UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONSERVATION LAW FOUNDATION, INC., *Plaintiff*, v. GULF OIL LIMITED PARTNERSHIP, *Defendant*.	Civil Action No. 3:21-cv-00932-KAD

DEFENDANT GULF OIL LIMITED PARTNERSHIP'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Gulf Oil Limited Partnership ("Gulf") respectfully submits this Memorandum of Law in Support of Motion to Dismiss the Complaint filed by Plaintiff Conservation Law Foundation, Inc. ("CLF") under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Over the past several years, CLF has resorted to litigation to advocate for and press its climate change policy positions and goals, filing a series of lawsuits against owners and operators of coastal petroleum terminals in New England. In 2016, CLF sued ExxonMobil in the United States District Court for the District of Massachusetts.[1] In 2017, CLF sued Shell in the United States District Court for the District of Rhode Island.[2] Concurrently with this case, CLF filed a similar suit against Shell in this court.[3] This case is just one more in this string of lawsuits.[4]

In each case, including this one, CLF has offered the same suite of general, conclusory, and speculative allegations about the causes and impacts of climate change, dressed up as alleged violations of the Clean Water Act (33 U.S.C. §§ 1251 *et seq*.) and the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 *et seq*., "RCRA"). Each complaint alleges the terminals are not adequately designed and do not have sufficient control measures to protect against the *future* risk of discharges and releases of pollutants, which CLF says could be caused by flooding

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[1] *Conservation Law Found., Inc. v. ExxonMobil Corp.*, C.A. 1:16-cv-11950-MLW (D. Mass.).

[2] *Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, C.A. No. 17-cv-00396-WES-LDA (D.R.I.).

[3] *Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, No. 3:21-cv-00933 (D. Conn.).

[4] CLF also has served a Notice of Intent to Sue against the owners and operators of another facility located in New Haven Harbor, namely, Buckeye PT Terminals, LP and related entities. *See* https://www.clf.org/wp-content/uploads/2020/07/New-Haven-NOI-Letters.pdf. Gulf is not aware of why CLF has not yet filed a lawsuit against Buckeye.

associated with climate change impacts such as rising sea levels and severe storms—conditions that, CLF acknowledges, will not occur for many years (2050, 2100, or later). In both of the prior litigated suits, the respective district courts applied well-established Federal law and held that CLF had no standing to assert claims based on allegations of injuries in the distant future because such injuries were too remote and speculative to meet the imminence requirement for an injury-in-fact under Article III. Because the claims asserted by CLF against Gulf are virtually identical to those asserted in the lawsuits against Shell and ExxonMobil, this Court should follow the District of Rhode Island and the District of Massachusetts and similarly dismiss CLF's claims based on speculative, future, distant harm.

CLF also alleges a host of claims based on conclusory, unsubstantiated accusations that Gulf's Stormwater Pollution Prevention Plan ("SWPPP") for the terminal is in some way deficient. For example, CLF asserts that Gulf violated the Clean Water Act by not including certain control measures and Best Management Practices ("BMPs") in its SWPPP to protect against future discharges of pollutants. But nowhere does CLF allege any facts showing how the existing BMPs and control measures are insufficient—and CLF never alleges or identifies what additional BMPs are necessary to comply with the Clean Water Act. This failure is particularly significant because Gulf has complied with its permit and all applicable regulations, and since it implemented the current BMPs and control measures, there have been no and there are no ongoing releases or discharges of pollutants from the terminal. Similarly, CLF alleges Gulf violated RCRA by not properly engineering, managing, operating, or fortifying the terminal against the risk of future releases of hazardous waste caused by climate change related flooding. But again, CLF alleges no facts showing how the terminal was improperly designed, engineered, or operated, or what changes must be made to comply with RCRA.

In each instance, CLF's unsupported, conclusory accusations fail to state plausible claims for relief. As a result, these claims must be dismissed for failure to state a claim.

