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-SVN

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

Gulf Oil Limited Partnership ("Gulf") moved to dismiss Plaintiff Conservation Law Foundation's (CLF) Complaint on two grounds. First, based on recent orders in the *Shell* and *Exxon* cases, CLF lacks standing to pursue claims based on future risks of discharges caused by climate change induced flooding. (Dkt. 33-1 at 8-12.) Second, CLF has not alleged actual facts to support Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18. (*Id.* at 12-17.)

In its Response, CLF does not dispute that its claims should be governed by the *Shell* and *Exxon* decisions. (Dkt. 43-1 at 11-18.) Rather, CLF contends its claims survive because they are based on current—and not future—risks of discharges. (*Id.*) But the Court need only read the Complaint and CLF's response, both of which plainly rely on claims of future risks of discharges, to recognize the true character and basis of CLF's claims. As a result, like in both *Shell* and *Exxon*, CLF's claims based on future risks of discharges caused by climate change related weather events must be dismissed for lack of standing.

Regarding the sufficiency of its allegations, CLF doubles down on its conclusory allegations and argues that it is not required to plead actual facts supporting its claims. (*Id*. at 18,

21, 27.) Demonstrating a profound misunderstanding of its pleading obligations under the Federal Rules and *Twombly*[1] and *Iqbal*[2], CLF contends that by requiring it to plead actual facts, Gulf "attempts to hold CLF to a higher pleading standard than is required," and "the burden is not on CLF to detail what specific control measures should have been implemented." (*Id.* at 18, 21.) CLF is incorrect. The Federal Rules and case law are clear that CLF must plead specific facts that plausibly support their claims. Here, CLF has not done that for Counts 1, 2, 3, 4, 6, 7, 8, 9, 16, 17, and 18. As discussed in Gulf's Motion and below, CLF's failure to identify actual facts supporting these claims requires dismissal. Accordingly, Gulf respectfully requests that the Court grant its Motion to Dismiss CLF's Complaint.

1. Because CLF's Response Proves Its Claims Are Based on Purported Future Risks of Discharges, Its Claims Must Be Dismissed for Lack of Standing.

In its Response, CLF appears to concede that, based on the recent decisions in the *Shell* and *Exxon* cases, it does not have standing to pursue claims based on future risks of discharges associated with climate-changed-induced flooding. (Dkt. 43-1 at 13.) Nevertheless, CLF contends its claims survive dismissal because its claims, at least according to its characterizations, are based on current and imminent—not future—risks of discharges. CLF, however, is incorrect. Indeed, CLF's response itself *proves* that its claims are based on allegations of future risks.

For example, in its response, CLF asserts the "Federal Emergency Management Administration estimates that a 100-year flood in Connecticut would cause over $13 billion in property damage, and climate change 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-**

[1] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

a-half years to twenty-five years." (Dkt. 43-1 at 8 (emphasis added).) CLF further relies on "any 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.* (emphasis added); *see also id.* at 16 (quoting same report).) According to CLF, the "Connecticut Legislature has adopted an official sea level rise prediction of 20 inches by **2050**." (*Id.* at 16 (emphasis added).) CLF continues that "[w]eather-related flooding is compounded by a high rate of sea level rise" and "[o]ne study has concluded that, in general, sea level rise contributes to an anticipated doubling of the odds of extreme flooding every **five years into the future**." (*Id.* (emphasis added).) CLF relies on another estimate that "greenhouse gases emitted by the year 2000 have already committed global mean sea level rise to approximately 1.7 meters" at some unknown point in the future. (*Id.* at 17 n.6.)

Despite arguing time and time again that its claims are based on current or imminent risks, the actual allegations supplied in its Complaint and in its brief rely on estimates and predictions of risks arising years—if not decades—in the future. Gulf acknowledges that based on the rulings in *Shell* and *Exxon* if CLF's claims were based on current or imminent risks of discharges, those claims would proceed to discovery. However, contrary to CLF's assertion that Gulf simply "selectively quoted" from its Complaint, it is undeniable that CLF's claims are based on *future* risks of discharges. CLF cannot point to a single factual allegation of a current or imminent risk of discharge from Gulf's New Haven Terminal. Accordingly, a straightforward application of the decisions in *Shell* and *Exxon* requires dismissal of CLF's claims.

