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February 23, 2021

NTE Connecticut, LLC,
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Attn: Brian Romeo
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Via Email and First class mail

The Attached Distribution List
Via Email

NOTICE OF PETITION for Declaratory Ruling
IN RE NTE Connecticut LLC, Application 201615592 For The Killingly Energy Center

Attached hereto is a petition for declaratory rulings being submitted on behalf of Allco Renewable Energy Limited and Windham Solar LLC related to *NTE Connecticut LLC, Application for Discharge 201615592.*

Pursuant to RCSA Section 22a-3a-4(a)(3), you are being provided with notice of a petition for declaratory ruling ("Petition") submitted to the Connecticut Department of Energy and Environmental Protection ("DEEP"). You have an interest in the subject matter of the Petition. A copy of the Petition is attached hereto. You and other interested persons have the opportunity to file comments and to request intervenor or party status in this matter under RCSA Section 22a-3a-4(c)(1).

Please feel free to contact me with any questions regarding the Petition.

Very truly yours,
/s/Thomas Melone
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SERVICE LIST

In the matter of
NTE Connecticut, LLC (Killingly)

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IN RE NTE Connecticut LLC, Application 201615592	**STATE OF CONNECTICUT** **DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION** Petition No. _____ February 23, 2021

PETITION FOR DECLARATORY RULINGS REGARDING THE APPLICATION BY NTE CONNECTICUT LLC FOR A DISCHARGE PERMIT

Pursuant to Connecticut General Statutes ("CGS") § 4-176 and section 22a-3a-4 of the Regulations of Connecticut State Agencies ("RCSA"), Allco Renewable Energy Limited and Windham Solar LLC (collectively, "Allco") hereby petition the Commissioner of the Connecticut Department of Energy and Environmental Protection ("DEEP") for declaratory rulings regarding application 201615592 by NTE Connecticut LLC ("NTE") for a permit to discharge wastewater to the Killingly Publicly-Owned Treatment Works ("POTW").

This petition requests the following declaratory rulings:

1. The final decision issued on January 20, 2021 (the "Final Decision") by the Office of Adjudications of DEEP recommending that NTE be issued the requested permit to discharge wastewater is clearly erroneous and should be vacated and reconsidered.

2. The proposed discharge by NTE to the Killingly POTW is the functional equivalent of a direct discharge to the waters of the United States ("WOTUS").

3. The Final Decision should be vacated and ignored because it fails to take a hard look at alternatives under the Clean Water Act ("CWA") and fails to comply with EPA's 404(b)(1) guidelines, and a permit cannot be issued unless and until DEEP takes a hard look at alternatives under the CWA and complies with EPA's 404(b)(1) guidelines..

4. The Final Decision should be vacated and ignored because it fails to evaluate whether the 650-megawatt natural gas Killingly Energy Center power plant (the "Project") satisfies the public interest requirement and a permit cannot be issued unless and until DEEP evaluate whether the Project satisfies the public interest requirement.

5. The Final Decision should be vacated and ignored because it fails to determine whether

the Project affects a special aquatic site and a permit cannot be issued unless and until DEEP determine whether the Project affects a special aquatic site.

A. <u>Introduction.</u>

"Climate change poses an existential threat to humanity." William Tong, *State of Connecticut v. Exxon Mobil Corp*., HHD-CV20-6132568-S (Conn. Sup. Ct. filed Sept. 14, 2020) No. 100.31 at P1. Connecticut is already suffering from "sea level rise, flooding, drought, increases in extreme temperatures and severe storms, decreases in air quality, contamination of drinking water, increases in the spread of diseases, and severe economic consequences." *Id*. at P17. "[C]limate change will continue to have increasingly serious, life-threatening, and financially burdensome impacts on the people of Connecticut and the lands, waters, coastline, species, natural resources, critical ecosystems, infrastructure and other assets owned by the State and its political subdivisions." *Id.* at P23. "Credible scientific evidence indicates-especially considering recent extreme weather events-that the catastrophic effects of climate change are occurring sooner than anticipated." *Id*. at P172. "Climate change has negatively impacted, is negatively impacting, and will continue to negatively impact Connecticut's people, lands, waters, coastline, infrastructure, fish and wildlife, natural resources, critical ecosystems, and other assets owned by or held in the public trust by the state of Connecticut and/or its municipalities." *Id.* at 173. "Climate change has caused, is causing, and will cause sea level rise, flooding, drought, an increase in extreme temperatures, a decrease in air quality, an increase in severe storms, contamination of drinking water, and an increase in certain disease-transmitting species." *Id*. at 174. "As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause an increase in illness, infectious disease and death." *Id.* at 175. "As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause serious damage to existing infrastructure, including but not limited to coastal and inland