RELEVANT FACTUAL BACKGROUND[5]

1. Gulf Owns and Operates a Petroleum Terminal in New Haven, Connecticut.

Gulf owns and operates a petroleum terminal located at 428-500 Waterfront Street, New Haven, Connecticut 06512 ("Terminal"). (Dkt. 1-3 at 12.) The Terminal occupies approximately 13 acres on the waterfront of New Haven Harbor, through which Gulf receives, stores, and distributes gasoline and petroleum products. (*Id.* at 14.) Upon receipt from marine vessels or pipelines, products are transferred to aboveground storage tanks located in the Terminal's tank farm, where they are stored before being ultimately transferred to onsite truck loading racks or distributed through interstate and intrastate pipelines. (*Id.* at 15.) While the outdated SWPPP attached by CLF showed the Terminal had a total of 21 storage tanks, Gulf has made numerous improvements to the Terminal and there are currently 17 storage tanks, a small office building, a garage, loading racks, and a "foam house," which houses the facility's fire suppression system equipment. (*Id.*)

2. Gulf Operates in Compliance with All Clean Water Act Permitting Requirements.

Gulf operates the Terminal pursuant to several federal and state permits, including (and relevant here), the State of Connecticut's Department of Energy and Environmental Protection ("DEEP") General Permit for the Discharge of Stormwater Associated with Industrial Activity,

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[5] The Complaint's allegations are accepted as true solely for the purposes of this Motion. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). "In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken…." *See Soyak v. Town of New Fairfield, Ct.*, 2008 WL 3992713, at *1 (D. Conn. Aug. 21, 2008) (citing Fed. R. Civ. P. 12(c)); *Courtenay Comms. Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir. 2003).

Registration No. GSI001571 ("Permit"), which was issued on June 1, 2011. (Dkt. 1-3 at 12.) Under the Permit, Gulf must prepare and maintain a SWPPP. (*Id.*) At all times, Gulf has prepared and implemented a SWPPP, which is certified by an independent, licensed engineer and periodically updated to reflect changes at the Terminal.[6]

3. Gulf's SWPPP Implements Control Measures to Minimize the Risk of Release of Pollutants from the Terminal.

As detailed in the version of the SWPPP attached to the Complaint, Gulf identifies all potential pollutant sources at the Terminal and describes the various structural control measures and BMPs implemented by Gulf to minimize the risk of release of pollutants from the Terminal. (*Id.* at 45, 50-63.) As it relates to CLF's claims of potential releases from flooding caused by alleged future climate change impacts, the SWPPP describes in detail the secondary containment structures and stormwater collection and treatment system.

For example, "[t]he terminal tank farm is surrounded by a single secondary containment structure," which consists of "an asphalt coated earthen dike or concrete dike." (Dkt. 1-3 at 18.) In addition, a "north-south intermediate dike divides the tank farm into two sections (east and west)," with the west section being "surrounded by an approximately six (6) foot high earthen dike," and the east section "surrounded by a four to six foot high earthen dike or concrete dike wall." (*Id.*) "The dike separating the two sections of the tank farm is lower than any portion of the perimeter berm, allowing both sections to work in combination." (*Id.* at 33.) As the SWPPP explains, "[t]he terminal's yard and tank farm areas have been designed such that potential spills occurring within the terminal yard and tank farm are contained within secondary containment,"

[6] CLF attached an outdated SWPPP as Exhibit B to its Complaint. Nonetheless, in accordance with Rule 12, for purposes of this Motion, Gulf will accept all the allegations as stated in the Complaint, including the references to the outdated SWPPP.

and "[t]hese structures/systems are designed to contain released product and prevent product releases from traveling beyond terminal property." (*Id.* at 32.)

