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

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

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INTRODUCTION

This case is the latest in a series of nearly identical citizen suits filed by Conservation Law Foundation, Inc. ("CLF") against operators of fuel terminals located along the New England coast that provide essential fuel supplies to the region.[1] These suits repeat the same basic claim: that the terminals are allegedly not prepared for precipitation and flooding risks exacerbated by climate change. CLF's Amended Complaint ("Complaint") includes pages of general information about climate change and is replete with conclusory legal statements, yet, *there are no specific factual allegations about the Terminal* that is the subject of this action (the "Terminal") that support these "failure to adapt" claims under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). First Am. Compl. ("FAC"), Counts 1-9, 12-14, ECF No. 47 ("Adaptation Claims"). If CLF wishes to litigate these duplicative suits, it must still comply with the requirements of the federal rules to proceed, including pleading sufficient and specific factual bases for its claims.

CLF's recent amendment of its Complaint does not cure these flaws. In 510-plus paragraphs, nowhere does CLF actually say what it thinks is wrong *with the Terminal*. There are no factual allegations that infrastructure is failing or inadequate in any way. There are no factual allegations that equipment does not meet regulatory design standards. There are not even factual allegations that the Terminal has a pattern of spills or issues during storms. Defendants raised several key deficiencies with CLF's allegations in a September 2020 response to CLF's notice of intent to file suit, *see* Ex. 1, yet CLF failed to provide the further required specificity in its Complaint. But this is not surprising. It confirms that this case is not actually about the Terminal — it is just another form lawsuit in CLF's campaign to use federal courts to

[1] *Conservation Law Found., Inc. v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW (D. Mass) (filed Sept. 26, 2016); *Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, No. 1:17-cv-396-WES-LDA (D.R.I) (filed Aug. 28, 2017); *Conservation Law Found., Inc. v. Gulf Oil Ltd. P'Ship*, No. 3:21-cv-932-KAD (D. Conn.) (filed July 7, 2021); *see also* Ltr. from Christopher M. Kilian, CLF to Eddie Soberal, Operations Sup., New Haven Terminals, Magellan Midstream Partners, L.P. (July 28, 2020), https://www.clf.org/wp-content/uploads/2020/07/New-Haven-NOI-Letters.pdf, p. 32; Ltr. from Christopher M. Kilian, CLF to Steven Cipullo, Terminal Manager, Sprague Twin Rivers Technology Terminal (May 19, 2021), https://www.clf.org/wp-content/uploads/2021/05/Sprague-TRT-Notice-of-Intent_FINAL.pdf.

advance its policy preferences relating to coastal fuel terminals operating under lawful state stormwater permits rather than participating in the regulatory process as it has every right to do.

This absence of supporting facts pervades the Complaint and is ultimately fatal to it. *First*, the Complaint violates basic rules of pleading by grouping together Defendants and bringing all claims against "Shell"—its chosen (and misleading) name for all Defendants. FAC ¶ 1. CLF's claims can only be brought against an owner, or entity with actual, hands-on involvement in the operations of the Terminal. Yet CLF has brought suit against two Defendants—Shell Oil Company and Shell Petroleum Inc. (the "Non-Owner/Operator Defendants")—without making any such averments. CLF attempted to cure its deficient pleading by adding general allegations regarding the Defendants' corporate structures. However, even these new allegations fail to provide a legal basis for CLF's claims. Fundamental principles of corporate law do not allow entities to be held liable for actions of affiliates without allegations of improper corporate conduct. CLF never alleges as much. There are no facts in the Complaint that warrant disregarding corporate form.

Second, the Complaint does not contain facts sufficient to create subject matter jurisdiction over a former operator, Motiva Enterprises LLC ("Motiva") for all of CLF's CWA claims and for claims arising under RCRA § 7002(a)(1)(A) (Counts 12 and 14) ("RCRA Regulatory Claims"). Former operators are not within the scope of these citizen suit provisions' grant of jurisdiction.

Third, the Complaint is devoid of the necessary factual allegations to meet the minimum requirements for standing to bring CLF's Adaptation Claims. CLF's claimed injury to its members' recreational and aesthetic interests is a future one, premised on risks of flooding and severe precipitation that CLF does not allege are even probable. Further, without allegations identifying any specific deficiencies at the Terminal, the basis of CLF's standing for its Adaptation Claims boils down to an allegation that precipitation or flooding is possible in New Haven. That does not allege an injury that is caused by the Defendants' conduct or that can be redressed by the Court—it is insufficient for standing.