development, roadways, railways, dams, water and sewer systems, and other utilities." *Id*. at 176. "As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause serious detrimental economic impacts on the State of Connecticut, its people, businesses and municipalities, including but not limited to heat-related productivity losses, increased energy cost and consumption, and agriculture, tourism, and recreation losses." *Id.* at 177.

Yet NTE wants to bring more of the same adverse effects to Connecticut. Despite overwhelming scientific data that the current pace of human-caused carbon emissions is increasingly likely to trigger irreversible damage to the planet,[1] a situation described by NASA scientists as the equivalent of a "five-alarm fire" for the planet, *id*., entities like NTE continue to seek to build new climate and health destroying projects, such as the proposed project.

The adverse health impacts of NTE's project are felt especially hard by children. Last week, at a White House Press Briefing, Special Presidential Envoy for Climate, John Kerry, stated that climate destruction from fossil fuel use is "the greatest cause of children being hospitalized every summer in the United States—we spent $55 billion a year on it—is environmentally induced asthma."[2]

Buried deep in DEEP's current draft integrated resources plan ("IRP") (at p.107), there is a brief acknowledgement of the severe adverse health effects in Connecticut from fossil fuel generators such as NTE's proposed facility. "Connecticut experiences some of the worst ozone pollution in the United States. Exposure to unhealthy levels of air pollution contributes to acute and chronic respiratory problems such as asthma, Chronic Obstructive Pulmonary Disease, and

[1] "*Major new climate study rules out less severe global warming scenarios*…" Washington Post, July 22, 2020, https://www.washingtonpost.com/weather/2020/07/22/climate-sensitivity-co2/.
[2] https://www.whitehouse.gov/briefing-room/press-briefings/2021/01/27/press-briefing-by-press-secretary-jen-psaki-special-presidential-envoy-for-climate-john-kerry-and-national-climate-advisor-gina-mccarthy-january-27-2021/ (Last visited February 23, 2021.)

other lung diseases. A recent national report, Asthma Capitals 2019, ranked New Haven (#11) and Hartford (#13) among the 100 largest U.S. cities where it is most challenging to live with asthma."

Earth's climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. The impacts of global climate change are already being felt in the United States and are projected to intensify in the future—but the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions. *See*, Climate Report,[3] Vol. II, Overview at 2 and the *IPCC Special Report*.[4]

Changing climate threatens the health and well-being of people in the Northeast through more extreme weather, warmer temperatures, degradation of air and water quality, and sea level rise. These environmental changes are expected to lead to health-related impacts and costs, including additional deaths, emergency room visits and hospitalizations, and a lower quality of life. Health impacts are expected to vary by location, age, current health, and other characteristics of individuals and communities. *See*, Climate Report, Vol. II, Ch. 18, at 117 and the *IPCC Special Report*.

The continued use of fossil fuels endangers the public health, safety and welfare of Connecticut and the Northeastern United States. *See*, Climate Report, Vol. II, Ch. 18, at 117 and

[3] *Fourth National Climate Assessment* (the "Climate Report") published by the United States Global Change Research Program and the United States Government Printing Office pursuant to the Global Change Research Act of 1990, judicial notice of which is requested. The full report is available at https://nca2018.globalchange.gov/ (last visited September 30, 2019), USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. doi:10.7930/NCA4.2018.

[4] Intergovernmental Panel on Climate Change (IPCC) ("IPCC Special Report"): "*Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*," judicial notice of which is requested. The full report is available at https://www.ipcc.ch/sr15/ (last visited September 30, 2019).

the *IPCC Special Report*. The continued injection of carbon-dioxide into the atmosphere from fossil-fuel electricity production harms the public health, safety and welfare. *See, e.g*., Climate Report Chapter 14, KM1 and KM2:

> The health and well-being of Americans are already affected by climate change, with the adverse health consequences projected to worsen with additional climate change. Climate change affects human health by altering exposures to heat waves, floods, droughts, and other extreme events; vector-, food- and waterborne infectious diseases; changes in the quality and safety of air, food, and water; and stresses to mental health and well-being…. People and communities are differentially exposed to hazards and disproportionately affected by climate-related health risks. Populations experiencing greater health risks include children, older adults, low-income communities, and some communities of color.

