

**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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF CONSERVATION LAW
FOUNDATION'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

ORAL ARGUMENT REQUESTED

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Plaintiff Conservation Law Foundation, Inc. (“CLF”) respectfully submits this memorandum of law in support of its opposition to Defendant Gulf Oil Limited Partnership’s (“Gulf”) Motion to Dismiss, ECF 33 (“Motion”), and requests the Court deny Gulf’s Motion in its entirety for the following reasons.

I. INTRODUCTION

As the Complaint describes, flooding and precipitation events are occurring at an increasing rate in the Northeast, including in the New Haven area. Climate change increases the frequency and intensity of storms and storm surges, and leads to sea level rise and increasing sea surface temperatures, all of which exacerbate flooding and precipitation.¹ The Clean Water Act (“CWA”) and Resource Conservation and Recovery Act (“RCRA”) exist to protect people and the environment from pollutant discharges from, among other things, precipitation and flooding. Gulf is not preparing its New Haven bulk petroleum storage terminal to protect it against these foreseeable severe flooding and weather-related risks and therefore has violated both the CWA and RCRA. CLF alleges that: (1) Gulf is in violation of the CWA by not complying with Connecticut’s General Permit for Discharges Associated with Industrial Activity, and (2) Gulf has violated RCRA by creating the risk of a washout of solid waste, creating an imminent and substantial endangerment, and failing to operate and maintain its Terminal to minimize the risk of spills, all by failing to prepare for the current and imminent risks associated with climate change.

Gulf requests that this Court dismiss CLF’s case, basing its argument on misstatements of the holdings in two similar cases filed by CLF. Gulf erroneously claims that the impacts from climate change on the Terminal are “speculative, future, distant harm,” and thus CLF has not

¹ These events and influences constitute the factors identified in the Complaint as causing and/or contributing to the substantial and imminent risk of pollutant discharge and/or release from the Terminal. Compl., Factual Background § IV.

established constitutional standing. Gulf’s Mem. in Supp. of Mot. to Dismiss, ECF 33-1 (“Gulf’s Mem.”) at 3. However, as properly read, CLF’s claims allege that Gulf’s current discharges at the Terminal and its failure to manage the risks from pollutant discharges associated with climate change impacts are currently resulting in actual and imminent harms to CLF’s members. The two other CLF lawsuits with claims that Gulf asserts are “virtually identical to those asserted” here actually demonstrate that CLF has standing in this matter. Gulf Mem. at 3. In *CLF v. Shell Oil*, the court held that

as to near-term harms from foreseeable weather events, [CLF] has asserted certainly impending harm The Complaint makes clear that a major weather event, magnified by the effects of climate change, *could happen at virtually any time, resulting in the catastrophic release of pollutants* due to Defendants’ alleged failure to adapt the Terminal to address those impending effects. While it might not occur for many years, the fact that it is certainly impending is enough to meet the standard.

ECF 33-2 at 3 (*Conservation Law Found. v. Shell Oil Prods. US*, No. 17-396 WES, 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020) (emphasis added) (“*Shell Oil Order*”).

The court in *CLF v. ExxonMobil* held similarly, noting that CLF alleged “a plausible claim that there is a ‘substantial risk’ that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants into [nearby] areas in the near future and while the Permit is in effect.” ECF 33-3 at 2 (Mot. To Dismiss Order, ECF 29, *Conservation Law Found. v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW (D. Mass. Sept. 13, 2017) (“*ExxonMobil MTD Order*”). This Court should find similarly and reject Gulf’s meritless challenge to CLF’s standing.

Gulf also mistakenly asserts that CLF has not adequately pled certain counts.² However, consistent with the court's findings in *Shell Oil* and *ExxonMobil*, CLF has pled sufficient facts to support plausible claims for relief. Accordingly, the Court should deny Gulf's Motion to Dismiss because (1) CLF has constitutional standing, and (2) CLF has properly pleaded facts to sustain its claims.

II. BACKGROUND

A. Climate Change in New Haven

Climate change is happening in New Haven now, and its effects will only continue to worsen. Compl. ¶¶ 158–59, 172. Climate change leads to more frequent and intense precipitation events, storm surges, flooding, and higher sea surface temperatures and sea levels. *Id.* at ¶¶ 158–59. Already, “New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms.” *Id.* at ¶ 197. The Port of New Haven is especially vulnerable to flooding because it is “partly within the 100-year floodplain with a base elevation equal to the coastal inundation. Topography and drainage problems cause flooding, and residents have reported frequent inconveniences due to street flooding.” *Id.* at ¶ 122.

Coastal flooding in the Northeast has increased because of an approximate one-foot rise in sea level over the past 120 years, and “[t]his trend is projected to continue.” *Id.* at ¶¶ 220–221. Even incremental amounts of sea level rise of between 1 to 10 centimeters can double the odds of flooding, and one study concluded that this leads to the odds of extreme flooding doubling “every 5 years into the future.” *Id.* at ¶ 224. Over that same time span, precipitation in the Northeast also

² At the same time, Gulf has not moved to dismiss a number of CLF's CWA violations, specifically: Gulf's failure to describe and implement practices to reduce pollutants and ensure Permit compliance (Count 5); Gulf's failure to identify or monitor discharges to impaired waters in Gulf's Stormwater Pollution Prevention Plan (“SWPPP”) (Counts 10 and 11); Gulf's failure to identify and monitor discharges from all outfalls (Counts 12 and 13); and Gulf's failure to manage infiltration of stormwater (Counts 14 and 15).

