Sierra Club respectfully submits the following comments to the Department of Energy and Environmental Protection ("DEEP") regarding Application No. 202001005-WQC for Section 401 Water Quality Certification for the Pomfret to Killingly Pipeline Project, in response to DEEP's December 22, 2020 Notice of Tentative Determination to Approve an Application for 401 Water Quality Certification. These comments incorporate and build on several earlier communications from Sierra Club to DEEP about Eversource's application including submissions dated June 9, 2020, June 30, 2020, October 7, 2020, and November 18, 2020, included as attachments to this letter.

Sierra Club urges DEEP to deny 401 certification with prejudice for the Pomfret to Killingly pipeline, as the proposed pipeline would cause violations of the state's water quality standards, and the conditions in the draft certification cannot adequately protect Connecticut's streams, wetlands, aquatic ecosystems and wildlife. Alternatively, Sierra Club urges DEEP to deny certification without prejudice and permit Eversource to reapply for certification in order to allow time to fully review the project's impacts and provide stronger protections for the state's water quality and wildlife. In any case, DEEP must act by January 14, 2021 to preserve the legal force and effect of any certification determination or conditions. If DEEP acts after this date, the agency will have waived its statutory right and abandoned its obligation to weigh in under Section 401. Given that DEEP appears poised to miss this critical deadline, Sierra Club requests a meeting with the Department and its counsel as soon as possible, and no later than January 12, 2021.

As detailed in the comments below and in the enclosed supplemental report prepared by Downstream Strategies ("Downstream Supplemental Report"), the draft certificate conditions leave several critical issues raised by Sierra Club and Downstream Strategies in prior

submissions to DEEP unaddressed. Primarily, the draft certificate fails to address the following impacts of the proposed pipeline:

- (1) Ephemeral streams and vernal pools that may be polluted by pipeline construction are not addressed by the draft certification, and mitigation measures are not included for the 17,424 square feet of forested wetlands that will be permanently converted and 3 acres of wetlands that will be temporarily impacted by pipeline construction;
- (2) Erosion and sedimentation resulting from pipeline construction in areas with steep slopes and highly erodible soil pose a significant risk to water quality and will cause violation of water quality standards for suspended and settleable solids, silt or sand deposits, turbidity, and biological condition even with best management practices identified and conditions imposed;
- (3) Pipeline construction would degrade water quality in several streams in the Durkee Brook watershed, causing cumulative damage to Durkee Brook and jeopardizing the continued viability of Durkee Brook's Brook trout population;
- (4) Risks of inadvertent returns from horizontal directional drilling under the Quinebaug River and under a tributary of Bark Meadow Brook are not adequately addressed by the certification;
- (5) Pipeline construction would destroy habitat for the state-listed endangered Northern long-eared owl and no acknowledgment of the presence of this species or protective measures for this species are included in the draft certification;
- (6) Habitat for state-listed endangered American bittern would likely be degraded or lost due to pipeline construction, as the provisions included in the draft certification necessary to protect such habitat are impossible to implement;
- (7) Other species are left vulnerable or wholly unprotected by the draft certification, including the Northern long-eared bat, Eastern box turtle, and wood turtle; and
- (8) A complex construction schedule will be required to adequately protect species and water resources threatened by pipeline construction, and the draft certification does not sufficiently address the challenge and additional impacts of meeting that schedule.

Approval of the proposed pipeline risks harm to Connecticut's rivers, streams, and wetlands that support state-listed endangered species. DEEP should deny certification to the pipeline because even with implementation of certification conditions the project will violate Connecticut's water quality standards. Alternatively, at a minimum DEEP should deny certification for the project without prejudice and allow Eversource to reapply to ensure adequate time for the agency to fully evaluate and address the damage that would be caused by the proposed pipeline. As explained more fully below, DEEP must take either of these actions before the January 14, 2021 deadline, as DEEP will forfeit its authority to protect the state's waters in relation to this project after that date.

