UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONSERVATION LAW FOUNDATION, INC.,

Plaintiff,

v.

SHELL OIL COMPANY, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, SHELL PETROLEUM, INC., TRITON TERMINALING LLC, and MOTIVA ENTERPRISES LLC,

Defendants.

Case No: 3:21-cv-00933-SALM

Filed: April 1, 2022

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Plaintiff Conservation Law Foundation ("CLF") fails to rebut Defendants' core arguments, ignoring bedrock principles of corporate law and stretching its thin factual allegations beyond reason. CLF's Amended Complaint ("Complaint"), Am. Compl. ("AC"), ECF No. 47, and its Opposition to Defendants' Motion to Dismiss ("Opp'n"), ECF No. 53, state *ad nauseum* allegations of the impacts of climate change, but CLF fails to point to specific factual allegations about the Terminal to support its "failure to adapt" claims under the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"). Am. Compl. ("AC"), Counts 1-9, 12-14, ECF No. 47 ("Adaptation Claims"). CLF has failed to meet its basic pleading obligations.

CLF is unable to rebut Defendants' core legal arguments under RCRA and the CWA, and cannot show that its allegations are more than conclusory allegations parroting the applicable legal standards. Although Defendants raised deficiencies with CLF's allegations in response to its notice letter, CLF did not provide further specificity. Instead, CLF filed a Complaint with allegations that are nearly identical to those filed in three other citizen suits. This is insufficient to satisfy Rule 8(a). It is unbelievable that each operator is violating its own permit following the exact same fact pattern. CLF improperly attempts to act as a super-regulator, imposing its own policy preferences through judicial action without a factual basis for its claims. CLF's claims should be dismissed.

ARGUMENT

I. The Non-Owner/Operator Defendants should be dismissed

A. CLF does not clearly set forth its claims against each Defendant

Rule 8(a) requires plaintiff to plead with specificity claims against each defendant.[1] CLF attempts to evade the requirement to plead with specificity its claims against Defendants Shell USA, Inc.[2] and Shell Petroleum, Inc. (the "Non-Owner/Operator Defendants"), arguing that group

[1] *See* Mem. of Law ISO Defs.' Motion to Dismiss P's Am. Compl. ("Defs.' Mem.") 12-13, ECF No. 50-1.
[2] Effective March 1, 2022, Defendant Shell Oil Company changed its name to Shell USA, Inc.

pleading is permissible where there is "an understandable explanation for why the Complaint was not more particularized." Opp'n 30 (citing *Arias v. East Hartford*, 2021 WL 3268846, at *4 (D. Conn. July 30, 2021)). CLF's reliance on *Arias* is misplaced. In *Arias* a plaintiff was permitted to use group pleading because it was unreasonable for the plaintiff to remember what role each officer played in an incident of police brutality. *Id.* at *6. The facts here could not be more different.

CLF raises for the first time in its Opposition that its allegations are not more particularized because of "how the Shell entities describe and present themselves to the public." Opp'n 31. Regardless of how any public-facing document is drafted, CLF still must meet the pleading standards of Rule 8(a). CLF cites to a 2016 Sustainability Report, which is not published by any of the Defendants. Opp'n 31. However, that report specifically states that "each company in which Royal Dutch Shell plc directly and indirectly owns investments are separate legal entities."[3] CLF's own statements differentiate between the Defendants, Opp'n 31, documents attached to the Complaint clearly identify the owners and operators of the Terminal, and CLF acknowledges that Motiva is not a subsidiary or even affiliated with any of the other Defendants, Opp'n 35-36. CLF is capable of defining the roles of each Defendant at the Terminal, yet it fails to plead its claims with similar specificity, thus violating Rule 8(a).[4]

B. CLF's theory of direct liability would expand *Bestfoods* beyond reason

Bestfoods and its progeny state that direct liability depends on "the parent's interaction with the subsidiary's facility" and not "the relationship between the two corporations." *United States v. Bestfoods*, 524 U.S. 51, 67 (1998). CLF makes only one specific allegation explaining

[3]Royal Dutch Shell plc, *Sustainability Report 2016* at 2 (2016), https://reports.shell.com/sustainability-report/2016/servicepages/downloads/files/entire_shell_sr16.pdf. On January 21, 2022, Royal Dutch Shell plc changed its name to Shell plc. *See Royal Dutch Shell plc changes its name to Shell plc*, https://www.shell.com/media/news-and-media-releases/2022/royal-dutch-shell-plc-changes-its-name-to-shell-plc.html (last visited Mar. 31, 2022).