“increased by approximately five inches, or more than 10% (0.4 inches per decade).” *Id.* at ¶ 254. What’s more, the effects of climate change will only continue to worsen. Federal Emergency Management Administration (“FEMA”) “estimates that a 100-year flood in Connecticut would cause over \$13 billion in property damage,” and “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.* ¶ 160. CLF cites an analysis that concluded that New Haven has an 18 percent chance of at least one flood over six feet between 2016 and 2030, with the odds growing to 49 percent by 2050. *Id.* at ¶ 230.

B. Gulf’s Terminal

Gulf owns and operates a bulk petroleum storage terminal in the Port of New Haven (the “Terminal”) pursuant to Connecticut’s General Permit for Discharges Associated with Industrial Activity (the “Permit”), part of Connecticut’s implementation of the CWA National Pollutant Discharge Elimination System program. *Compl.* ¶¶ 20, 124. The Terminal is also regulated under RCRA as a Small Quantity Generator of hazardous waste pursuant to RCRA. *Id.* at ¶¶ 95–96; *see* 40 C.F.R. § 262.16; 42 U.S.C. § 6922. Many toxic and hazardous wastes, some of which are highly carcinogenic, are present at the Terminal, including petroleum hydrocarbons and other hazardous waste constituents. *Compl.* ¶¶ 97, 421, 440, 455 (listing toxic chemicals). The Terminal is also vulnerable to climate change associated flooding risks because of its geographic location, design, and operation. The National Oceanic and Atmospheric Administration’s (“NOAA”) tool for mapping floodplains makes clear that the Terminal is in the middle of the FEMA Flood Zones. *Id.* at ¶ 431. NOAA’s SLOSH (Sea, Lake, and Overland Surges from Hurricanes) modeling also indicates that the Terminal would be inundated by a Category 1 hurricane. *Id.* at ¶ 191–202. In fact, “all of the oil terminals in the Port of New Haven, including the Terminal, were inundated when Superstorm Sandy hit New Haven on October 29, 2012.” *Id.* at ¶ 204. “Despite swamping

the Terminal, the storm surge from Sandy was less than initially anticipated owing to a change in the storm's trajectory." *Id.* at ¶ 206. As some experts noted, "[u]nder different storm tracking scenario, Superstorm Sandy could have caused more damage if the flooding inundation was superposed with high tides." *Id.* at ¶ 208.

In addition, there are a myriad of deficiencies at the Terminal, both structural and operational. For example, Gulf's tank farm containing its storage tanks does not have an impermeable floor to ensure that "a release of petroleum would not migrate to a navigable water body or adjoining shoreline." *Id.* at ¶¶ 417, 414–19 (quoting SWPPP, App. D at 2). Additionally, Gulf admitted that it needs to modify its containment berms surrounding the tanks "[i]n order to provide additional containment for the permitted tanks and protect the tank farm from a 100-year storm event." Compl. Ex. D, ECF 1-5 at 14; Compl. ¶ 73. Even though storm surge has caused aboveground storage tanks "to buckle or float off their foundations, resulting in catastrophic oil spills," Compl. ¶ 210, Gulf has not taken measures to secure its Terminal such as "filing the tanks with liquid or anchoring the [tanks] to their bases." *Id.* at ¶ 211.

C. CLF's Claims

CLF has alleged that Gulf is violating (i) the CWA by violating several conditions of the Permit, (ii) RCRA's "open dumping" provision, (iii) the RCRA generator rule, and (iv) RCRA's "imminent and substantial endangerment" provision.

CLF has alleged that the Permit places affirmative duties on Gulf to evaluate the risks posed to the Terminal by climate-changed-induced severe weather events and to take action to address those risks, but Gulf has failed to do so. In particular, Gulf is obligated to "*minimize* the discharge of pollutants" from the Terminal by, among other things, implementing control measures to (i) eliminate any non-stormwater discharges, (ii) manage stormwater runoff, and (iii) minimize the risk of spills. Compl. ¶¶ 314–29, 355–59, 360–64; Permit §§ 5(b)(11), 5(c)(2)(E), 5(b)(7),

5(b)(9). Gulf is required to evaluate conditions that could result in pollutant discharges and develop control measures to mitigate those risks. *See, e.g.*, Compl. ¶ 146 (quoting Permit § 5(b)(7) (requiring Gulf to “investigate the need for stormwater management or treatment practices,” “consider the potential of various sources at the facility to contribute pollutants to stormwater discharges,” and “implement and maintain” those measures). Gulf is required to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”) that identifies the potential pollutant sources, Compl. ¶ 150, and describes the control measures Gulf has implemented to address the risk of discharges. *Id.* at ¶ 155. Gulf is further required to update the SWPPP as conditions change and to disclose known risks to regulators. *Id.* at ¶¶ 333, 341, 366, 373; Permit § 5(c)(5). Gulf has violated its Permit by failing to disclose or address climate change risks at the Terminal. Compl. ¶¶ 318–19, 324, 335–41, 345–46, 352–53, 357–58, 362–63, 374–77. By failing to take climate change into account, Gulf is violating the Permit’s requirements.