Reducing greenhouse gas emissions would benefit the health of Americans in the near and long term. By the end of this century, thousands of American lives could be saved and hundreds of billions of dollars in health-related economic benefits gained each year under a pathway of lower greenhouse gas emissions. *See*, Climate Report, Chapter 14, KM4 and the *IPCC Special Report.* "Current and future emissions of greenhouse gases, and thus emission mitigation actions, are crucial for determining future risks and impacts of climate change to society…. Climate change is projected to significantly damage human health, the economy, and the environment in the United States, particularly under a future with high greenhouse gas emissions…. Research supports that early and substantial mitigation offers a greater chance of avoiding increasingly adverse impacts." Climate Report, Chapter 29 at 1348.

B. <u>Petitioners.</u>

Allco Renewable Energy Limited is a Delaware corporation, with an office at 157 Church Street, 19th floor, New Haven, Connecticut 06510. Windham Solar LLC is a Connecticut limited liability company, with an office at 157 Church Street, 19th floor, New Haven, Connecticut 06510. Allco is a developer of solar projects in Connecticut and other ISO-NE States. Allco's corporate

mission is to combat climate change, enforce laws that benefit developers of solar energy on a broad scale, and open up markets broadly to solar development. Allco's mission includes fighting the devastating environmental impacts from burning fossil fuels, including, without limitation, the adverse effects that continued use of fossil-fuel generation will have on endangered species.

C. Application 201615592.

On January 20, 2021, the Office of Adjudications of DEEP issued the Final Decision with respect to the above-captioned permit application recommending that the applicant, NTE be issued the requested permit to discharge up to 90,000 gallons per day of wastewater from the proposed 650-megawatt Killingly Energy Center, a natural-gas fired power plant, to the Killingly Publicly-Owned Treatment Works ("POTW"). The Killingly POTW would then in turn discharge that wastewater into the Quinebaug River.

The Final Decision is flawed, clearly erroneous and must be vacated. A permit for the proposed discharge cannot be issued based upon the application or the Final Decision. The Final Decision ignores the requirements of the CWA and the United States Supreme Court's functional equivalency doctrine under the CWA announced in *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020). As such the Final Decision must be vacated.[5]

I. NTE'S PROPOSED DISCHARGE IS A DIRECT DISCHARGE TO THE WATERS OF THE UNITED STATES.

Section 4(A) of the NPDES Permit for the Killingly POTW (CT0101257) prevents the acceptance of NTE's wastewater. Section 4(A) of the Killingly permit states:

> "The Permittee shall not accept any new sources of non-domestic wastewater conveyed to its POTW through its sanitary sewerage system or by any means

[5] The Final Decision purports to recommend authorization of the discharge but fails to address any of the requirements of section 404 of the CWA. In that respect, the Final Decision does not authorize the discharge because it does not purport to be a permit issued under section 404. That is good news in the sense that the Killingly Energy Center cannot be built without a section 404 permit because its discharge is the functional equivalent of a direct discharge.

> other than its sanitary sewage system unless the generator of such wastewater; (a) is authorized by a permit issued by the Commissioner under Section 22a-430 CGS (individual permit), or, (b) is authorized under Section 22a-430b (general permit), or, (c) has been issued an emergency or temporary authorization by the Commissioner under Section 22a-6k."

Thus, this is not a situation where the Killingly POTW is already authorized to accept NTE's wastewater. Rather NTE's wastewater can only be accepted by the Killingly POTW if a new permit is issued, which is the permit under consideration.

As a result, the permit under consideration is also a permit *to increase* in what the Killingly POTW is permitted to discharge into the waters of the United States. That in turn means the permit for NTE is the functional equivalent of a direct discharge into the waters of the United States. Viewed another way, the permit under consideration is authorizing an additional *direct* discharge into the waters of the United States that would otherwise not be permitted. The permit application is therefore subject to the full requirements of direct discharges under the CWA.