In addition to the secondary containment, Gulf has designed and implemented a stormwater collection and treatment system to collect, store, treat, and dispose of stormwater from the Terminal. The Terminal has two underground stormwater treatment tanks with a collective capacity of 23,000 gallons—"[o]ne 15,000-gallon stormwater interceptor tank and one 8,000-gallon underground oil/water separator are connected in series to process stormwater and to function as spill containment at the rack." (*Id.* at 23.) As designed, the "interceptor tank is primarily designed to treat stormwater for solids that are collected in the drainage area" and the "oil/water separator process stormwater to separate potential product from stormwater." (*Id.*) Following treatment, the "oil/water separator tank discharges treated stormwater to the City of New Haven's storm sewer, which discharges to New Haven Harbor at the base of the Tomlinson Bridge." (*Id.* at 25.)

Contrary to CLF's claims, the SWPPP specifically addresses the risk of discharges from flooding caused by natural disasters, including hurricanes. "Storm induced spills are protected against through the use of appropriate construction materials for tanks and secondary containment structures. Also, multiple releases are prevented during potential natural disasters through measures like closing valves between tanks." (*Id.* at 31.)

4. Gulf Has Had No Discharges or Releases of Pollutants from the Terminal.

The control measures and Best Management Practices ("BMPs") implemented in the SWPPP have been successful. Since their adoption, there have been no and there are no ongoing discharges or releases of pollutants from the Terminal. (Dkt. 1-3 at 42-43.)

5. CLF's Claims Are Based on Alleged Climate Change Impacts in the Future.

Despite having no discharges or releases of pollutants from the Terminal, on July 7, 2021, CLF filed its Complaint alleging potential *future* injuries arising from Gulf's operation of the New Haven Terminal. (*See generally* Dkt. 1.) In general, CLF alleges that Gulf has violated its General Permit, the Clean Water Act, and RCRA by not adequately accounting for and protecting against the potential release and discharge of pollutants and hazardous waste caused by increased flooding associated with climate change impacts. (*Id*. at ¶¶ 12-15, 315-20, 322-29, 344-48, 350-54, 356-59, 361-64, 373-79, 421-36, 438-53, 455-65). On these claims, CLF's Complaint takes a scattershot approach, alleging that Gulf should have either included certain additional control measures or BMPs to protect against possible future flooding of the Terminal or disclosed certain additional information CLF believes Gulf possessed related to future risks of flooding. (*Id.* at ¶¶ 319, 324, 335-37, 345, 358, 363, 367, 374, 444-45, 459, 460.) CLF, however, never identifies the controls it believes are necessary or lacking or what information should have been disclosed to comply with the Clean Water Act. (*Id.*)

In addition to CLF's failure to allege any actual facts showing how Gulf's SWPPP is deficient or what specific control measures or information CLF contends should have been included, CLF also asserts numerous claims based on alleged future risks of discharges resulting from increased sea levels, severe precipitation events, and other alleged climate change impacts that, by CLF's own admission, will not occur for years or even decades. (*See, e.g.*, *Id*. at ¶¶ 22 ("climate scientists estimate that by 2050 this '100 year flood' will revisit the Connecticut coast, on average, not once every 100 years, but once every twelve-and-a-half to twenty-five years"); *id.* at ¶ 23 ("Sea-level rise will likely increase the odds of flooding by a thousand-fold . . . in a half-century. By 2100, today's 'once-in-a-lifetime' (e.g., 50-year return period) coastal flood

level may be exceeded every day during the highest tide[.]"); *id.* at ¶ 160 (same); *id.* at ¶ 197 (sea-level rise in New Haven is only 2.5mm per year); *id.* at ¶ 226 ("It is virtually certain that global mean sea level rise will continue beyond 2100, with sea level rise due to thermal expansion to continue for many centuries."); *id.* at ¶ 229 ("Global sea level is projected to rise another 1 to 4 feet by 2100 as a result of both past and future emissions from human activities."); *id.* at ¶ 230 ("[W]e project 4.1 feet of rise locally by 2100[.]"); *id.* at ¶ 232 ("A 2019 analysis by CIRCA concluded that communities in Connecticut should plan that sea level will be 0.5 m (1 ft 8 inches) higher than the 1992 level in Long Island Sound by 2050.").