RCRA imposes similar duties on Gulf, which Gulf is also violating. In particular, RCRA requires a Small Quantity Generator of hazardous waste—like the Terminal—to “to minimize the possibility” of hazardous waste releases, Compl. ¶¶ 454–65; 40 C.F.R. § 262.16(b)(8)(i) (the generator rule), and it requires all facilities in floodplains to avoid solid waste washing out into the environment so as to pose a hazard to human life, wildlife, land, or water resources. Compl. ¶¶ 420–36, 95–96; 40 C.F.R. § 257.3-1(a) (open dumping rule). RCRA also allows a citizen suit to be filed against any person that has contributed or “is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste” if the waste “may present an *imminent and substantial endangerment* to health or the environment.” Compl. ¶¶ 437–53; 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Given the location of the Terminal and structural

deficiencies, there is no way Gulf can meet these obligations without considering climate change in how it operates the Terminal; yet Gulf has failed to do so.

CLF members are harmed by Gulf's failure to operate its Terminal in a way that plans for the effects of climate change because "CLF members live near, recreate on, and regularly visit the area and waters near Gulf's Terminal, including, but not limited to, the New Haven Harbor, the Quinnipiac River, and the Mill River." Compl. ¶ 9. As such, "CLF and its members are also concerned about, and have an interest in, eliminating the risk from the discharge and/or release of pollutants from the Terminal into the New Haven Harbor, the Quinnipiac River, and the Mill River, as well as into nearby communities and ecosystems." *Id.* at ¶ 11. "CLF and its members are affected by, and concerned with, pollutant discharges and/or releases resulting from Gulf's failure to satisfy its obligations under the Clean Water Act and RCRA." *Id.* at ¶ 12. CLF's members' concerns are especially justified considering Gulf's own Terminal has been inundated by Superstorm Sandy in the recent past. *Id.* at ¶ 204. "One of the most devastating aspects of [Sandy] was surge[.] . . . As sea level continues to rise, whenever we get a storm like this – or even a garden-variety storm – we are going to see more damage." *Id.* at ¶ 209.

Gulf seeks to shirk its responsibilities under the CWA and RCRA, endangering CLF's members—which is why CLF sued Gulf to hold it accountable.

D. CLF's Other Cases

In 2017, CLF sued Shell Oil under the CWA and RCRA for, *inter alia*, failure to consider and design its bulk storage and fuel terminal in Providence Rhode, Island to address risks from reasonably foreseeable severe weather events, similar to Gulf's failure here. *Shell Oil* Order at 1 (2020 WL 5775874, at *1). Shell Oil moved to dismiss CLF's claims for lack of standing, arguing CLF alleged injuries from weather that are "highly speculative, remote, or hypothetical." Shell MTD Mem., *Shell Oil*, No. 1:17-cv-00396-WES-LDA, ECF 46-1 at 14 (D.R.I. Oct. 11, 2019). The

court noted that Shell Oil’s “standing challenge largely centers on imminence, ‘a somewhat elastic’ benchmark meant ‘to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.” *Shell Oil* Order at 2 (2020 WL 5775874, at *1) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)). The court held that

as to near-term harms from foreseeable weather events, [CLF] has asserted certainly impending harm . . . The Complaint makes clear that a major weather event, magnified by the effects of climate change, *could happen at virtually any time, resulting in the catastrophic release of pollutants* due to [the] [d]efendants’ alleged failure to adapt the [t]erminal to address those impending effects. While it might not occur for many years, the fact that it is certainly impending is enough to meet the standard.

Shell Oil Order at 3 (2020 WL 5775874, at *1) (emphasis added).

Shell Oil relied on an opinion in *ExxonMobil*, where the court also clarified the basis for CLF’s standing and did not dismiss any claims for lack of standing. *Shell Oil* Order at 2 n.1 (2020 WL 5775874, at *1 n.1) (citing *ExxonMobil* MTD Order). In 2016, CLF sued ExxonMobil under the CWA and RCRA for similar violations to those alleged here at ExxonMobil’s bulk petroleum oil terminal in Everett, Massachusetts. *Conservation Law Found., Inc. v. ExxonMobil Corp.*, 3 F.4th 61, 66–67 (1st Cir. 2021). ExxonMobil moved to dismiss certain counts for lack of standing, arguing CLF’s injuries were “remote,” “uncertain” and based on “speculation.” Mem. in Supp. of Def.’s Second Mot. to Dismiss, *ExxonMobil*, No. 1:16-cv-11950-MLW, ECF 37 at 21–23 (D. Mass. Dec. 20, 2017).

Rejecting ExxonMobil’s arguments, the court found that CLF stated “a plausible claim that there is a ‘substantial risk’ that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants into those areas in the near future and while the Permit is in effect.” *ExxonMobil* MTD Order at 2. The court held that “CLF has standing for ‘near term harms’ from climate change . . . [and] other foreseeable weather events.” Mot. to

Dismiss Hr’g Tr. at 127, *ExxonMobil*, No. No. 1:16-cv-11950-MLW, ECF 73 (D. Mass. Mar. 13, 2019) (“*ExxonMobil* MTD Hr’g Tr.”).³ To the extent either court granted the defendants’ motions to dismiss, it was on the narrow issue of 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.” *ExxonMobil* MTD Order at 2; *see also Shell Oil* Order at 2–3 (2020 WL 5775874, at *1) (“[T]o the extent that [CLF’s] claims rely on future harms, [CLF] lacks standing. These flawed allegations include, for example, those detailing that, by 2100, the National Oceanic Atmospheric Administration predicts—worst-case scenario—a greater-than-eight-foot sea level increase.”).

This Court should similarly find that CLF has adequately alleged its claims and deny Gulf’s Motion to Dismiss.