The "functional equivalency" test in respect to discharges under the CWA was announced last year by the United States Supreme Court in *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020). In *Maui* the Supreme Court emphasized that the:

> Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without an appropriate permit … The Act defines "pollutant" broadly, §502(6); defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including, e.g., any "container, [**643]" "pipe, ditch, channel, tunnel, conduit," or "well," §502(14); and defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source," §502(12). It then uses those terms in making "unlawful" "the discharge of any pollutant by any person" without an appropriate permit. §301.
>
> *Maui* at 1465-1466.

NTE's discharge is clearly an "addition" of a pollutant from a point source into the waters of the United States. But for the issuance of the proposed permit to NTE, no one would be able to

discharge NTE's wastewater into the Quinebaug River. While the permit in form purports to only authorize a discharge to the Killingly POTW, it is also authorizing the Killingly POTW to accept that wastewater and then discharge it into the Quinebaug River.

Having established that under the Supreme Court's *Maui* decision that the NTE is either a direct discharge or the functional equivalent of a direct discharge into the waters of the United States, DEEP (as delegatee under the CWA[6]) must comply with the full requirements of the CWA in deciding whether NTE is entitled to a permit. The Final Decision fails to do so and must therefore be vacated and a permit cannot be issued until the full requirements of the CWA are satisfied.

II. FAILURE TO TAKE A HARD LOOK AT ALTERNATIVES UNDER THE CLEAN WATER ACT—FAILURE TO COMPLY WITH EPA'S 404(B)(1) GUIDELINES.

Section 404(a) of the CWA authorizes permits for the discharge of dredged or fill material into navigable waters "after notice and opportunity for public hearings." 33 U.S.C. § 1344(a).[7] In making permitting decisions, a set of guidelines developed by the Environmental Protection Agency ("EPA") must be followed (the "404(b)(1) Guidelines" or "Guidelines"). *See id*. § 1344(b); *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). These Guidelines prohibit the issuance of a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). A public interest review for each proposed discharge is also required, and a permit cannot be issued that (1) would "not

[6] Pursuant to an approval dated September 26, 1973, by the Administrator of the United States Environmental Protection Agency for the State of Connecticut, the State administers the NPDES permit program.

[7] The Final Decision purports to recommend authorization of the discharge but fails to address any of the requirements of section 404 of the CWA. In that respect, the Final Decision does not authorize the discharge because it does not purport to be a permit issued under section 404.

comply with [EPA's] 404(b)(1) [G]uidelines" and/or (2) that would be "contrary to the public interest." 33 C.F.R. § 320.4(a)(1).

Under EPA's 404(b)(1) Guidelines, an alternative to the proposed discharge is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Alternatives need not be in locations that are presently owned by a permit applicant so long as they are otherwise practicable and could "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." *Id*.; *accord Bersani*, 850 F.2d at 39.

"[P]racticable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters," *see* 40 C.F.R. § 230.10(a)(1)(i), such as onshore renewable energy generation with storage. That purpose could be fulfilled by onshore renewable energy with solar energy.

The Final Decision does not engage in any analysis of, much less take a hard look at, whether the proposed Project's purposes could be accommodated by onshore renewable energy generating sources. Indeed, the Final Decision wholly ignores everything outside of narrow analysis of a discharge to a POTW. No energy supply alternative was mentioned. Yet that approach lays bare the failure of the Final Decision to take a hard look at alternatives that do not have adverse aquatic consequences. The requested permit cannot be issued until the full requirements of the EPA 404(b)(1) Guidelines and the CWA are satisfied, including an analysis of whether the proposed Project's purposes could be accommodated by onshore renewable energy generating sources.

III. FAILURE TO EVALUATE WHETHER THE PROJECT SATISFIES THE PUBLIC INTEREST REQUIREMENT.

For a permit to be issued for the proposed Project, the proposed use must be in the public interest. The public interest review must be "based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 CFR §320.4(a)(1).

"Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case." *Id.* "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." *Id.* "The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources." *Id.*

"All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." *Id.*

The Final Decision simply fails to offer any explanation as to why Project meets the public interest test. The proposed Project does not satisfy the public interest test. The proposed Project would result in displacement of renewable energy projects with storage. The proposed Project would contribute to global warming as compared to renewable energy substitutes such as solar.