I. Background

On January 14, 2020 Eversource filed an application with DEEP for certification under Section 401 of the Clean Water Act for a proposed 2.8-mile gas pipeline in Windham County, Connecticut, running from Wrights Crossing Road in Pomfret to Lake Road in Killingly. Eversource Energy Service Company, Application for a Section 401 Water Quality Certification

for the Pomfret to Killingly Pipeline Project (January 2020), p. 20 [hereinafter *Eversource Application*]. Eversource also seeks approval under General Permit 6 from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, triggering its obligation to obtain certification from DEEP under Section 401. *Id.* at 2. The proposed 16-inch pipeline would run parallel to an existing 6-inch welded steel gas pipeline constructed in the 1950s and would be sited within or adjacent to the right-of-way for the existing pipeline. *Id.* at 20. The proposed gas pipeline would connect a proposed 650 MW gas-powered electricity facility to the gas distribution system. *Id.*

The proposed pipeline route crosses seven watercourses, including the Quinebaug River, five intermittent streams, and a pond. *Id.* at 190. The length of the proposed pipeline is contained within the Durkee Brook watershed, running parallel to the watercourse for 2.5 miles. Downstream Strategies, *Potential Impacts from Eversource's Proposed Pomfret to Killingly Pipeline Project* (June 3, 2020), at 20 [hereinafter *Downstream Report*]. Five of the watercourses crossed by the proposed pipeline route are tributaries of Durkee Brook, forming headwaters of the stream. *Id.* Durkee Brook is especially valuable as habitat for brook trout, which populate the watercourse according to DEEP fisheries data. Connecticut Environmental Conditions Online, *Connecticut DEEP Fish Community Data-Inland Waters Interactive map*, <https://cteco.uconn.edu/projects/fish/viewer/index.html> (2015). Eversource has proposed the use of horizontal directional drilling under the Quinebaug River for approximately 600 feet, 195 feet of which would be under the river itself. *Eversource Application* at 168, 190. The proposed project would also cross a tributary to Bark Meadow Brook adjacent to the Airline State Park trail via horizontal directional drilling, which would necessitate 210 feet of drilling. *Id.* at 168. Eversource proposes to cross all other watercourses using a dam and pump method or flume method, to be determined at the time of construction. *Id.* at 103.

The project would also cross fourteen wetlands, twelve of which are delineated in the application as federal jurisdictional wetlands, while one qualifies as a State-regulated wetland based on its floodplain soils. *Eversource Application*, at 210. Eleven of the wetlands crossed by the proposed pipeline are in the Durkee Brook watershed. *Downstream Report*, at 2. Among the wetlands crossed by the proposed pipeline is Wyndham marsh, a 65-acre marsh located on the Wyndham Land Trust. *Downstream Report*, at 25; Email from Min Huang, Migratory Bird Program Leader, DEEP, *Re: Water Control System—Wyndham Marsh*, May 16, 2020. This wetland previously supported nesting for populations of American bittern, sora, and Virginia rail, and at present supports nesting waterfowl. Email from Min Huang, Migratory Bird Program Leader, DEEP, *Re: Water Control System—Wyndham Marsh*, May 19, 2020. DEEP is currently engaged in a permitting process to install a water control system to restore this marsh and to reestablish breeding habitat for the state-listed endangered American bittern and other bird species. *Id.*

Eversource predicts that tree clearing within wetlands would result in 17,424 sf (0.40 acres) of permanent wetland conversion. *Eversource Application*, at 20. Eversource further predicts that the project would result in temporary direct wetland impacts totaling 16,416 square feet (0.38 acres) during construction from trenching, backfilling, and restoration, and an additional 121,479 square feet (2.79 acres) of temporary timber matting. *Id.* Eversource

anticipates approximately 5,248 cubic yards of temporary discharge but no permanent fills to wetlands or watercourses. *Id.*

On December 22, 2020, DEEP issued a Notice of Tentative Determination to Approve an Application for 401 Water Quality Certification and a draft certification for the pipeline, inviting public comment on the determination through January 21, 2021. The draft certification includes limited conditions to address impacts of the proposed pipeline, including restrictions on: construction activity in wetlands during American bittern breeding season; alterations to large marsh complexes; digging in upland forested areas, river banks, and river bottoms during winter months to protect the Eastern box turtle and wood turtle; unconfined watercourse work outside of summer months to protect inland fisheries resources; and impacts to one vernal pool in the proposed pipeline path. As discussed below, among other shortcomings, the draft certificate does not include protections for the Northern long-eared owl, Northern long-eared bat, and five vernal pools in the proposed pipeline's path.