III. ARGUMENT

Gulf’s Motion to Dismiss should be denied because, as two other courts have similarly found, (1) CLF has standing to bring its claims, and (2) CLF has alleged sufficient facts to sustain its claims.

A. CLF Has Standing to Bring Its Claims

As the courts have already held in *Shell Oil* and *ExxonMobil*, CLF has standing to assert its claims. “Where, as here, a case is in the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element.” *Spokeo v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). “[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact—not proof—in the complaint or supporting affidavits.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987) (internal quotations

³ An excerpt of the *ExxonMobil* Motion to Dismiss Hearing Transcript is attached hereto as Exhibit A.

omitted). The court “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). To satisfy the elements of Article III standing, the plaintiff must show that

(1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180–181 (2000).⁴

CLF alleges sufficient facts to satisfy all three elements of standing. Importantly, Gulf does not dispute that CLF’s members’ injuries are: concrete and particularized (element 1(a)); traceable to Gulf (element 2); or redressable (element 3). Gulf challenges only that CLF’s injuries are “actual or imminent” (element 1(b)). However, as described below, CLF has adequately alleged that the Terminal is at risk from climate-change-induced severe weather events that are already occurring or will occur around the Terminal in the near future, and Gulf’s characterization of CLF’s claims as alleging only “future” risk is false. Therefore, CLF has standing to bring its claims because its members have suffered concrete, particularized, actual, and imminent injuries that are fairly traceable to Gulf and will be redressed if the Court grants CLF the relief sought in the Complaint.

⁴ An organization has standing to sue on behalf of its members when: (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization’s purpose; and (3) neither the claim nor the relief requested requires and individual member’s participation in the lawsuit. *Laidlaw*, 528 U.S. at 181. Gulf does not challenge the second or third prong of this test. Thus, the only issue is whether any member of CLF would have standing to bring the claims asserted in the Complaint. In any case, CLF is “dedicated to the conservation and protection of New England’s public health, environment, and natural resources” and “has long worked to protect the health of New England’s waterways, including addressing the significant water quality impacts of industrial and stormwater pollution.” Compl. ¶ 8.

As the courts found in *Shell Oil* and *ExxonMobil*, CLF has sufficiently alleged an imminent or actual injury in its Complaint against Gulf.⁵ “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013)). “One does not have to await the consummation of the injury to obtain preventative relief. If the injury is certainly impending, that is enough.” *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923), quoted in *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994). Here, CLF has sufficiently alleged that the risks of severe weather to—and resultant pollutant discharges from—the Terminal are both “substantial” and “certainly impending.”

The effects of climate change are already being felt in New Haven, and they are increasing. Storm surge has been “steadily increasing” due to sea level rise. Compl. ¶ 194. Also, there have been more frequent record-breaking precipitation events, causing threats of flooding and major snowstorms. *Id.* “As a coastal town, New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms.” *Id.* at ¶ 197. Already, “precipitation [in the Northeast] increased by approximately five inches, or more than 10% (0.4 inches per decade).” *Id.* at ¶ 254. NOAA’s model on hurricane surge values shows that “much of the Port of New Haven, including the Terminal, would be inundated by a Category 1 hurricane, while the remainder of the Port would be inundated by storm surge from a Category 2 hurricane.” *Id.* at ¶ 202. The City of New Haven itself has determined that it is “particularly vulnerable to all

⁵ *Shell Oil* Order at 3, 6 (2020 WL 5775874, at *1, *2) (“[A]s to near-term harms from foreseeable weather events, [CLF] has asserted certainly impending harm . . . RCRA ‘allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists’, emphasizing ‘[i]t is the threat that must be close at hand, even if the perceived harm is not.’”) (quoting *Maine People’s All. & Nat. Res. Def. Council v. Mallinckrodt*, 471 F.3d 277, 279 & n.1 (1st Cir. 2006)); *ExxonMobil* MTD Order at 1–2 (“[It is plausible that [CLF’s] claimed injuries are . . . actual or imminent, and fairly traceable to defendants’ alleged ongoing or imminent discharges . . . [CLF] state[d] a plausible claim that there is a ‘substantial risk’ that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants into those areas in the near future.”).

hurricanes forecasted to track to New England . . . due to the ability of Long Island Sound to amplify hurricane surges.” *Id.* at ¶ 196. Moreover, “[t]emperatures in Connecticut have increased about 3°F since the beginning of the 20th century.” *Id.* at ¶ 228.

Indeed, the Connecticut Coastal Hazard Viewer from the Connecticut Department of Energy and Environmental Protection demonstrates that the Gulf Terminal has already been flooded by Superstorm Sandy. Compl. ¶ 204. While Sandy was only a tropical storm by the time it hit Connecticut, the storm surge therefrom was 9.14 feet above normal tide levels. *Id.* at ¶ 205. Connecticut’s post-Sandy analysis indicates that Sandy could have caused much more damage to New Haven. *Id.* at ¶ 206. A storm similar to Sandy in the future could increase the water level by almost three feet, causing even more damage than Sandy already did. *Id.* at ¶¶ 208–09.