Fourth, the Complaint is so lacking in factual support that the Adaptation Claims fail to state a claim under RCRA or the CWA. With regard to RCRA, CLF claims certain regulatory violations and that an "imminent and substantial endangerment" exists under RCRA due to the Defendants' alleged failure to adapt to the risk of possible flooding and severe precipitation. Nearly every element of these claims is lacking in factual support. RCRA governs the management of *waste*, but CLF's RCRA allegations concern tanks and the fuel and other useful products within them—they have nothing to do with waste. Further, RCRA's endangerment provision requires that the defendant engage in *active* conduct to impose liability, and here CLF alleges the opposite—that the Defendants have *failed to act*. The Complaint contains no specific factual allegations regarding how the management of saleable product is causing an imminent and substantial endangerment or violates any applicable RCRA regulations—just conclusions that parrot the language of the statute. CLF has not stated a claim under RCRA.

CLF's Adaptation Claims also fail to state a cognizable claim under the CWA. These CWA claims seek to impose obligations far beyond the fixed five-year term of the Terminal's permit. CLF's CWA Adaptation Claims also allege the Terminal's stormwater pollution prevention plan ("SWPPP") does not "consider" the risks of flooding and severe precipitation, but CLF includes no factual allegations concerning how the documents are insufficient. The SWPPP itself, an exhibit to the Complaint, incorporates the control measures and best management practices required by the permit. The violations alleged by CLF merely repeat the language of the permit. Such bare and unsupported legal conclusions do not state a CWA claim.

Fifth and finally, CLF's RCRA and CWA Adaptation Claims should be dismissed under the doctrine of abstention. As described in detail below, Connecticut is currently engaged in comprehensive and ongoing efforts to put in place regulatory measures to address potential increased stormwater due to climate change-influenced precipitation and flooding—*i.e., the very concerns raised by CLF*. CLF asks the Court to ignore this work by the State and address these questions itself before the State has made its

determinations. Further, the State's ongoing efforts belie CLF's claim that the State has already incorporated such standards in its permits and makes clear that this is not an "enforcement" action as contemplated by the citizen suit provisions, but rather an attempt to short-circuit the State's regulatory process. CLF could (and should) have raised its concerns when the State solicited comments on the reissuance of the General Permit; CLF also could (and should) have specifically addressed its concerns with the SWPPP and its alleged "failure to consider" climate change impacts during the public comment process. In light of CLF's decision not to engage in the State's processes to address permitting concerns, the Court should defer to the State and abstain from ruling on these claims.

CLF's Adaptation Claims, if actionable (which they are not), would subject virtually all coastal facilities—*merely by virtue of their location at sea level*—to liability under RCRA and the CWA for "failing to adapt" to address the possibility of risks due to flooding and severe precipitation, regardless of whether these risks are speculative or remote in time, or the state agencies responsible for assessing such risks have evaluated whether such measures are necessary, and if so, in what way. Rather than supplement government enforcement of these statutes—Congress' intended purpose of the CWA and RCRA citizen suit provisions—CLF's series of citizen suits seeks to have this Court and others act as a super-regulator to second guess agencies and impose CLF's policy preferences through judicial action impacting terminals that provide critical fuel products to the region. CLF's claims should be dismissed.[2]

BACKGROUND

I. THE NEW HAVEN TERMINAL AND DEFENDANTS' CONNECTION, OR LACK THEREOF, TO THE TERMINAL.

The New Haven Terminal is a bulk storage and distribution fuel terminal located at 481 East Shore

[2] As stated in the motion to dismiss accompanying this memorandum, Defendants Shell Oil Company, Shell Petroleum Inc., and Motiva Enterprises LLC move to dismiss all causes of action. Defendants Triton Terminaling LLC, and Equilon Enterprises LLC (d/b/a Shell Oil Products US) move to dismiss Causes of Action 1-9 and 12-14 in their entirety.