2. CLF Has Not Alleged Facts Supporting Plausible Claims for Relief.

In its Motion, Gulf argued that certain of CLF's Clean Water Act claims (Counts 1, 2, 3, 4, 6, 7, 8, and 9) and its RCRA claims (Counts 16, 17, and 18) must be dismissed for failure to

allege actual facts—and not mere conclusions—that Gulf was violating its permit. In particular, Gulf demonstrated that CLF had not pled facts identifying (a) the Best Management Practices (BMPs) and control measures it contends Gulf omitted from its Stormwater Pollution Prevention Plan (SWPPP) that were necessary to comply with the Clean Water Act; (b) what sources of pollutants it contends Gulf omitted from its SWPPP that were necessary to comply with the Clean Water Act; (c) what information was not disclosed by Gulf that was necessary to comply with the Clean Water Act; and (d) how the Terminal must be re-designed and engineered to comply with RCRA. (Dkt. 33-1 at 12-17.)

In its Response, CLF argues it need not plead such facts and attempts to flip its burden onto Gulf. CLF contends that "Gulf has the obligations backward" because "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." (Dkt. 43-1 at 17.) CLF is incorrect as a matter of law. Under well-established federal law, CLF has an affirmative pleading obligation to identify the factual bases for its claims. *See Carney v. Horion Investments Ltd.*, 107 F. Supp. 3d 216, 223 (D. Conn. 2015) ("The plausibility standard set forth in *Twombly* and *Iqbal* obligates the plaintiff to provide the grounds of his entitlement to relief through more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."); *Id.* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Indeed, federal courts regularly dismiss citizen suit complaints like this one that contain no facts showing how the defendant is allegedly in violation of its permit. *See, e.g., Wilder v. Thomas*, 854 F.2d 605, 614 (2d. Cir. 1988) ("[V]ague and conclusory assertions [such as] 'Failure to make reasonable further progress in the 1979 SIP implementation' . . . were

insufficient to sustain a citizen suit and plaintiff's claim that city "has failed, or will fail" to attain air quality standards "falls short of [the] **requirement of specificity**") (emphasis added); *Council of Commuter Orgs. v. Metro. Transp. Auth.*, 683 F.2d 663, 670 (2d Cir. 1982) (plaintiffs seeking to bring a citizen suit "for violation of an emission standard or limitation contained in an applicable plan . . . must allege a violation of a specific strategy or commitment in the **SIP and describe, with some particularity, the respects in which compliance with the provision is deficient**") (emphasis added); *Sandy Hook Watermans All., Inc. v. N.J. Sports and Exposition Auth.*, 2011 WL 2976855, at *5 (D.N.J. July 20, 2011) (dismissing complaint where plaintiff **did not identify specific facts showing how defendant's actions constituted a violation** of its permits under the CWA, noting that "Plaintiff's allegations of ongoing pollution are based upon guesswork") (emphasis added).

As discussed below, because CLF has not pleaded actual facts showing how Gulf allegedly violated its permit and the Clean Water Act and RCRA, CLF's claims be dismissed.

A. Counts 1, 2, 6, and 7 Must Be Dismissed because CLF Pleaded No Facts Showing Gulf Needs to Implement Additional Control Measures.

CLF's primary claim against Gulf seems to be that Gulf has not implemented certain BMPs and "control measures" in its SWPPP that are necessary to protect the Terminal against the risk of future discharges associated with climate-changed induced flooding. As CLF states, under the Permit, Gulf must implement control measures to "minimize" the discharge of pollutants. (Dkt. 43-1 at 19.) The key term here is "minimize," which is defined as "to reduce and/or eliminate to the extent achievable using control measures that are [1] **technologically available** and [2] **economically practicable** and [3] **achievable in light of best industry practice**." (*Id.* (quoting Permit § 5(b)) (emphasis added).) Critically, CLF's Complaint contains *no allegations whatsoever* identifying BMPs or control measures that are not being implemented

and that are (1) technologically available, (2) economically practicable, and (3) achievable in light of best industry practice. This is a fundamental pleading failure as CLF cannot show that any other BMPs or control measures are required under the Permit. This alone warrants dismissal of Counts 1, 2, 6, and 7.