In addition to allegations about currently occurring impacts, CLF has also alleged that the risks are increasing now and in the near term. The Connecticut Legislature “has adopted an official sea level rise prediction of 20 inches by 2050.” *Id.* at ¶ 139. “Weather-related flooding is compounded by a high rate of sea level rise of 2.5mm per year (the global mean trend is 0.5mm per year).” Compl. ¶ 197. One study has concluded that, in general, that sea level rise contributes to an anticipated doubling of the odds of extreme flooding “every 5 years into the future.” *Id.* at ¶ 224. The Connecticut Governor’s Steering Committee on Climate Change has noted that sea level rise and storm surges can lead to “devastating impact[s]” on dredging, national security, commercial transport and fishing, recreational boating, infrastructure, flooding of roads, energy fuel transportation, and more. *Id.* at ¶ 195. CLF cites an analysis that concluded that New Haven has an 18 percent chance of at least one flood over six feet between 2016 and 2030, with a 49 percent chance out to 2050. *Id.* at ¶ 230.

Gulf selectively quotes paragraphs from CLF’s Complaint discussing future risks of climate-change-affected flooding predicted to occur in 2050 and 2100 to mischaracterize CLF’s

injury as “speculative, future and distant.” Gulf Mem. at 8, 12 (citing Compl. ¶¶ 22, 23, 229, 230, 232). But this argument misses the mark for two reasons.

First, as described above, CLF has alleged various facts demonstrating that climate-change-induced severe weather is a threat to the Terminal now, and the risk is only increasing. These events “could happen at virtually any time,” as *Shell Oil* held. *Shell Oil* Order at 3 (2020 WL 5775874, at *1).

Second, Gulf mischaracterizes the nature of CLF’s allegations that include predictions further out. Extreme weather events and sea level rise projected to occur *by* 2050 and 2100 are not cited because they constitute discrete events that will occur exactly on those dates in the future; rather, these facts are cited to provide context for the concept that the effects of climate change must be occurring now and are worsening. *See* Compl. ¶ 24. The sea level along the Connecticut coast will not simply jump 20 inches in 2050 or as high as four feet in 2100, *Id.* at ¶¶ 139, 229–30; nor will the 100-year storm magically become a 12.5–25-year storm in January 2050. *Id.* at ¶ 22. The changes are gradual, meaning there are changes happening now that will only aggregate with the passage of time. *See ExxonMobil* MTD Hr’g Tr. at 127 (noting that while sea level rise by 2100 is not the basis of standing, it is “relevant for other purposes”). Contrary to Gulf’s characterization, the courts in both *Shell Oil* and *ExxonMobil* found CLF had adequately alleged that the risk of harm to the terminals, and resultant pollutant discharges, were imminent.⁶

Gulf is unprepared to prevent discharges and releases from its Terminal from increased and increasing flooding and precipitation. The CWA and RCRA were enacted specifically to prevent such catastrophes from devastating an entire community and the resources upon which it relies.

⁶ Also, many climate change effects are already “committed,” meaning they will occur regardless of any future human action. *See, e.g.*, Compl. ¶¶ 225–27 (“Researchers have found that the greenhouse gases emitted by the year 2000 have already committed global mean sea level rise to approximately 1.7 meters (range of 1.2 to 2.2 meters).”). Therefore, even predictions out into the future are far from speculative.

Disasters like these have occurred, are occurring, and will continue to occur throughout New Haven. As a result, taken in the light most favorable to CLF, the Complaint alleges its members face actual and imminent harm, establishing standing.

B. CLF Has Alleged Sufficient Facts to Sustain Its Claims

CLF's Complaint contains detailed factual allegations that, taken in the light most favorable to CLF, state plausible claims for relief. Gulf devotes a significant portion of its brief asserting that CLF alleges "no facts" supporting its claims, Gulf Mem. at 3, 14, 16, but Gulf's argument essentially attempts to hold CLF to a higher pleading standard than is required. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. "The assessment of whether a complaint's factual allegations plausibly give rise to an entitlement to relief 'does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal conduct.'" *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020) (internal quotations omitted). The Court "accept[s] well pleaded factual assertions as true" and "draw[s] all reasonable factual inferences in favor of the plaintiff." *Id.* at 76. Here, CLF has satisfied the pleading requirements for its CWA and RCRA claims.

1. CLF Has Sufficiently Plead Its Clean Water Act Claims

To state a claim under the CWA, a plaintiff must allege a violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1)(A). A violation of a permit or a condition of a permit constitutes an effluent violation under the statute. 33 U.S.C. § 1365(f)(7).

CLF has alleged that Gulf's CWA Permit imposes an affirmative duty on Gulf to consider and address risks of pollutant discharges from foreseeable severe weather events, including those driven by climate change. For example, Gulf has the duty to implement "control measures" to "minimize the discharge of pollutants" from the Terminal. Compl. ¶ 142 (quoting Permit § 5(b)). The Permit defines "minimize" to mean "reduce and/or eliminate *to the extent achievable* using control measures that are technologically available and economically practicable and achievable *in light of best industry practice.*" *Id.* (emphasis added); *see also id.* at ¶ 143. This duty to apply "best industry practice" to eliminate discharges as much as possible places an affirmative duty on Gulf to both (i) evaluate the potential risk of discharges, and (ii) take actions to reduce those risks.

The scope of Gulf's duty is apparent from the examples of Control Measures that are identified in the Permit. For example, the requirement to manage stormwater runoff requires Gulf to:

1. "investigate the need for stormwater management or treatment practices that shall be used to divert, infiltrate, reuse, or treat stormwater runoff in a manner that minimizes pollutants in stormwater discharges from the site";
2. "implement and maintain stormwater management or treatment measures determined to be reasonable and appropriate to minimize the discharge of pollutants from the site";
and
3. "consider the potential of various sources at the facility to contribute pollutants to stormwater discharges associated with industrial activity when determining reasonable and appropriate measures."