[4] CLF also does not rebut defendants' argument that CLF improperly expands the term "Shell" beyond the named Defendants. Defs.' Mem. 6.

how the Non-Owner/Operator Defendants are involved with the Terminal: "Shell, acting through its officers, managers, subsidiary companies, and instrumentalities, owns, and operates the Terminal." AC ¶ 106. This allegation is insufficient for a finding of direct liability under *Bestfoods*.

CLF's theory of direct liability would subject *any* parent/corporate affiliate to direct liability for actions of a related entity. CLF argues that it plausibly alleged that the "Shell group of companies has centralized climate change policies and strategies" and that the Non-Owner/Operator Defendants are "responsible for implementing these policies through their subsidiaries." Opp'n 32. *Bestfoods* states that activities that are consistent with a parent's investor status such as "monitoring of the subsidiary's performance . . . and articulation of general policies and procedures, should not give rise to direct liability." 524 U.S. at 72. Thus, "centrally managed" climate change policies and strategies, Opp'n 32, cannot give rise to direct liability.

CLF's allegation that all Defendants are required to implement centralized policies and strategies also fails to support a theory of direct liability. CLF cites to *United States v. Kayser-Roth* to support its position, Opp'n 32, but the court in *Kayser-Roth* found that direct liability is only appropriate where the activities of the corporate affiliates "went far beyond the norms of parental oversight." 272 F.3d 89, 104 (1st Cir. 2001) (citing *Bestfoods*, 524 U.S. at 66-67).[5] CLF's allegations describe a typical oversight role. It is unremarkable that a subsidiary within a multi-national group of companies receives general strategic direction from the corporate group. This Court should dismiss all claims against the Non-Owner/Operator Defendants.

II. CLF ignores corporate law by arguing that alleged Motiva violations are "ongoing"

CLF again ignores bedrock principles of corporate law, arguing that because there is "a connection" between the current and former Terminal operators, Motiva, which has no corporate

[5] In *Kayser-Roth*, the court found that the parent was "essentially in charge in practically all of [the facility's] operational decisions, including those involving environmental concerns." 272 F.3d at 102.

affiliation with the other Defendants, "should not be absolved from liability." Opp'n 36. CLF acknowledges that Motiva transferred the Permit to Triton in May 2017, but argues that this permit transfer should be disregarded because it was "in name only." Opp'n 34. CLF provides no legal support for this position, which should be disregarded.[6] Instead, CLF states that in the formal transfer agreement references to "Shell" include Motiva, Opp'n 35, but cites only to an allegation in its Complaint. *See* AC ¶ 36. The allegation cites an announcement, which makes no such statement. Instead, the announcement separately defines "Shell" and "Motiva" and states that Saudi Aramco "assumes full ownership of the Motiva Enterprises LLC name and legal entity."[7]

CLF also alleges that the violations are not "wholly past" without any legal support. Opp'n 35. CLF alleges, for the first time in its Opposition, that violations "have been occurring since at least 2016," *id.*, providing no citation to its Complaint. CLF's notice letters were sent in July 2020 and February 2021. Compl. Exs. A, B. Motiva ceased ownership of the Terminal in May 2017, thus at the time of the notice, any alleged violations were wholly past.[8] There is no reason to keep Motiva in this litigation since any alleged violations attributable to Motiva are long past and CLF has alleged claims against the current owners and operators. There is no need to complicate this matter with parties with no potential liability. Motiva should be dismissed.

III. CLF has not shown it suffers from an injury-in-fact that is imminent or traceable

CLF ignores allegations in its own Complaint and avoids Defendants' legal argument in a misguided attempt to support its claim that it suffers an alleged injury that is imminent or traceable.

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[6] *Lewis v. Berryhill*, 2018 WL 1377303, *at 9 n.7 (D. Conn. Mar. 19, 2018) (declining to address argument unsupported by record or case law).

[7] https://www.shell.com/media/news-and-media-releases/2017/completion-transaction-to-separate-motiva-assets.html

[8] *See Brossman Sales, Inc. v. Broderick*, 808 F.Supp. 1209, 1214 (E.D. Pa. 1992) (dismissing CWA claim because "defendants . . . relinquished ownership of the source of the alleged violation and no longer have the control to abate it"). CLF argues that *Gwaltney* does not apply to RCRA imminent and substantial endangerment claims, Opp'n n.15, but the court never made such a blanket statement in *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d. Cir. 1993).