Parkway, New Haven, Connecticut. FAC ¶ 2.[3] The Port of New Haven is the second largest port in New England[4] and is "a crucial import location for refined petroleum products[.]"[5] The Terminal has 39 above ground tanks that store petroleum and other fuel products. FAC, Ex. G, at 9-11. The fuel products from the Terminal are distributed throughout Connecticut and elsewhere in New England. *See supra* n. 6.

The Terminal operates its stormwater system under Connecticut's General Permit, Registration No. GSI002800. FAC ¶ 28. Per the Connecticut Department of Energy and Environmental Protection ("DEEP"),[6] the Terminal's most recent registration application was received on July 10, 2017, and registration was issued on December 5, 2017. *Id*. The current permit expires on September 30, 2024. *Id*. Facilities that operate under the General Permit must prepare and maintain a SWPPP. *See* DEEP, *General Permit for the Discharge of Stormwater Assoc. with Industrial Activity* (2021) ("GP") § 5(c). Consistent with this requirement, the Terminal maintains a SWPPP. The Terminal's July 2017 SWPPP is at Ex. G to the Complaint. The SWPPP was subject to public comment. *Id.* § 4(d)(2). CLF did not submit comments.

The purpose of the SWPPP is to describe control measures to reduce or eliminate the potential for the discharge of stormwater runoff pollutants. FAC, Ex. G, at 32-33. The Terminal's SWPPP describes that all of the above ground tanks at the Terminal are organized "with three main containment areas." *Id.*, Ex. G, at 8. As required by the General Permit, *see* GP § 5(b)(9)(A)(i), the containment area is impermeable: its floors and berms are constructed of compacted earth and crushed stone. FAC, Ex. G, at 8. The secondary containment areas are designed to contain the entire contents of the largest container "plus sufficient freeboard to allow for precipitation." *Id.* Ex. H, at 41, 63-64.

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[3] Defendants do not admit to any allegations in the Complaint, and state the facts as alleged in the Complaint for purposes of this motion only. *See Slainte Investments Limited Partnership v. Jeffrey*, 142 F.Supp.3d 239, 244 (D. Conn. 2015).

[4] *See New Haven Lawmakers Applaud Release of $5M for Harbor Dredging* (April 16, 2021), http://www.senatedems.ct.gov/looney-news/3717-looney-210316#sthash.U3SUG9FS.dpbs ("New Haven Harbor is a key location for petroleum products for Connecticut and New England. It is the second largest port in New England….")

[5] *See* U.S. Army Corps of Engineers, *New Haven Harbor Final Integrated Feasibility Report and EIS, New Haven Harbor Navigation Improvement Project Economic Appendix*, at C-7 (February 2020), https://www.nae.usace.army.mil/Missions/Projects-Topics/New-Haven-Harbor/New-Haven-Harbor-EIS/

[6] https://www.depdata.ct.gov/permit/Industrial_Stormwater_Reg_Report.pdf.

The Terminal has one stormwater drainage area separated into four sections. *Id.* Ex. G, at 15. Stormwater is collected in a series of catch basins, which allow for settling of solids before stormwater is directed to one of two retention basins. *Id.* Ex. G, at 15, 32. In the retention basins, pollutants further separate out from the stormwater, which then discharges through an outfall to the City of New Haven's municipal storm sewer. *Id.*

The Terminal's SWPPP identifies sources of potential pollutants to stormwater, including petroleum products from the aboveground tanks as one such potential source. *Id.* Ex. G, at 18. CLF's Complaint alleges *one* instance of stormwater discharges with pollutants exceeding benchmark levels related to a severe weather event in the past ten years — Hurricane Irene. *Id.* ¶¶ 260-63. CLF does not allege exceedances of benchmarks during any other severe weather events, including Superstorm Sandy.[7]

CLF originally named six defendants in this case. It removed one, Shell Trading (US) Company, in response to Defendants' motion to dismiss. CLF has now amended its pleading and named five defendants in its Complaint: Shell Oil Company, Equilon Enterprises LLC ("Equilon") d/b/a Shell Oil Products US, Shell Petroleum Inc., Triton Terminaling LLC ("Triton"), and Motiva.[8] *See generally* FAC. Of these five named defendants, only Motiva, Triton, and Equilon (d/b/a Shell Oil Products US) are alleged to have ever owned or operated the Terminal. FAC ¶¶ 28, 30, 33. Motiva was not formed as a corporate entity until 1998. *Id.* ¶ 35. It ceased operation of the Terminal in May 2017. *Id.* ¶ 36. On May 1, 2017, the Terminal's permits were transferred from Motiva to Triton and Equilon. *See id.* ¶ 37. Shell Oil Company and Shell Petroleum Inc. are not alleged to have owned or operated the Terminal at any time.