Compl. ¶ 146 (quoting Permit § 5(b)(7)). Additional provisions include the requirements to (i) "eliminate non-stormwater discharges," (ii) "minimize the potential for leaks and spills," and

(iii) “minimize exposure to stormwater of materials identified in the ‘Inventory of Exposed Materials.’” Compl. ¶¶ 145–49.

The Permit also requires Gulf to develop and implement a SWPPP to describe its evaluation of potential risks and the actions it has taken to address those risks. For example, the SWPPP must include a “Summary of Potential Pollutant Sources” which requires Gulf to, among other things, (i) identify any pollutants that could be mobilized by stormwater, and (ii) describe “existing structural and non-structural control measures to reduce pollutants in stormwater runoff.” Compl. ¶ 154 (quoting Permit § 5(c)(2)(D)(iii)). The SWPPP must also describe all the control measures implemented at the site, including “the appropriateness and priorities of control measures in the [SWPPP] and how they address identified potential sources of pollutants at the site.” Compl. ¶ 155 (quoting Permit § 5(c)(2)(E)). The SWPPP must include a signed certification by a professional engineer attesting to the completeness and sufficiency of the SWPPP contents. Compl. ¶ 156. As the *ExxonMobil* court put it when dealing with a similar CWA Permit, Gulf’s Permit requires it “to consider foreseeable severe weather events, including any climate change-induced weather events, in developing and maintaining its [SWPPP] . . . [and] *proactively* address potential discharges of pollutants.” *ExxonMobil* MTD Hr’g Tr. at 132,133 (emphasis added).

However, Gulf has not considered, much less addressed, risks of pollutant discharge and release from the more frequent and severe foreseeable weather events exacerbated by climate change described in Sections II and III.A above. The SWPPP does not analyze the potential for flooding from severe weather, so: (i) Gulf cannot have implemented the control measures required to “minimize the discharge of pollutants” and to eliminate non-stormwater discharges (Counts 1, 5, 6, 7); (ii) the Terminal is not being operated in accordance with the Connecticut Coastal Management Act (Count 2); (iii) the SWPPP does not identify all potential pollutant sources

(Count 4); (iii) the certification of the SWPPP as complete and accurate was false and has not been amended as required (Counts 3, 9), and (iv) Gulf has not given all relevant facts to CT Department of Energy and Environmental Protection regarding risks to the Terminal (Count 8).

None of Gulf's arguments to the contrary alter this conclusion.

First, Gulf argues that CLF was required to plead the exact control measures (or BMPs) that Gulf was required to include in its SWPPP, Gulf Mem. at 13–15, but Gulf has the obligations backward. As explained, the Permit requires *Gulf* to develop control measures to minimize foreseeable risk of pollutants being discharged from the Terminal and describe those control measures in the SWPPP. Compl. ¶¶ 141–49, 151. CLF has adequately alleged that the Terminal faces an imminent risk from severe weather, *see supra* Sections II and III.A, and that Gulf does not describe or address those risks in the SWPPP, Compl. ¶¶ 315–28. The burden is not on CLF to detail what specific control measures should have been implemented, at least not at the *pleadings stage*. Indeed, the courts in both *ExxonMobil* and *Shell Oil* rejected identical arguments. *ExxonMobil* MTD Order at 3; *ExxonMobil* MTD Hr'g Tr. at 125; *Shell* MTD Mem., *Shell Oil*, No. 1:17-cv-00396-WES-LDA, ECF 46-1 at 43–50 (D.R.I. Oct. 11, 2019); *Shell Oil* Order at 11–12 (2020 WL 5775874, at *4).

Gulf's argument is particularly puzzling because Gulf has not moved to dismiss Count 5, which alleges that Gulf failed to describe and implement practices to minimize pollutant discharges. *See* Compl. ¶¶ 349–54. By failing to seek dismissal of Count 5, Gulf has waived any right to move to dismiss that claim. Fed. R. Civ. P. 12(g)(2); *Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 214 (E.D.N.Y. 2013) (“Rule 12(g)(2) precludes a subsequent motion to dismiss . . . rais[ing] defenses or objections that were ‘available’ to the defendant at the time of a prior motion to dismiss.”) (discussing Rule 12(b)(6)). It is unclear how Gulf could admit this failure, even at

the pleading stage, and still challenge any of CLF's claims regarding control measures, Gulf Mem. at 13–15, or failure to disclose required information to regulators. *Id.* at 15–16.

Moreover, the Complaint includes many factual allegations about the insufficiency of Gulf's infrastructure. For example, the Complaint notes that Gulf has not certified that it has an impermeable secondary containment area or that "a release of petroleum would not migrate to a navigable water body or adjoining shoreline." Compl. ¶¶ 414–19 (quoting SWPPP, App. D at 2). Compl. ¶¶ 92–94, 416–17. Also, per Gulf's own documents, the berm heights around the ASTs are insufficient to provide adequate secondary containment because they *do not adequately "protect the tank farm from a 100-year storm event,"* a major component of CLF's claims. Compl. ¶ 73; Compl. Ex. D, ECF 1-5 at 14 (emphasis added). And while Gulf is raising the berm heights and modifying the containment area floor, CLF has raised questions about the adequacy of these modifications to withstand sea-level rise, increased precipitation, and flooding. Compl. ¶¶ 73–76 (discussing Letter from CLF to Gulf highlighting ways in which Gulf's planning and design are likely inadequate, such as comparing Gulf's proposed 13-foot design elevation with a U.S. Army Corps of Engineers study tentatively recommending a floodwall system with a top elevation of more than 15 feet).