II. DEEP's deadline to take legally effective action on the Pomfret to Killingly pipeline is January 14, 2021

Under Section 401 of the Clean Water Act, the deadline for a state agency to issue a decision on an application for certification is one year from the date the application was received, or the state waives the opportunity to limit a project's impact on water quality. 33 U.S.C. § 1341 ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.") (emphasis added). This deadline may not be tolled, even if a state deems an application incomplete. *New York State Dep't of Env'tl. Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450 (2d Cir. 2018) [hereinafter *NYSDEC v. FERC*] (holding that the deadline for action under Section 401 is one year from the date the state agency received the request for certification, regardless of when the state determines the application is complete).¹ If a state agency fails to act within the one-year deadline, the permitting federal agency may issue the relevant permit and any denial or conditions issued by the state agency after the federal deadline will have no legal effect. *See e.g., Puerto Rico Sun Oil Co. v. U.S. E.P.A.*, 8 F.3d 73, 79-80 (1st Cir. 1993).

Eversource submitted its application for certification on January 14, 2020. This means that January 14, 2021 is the deadline for DEEP to act on Eversource's application for certification under Section 401 of the Clean Water Act. Although DEEP issued a Notice of Insufficiency on July 16, 2020, *NYSDEC v. FERC* expressly holds that such action does not toll the one-year deadline set forth in Section 401. 884 F.3d at 455. If DEEP fails to issue a final determination by January 14, 2021 then it will be deemed to have waived the opportunity to weigh in under Section 401 and the relevant permit will be issued under Section 404 of the Clean

¹ *See New York State Dep't of Env'tl. Conservation v. Fed. Energy Regulatory Comm'n*, at 455 ("[NYDEC] contends that the review process under Section 401 begins only once it, a state agency, deems an application 'complete.' FERC, on the other hand, argues that the one-year review period commences when the Department receives a request for water quality certification. We agree with FERC.").

Water Act. *See Puerto Rico Sun Oil Co.*, at 79-80. Any conditions DEEP places in a 401 certification issued after the January 14, 2021 deadline will have no legal effect. *See id.*

III. DEEP should deny certification for the pipeline, as the pipeline will damage wetlands, streams, and wildlife in violation of the Connecticut water quality standards, and the conditions in the draft certification do not adequately protect the state's water quality

Connecticut's water quality standards protect "rivers and streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs, federal jurisdictional wetlands, and other natural or artificial, public or private, vernal or intermittent bodies of water." Conn. Agencies Regs. § 22a-426-1(60). The antidegradation policy for these waterways dictates that "existing and designated uses such as propagation of fish, shellfish and wildlife, recreation, public water supply, and agriculture, industrial use and navigation, and the water quality necessary for their protection are to be maintained and protected." Conn. Agencies Regs. § 22a-426-8. The antidegradation policy further states that "[t]he Commissioner shall not issue any permit, water quality certificate or authorization for a discharge or activity unless the Commissioner finds that all existing and designated uses... will be fully protected." *Id.* Durkee Brook and its tributaries are designated Class A waters, with the following designated uses: (1) habitat for fish and other aquatic life and wildlife, (2) potential drinking water supplies, (3) recreation, (4) navigation, and (5) water supply for industry and agriculture. *See* DEEP, Water Quality Classifications, Killingly, CT Map (October 2018); Conn. Agencies Regs. § 22a-426-4. The Quinebaug River has been designated as a Class B surface water, which has the same designated uses as Class A waters with the exception of potential drinking water supply. *Id.* The regulations include standards for suspended and settleable solids, silt or sand deposits, turbidity, and biological condition of surface waters, among others, dictating that these characteristics shall not exceed levels necessary to protect and maintain all designated uses. Conn. Agencies Regs. § 22a-426-9(a)(1).