[7] Superstorm Sandy had peak storm tides surpassing the water levels from Hurricane Irene. *See* NOAA Storm Events Database, https://www.ncdc.noaa.gov/stormevents/eventdetails.jsp?id=421639

[8] As the Complaint acknowledges, Equilon and Shell Oil Products US are the same entity; Equilon does business as Shell Oil Products US. *See* FAC ¶ 27.

II. CWA AND RCRA FRAMEWORKS

A. CWA

The CWA requires that "individuals, corporations, and governments secure National Pollutant Discharge Elimination System ("NPDES") permits before discharging pollution from any point source into the navigable waters of the United States." *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013) (citing 33 U.S.C. §§ 1311(a), 1362(12) (additional citations omitted)). NPDES permits impose a variety of requirements, including limits on the quantity or concentration of pollutants that may be discharged and obligations to monitor the quality of effluent. 40 C.F.R. §§ 122.44, 122.48.

NPDES permits last for "fixed terms not exceeding five years." 33 U.S.C. § 1342(b)(1)(B). These five-year terms allow for reevaluation of the terms of the permit in light of any new information or changes. *See Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 22 (1st Cir. 2012).

In 1990, the U.S. Environmental Protection Agency ("EPA") promulgated rules establishing requirements unique to NPDES permits for discharges of stormwater. 55 Fed. Reg. 47,990 (Nov. 16, 1990). Industrial stormwater dischargers (subject to limited exclusions) must obtain an individual or general permit and comply with the permit's conditions. 40 C.F.R. §§ 122.26(c)(1), 122.41(a). Most permits also require dischargers to develop and implement a SWPPP, which specifies the procedures the discharger will employ to control stormwater pollution. *See, e.g.*, EPA, Multi-Sector General Permit Sec. 6 (2021).

Although it created a federal regulatory scheme, Congress sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective . . . ."). States may obtain authorization to administer the NPDES program. 33 U.S.C. § 1342(b). Where a state program is in place, the federal NPDES program is suspended. *See id.* § 1342(c).

Connecticut obtained authorization to administer the NPDES program in 1974. 39 Fed. Reg. 26,061 (July 16, 1974). Connecticut has its own statute and regulations governing water pollution control. *See generally* Conn. Gen. Stat. § 22a-416 *et seq.*; Conn. Agencies Reg. § 22a-430 *et seq.* Pursuant to statutory authority, *see* Conn. Gen. Stat. § 22a-430b, DEEP issued the General Permit on October 1, 1992. *See* DEEP, GP Fact Sheet (2019).[9] The General Permit has since been reissued, including on October 1, 2019. *Id.* It was most recently reissued again without modification in October 2021 after notice and comment. *See* DEEP, Notice of Reissuance without Modifications (2021).[10] The current General Permit will expire September 30, 2024. DEEP has stated that, prior to the September 30, 2024 expiration date, it intends to issue a new General Permit with modifications. *See* GP Fact Sheet.

Violations of a state-issued NPDES permit may be enforced by EPA, the state, or citizens. 33 U.S.C. §§ 1319, 1342(b)(7), 1365. However, the statute envisions that the government — not private citizens' groups — will bear primary responsibility for enforcement. The CWA's citizen suit provision "is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

B. RCRA

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citation omitted). Materials that are not wastes are outside the purview of RCRA. Relatedly, CWA permitted discharges are excluded from the definition of solid waste under RCRA. 42 U.S.C. § 6903(27).

RCRA provides for citizen enforcement of the statute, including against an entity that has "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or

[9] https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Factsheets_Water_Discharges/stormindustfs.pdf
[10] https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/industrial/20210614-GSI_ReissuanceNotice-websiteSIGNED.pdf

disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Like with the CWA, Congress intended that citizen suits under RCRA be secondary to the government's primary role in enforcement. *Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 9–10 (1st Cir. 2009). Neither the CWA nor RCRA are vehicles that allow private citizens to attempt to impose regulatory requirements through the judicial system.