The Complaint also states that Gulf's SWPPP does not include BMPs designed to protect tanks during a flood, such as filling the ASTs with liquid before storms, or anchoring the ASTs to their bases so storm surge does not cause them to buckle or float off their foundation. Compl. ¶ 210–11. In fact, sixteen years ago during Hurricane Katrina, five or six major spills were caused by ASTs lifted by storm surge, which put Gulf on notice of the undoubtable risk of discharge and/or release of pollutants by storm surges. *Id.* at ¶ 210–11. These detailed facts, taken in the light most favorable to CLF, lead to a reasonable inference that Gulf's has not designed the Terminal to

adequately prepare for the foreseeable severe weather events and therefore is not implementing the appropriate measures to comply with the CWA.

Second, Gulf argues that CLF did not adequately plead what sources of pollutants Gulf failed to identify in its SWPPP, Gulf Mem. at 15, but CLF alleges numerous potential sources of pollutants that may reasonably be expected to affect the stormwater quality near the Terminal. For example, the Complaint alleges that discharges may occur from sources like improperly moored and unprepared ASTs, insufficiently built floodwalls and seawalls, permeable containment areas, and more—and alleges past incidences of flooding from climate-change-related factors. Compl. ¶¶ 73–74, 76, 210–11, 309–12, 415–19; *see ExxonMobil* MTD Hr’g Tr. at 133 (“[T]he permit requires [the Permittee] to *proactively* address potential discharges of pollutants.”) (emphasis added)). Due to the disastrous effects that Superstorm Sandy and other past hurricanes have had on bulk petroleum terminals, Gulf is aware that its Terminal may be vulnerable to risks of pollutant discharge and release from the effects of such storms and hurricanes.⁷

Third, Gulf argues that CLF does not allege what information Gulf should have provided to regulators, Gulf Mem. at 15–16, but this argument fails for the same reasons described above. The Complaint adequately alleges that Gulf has failed to analyze, disclose, or guard against the risks posed to the Terminal by foreseeable severe weather conditions despite knowing about the consequences of such weather conditions on bulk petroleum storage facilities. *See supra*, note 7 and accompanying text; Compl. ¶ 163. Moreover, the Complaint states that Gulf was a company

⁷ Because of Sandy, “Motiva Enterprises LLC’s Terminal in Sewaren, New Jersey suffered an approximately 378,000-gallon oil release into the Arthur Kill as a result of a containment failure.” Compl. ¶ 257. “Hurricane Harvey’s intense rains and flooding struck the Texas energy sector, damaging facilities and causing releases and discharges of pollutants, including toxic chemicals.” *Id.* at ¶ 260. In 2017, one of Shell Oil’s tank’s “roof started sinking at 3:00 AM due to Hurricane Harvey dumping heavy and large amounts of rainfall in a short period of time,” resulting in discharges of approximately “2,968.8 pounds of benzene, 1,272.4 pounds of ethylbenzene, 11,451.1 pounds of toluene, and 7,634.1 pounds of xylene.” *Id.* at ¶ 264. “At Kinder Morgan’s Pasadena Terminal, a 6.3-million-gallon fuel storage tank spilled an unspecified amount of gasoline . . . after tilting over due to large volumes of rain from Harvey.” *Id.* at ¶ 266.

affiliation committee member in an American Petroleum Institute study on carbon dioxide. Compl. ¶ 164. Gulf “also participated in an ongoing project with other major oil companies to collect ocean data from newly installed Shell oil platforms for the development and calibration of environmental forecasting theories.” *Id.* at ¶ 170 (internal quotations omitted). Also, the Connecticut Coastal Hazards Viewer demonstrates that Gulf’s own Terminal was “inundated when Superstorm Sandy hit New Haven on October 29, 2012.” *Id.* at ¶ 204.

In addition, as to Count 9 specifically, Gulf failed to disclose that most of its stormwater discharges are made directly to New Haven Harbor through two outfalls that are not identified in the SWPPP. *Id.* at ¶¶ 375–76; *see also id.* at ¶¶ 337, 396–99, 401–05. Because Gulf did not disclose these outfalls and the resulting discharges to impaired waterbodies, Gulf failed to include information regarding monitoring such discharges. *Id.* at ¶¶ 339–40, 381–87, 390–94. How Gulf can claim that its SWPPP complies with the CWA is puzzling, Gulf Mem. at 4–6, given that it is not even monitoring certain outfalls and thus is not aware of discharge risks therefrom. *See also* Compl. Counts 12–13 (counts alleging Gulf failed to identify and monitor outfalls, which Gulf has not moved to dismiss).

Accordingly, CLF has alleged more than enough facts to satisfy its pleading burden with respect to its CWA claims.

2. CLF Has Adequately Alleged Its RCRA Claims

With respect to CLF’s RCRA claims, Gulf repeats similar arguments that CLF has not alleged sufficient facts to state claims, but these arguments fail for the same reasons discussed above.