Defendants' Memo sets forth argument regarding traceability, Defs.' Mem. 20, which CLF does not address in its Opposition. Defendants' argument is not dependent solely on "the very first link in the chain," Opp'n 7 n.4, but an entire chain of speculative events unfolding just as CLF alleges. CLF fails to address this speculative chain, other than the first link, thus conceding this argument.[9]

Similarly, Defendants' Memo calls into question whether CLF alleged a particularized and concrete injury-in-fact. Defs.' Mem. 20-21.[10] CLF's Complaint only alleges generally that its members "use and enjoy" waters near the Terminal and are "concerned about, and have an interest in eliminating the risk" of a potential discharge from the Terminal. Opp'n 8. CLF argues that that "the risks and discharges are not theoretical," Opp'n 8, citing only to an allegation of one discharge in exceedance of benchmark levels in 2011 – nearly 10 years before CLF sent its notice letters. Comp. ¶¶ 259-60. CLF does not allege that any of its members were injured by that event or refrain from using the waterways because of that event or any potential future events. *Compare with Me. People's Alliance v. Mallinckrodt*, 471 F.3d 277, 284 (1st Cir. 2006) (members of the plaintiff's organization have "modified their behavior" due to fear of future contamination).

Disregarding the claims in its Complaint and avoiding Defendants' arguments regarding "imminence," CLF alleges for the first time in its Opposition that "the risk to the Terminal is present now and is increasing over time." Opp'n 10. CLF does not cite to its Complaint. CLF "cites certain future projections to support the inference that risks are increasing," *id.*, but there are no allegations that support a current risk *to the Terminal*. While CLF alleges that "heightened risks from climate change are already here," Opp'n 9, these allegations do not support that there is a current risk *to the Terminal* that is both "substantial" and "certainly impending."

[9] *See Lewis*, *supra*, 2018 WL 1377303, at *9 n.7.
[10] The Court also has "an independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

CLF incompletely cites the findings of two courts on its nearly identical citizen suits. Opp'n 9-10. Those courts did not simply find that CLF had standing to bring its claims. Both courts found that CLF lacks standing "to the extent that its claims rely on future harms." *CLF v. Shell Oil Products US, et al.* (*"Shell RI"*), 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020).[11] While Defendants maintain that CLF lacks standing for *all* of its Adaptation Claims, this Court should, at the least, find that CLF lacks standing for claims relying on future harms.

Finally, instead of showing how it has alleged a "serious likelihood of harm," CLF disputes that the holding in *TransUnion* applies in cases where there are civil penalties. Opp'n 11. Nowhere in *TransUnion* does the Court state that the holding is limited to claims for damages.[12] Defendants cited *Exxon*, Defs.' Mem. 20, n.24, which is relevant, particularly considering that the Parties have not identified any courts that have directly addressed this question.[13] The standard set forth in *TransUnion* should apply to claims for civil penalties; CLF has failed allege a "serious likelihood of harm" and all claims for civil penalties must fail.

IV. CLF fails to state a claim under RCRA or the CWA

A. CLF fails to state a claim under RCRA

CLF fails to state a claim under RCRA § 7002(a)(1)(A) or RCRA § 7002(a)(1)(B). CLF fails to rebut why saleable product in the storage tanks is not considered "waste." *See* Defs.' Mem. 24 (citing 6 cases that go unrebutted by CLF). Instead, CLF repeats the "intent to discard" standard without providing any support for how a court would interpret that standard under RCRA. CLF cites to a footnote from a Texas criminal tax evasion case to show how to discern "intent" without

[11] *See also* Opp'n Ex. 2 (*CLF v. Exxonmobil Corp.*, No. 16-cv-11950 (D. Mass.) ("*Exxon*"), Mar. 13, 2019 Tr. 127) (finding that CLF lacked standing as to harms in the future future).
[12] *TransUnion* contrasted damages and injunctive relief, but said nothing about civil penalties. *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2210 (2021).
[13] *Exxon* cites to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987), for the proposition that, like damages, civil penalties may only be "brought to enjoin or otherwise abate an ongoing violation." *Exxon*, (D. Mass. Dec. 22, 2021), Mem. and Order., at 4, n.1, ECF No. 131.

any explanation of how that standard applies under RCRA. Opp'n 21-22. CLF then attempts to re-write its Complaint, stating that it clearly alleged that its claims encompass "*all* of the waste at the Terminal, not just waste related to the product storage tanks." Opp'n 21.[14] However, the Complaint only alleges that the Terminal generates "refined petroleum products containing and/or comprised of hazardous waste constituents," AC ¶¶ 489, 504, and that these "petroleum products stored at the Terminal qualify as 'solid waste,'" AC ¶¶ 491, 506.[15] Saleable product is not waste.[16]

CLF also fails to address that the Terminal's SWPPP considers that stormwater could be impacted by petroleum products from storage tanks. Defs.' Mem. 25. Defendants do not ask CLF to "identify every way" that they allege the Terminal is in violation of RCRA, Opp'n 27, but to provide with specificity *any* alleged deficiency. Where the SWPPP contradicts CLF's conclusory allegations, CLF has failed to state a claim, and its RCRA claims should be dismissed.