III. CONNECTICUT'S ACTIVE ENGAGEMENT TO ADDRESS POTENTIAL INCREASES IN FLOODING AND STORM IMPACTS.

Over the past two decades, Connecticut has made climate adaptation, including protection of important infrastructure from coastal flooding, a priority. In 2002, Connecticut established the Governor's Steering Committee on Climate Change ("GSC"). *See* Exec. Order No. 46 (2015).[11] In 2011, the GSC Adaptation Subcommittee released the Connecticut Climate Preparedness Plan, which recommends actions to incorporate the impacts of climate change on infrastructure planning, including stormwater.[12]

Since that time, the State's legislative and executive branches have worked to characterize and prepare for these potential stormwater impacts. In 2012, the legislature passed a Coastal Omnibus Bill, incorporating the concepts of sea level rise, coastal flooding, and erosion patterns into the Coastal Management Act's ("CMA") policies on coastal development. Conn. Pub. Act. 12-101(a)(5); *see also* Office of Long Island Sound Programs Guidance.[13] DEEP published in September 2020 a report that discusses the potential impacts of sea level rise and stormwater runoff, and efforts to address such impacts.[14] The University of Connecticut is required to "publish a sea level change scenario for the state" every ten years to guide municipal and state planning, *see* Conn. Gen. Stat. § 25-68o(b), the most recent of which

[11] The GSC was since disbanded and, in 2015, a new Governor's Council on Climate Change ("GC3") was formed. *See* https://portal.ct.gov/-/media/DEEP/climatechange/EO46ClimateChangepdf.pdf

[12] https://portal.ct.gov/-/media/DEEP/climatechange/ConnecticutClimatePreparednessPlan2011pdf.pdf

[13] http://www.ct.gov/deep/lib/dep/newsletters/soundoutlook/pa_12_101_coastal_omnibus_fact_sheet.pdf.

[14] *See* DEEP, Assessment and Strategies of the Connecticut Coastal Management Program, 2021 to 2025 Enhancement Cycle (Sept. 2020), https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal_management/Final-CT-Section-309-Coastal-Management-Assessment-2021-to-2025.pdf.

was adopted on December 26, 2018.[15] The legislature has also addressed emergency preparedness and response, climate adaptation and data collection, and sea level rise and funding of adaptation projects. *See* Conn. Pub. Act No. 12-148; Conn. Special Act No. 13-9; Conn. Pub. Act No. 13-15. Effective July 2021, the Act Concerning Climate Change Adaptation authorizes the creation of municipal stormwater authorities. Conn. Pub. Act No. 21-115. These authorities may develop stormwater management programs. *Id*., 1-2. The law also expands the authority of certain municipal boards to address flood prevention and climate resilience and their ability to fund climate resilience projects. *Id*., 9-10.

Importantly, the State has taken actions just within the past year to specifically address stormwater management. In January 2021, the GC3 released an update to the 2011 plan. *See* Exec. Order No. 3 (2019);[16] GC3, Taking Action on Climate Change and Building a More Resilient Connecticut for All (2021) ("2021 Report").[17] The 2021 Report includes recommendations to develop a governance structure to facilitate implementation of strategies pertaining to climate adaptation and resiliency, and identify and implement best management practices to protect infrastructure. 2021 Report, 47. In December 2021, the Governor directed DEEP to update design criteria for stormwater management systems and assist municipalities with the creation and operation of stormwater authorities. Exec. Order No. 21-3 (2021).

LEGAL STANDARD

In order to survive a motion to dismiss, a "complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When allegations in the complaint "do not permit the court to infer more than the mere possibility of misconduct," a plaintiff has failed to state a claim. *Iqbal*,

[15] *See* DEEP, Statement of Commissioner (Dec. 26, 2018), https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal_management/coastal_hazards/SeaLevelChangeDEEPStatement12262018pdf.
[16] https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-3.pdf?la=en&hash=F836ED64F1BB49A5424AB4C7493A3AE3
[17] https://portal.ct.gov/-/media/DEEP/climatechange/GC3/GC3_Phase1_Report_Jan2021.pdf

556 U.S. at 679; *see also Twombly*, 550 U.S. at 570 (requiring that factual allegations "be enough to raise a right to relief above the speculative level").