The conditions in the draft certification fail to uphold these water quality standards and are inadequate to protect rivers, streams, wetlands, and wildlife from degradation. Standards for suspended and settleable solids, silt or sand deposits, turbidity, and biological condition in Durkee Brook and its tributaries are likely to be violated by construction of the proposed pipeline. Downstream Strategies, *Supplemental Report: Potential Impacts from Eversource's Proposed Pomfret to Killingly Pipeline Project* (January 8, 2021) [hereinafter *Downstream Supplemental Report*]. Pipeline construction would further result in loss of habitat for fish and other aquatic life and wildlife—a protected designated use under the Connecticut water quality standards. *Id.* Among the species that would be harmed by construction are state-listed endangered and special-concern species such as the American bittern, Northern long-eared owl, Northern long-eared bat, wood turtle, and Eastern box turtle. *Id.* The project is fundamentally damaging to Connecticut's water quality and certification for the project under Section 401 should be denied.

A. Ephemeral streams, vernal pools, and mitigation requirements are not addressed by the draft certification

The draft certification fails to provide protection for ephemeral streams and vernal pools that may be polluted by pipeline construction, and fails to require mitigation measures for the wetlands and vernal pools that will be impacted. *Downstream Supplemental Report*, at 5-6. Vernal and intermittent waters are protected under the Connecticut Water Quality standards but are left vulnerable to degradation by the draft certification, including five vernal pools Eversource identified in its application that are not addressed. See Conn. Agencies Regs. § 22a-426-1(60); *Downstream Supplemental Report*, at 6. Ephemeral streams flow into larger streams, such as Durkee Brook, and transport sediment and other pollution to downstream waterways, meaning damage to these watercourses may lead to further water quality standard violations downstream. *Id.* at 5. Further, no mitigation measures are included for vernal pools or for the 17,424 square feet of forested wetlands that will be permanently converted and for the three acres of wetlands that will be temporarily impacted by pipeline construction. *Downstream Supplemental Report*, at 5. The draft certification leaves these resources vulnerable to damage and is inconsistent with Connecticut's water quality standards.

B. The draft certification does not adequately address the effects of erosion and sedimentation, which would impact several streams in the Durkee Brook watershed and cause cumulative damage to Durkee Brook and jeopardize the continued viability of Durkee Brook's Brook trout population, in violation of water quality standards

Erosion and sedimentation resulting from pipeline construction pose a significant risk to water quality. *Downstream Supplemental Report*, at 7. As explained by Downstream Strategies, "stream and wetland crossings, extensive use of construction mats in wetland areas, and disturbance of streambanks and upland areas from pipeline construction will cause erosion" that would increase sediment delivery to streams and wetlands. *Downstream Report*, at 2-3. The impact of erosion and sedimentation would be "additional suspended and settleable solids, silt or sand deposits, increased turbidity, and impacts to aquatic habitat that would harm the biological condition of the surface waters." *Id.* at 5. These impacts would be further exacerbated by areas with steep slopes and highly erodible soil along the pipeline route, as 55% of the pipeline corridor contains soil with high erosion potential and five of the proposed stream crossings are within these severe erosion zones. *Id.* at 14. These water quality impacts would persist over the 18 to 24-month construction timescale of the project and beyond, as areas cleared for construction will continue to cause increased sedimentation to waterways until these areas are fully revegetated. *Id.* at 20. Additionally, the cleared pipeline path could increase the speed of runoff compared to thick woody cover from trees and shrubs, a long-term impact which Downstream Strategies explained "can increase flows in streams during storm events, which can exacerbate existing streambank erosion problems or create new streambank instability." *Id.*

Erosion and sedimentation from pipeline construction would cause cumulative damage to the hydrology of Durkee Brook and its tributaries in violation of Connecticut's water quality standards. Although the proposed pipeline does not cross Durkee Brook, the watercourse would be significantly impacted by sedimentation caused by construction of the proposed pipeline.