CLF's allegations that Defendants are contributing to an imminent risk similarly fail.[17] CLF states there is "a history of spills" at the Terminal, and an isolated incident of flooding. Opp'n 24. CLF's claims refer to the risk from the loss of saleable product due to the alleged failure of the Terminal to "adapt" to risks from climate change. CLF's allegations do not support that Defendants are "contributing" to this alleged harm, which, contrary to CLF's case law citations, requires "affirmative human action." *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996) (declining to follow *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981)). CLF fails to

[14] CLF cites to *Shell RI* to support its claims that it adequately pled *inter alia* the existence of waste at the Terminal, Opp. 21, 22, 25, 27, but the facts underlying the two cases are fundamentally different. In *Shell RI*, CLF pled that a Site Characterization Report and Remedial Action Plan documented certain contamination and established long-term groundwater monitoring for certain Areas of Concern. *See Shell RI*, 3d Am. Compl. ¶ 410, ECF No. 45. There are no such allegations in this case.

[15] The paragraphs cited by CLF cross-reference Paragraphs 104-112 of the Complaint (which Defendants assume to be a typographical error meant to refer to Paragraphs 143-151). Paragraphs 143-151 refer to "petroleum hydrocarbons and other constituents" and "butane," which is "blended with gasoline," and thus another saleable product. Am. Compl. ¶¶ 145, 147. Even when describing the Terminal more broadly, CLF only refers to petroleum products and petroleum additives. *See* Am. Compl. ¶¶ 112-121. CLF does not refer to any other type of "waste."

[16] *See* Defs.' Mem. 22-24.

[17] For the reasons described above, *supra* Sec. III, there is no imminent injury under RCRA.

distinguish the weight of case law cited by Defendants holding "contributing to" under RCRA requires active conduct. Defs.' Mem. 26-27. For example, CLF does not contest that in *Interfaith*, defendant's alleged "studied indifference" to contamination was found insufficient to impose RCRA liability. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 845-46 (D.N.J. 2003). CLF's "failure to adapt" theory is closely analogous and likewise insufficient under RCRA.

CLF also fails to satisfactorily allege a claim under RCRA § 7002(a)(1)(A). CLF alleges a claim for "open dumping" of hazardous waste under RCRA even though Connecticut maintains its own waste management program and regulation pertaining to open dumping, which it carries out "in lieu of the Federal program". 42 U.S.C. § 6926(b).[18] The State program supersedes the federal regulations.[19] With respect to CLF's claim arising under the RCRA generator rule, CLF fails to rebut Defendants' argument that the cited Connecticut regulation applies to water discharge permits, not generators of hazardous waste, and CLF fails to address the conclusory nature of its allegation arising under the applicable federal regulation. Defs.' Mem. 29-30. This type of pleading cannot provide the grounds to withstand a motion to dismiss. *Twombly*, 550 U.S. at 555.

B. CLF fails to state a claim under the CWA

CLF supports its CWA arguments by referring to *Exxon* and *Shell RI*. Opp'n 13-14, 16-18. These references should be disregarded. *Exxon* and *Shell RI* interpreted entirely different *individual* permits. *See Exxon*, 3 F.4th 61, 65 (1st Cir. 2021); *Shell RI*, 2020 WL 5775874, at *3 (D.R.I. Sept. 28, 2020). This case is about a Connecticut General Permit ("Permit"), which is not directly comparable.

[18] Although it is not explicit in Count 12, CLF brings its "open dumping" claim under RCRA § 7002(a)(1)(A). *See, e.g.*, *S. R. Assoc. v. IBM Corp.*, 216 F.3d 251 (2d. Cir. 2000) (analyzing an open dumping claim under RCRA § 7002(a)(1)(A)).

[19] *See Dague v. City of* Burlington, 935 F.2d 1343, 1352 (2nd Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (finding that state hazardous waste programs affect actions brought pursuant to RCRA § 7002(a)(1)(A), but not § 7002(a)(1)(B)).