This standard does not permit a plaintiff to rely on "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal*, 556 U.S. at 678. Claims must rest on well-pleaded *factual* allegations." *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 321 (2d Cir. 2021) (citing *Iqbal*, 556 U.S. at 678-80) (emphasis in original). The Court must ignore "legal conclusions couched as factual allegations or naked assertions devoid of further factual enhancement." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 207 (2d Cir. 2020) (quoting *Iqbal*, 556 U.S. at 678) (internal punctuation omitted).

The legal standards for motions to dismiss brought under Rules 12(b)(1) and 12(b)(6) are "substantively identical."[18] *Gonzalez v. Option One Mortg. Corp.*, 2014 WL 2475893, at *2 (D. Conn. June 3, 2014) (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003)). "On a Rule 12(b)(1) motion, however, the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists. . . ." *Id.* Courts must resolve issues of subject matter jurisdiction before addressing the merits of a case. *See, e.g., Polera v. Board of Educ. of Newburgh Enlarged City School Dist.*, 288 F.3d 478, 481 (2d Cir. 2002).

ARGUMENT

I. CLF FAILS TO ALLEGE ANY CLAIMS SPECIFICALLY AGAINST THE NON-OWNER/OPERATOR DEFENDANTS.

CLF has named five Defendants in this case, but two—the Non-Owner/Operator Defendants—should be dismissed because CLF has not alleged any claims specifically against them. CLF's grouping of

[18] In considering a motion for a failure to state a claim, the Court is permitted to consider "documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Courts are also allowed to consider "matters of public record" in ruling on a 12(b)(6) motion. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998). In considering a motion to dismiss for lack of subject matter jurisdiction, the Court "may refer to evidence outside the pleadings." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). A motion to dismiss on abstention grounds is akin to a motion to dismiss for lack of subject matter jurisdiction, and a court may also consider documents outside the pleadings. *See DeLoreto v. Ment*, 944 F. Supp. 1023, 1028-29 (D. Conn. 1996).

separate corporate entities under a single name—"Shell"—without specifying the conduct allegedly attributable to each is impermissible. This chosen shorthand is ambiguous and misleading and violates the pleading standards of Federal Rule of Civil Procedure 8(a). Further, CLF does not allege any facts that would suffice to meet the high standard of holding a corporate entity liable for acts of an affiliate.

A. CLF's group pleading violates Rule 8 and fails to assert a claim against the Non-Owner/Operator Defendants.

All of CLF's claims are premised on obligations that only apply to an owner or entity with actual involvement in the operations of the Terminal.[19] CLF's Complaint does not make any specific allegations that the Non-Owner/Operator Defendants are involved in the ownership or operation of the Terminal. Instead, CLF's allegations with respect to the Terminal are made against CLF's chosen shorthand "Shell."[20] *See* Compl. ¶ 1. This improper grouping fails the basic pleading standard of Rule 8(a). Fed. R. Civ. P. 8(a); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) ("[T]he principal function of pleadings . . . is to give the adverse party fair notice of the claim asserted").

When a case contains multiple defendants, the complaint must "indicate clearly . . . the basis upon which the relief is sought against the particular defendants." *Yucyco, Ltd. v. Republic of Slovenia*, 984 F.Supp. 209, 219 (S.D.N.Y. 1997) (citation omitted); *see also Atuahene v. City of Hartford*, 10 Fed.Appx. 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [Plaintiff's] complaint failed to satisfy this minimum standard"). Group pleading is improper where, despite "saving space," the grouping "results in factual allegations . . . [that are] implausible" and leads to ambiguities. *Via Vadis, LLC v. Skype, Inc.*, 2012 WL 2789733, at *1 (D. Del. July 6, 2012). This "method of 'lumping' or 'grouping' corporate families impermissibly ignores

[19] *See, e.g., Prisco v. A & D Carting Corp.*, 168 F.3d 593, 609 (2d Cir. 1999) (plaintiff must specifically allege each particular defendant engaged in one of the enumerated statutory activities with respect to the particular waste at issue); *Kaladish v. Uniroyal Holding, Inc.*, 2005 WL 2001174, at *5 (D. Conn. Aug. 9, 2005) (same); *see also infra* Section II.