Downstream Report, at 21-23. The watercourse runs parallel to the proposed pipeline route for 2.5 miles and is located within approximately 150 feet and downgradient from the construction right-of-way, meaning that any dislodged soil would flow down to Durkee Brook. *Id.* at 20-21. Further, the length of the proposed pipeline is within the Durkee Brook watershed and the pipeline will cross five tributaries to Durkee Brook, making up headwaters of the stream.² *Id.* Such headwater streams “directly impact the integrity of downstream water resources.” *Id.* The impacts of the proposed stream crossings and construction activities would be concentrated in Durkee Brook because water from each crossing converges downstream, increasing impacts to downstream waterways. *Id.* As concluded by Downstream Strategies, “[t]hese five crossings are likely to have cumulative impacts with significant delivery of sediment to Durkee Brook.... sediment introduced to headwaters streams and tributaries to Durkee Brook will likely lead to violations of water quality standards—including narrative standards for suspended and settleable solids, silt or sand deposits, turbidity, and biological condition.” *Id.*

This process of erosion and sedimentation would harm brook trout populations, impairing the designated use of Durkee Brook as fish and wildlife habitat. *Downstream Report*, at 20-23. As Downstream Strategies concluded in its initial report, “[e]rosion and resulting sedimentation in Durkee Brook... pose a significant risk to water quality and trout habitat.” *Id.* at 20. Increased sedimentation negatively impacts brook trout populations because fine sediments can smother fish eggs and aquatic invertebrates that trout rely on for food. *Id.* Fine sediments also cause alterations to the streambed, covering the gravel and small cobble substrates used by trout for depositing their eggs. *Id.* Further, temporary increases in turbidity can reduce dissolved oxygen levels in the water, impeding trout from finding food and avoiding predators. *Id.* In addition, removal of tree cover in riparian zones and wetlands that feed small streams contributes to increased water temperatures and reduced oxygen levels in the water. *Id.* Such impacts would violate Connecticut water quality standards, threatening the designated use of Durkee Brook as brook trout habitat. *Id.*

The conditions in the draft certificate do little to alleviate these harms and leave Durkee Brook and its brook trout population vulnerable to water quality standard violations. *Downstream Supplemental Report*, at 11-12. While General Condition 10 purports to strictly limit pollution in wetlands and streams, declaring that an activity which inherently causes sedimentation and erosion shall not have those impacts is not a meaningful protection against degradation of water quality. As concluded by Downstream Strategies, this condition is “likely impossible to comply with,” rendering the condition “not meaningful.” *Id.* at 4.

Even with more attainable certification conditions, water quality standards in Durkee brook and its tributaries would likely be violated. *Downstream Report*, at 20. Construction activities cause erosion and sedimentation even when best management practice are used. *Downstream Report*, at 10. Given the pipeline route, which includes seven stream, river, and pond crossings, as well as 14 wetland crossings, and the steep terrain in the area, adverse impacts to water quality cannot be avoided and water quality standards cannot be maintained. As explained by Downstream Strategies, “[r]egardless of method used and care taken during

² Two of these tributary crossings are just upstream from their confluences with Durkee Brook, making sediment delivery to Durkee Brook exceedingly likely. *Downstream Report*, at 21. Three crossings are on tributaries that combine to form a main tributary to Bark Meadow Brook, the largest tributary to Durkee Brook. *Id.*

construction, crossings disturb streambanks, streambeds, and wetland soils, causing a marked increase in sedimentation and turbidity.” *Id.* “Even with the proper installation and maintenance of erosion and sediment control [best management practices], water quality standards are likely to be violated and trout habitat is likely to be damaged.” *Downstream Report*, at 20. Given the significant water quality impacts that cannot be avoided by best management practices, DEEP should find that this project is inconsistent with Connecticut’s water quality standards and should not grant certification under Section 401.

C. Potential inadvertent returns from horizontal directional drilling under the Quinebaug River and under a Bark Meadow Brook tributary are not adequately addressed by the certification and introduce risk of additional water quality standard violations

Proposed horizontal directional drilling under the Quinebaug River and the Bark Meadow Brook tributary introduce the risk of inadvertent returns of drilling fluid to the ground or surface water at the drill site. *Downstream Supplemental Report*, at 10-11. While the draft certification requires Eversource to implement the “typical inadvertent return plan” submitted in its application, it fails to require any site-specific inadvertent return plans or fluid loss response plans. *Id.* Inadvertent returns of drilling fluid and runoff from work areas could introduce polluted water into streams, rivers, and wetlands, causing violations of the Connecticut water quality standards. *Downstream Report*, at 18. Risk of inadvertent returns exists even when preventative measures are taken, and the certification does not include requirements to adequately protect water quality and avoid violation of water quality standards should inadvertent returns occur. *Downstream Supplemental Report*, at 11.