CLF's CWA Adaptation Claims are premised on future risks and future injury, which fall outside of the Terminal's 5-year permit term. CLF reiterates that it has adequately alleged "current and certainly impending impacts," Opp'n 12-13, but, for the reasons stated *supra*, these allegations are insufficient. CLF's only legal citations that support this assertion are to the opinions in *Exxon* and *Shell RI*. *Id.* CLF goes so far as to state that the *Exxon* court "when dealing with a similar CWA permit" stated that "the CT Permit requires Defendants" to consider certain events. Opp'n 13. As described *supra*, this argument must be disregarded; the *Exxon* court never addressed the "CT Permit." Similarly, CLF's argument that "permits are commonly expired and administratively continued for years," *id.* 14, rings hollow in light of its subsequent acknowledgement that the Permit has been reauthorized four times in the past 10 years. CLF suggests, without any support, that extensions "without modifications" mean that the State did not reevaluate the Permit. *Id.* The State could have reevaluated the Permit, but declined to make any modifications.

CLF failed to show that the Permit requires consideration of the risks "from foreseeable severe weather events." Opp'n 15. CLF's claims are based on "threats posed by precipitation and flooding" which it alleges "are exacerbated by storms and storm surges . . . as well as the present impacts and risks of climate change." *Id*. at 14. CLF points to its own Complaint and hearing transcript from *Exxon*, which addresses a different permit. CLF fails to rebut that the State could have specifically included this information in its Permit, like the EPA recently did when it amended its Multi-Sector General Permit. Defs.' Mem. 32, n.32. It did not. Because the Permit does not require consideration of impacts of severe weather events, the Terminal is in compliance with the Permit, and the permit shield applies.

Finally, CLF fails to identify any specific, non-conclusory allegations sufficient to support its CWA Adaptation Claims. CLF argues that it does not need to "plead the exact control

measures" that Defendants should have included in the SWPPP. Opp'n 17-19. CLF must provide a plausible claim for relief. *Twombly*, 550 U.S. at 555. Conclusory allegations of "inadequate infrastructure design" do not provide the requisite information for Defendants to defend against the claims.[20] Defendants raised this issue in response to CLF's notice letter, but have received no further specificity. CLF argues that there is "no exception for disclosure of information Defendants think regulators might possess." Opp'n 19. However, that the SWPPP was approved by the regulator after the requisite approval process and public comment period,[21] even though the SWPPP was allegedly inadequate, suggests that the regulator may not have interpreted the Permit requirements in the same way as CLF. CLF's arguments hinge on its belief that the SWPPP "does not analyze the potential for flooding from severe weather," Opp'n 16, but the required contents of the SWPPP, which are set forth in the Permit, never use the word "analysis". Permit,[22] § 5(c)(2). CLF's conclusory allegations fail to state a claim for a violation of the CWA.

CONCLUSION[23]

Defendants respectfully request that this Court dismiss all causes of action against Defendants Shell USA, Inc. (f/k/a Shell Oil Company), Shell Petroleum, Inc., and Motiva Enterprises LLC, and causes of action 1-9 and 12-14 against Defendants Triton Terminaling LLC, and Equilon Enterprises LLC (d/b/a Shell Oil Products US).

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[20] CLF stretches its allegations by arguing that its Complaint contains "numerous allegations of the Terminal's inadequate infrastructure design." Opp'n 19. The cited paragraphs either address risks associated with inadequate infrastructure, or simply repeat the phrase "inadequate infrastructure design" without providing any specificity as to *how* the infrastructure is adequate. *See* AC ¶¶ 15, 236, 273, 298, 307, 508.

[21] *See* CT DEEP Industrial Stormwater Registration Status, https://www.depdata.ct.gov/permit/Industrial_Stormwater_Reg_Report.pdf (application received on July 10, 2017 and registration issued on December 5, 2017); Permit § 4(d)(2) (public comment period).

[22] CT DEEP, *General Permit for the Discharge of Stormwater Associated with Industrial Activity*, https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/industrial/20210316-Industrial-General-Permit-As-Is-Renewal---CleanSIGNED.pdf

[23] As explained in Defendants' Notice Regarding Memorandum of Law in Support of Defendants' Motion to Dismiss, ECF No. 54, Defendants do not address the stricken abstention argument in this reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, the foregoing Reply Memorandum in support of Defendants' Motion to Dismiss Plaintiff's Amended Complaint was filed through the Court's electronic filing ("ECF") by which means the document is available for viewing and downloading from the ECF system and a copy of the fulling will be sent electronically to all parties registered with the ECF system.

Bina Reddy