ARGUMENT AND CITATION OF AUTHORITY

CLF's claims must be dismissed for two reasons. First, CLF's claims based on speculative, future, and distant harms are not sufficient to confer Article III standing. Second, CLF has not alleged facts that plausibly support its claims in Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18 that Gulf violated the Clean Water Act or RCRA.

1. CLF's Claims Based on a Risk of Future Flooding Associated with Climate Change Must Be Dismissed for Lack of Standing.

As the district courts in Massachusetts and Rhode Island recently held in the two other lawsuits filed by CLF against petroleum terminals in New England, CLF's claims based on distant future risks of flooding associated with potential climate change impacts fail as a matter of law and must be dismissed for lack of standing.

A. To Possess Standing, CLF Must Allege Facts Showing an Actual and Imminent Injury-in-Fact.

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject

matter before it considers the merits of a case." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Injury-in-fact is "the 'first and foremost' of standing's three elements." *Id.* (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560)). "'[A]llegations of possible future injury' or even an 'objectively reasonable likelihood' of future injury are insufficient to confer standing." *McMorris v. Carlos Lopez & Assoc., LLC*, 995 F.3d 295, 300 (2d Cir. 2021) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013)). Instead, an alleged future injury "constitutes an Article III injury in fact only 'if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

In addition, "[a] plaintiff 'must demonstrate standing for each claim and form of relief sought.'" *Liu v. United States Cong.*, 834 Fed. App'x 600, 602 (2d Cir. 2020). "Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each of the elements that make up the irreducible constitutional minimum of standing." *Faculty v. N.Y. Univ.*, 2021 WL 3744414, at *4 (2d Cir. Aug. 25, 2021) (internal marks omitted). In environmental cases like this one, "[t]he relevant showing for Article III standing is not injury to

the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Enviro. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000).

Because CLF's claims based on alleged injuries far in the future fail this standard, they must be dismissed.

B. CLF Does Not Have Standing to Assert Claims Based on Distant Future Risks of Flooding.

As mentioned above, this lawsuit is one in a series of similar lawsuits filed by CLF against owners and operators of petroleum terminals. In this case and the others, CLF alleges violations of the Clean Water Act and RCRA based on the potential future risk of releases and discharges of pollutants and/or hazardous waste from predicted flooding associated with alleged climate change impacts, including rising sea levels and increased severity of storms. In this lawsuit, however, CLF has chosen to ignore clear rulings within the last two years, in which two separate federal courts held that CLF did not have standing to bring virtually identical claims based on allegations of distant future harms.

For example, just last year in the *Shell* case, the District of Rhode Island held that CLF lacked standing to bring claims based on injuries arising from predicted sea level changes in 2100 because such injuries were not sufficiently imminent to constitute an actionable injury-in-fact. *See Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, C.A. No. 17-cv-00396-WES-LDA, 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020) (citing *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012)) (attached as Exhibit 1). In that case, the Court ruled that "to the extent that [CLF's] claims rely on future harms, Plaintiff lacks standing." *Id.* at 2. The Court explained that CLF's "flawed allegations include, for example, those detailing that, by 2100, the National Oceanic and Atmospheric Administration predicts—worst-case scenario—a greater-than-eight-foot sea level increase, and it is 'virtually certain' the global mean sea level will

continue to rise beyond then." *Id.* at 2-3. The Court expressly noted that it was following "Judge Wolf's holding" in the *ExxonMobil* case "in which he found the plaintiff lacked standing as to harms in the far future[.]" *Id.* at 2 n.1.