As detailed in Downstream Strategies’ initial report, horizontal directional drilling-related fluid spills have contaminated streams and wetlands during construction of numerous pipeline projects, including during construction of the Mariner East II Pipeline in Pennsylvania and the Rover Pipeline in Ohio, Pennsylvania, and West Virginia, spilling millions of gallons of drilling fluid into multiple waterways. *Downstream Report*, at 18-19. These spills led to significant water quality issues and costly cleanup efforts. *Id.* In one stream contamination event due to inadvertent returns from the Mariner East II Pipeline in the Juniata River, drilling fluid was visible in the river for 1.5 miles downstream of the incident. *Id.* Construction of the proposed pipeline introduces these risks to Connecticut’s waterways, increasing possibility of harm to the state’s water and resources and violation of the state’s water quality standards.

D. The draft certification fails to acknowledge the presence of the Northern long-eared owl in the pipeline path and fails to provide any protections for this state-listed endangered species

Pipeline construction would destroy habitat for the state-listed endangered Northern long-eared owl—a species that was consistently documented in the area from March to May 2020—but no protective measures for this species are included in the draft certification. *Downstream Supplemental Report*, at 12; Declaration of Aaron Bourque, November 10, 2020; Declaration of Andy Rzeznikiewicz, September 29, 2020. Two Connecticut Audubon Society employees whose work focuses on bird ecology documented the presence of Northern long-eared owls in

the project area beginning on March 8 through May 3, 2020, alongside several other birders. *Id.* These Audubon employees have provided signed declarations, submitted to DEEP on October 7, 2020 and November 18, 2020, attesting to the owl sightings. *See id.* However, DEEP has refused to acknowledge the presence of the Northern long-eared owl in the project area, instead relying on an outdated NDDDB database and determination to erroneously conclude that Northern long-eared owls are not present in the project area. Due to this oversight, the draft certificate fails to include any protections for this state-listed endangered species.

Northern long-eared owls were documented in the proposed pipeline's path and are vulnerable to disturbances from pipeline construction. As Sierra Club highlighted in its initial comments to DEEP, the Northern long-eared owls have been observed directly in the proposed pipeline path, in one instance perching on the post marking the route of the existing pipeline. *See Declaration of Aaron Bourque*, at 2. Noise and construction traffic from the proposed project could reduce the foraging efficiency of owls, which depend almost entirely on sound to hunt for prey. *Downstream Report*, at 20, 24. Such disturbance could drive the owls from the habitat entirely, effectively resulting in habitat loss. *Id.* Adding to the significance of this habitat, Mr. Bourque notes that owl sightings occurred during the peak of the Northern long-eared owl's breeding season and he believes the owls were likely breeding in this area given the timing. *See Declaration of Aaron Bourque*, at 7. Damage to the ecosystems crossed by the pipeline and the species they support would be a loss of a designated use inconsistent with the Connecticut water quality standards. The draft certification fails to address these concerns entirely, lacking requirements for pre-construction surveys for active nests and roosting areas, or a buffer zone for traffic and noise around nesting habitat.