The Final Decision's failure to evaluate whether the proposed Project satisfies the public interest test requires that the Final Decision be vacated. A permit cannot be issued unless and until DEEP evaluates whether the Project satisfies the public interest requirement.

IV. FAILURE TO DETERMINE WHETHER THE PROJECT AFFECTS A SPECIAL AQUATIC SITE.

Where a proposed permit would allow discharge into a special aquatic site, a two-step analysis must be undertaken to determine what presumption to apply to the analysis of whether to grant the permit. First, the project's "basic purpose" under 40 C.F.R. § 230.10(a)(3) must be defined. *See, e.g., Sierra Club v. Van Antwerp*, 362 F. App'x 100, 105-06 (11th Cir. 2010); *Town of Abita Springs v. U.S. Army Corps of Eng'rs*, 153 F. Supp. 3d 894, 919 (E.D. La. 2015). Second, the determination must be made as to whether the "basic purpose" is "water dependent." *See* 40 C.F.R. § 230.10(a)(3); *Sierra Club*, 362 F. App'x at 106; Abita Springs, 153 F. Supp. 3d at 919. An action is water dependent if it requires access or proximity to, or a location on, water in order to fulfill its basic purpose. *See* 40 C.F.R. § 230.10(a)(3). Thus, when a project's basic purpose is to provide boat access to a river, the project is water dependent because it must be located in water to achieve its basic purpose. *See Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345-46 (8th Cir. 1994). In contrast, a proposed gold mine is not water dependent even if the applicant wishes to mine in a watershed because mining gold does not always require access or proximity to water. *See Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008).

Here, providing flexible, reliable, baseload power to ISO-NE is not water dependent. If a proposed project by its general nature is not water dependent, there is a presumption that practicable alternatives to the project are available in less sensitive areas. *See* 40 C.F.R. § 230.10(a)(3). Likewise, there is a presumption that such practicable alternatives have less adverse

impact on the aquatic ecosystem. *See id*. Once a project is determined to be non-water dependent, the burden shifts to the permit applicant to rebut the first presumption by "clearly demonstrat[ing]" that a practicable alternative is not available, *id*., and to rebut the second presumption with "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable." *Sierra Club*, 362 F. App'x at 106 (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004)). If the basic purpose of a proposed project is water dependent, then these presumptions do not apply.

Thus, if a project is located in a special aquatic site, the determination of the "project's basic purpose and whether it is water dependent are threshold questions that determine the procedure [to be] follow[ed] in granting the applicant a permit." *Id*. If the project's basic purpose is improperly defined or improperly determined to be water dependent, then the procedure set forth by the 404(b)(1) Guidelines would have been violated.

The Final Decision makes no mention of "special aquatic sites" as defined in 40 C.F.R. §§ 230.40-230.45, particularly 40 C.F.R. §§ 230.43 (vegetated shallows) and 40 C.F.R. §§ 230.44 (coral reefs). The failure of the Final Decision to specifically review whether the proposed Project has any effect on "special aquatic sites" is clear error. A permit cannot be issued unless and until DEEP evaluates whether the proposed discharge has any effect on "special aquatic sites".

Conclusion

For the reasons stated above, Allco requests that the Commissioner issue the following declaratory rulings:

1. The Final Decision is clearly erroneous and should be vacated and reconsidered.
2. The proposed discharge by NTE to the Killingly POTW is the functional equivalent of a direct discharge to the waters of the United States.
3. The Final Decision should be vacated and ignored because it fails to take a hard look

at alternatives under the CWA and fails to comply with EPA's 404(b)(1) guidelines, and a permit cannot be issued unless and until DEEP takes a hard look at alternatives under the CWA and complies with EPA's 404(b)(1) guidelines.

4. The Final Decision should be vacated and ignored because it fails to evaluate whether the Project satisfies the public interest requirement and a permit cannot be issued unless and until DEEP evaluate whether the Project satisfies the public interest requirement.

5. The Final Decision should be vacated and ignored because it fails to determine whether the Project affects a special aquatic site and a permit cannot be issued unless and until DEEP determine whether the Project affects a special aquatic site.

Dated: February 23, 2021

Respectfully submitted,

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