Similarly, in the *ExxonMobil* case, the District of Massachusetts found that alleged risks of injuries arising from sea level changes, flooding, and severe storms in 2050 and 2100 were not sufficiently imminent to confer standing. *See* Motion Hearing and Ruling at 127:6-18, *Conservation Law Found., Inc. v. ExxonMobil Corp.*, C.A. 1:16-cv-11950-MLW, (D. Mass. Mar. 13, 2019), ECF No. 73 (holding CLF "lacks standing for harms 'in the far future,' including alleged sea level rises in 2100); Order at 2-3, *Conservation Law Found., Inc. v. ExxonMobil Corp.*, C.A. 1:16-cv-11950-MLW, (D. Mass. Sept. 13, 2017), ECF No. 29 ("[P]laintiff does not have standing for injuries that allegedly will result from rises in sea level, or increases in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100. . . . Such potential harms are not 'imminent[.]'") (attached collectively as Exhibit 2).

These courts are not alone. In fact, courts have consistently found plaintiffs like CLF do not have standing for such far-off climate change claims. *See, e.g., Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 11130 (D.N.M. 2011) (finding allegations of injuries resulting from climate change that "are not anticipated to occur for many years or decades" are not actual or imminent for the purposes of Article III).

This case is no different. Here, CLF repeatedly alleges possible injuries that could occur decades from now, based on a potential risk of future releases and discharges associated with possible flooding caused by speculative climate change impacts, including increased sea levels and increased severity in storms:

- "'[C]limate scientists estimate that **by 2050** this "100 year flood" will revisit the Connecticut coast, on average, . . . once every twelve-and-a-half to twenty-five years.'" (Compl. at ¶ 22 (emphasis added); *see also id.* at ¶ 160);

- "'**By 2100**, today's "once-in-a-lifetime' (e.g., 50-year return period) coastal flood level may be exceeded during the highest tide[.]'" (*Id.* at ¶ 23 (emphasis added));

- "'[I]t is *virtually certain* that global mean sea level rise will continue **beyond 2100**, with sea level rise due to thermal expansion to continue for many centuries.'" (*Id*. at ¶ 226 (modification and first emphasis in original));

- "'Global sea level is projected to rise another 1 to 4 feet **by 2100** as a result of both past and future emissions from human activities.'" (*Id.* at ¶ 229 (emphasis added));

- "'Based on the National Climate Assessment intermediate high sea level rise scenario, we project 4.1 feet of rise locally **by 2100**, from a 1992 baseline.'" (*Id*. at ¶ 230 (emphasis added));

- "A 2019 analysis by CIRCA concluded that communities in Connecticut should plan that 'sea level will be 0.5 m (1 ft 8 inches) higher than the [1992 level] in Long Island Sound **by 2050**.'" (*Id*. at ¶ 232 (modification in original) (emphasis added)).

Just as such claims based on distant future harm were insufficient to allege an injury-in-fact sufficient to confer standing in the *Shell* and *ExxonMobil* cases, here, the same claims based on the same alleged distant future harm from the same alleged climate change impacts likewise fail to confer standing. Accordingly, consistent with the rulings in the *Shell* and *ExxonMobil* cases and with well-established Federal case law, this Court should find that CLF lacks standing to bring any claims based on allegations of injuries arising from alleged conditions in the future.

2. Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18 Must Be Dismissed because CLF Has Not Alleged Facts Supporting Plausible Claims for Relief.

In addition to not having standing to pursue its claim associated with distant future harms associated with climate change, CLF also has not pleaded facts showing plausible claims for relief for Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18.

To survive a motion to dismiss for failure to state a claim, a plaintiff's claims must contain sufficient factual matter which, when accepted as true, states a claim for relief "that is plausible on

its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not pass muster under the Federal Rules. *Iqbal*, 556 U.S. at 678. As the Supreme Court has recognized, the Federal Rules do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79.