E. Wetland habitat for state-listed endangered American bittern would likely be degraded or lost due to pipeline construction, as the draft certification protections are impossible to implement

The proposed pipeline route will damage American bittern habitat,³ causing significant impacts to this state-listed endangered species that will not be prevented by the conditions included in the draft certification. While the draft certification includes conditions intended to protect the American bittern, these conditions are inconsistent with pipeline construction plans and compliance would be impossible. *Downstream Supplemental Report*, at 13. For example, the certificate conditions dictate that Eversource “shall avoid permanent alterations to large marsh complexes which would increase indirect effects of water quality change and general disturbance of the marsh. Wherever feasible, the Licensee shall operate outside of a three hundred (300) foot buffer around marshes.” License No. 20201005-WQC, at 3. However, the planned pipeline route crosses 2,000 feet through the Wyndham Marsh complex—which DEEP is actively engaged in restoring as habitat for such state-listed endangered species—in direct conflict with the certificate conditions. This crossing will necessarily cause permanent alterations to the marsh and will unavoidably violate the 300-foot buffer, rendering it “impossible” to comply with. *Downstream Supplemental Report*, at 13. The conditions further dictate that Eversource “shall not change water quality, turbidity, temperature, or chemistry of wetland complexes.” License No. 20201005-WQC, at 3. However, the pipeline route crosses

³ American bittern have been documented calling in the marsh at the northwest end of the proposed pipeline path in recent months and to the southwest of the proposed pipeline in Wyndham marsh. *Downstream Report*, at 25.

fourteen wetlands and will necessarily change water quality, turbidity, temperature, and chemistry of those wetland complexes. *Downstream Supplemental Report*, at 13. The proposed project would reduce water quality in the marshes, increase cover of non-native species, and otherwise disturb the ecosystem's vegetation, reducing food available to bitterns and their prey. *Downstream Report*, at 25. The draft certification conditions will necessarily be violated and do not provide meaningful protection for the American bittern.

F. Other species are left vulnerable or wholly unprotected by the draft certification, including the Northern long-eared bat, Eastern box turtle, and wood turtle

1. Federally and state-listed endangered Northern long-eared bats are not protected by the draft certification

Northern long-eared bats are present in the project area according to the USFWS Information for Planning and Conservation system, but are unprotected by the draft certification, which fails even to implement Eversource's proposed protective measures. Northern long-eared bats are endangered both federally and within the state, leading Eversource to propose a voluntary moratorium on tree clearing during the bat's pup-rearing season, between June 1 and July 31, to reduce the possibility of incidental take of breeding and young bats. *Downstream Supplemental Report*, at 14-15. The certification fails to implement that moratorium and fails to require any other protective measures for this species.

2. The Eastern box turtle and wood turtle are not adequately protected by the draft certification

Eastern box turtles and wood turtles in the pipeline path are inadequately protected by the certificate conditions. Both are species of special concern in Connecticut and would be harmed by project construction, as these turtles are susceptible to being crushed during digging and by equipment and vehicle traffic. *Downstream Report*, at 25. The certificate conditions limit digging and ground clearing in upland forested areas within ten meters of streams and rivers between November 1 and April 1 and restrict digging in upland forested areas, river banks, and river bottoms to between April 1 and November 1. License No. 20201005-WQC, at 3. However, these upland areas have not been clearly delineated in the project plans although they likely occur along the length of the proposed pipeline route. *Downstream Supplemental Report*, at 14. The conditions also fail to require wildlife exclusion fencing along the length of the project to protect these species, leaving them vulnerable to direct impacts from construction. *Id.*

G. The project requires a complex construction schedule to protect species threatened by pipeline construction and the draft certification does not sufficiently address the challenge and potential impacts of compliance with that schedule

A complex construction schedule will be required to adequately protect species and water resources threatened by pipeline construction, posing challenges not sufficiently addressed by the draft certification, and demonstrating why allowing this project to proceed is inconsistent with

protecting water quality. Given the necessary restrictions to protect vulnerable species and resources, construction time will increase, increasing the risk of direct species impacts and of erosion from storm events, and pipeline construction impacts would be exacerbated as construction will have to move throughout the corridor for an extended period of time.

Downstream Supplemental Report, at 15; *Downstream Report*, at 28. Stream crossings created for vehicle and equipment traffic and construction mats in wetland areas may have to stay in place for months or be installed and removed multiple times to complete the project.