CLF has alleged three RCRA claims: Count 15—open dumping, Count 16—imminent and substantial endangerment, and Count 17—violation of the RCRA generator rule. “RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and

hazardous waste.” *Simsbury-Avon Pres. Soc’y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204–05 (2d Cir. 2009). The purpose of RCRA is to protect human health and the environment from current and future threats by “reduc[ing] the generation of hazardous waste and [] ensur[ing] the proper treatment, storage, and disposal of that waste which is nonetheless generated.” *Id.* at 205. RCRA’s citizen suit provision allows private parties to bring suit “to enforce waste disposal regulations promulgated under the Act.” *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 22 (1989). Citizens may bring suits against “certain responsible persons, including former owners, ‘who ha[ve] contributed or who [are] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which *may present an imminent and substantial* endangerment to health or the environment.’” *Meghrig v. Kfc W.*, 516 U.S. 479, 484 (1996) (quoting 42 U.S.C. § 6972(a)(1)(B)) (emphasis in original).

To state a regulatory violation under RCRA, a plaintiff must allege violations of any “standard, regulation, condition, [or] requirement . . . pursuant to this chapter.” 42 U.S.C. § 6972(a)(1)(A). Open dumping is “prohibited by [42 U.S.C.] § 6945(a), and because failing any criterion listed in [40 C.F.R.] §§ 257.1 through 257.4 automatically renders a facility an open dump, *failure to satisfy any one criterion itself violates RCRA*,” *S. Rd. Assocs. v. Int’l Bus. Machs. Corp.*, 216 F.3d 251, 256 (2d Cir. 2000) (emphasis in original). One of the open dumping criteria provides that: “Facilities or practices in floodplains shall not . . . result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.” 40 C.F.R. § 257.3-1(a). Consequently, it is a violation of RCRA for any facility located in a floodplain to engage in practices that could result in the release of solid waste into the environment.

The RCRA generator rule places additional duties on Gulf to avoid discharges of hazardous waste. As a Small Quantity Generator of hazardous waste, Compl. ¶¶ 95–100, Gulf is required to

“maintain and operate its facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.” 40 C.F.R. § 262.16(b)(8)(i); *see also* CONN. AGENCIES REGS. § 22a-430-3(h) (requiring facilities to “take all reasonable steps to minimize or prevent any discharge . . . which has a reasonable likelihood of adversely affecting human health or the environment.”). Failure to minimize the risks of unplanned releases of hazardous waste into surface waters violates the generator rule.

To plead an imminent and substantial endangerment claim, a plaintiff must allege “that a ‘risk of threatened harm is present,’” that the risk is “substantial” or “serious,” and that there be “a reasonable prospect of future harm.” *Simsbury-Avon*, 575 F.3d at 210–11. “This is expansive language, which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.” *Id.* at 210 (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (emphasis in original)).

CLF has alleged sufficient facts to state a claim under all three RCRA Counts. CLF has alleged that the Terminal “generates, stores, handles, and disposes of” hazardous and solid waste, Compl. ¶¶ 95–100, and that it is located in a floodplain. *Id.* at ¶¶ 430–31. As explained above with CLF’s CWA claims, the Terminal is at imminent risk from severe weather and Gulf has taken no action to evaluate or address those risks, *id.* at ¶¶ 158–272, 313, thereby presenting an “imminent and substantial endangerment to human health and the environment” (Count 17). *Id.* at ¶¶ 438–53. It follows that Gulf has also failed in its duties to (i) prevent “washout of solid waste” harmful to human life (*see* Count 16—open dumping), and (ii) “minimize the possibility of . . . any unplanned . . . release of hazardous waste or hazardous waste constituents” (Count 18—generator rule). As with the CWA claims, RCRA places affirmative duties on *Gulf* to *prevent* washout and *minimize*

and/or eliminate the risk of pollutants spilling from the facility into nearby waterways, and contrary to Gulf’s protestations (Gulf Mem. at 16–17), CLF is not required to identify all the ways in which Gulf could change its facility to become RCRA compliant in addition to considering and preparing for the impacts of climate change. Nevertheless, as detailed above, CLF has alleged structural and operational deficiencies, such as inadequate berm heights and failure to secure ASTs during a storm, Compl. Ex. D, ECF 1-5 at 14; Compl. ¶¶ 73–76, 210–11, that highlight Gulf’s failure to meet its affirmative obligations under RCRA.

* * * * *

As *Lynch* requires, and as the courts found in *Shell Oil* and *ExxonMobil*, CLF has pled enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal conduct. *ExxonMobil* MTD Hr’g Tr. at 134 (concluding that reliance on lack of changes in the facility after the permit was issued was a “sufficient factual allegation for motion to dismiss purposes” to allege ExxonMobil’s failure to consider foreseeable severe weather events in designing its terminal); *see also Shell Oil* Order at 9 (2020 WL 5775874, at *3).⁸ Therefore, CLF has alleged sufficient facts to sustain its claims by identifying the Terminal’s deficiencies.

IV. CONCLUSION

For the foregoing reasons, Gulf’s Motion to Dismiss should be denied.

⁸ *See also Coastal Envtl. Rights Found. v. Am. Recycling Int’l*, No. 17-cv-00425-BAS-JMA, 2017 WL 6270395, at *11 (S.D. Cal. Dec. 8, 2017) (noting the plaintiff adequately pled claims of the defendant’s violations of best management practices to prevent pollutant discharges by identifying the defendant’s failure to cover containers and other industrial materials exposed to stormwater); *cf. United States v. K.P. Kauffman Co.*, 389 F. Supp. 3d 935, 941 (D. Colo. 2019) (refusing to dismiss a case under 12(b)(6) when the plaintiff, in a Clean Air Act citizen suit, pled failure to ensure site glasses of enclosed combustors were clean to support its allegation that the defendant failed to implement “good engineering practices”).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, the foregoing document was filed through the ECF system, by which means a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ James Crowley _____

James Crowley