Nonetheless, in its Response, CLF identifies two control measures it contends need to be implemented: (1) "filling the aboveground storage tanks ("ASTs") with liquid before storms" or (2) anchoring ASTs to their bases so storm surge does not cause them to buckle or float off their foundation." (Dkt. 43-1 at 22.) Contrary to CLF's assertion, it is undisputed Gulf already implements *these exact control measures*. In its Facility Response Plan, which is one of several documents, including the SWPPP and Spill Prevention Control Countermeasure ("SPCC") Plan, which is required by its Permit and submitted to the Connecticut Department of Energy and Environmental Protection ("DEEP"), Gulf provides a detailed discussion of different control measures in place to respond to natural disasters, including hurricanes and the risk of flooding.

Specifically, the Facility Response Plan identifies 53 separate control measures Gulf takes ahead of arrival of a hurricane to protect against the risk of discharges, including "[a]ll open manways on tanks should be closed and the tanks should be filled with at least 5' of water," "transfer product or water into empty and near empty tanks (to at least 5')," "fill additive tanks and/or strap them down," "[o]n product tanks with weather dome roofs all doors are to be closed and secured," "[c]lose and secure hazardous waste storage containers," and "[v]erify tank volumes to ensure there is sufficient product or water to keep the tanks from floating." (Gulf

Facility Response Plan, attached as Exhibit 1 (under seal), at 5-34-5-37.)[3] In other words, Gulf already implements the control measures CLF alleges it lacks—and dozens more.

Because CLF has not alleged any control measures that are technologically available, economically practicable, and achievable in light of best industry practice that Gulf does not already implement at the Terminal, Counts 1, 2, 6, and 7 must be dismissed.

B. Count 4 Must Be Dismissed because CLF Has Pleaded No Sources of Pollutants that Gulf Has Not Already Identified in Its SWPPP.

In its Response, CLF argues that Gulf has violated its Permit because it has not identified three potential sources of pollutants: "improperly moored and unprepared ASTs," "insufficiently built floodwalls and seawalls," and "permeable containment areas." (Dkt. 43-1 at 19.) CLF is incorrect on each point.

First, contrary to CLF's allegation, Gulf has identified the ASTs as a potential source of pollutants in its SWPPP:

> The facility has been evaluated to identify potential sources of stormwater pollutants. A number of miscellaneous items, which have the potential to impact stormwater quality, were identified at the facility. **Potential sources of pollution at Gulf Oil terminal consist primarily of structures and facilities used in the operation of the terminal.** The noted items are listed and described below and are depicted on the Site Plan (Figure 2).

[3] The Court may take judicial notice of Gulf's Facility Response Plan as it is a document prepared in conjunction with Gulf's Permit, SWPPP, and SPCC and submitted to Connecticut DEEP and the U.S. Environmental Protection Agency. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991) (taking judicial notice of regulatory filing with the Securities and Exchange Commission because "the documents are required by law to be filed with the SEC, and no serious question as to their authenticity can exist" and "the documents are the very documents that are alleged to contain the various misrepresentations or omission" alleged to be deficient). As the Second Circuit has explained, "a plaintiff whose complaint alleges that such documents are legally deficient can hardly show prejudice resulting from a court's studying of the documents." *Id.* at 774. Indeed, "[w]ere courts to refrain from considering such documents, complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure." *Id.*

(Dkt. 1-3 at 45 (emphasis added).) Gulf then specifically identifies twelve separate potential sources of pollutants, including, the ASTs. (*Id.*) As discussed above, the Facility Response Plan contains—in a remarkable level of detail—the steps taken by Gulf to prepare its ASTs for the risk of flooding caused by severe weather events. (Ex. 1 at 5-34-5-37.) CLF's allegation that Gulf did not identify its ASTs as a potential source of pollutants is simply untrue.

Second, the SWPPP provides all necessary details of the Terminal's seawalls, floodwalls, and containment structures:

> The terminal tank farm is surrounded by a single secondary containment structure as depicted on Figure 2. This containment structure consists of an asphalt coated earthen dike or concrete dike. A north-south intermediate dike divides the tank farm into two sections (east and west). The west section, containing Tanks 112, 113, 114, 115, and 122 [redacted] is surrounded by an approximately six (6) foot high earthen dike. The east section, containing Tanks 101, 103, 104, 105, 106, 108, 109, 110, and 111, is surrounded by a four to six foot high earthen dike or concrete dike wall. Six of Gulf Oil's smaller aboveground storage tanks (Tanks 116, 117, 118, 119, 120, and 121), used for the storage of [redacted], are also located in the eastern section of the tank farm.