Downstream Report, at 28. Further, multiple stream crossings would likely be constructed at the same time, which Downstream Strategies concluded would “increase[e] the area that will be exposed as bare soil and mak[e] it even more likely that the project would cause cumulative impacts in Durkee Brook.” *Id.* at 21. If the additional necessary protections proposed in Eversource’s application for Northern long-eared bats and vernal pools are considered, the schedule becomes even more complex. As *Downstream Strategies* concluded, “it would be challenging if not impossible for Eversource to complete construction while complying with DEEP-imposed and self-declared wildlife protection measures.” *Downstream Supplemental Report*, at 16. While these restrictions are important to protect vulnerable species, they will lead to additional construction complications and increase damage from the project. *Id.*

Alternatively, the restrictions may simply not be followed, resulting in direct impacts to endangered and special concern species. Either way, the project is inconsistent with Connecticut’s water quality standards, and should not be granted certification under Section 401.

IV. Alternatively, at a minimum DEEP should deny certification for the pipeline without prejudice to allow additional time to fully and adequately evaluate and address the pipeline’s impacts

As outlined above, the conditions included in the draft certification are inadequate to protect Connecticut’s water quality. Stronger protections are clearly needed; however, there is insufficient time before January 14, 2021 for DEEP to issue a certificate with more protective conditions. At a minimum, DEEP must deny certification for the pipeline without prejudice to allow time for the agency to conduct an adequate review of the project’s impacts. While Sierra Club maintains this project is inherently inconsistent with Connecticut’s water quality standards and should be denied outright, DEEP must at least perform its duty to fully review the impacts of the project for consistency with Connecticut’s water quality standards. The draft certification is incomplete in several respects, including failures to:

- (1) adequately protect ephemeral streams and vernal pools;
- (2) require mitigation measures for wetlands and vernal pools;
- (3) adequately address the effects of erosion and sedimentation and protect Durkee Brook and its Brook trout population;
- (4) address risks of inadvertent returns from horizontal directional drilling under the Quinebaug River and under a tributary to Bark Meadow Brook;
- (5) acknowledge the presence of the Northern long-eared owl in the pipeline path and to provide any protections for the state-listed endangered species;
- (6) provide genuine protections for wetland habitat for state-listed endangered American bittern and its wetland habitat;

- (7) provide adequate protection for other endangered and special-concern species including the Northern long-eared bat, Eastern box turtle and wood turtle;
- (8) address the complexity of the schedule that would be required to construct the pipeline and the damaging impacts from an extended construction schedule.

The draft certification leaves Connecticut's waters vulnerable to numerous violations of the Connecticut water quality standards. Because DEEP must issue a final certification by the federal deadline to have any legal authority to protect the state's waters, there is no time left to remedy these deficiencies in the certification. To maintain a minimum level of protection for Connecticut's waters and uphold the state's water quality standards, DEEP must reject certification for the project and permit Eversource to reapply in order to allow time to fully review the project's impacts and provide stronger protections for Connecticut's water resources.

V. Conclusion

The proposed pipeline project is incompatible with Connecticut's water quality standards. The conditions included in the draft certificate fail to adequately protect the state's rivers, streams, wetlands, and wildlife from the damaging impacts of the project. Water quality standards for suspended and settleable solids, silt or sand deposits, turbidity, and biological condition are likely to be violated, and designated uses as habitat for fish and other aquatic life and wildlife would be lost. Connecticut is out of time to adequately address these impacts and must either deny certification for the pipeline outright by January 14, 2021 or deny without prejudice by that date to allow more time to fully evaluate the project's impacts. If DEEP fails to act by this deadline, the state will forfeit the right to place any legally binding constraints on the pipeline project and the project will be permitted to proceed without any such protections. DEEP must act now to uphold Connecticut's legal authority and to protect the state's water resources.

Sincerely,

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Attachments:

1. Downstream Strategies Supplemental Report, January 8, 2021.
2. Sierra Club Initial Comments on Eversource 401 Application, June 9, 2020.
3. Downstream Strategies Initial Report, June 3, 2020.
4. Sierra Club Letter re Pomfret to Killingly Pipeline, June 30, 2020.
5. Sierra Club Letter re Rzeznikiewicz Declaration on Long-Eared Owl, October 7, 2020.
6. Sierra Club Letter re Bourque Declaration on Long-Eared Owl, November 18, 2020.

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