Under Rule 8, "[t]he factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead sufficient factual matter to render the legal claim plausible, i.e., more than merely possible." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 677). The rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555-56. If the complaint provides no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," it is insufficient. *Id.* at 555. "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss" from being granted. *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (internal citations and quotations omitted).

Despite the length of the Complaint, CLF has failed to allege sufficient facts to support the claims it asserts in Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18. Accordingly, those claims must be dismissed.

A. Counts 1, 2, 6, and 7 Must Be Dismissed because CLF Has Not Pleaded Facts Identifying the BMPs and Control Measures It Contends Gulf Must Include in Its SWPPP to Comply with the Clean Water Act.

In Counts 1, 2, 6, and 7, CLF alleges Gulf has violated the Clean Water Act by not including BMPs or control measures in its SWPPP to address unspecified risks associated with climate change. For example, in Count 1 CLF alleges Gulf is violating its Permit and the Clean

Water Act "[b]ecause the SWPPP for the Terminal fails to describe or ensure implementation of BMPs [Best Management Practices] that will be used to ensure that non-stormwater pollutant discharges resulting from the factors discussed in Section IV.A." (Compl., ¶ 319.) Similarly, in Count 2 CLF alleges the "SWPPP for the Terminal does not detail or ensure implementation of control measures that will be used to ensure that pollutant discharges resulting from the factors discussed in Section IV.A do not occur." (*Id..*, ¶ 324.) Count 6 alleges Gulf is violating its Permit "[b]ecause the SWPPP for the Terminal fails to describe or ensue implementation of BMPs that will be used to address run-on to avoid areas that may contribute pollutants." (*Id.*, ¶ 358.) And in Count 7 CLF alleges the "SWPPP for the Terminal fails to describe or ensure implementation of BMPs that will be used to minimize the potential for leaks and spills resulting from the factors discussed in Section IV.A." (*Id.*, ¶ 363.)

Nowhere in the Complaint, however, does CLF identify what BMPs it believes are necessary and were otherwise omitted from the SWPPP or why their omission constitutes a violation of the Permit and the Clean Water Act. The Complaint contains no facts whatsoever as to the nature and scope of any BMPs or control measures CLF believes are necessary to control the potential release of pollutants from flooding or other climate change impacts. CLF provides no facts showing how different or additional BMPs or control measures would prevent potential flooding associated with climate change impacts from occurring in the future. This information is critical because the SWPPP *does* contain BMPs and control measures to prevent the release of pollutants from the Terminal, and these BMPs are working—there are no ongoing discharges of pollutants from the Terminal and Gulf is in compliance with its Permit and all applicable laws and regulations.

Even taking all the allegations in the Complaint as true, CLF does not allege how the existing BMPS are inadequate, what actions Gulf must take to comply with the Clean Water Act or what BMPs or control measures CLF contends are necessary to prevent hypothetical, future pollutant discharges from the Terminal in violation of Gulf's Permit. Accordingly, CLF has not alleged facts giving rise to plausible claims in Counts 1, 2, 6, and 7 that omission of these unidentified BMPs and control measures somehow violates the Clean Water Act. These claims must, therefore, be dismissed.

B. Count 4 Must Be Dismissed because CLF Has Not Pleaded Facts Identifying What Sources of Pollutants It Contends Were Omitted from Gulf's SWPPP.

In Count 4, CLF alleges that "Gulf has failed to identify sources of pollutants resulting from the factors discussed in Section IV.A," which it contends violates the Clean Water Act. (Compl., ¶ 345.) But just as in the Counts discussed above, CLF provides no actual facts supporting this claim—just conclusory assertions. CLF never alleges what sources of pollutants it believes exist that were not identified and disclosed by Gulf in the SWPPP. As a result, Count 4 must be dismissed.

C. Counts 3, 8, and 9 Must Be Dismissed because CLF Has Not Pleaded Facts Identifying What Information It Alleges Should Have Been Disclosed to Comply with the Clean Water Act.