(Dkt. 1-3 at 18-19.) While CLF correctly notes that Gulf is in the process of building an even larger dike that protects against a 100-year storm event[4], the existing six-foot high dike is more than sufficient to protect against the two feet of sea level rise alleged in the Complaint. (Dkt. 1, ¶ 309.) And as for its containment areas, Appendix C of the SWPPP contains detailed calculations demonstrating "there is adequate volume to meet the requirement for 110% of the largest storage tank's capacity (i.e. 10% freeboard), the largest tank plus the precipitations from a 25-year, 24-hour storm, and 10% of the total volume of all tanks in the area." (*Id.* at 114.) The SWPPP then details the Terminal's drainage design, which collects stormwater collected within the secondary containment structure and pumps it several catch basins, which discharge to the stormwater

[4] The design storm for properly sizing the secondary containment structure is a 25-year, 24-hour storm. In other words, Gulf is building a seawall that exceeds its regulatory requirements.

treatment system prior to discharging to outfalls. (*Id.* at 64-65, 32.) In short, contrary to CLF's allegations, the SWPPP contains detailed discussions of the very potential sources of pollutants CLF claims Gulf is lacking.

C. Counts 3, 8, and 9 Must Be Dismissed because CLF Has Not Alleged What Information Gulf Did Not Disclose.

CLF argues that it has adequately alleged 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." (Dkt. 43-1 at 23.) But, again, Gulf's SWPPP, SPCC, and Facility Response Plan contain detailed analyses of potential risks associated with flooding from severe weather events. Given these analyses, which CLF omits from its Complaint and its Response, it is altogether unclear what additional information could have or should have been disclosed to Connecticut DEEP. CLF's conclusory allegations are not sufficient to state a claim and Counts 3, 8, and 9 must be dismissed.

D. Counts 16, 17, and 18 Must Be Dismissed because CLF Has Not Alleged How Gulf Allegedly Violated RCRA.

Regarding its RCRA claims, CLF takes the same approach as with its Clean Water Act claims. CLF contends that it "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." (Dkt. 43-1 at 27.) But as discussed above, CLF is *obligated* to allege actual facts supporting each of its RCRA claims—and not leave Gulf guessing as to the basis of CLF's claims. *See Wilder*, 854 F.2d at 614; *Council of Commuter Orgs.*, 683 F.2d at 670; *Sandy Hook Watermans All., Inc.*, 2011 WL 2976855, at *5. Here, CLF has not done that.

Pressed for actual facts to support its RCRA claims, CLF alleges only that (1) Gulf stores hazardous and solid waste, (2) the Terminal is in a floodplain, (3) there are risks of severe weather, and (4) "Gulf has taken no action to evaluate or address those risks." (Dkt. 43-1 at 27.) But as discussed above, *supra* Section 2(a), (b), and (c), the documents attached to CLF's Complaint, including Gulf's SWPPP and SPCC, as well as the Facility Response Plan, demonstrate Gulf has completed detailed analyses of flooding risks by severe weather events and implemented dozens of BMPs and control measures. *See, e.g.*, *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998) ("It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations."); *ALA, Inc. v. CCAIR, Inc.*, 259 F.3d 855, 859 n.8 (3d Cir. 1994) (concluding that when documents attached to a complaint contradict the allegations of the complaint, the document controls in a Rule 12(b)(6) motion to dismiss for failure to state a claim); *Amidax Trading Group v. S.W.I.F.T. SCRL*, 607 F. Supp. 2d 500, 502 (S.D.N.Y. 2009) (same).

Counts 16, 17, and 18 of CLF's Complaint rely on conclusory allegations that the Terminal has design, engineering, and infrastructure failures that, in CLF's view, violate RCRA. But CLF has failed to say what those actual failures are and why they constitute violations of RCRA. CLF has also failed to allege actual facts showing how the unidentified design flaws will lead to alleged discharges of solid waste. *Twombly, Iqbal*, and their progeny have made it clear that pleading in a federal action is not meant to be a game in which the defendant is left to guess the basis for the claims being asserted against it. Because CLF has not alleged actual facts to support its RCRA claims, they must be dismissed.

Respectfully submitted this 15th day of December 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon counsel, via the Court's CM/ECF e-mail notification system, on this the 15th day of December 2021:

/s/ Sandra Marin Lautier