The third category of claims made by CLF is that Gulf possessed information related to unspecified risks of climate change that it should have but did not disclose either in its SWPPP or to the Connecticut Department of Energy and Environmental Protection. For example, in Count 3, CLF alleges that Gulf made the required certifications of the SWPPP "without disclosing information known to it regarding the factors discussed in Section IV.A," "without developing and implementing a SWPPP that included discussion or disclosure of information known to it about climate change," and "without considering the spill prevention and control

procedures that would be necessary to address the factors discussed in Section IV.A." (Compl., ¶¶ 335, 336, 337.) Additionally, in Count 8, CLF alleges that "Gulf has failed to submit relevant facts and/or submitted incorrect and incomplete information regarding the risk of climate-change discussed above." (*Id.*, ¶ 367.) And in Count 9, CLF alleges that Gulf is violating its Permit and the Clean Water Act because "Gulf has not amended or updated its SWPPP based on information known to it regarding the factors discussed in Section IV.A." (*Id.*, ¶ 374.)

But again, CLF never alleges what information it believes Gulf possessed but did not disclose that made its SWPPP or submissions incorrect or incomplete. CLF provides no facts anywhere stating what information Gulf possessed that it did not disclose. Without any such facts, CLF's claims, again, are just conclusory accusations. Gulf is unable to identify what actions CLF is alleging Gulf must take to comply with the Clean Water Act. Because CLF alleges no facts to support Counts 3, 8, and 9, those claims must be dismissed.

D. Counts 16, 17, and 18 Must Be Dismissed because CLF Has Not Pleaded Facts Identifying How the Terminal Must Be Re-Designed and Engineered to Comply with RCRA.

In addition to its Clean Water Act claims, CLF also alleges that Gulf has violated RCRA by not properly designing or engineering the facility to protect against risks of discharges or releases of hazardous substances associated with climate change. In Count 17, CLF alleges "[t]here is a substantial and imminent risk of the Terminal discharging and/or releasing pollutants because the Terminal has not been properly engineered, managed, operated, or fortified to protect against the factors discussed in Section IV.A," and Gulf has not "integrated the factors discussed in Section IV.A . . . into its systems for handling, storage, or disposal of hazardous waste at the Terminal." (Compl., ¶¶ 444-45.) In Count 18, CLF alleges Gulf has discharged and/or released pollutants and hazardous waste from the Terminal due to

"infrastructure failures and inadequately infrastructure design," and there will be unplanned spills or releases in the future "because the terminal has not been properly engineered, managed, operated, maintained, or fortified in recognition of the factors discussed in Section IV.A." (*Id.*, ¶¶ 459-60.) And in Count 16, CLF alleges that Gulf is violating RCRA by its "failure to address the known imminent risks associated with severe precipitation, extreme weather, storm surge, and sea level rise." (*Id.*, ¶ 422.)

But just as with its Clean Water Act claims, CLF never identifies how the Terminal was not "properly" engineered, managed, operated, or fortified or what changes are necessary to the engineering, management, operation, or fortification of the Terminal to protect against the release of "hazardous waste" or how its systems for handling, storing, and disposing of hazardous wastes are deficient and should be changed. Without actual factual allegations setting forth such deficiencies, CLF's allegations that RCRA requires Gulf to make changes to the Terminal's design, engineering, management, operation, or fortifications, or its systems to handling, storing, and disposing of hazardous wastes, do not rise above conclusory speculation and do not state plausible claims for relief. Counts 16, 17, and 18 must be dismissed.

CONCLUSION

For the foregoing reasons, Gulf respectfully requests that that Court grant its Motion to Dismiss CLF's Complaint and dismiss all claims arising out of alleged injuries that could occur in the future and Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18.

[*Signature on the following page*]

Respectfully submitted this 20th day of October.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2021, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of Court's electronic filing system or by mail on anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Benjamin Daniels
Benjamin M. Daniels