[20] Not only does CLF improperly group defendants that are distinct corporate entities merely because they share the same ultimate parent, it also includes Motiva in this group, a company that has never shared an ultimate parent with any other defendant.

corporate separateness and therefore fails to state a viable . . . claim. . . ." *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd.*, 2011 WL 7053807, at *14-15 (E.D.N.Y. Jan. 4, 2011). CLF specifically alleges and attaches as exhibits documents that identify other Defendants as the current or former owners, operators, and/or permittees. FAC ¶ 28 (alleging Shell Oil Products US holds stormwater permit), ¶ 32 (alleging Triton owns the Terminal), ¶ 34 (alleging Motiva operated the Terminal), *id.* Ex. C (stormwater monitoring report submitted by Shell Oil Products US), *id.* Ex. F (Triton ownership of property), *id.* Ex. G (SWPPP submitted by Shell Oil Products US), Ex. H (SPCC lists Shell Oil Products US as plan holder). The Non-Owner/Operator Defendants are named improperly and unnecessarily and this Court should dismiss the entire Complaint against them. *See Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 (S.D.N.Y. 2018) (dismissing claims for impermissible group pleading); *Automated Transaction LLC v. N.Y. Comm. Bank*, 2013 WL 992423, at *4 (E.D.N.Y. Mar. 13, 2013) (same); *Zalewski v. T.P. Builders, Inc.*, 2011 WL 3328549, at *5 (N.D.N.Y. Aug. 2, 2011) (same).

B. CLF's allegations fail to meet the high bar to hold Non-Owner/Operator Defendants liable for the actions of a related corporate entity.

To the extent CLF contends the Non-Owner/Operator Defendants are liable for the acts of other corporate entities, that is easily dismissed. The Complaint fails as a matter of law to provide any basis to hold these two Defendants liable under such a theory. CLF cursorily alleges in one sentence: "Shell, acting through officers, managers, subsidiary companies, and instrumentalities, owns and operates the Terminal." Am. Compl. ¶ 106. The Supreme Court has long made clear that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). This bedrock principle of corporate law can only be overcome where "the corporate veil may be pierced". *Id.* at 62.[21] In Connecticut,

[21] Plaintiffs allege that Defendants are corporate affiliates, but that not all have a parent-subsidiary relationship. *See* FAC ¶¶ 18-27, 30, 33, 35. The rationale expressed by the Supreme Court in *Bestfoods* is equally applicable to companies with any alleged

"the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." *Lego A/S v. Best-Lock Const. Toys, Inc.*, 886 F.Supp.2d 65, 79 (D. Conn. 2012); *Angelo Tomasso, Inc. v. Armor Const. & Paving, Inc.*, 447 A.2d 406, 410-11 (Conn. 1982) (describing Connecticut's "instrumentality rule" and "identity rule" for piercing the corporate veil).

CLF never alleges "the improper use of the corporate form." *Naples v. Keystone Bldg. & Development Corp.*, 990 A.2d 326, 340 (Conn. 2010). The basic allegation that Defendant Shell Petroleum, Inc. is "the ultimate United States parent of Shell group entities" is insufficient to bring a claim against this Defendant. FAC ¶ 19. Similarly, allegations that Defendant Shell Oil Company "exercises control" over two of the Defendants, with nothing more, does not allege anything improper or establish any connection to the Terminal. *Id.* ¶ 56. Nor does CLF allege *any* facts that would support a finding of direct parent liability. *See Bestfoods*, 524 U.S. at 71; *see generally Schiavone v. Pearce*, 77 F.Supp.2d 284, 290-93 (D. Conn. 1999) (applying *Bestfoods* direct liability analysis). CLF has pled claims against the owner, operator and permittee of the Terminal and it provides no basis to include additional Defendants. Nothing in the Complaint even suggests fraud or the promotion of injustice, or any reason at all sufficient to pierce the corporate veil and hold the Non-Owner/Operator Defendants liable for actions of corporate affiliates.

II. THE CWA AND RCRA DO NOT PERMIT THE COURT TO EXERCISE SUBJECT MATTER JURISIDCTION OVER FORMER OWNER/OPERATOR MOTIVA.

CLF's eagerness to name as many defendants as possible swept in an entity against which it cannot bring its CWA claims or RCRA Regulatory Claims: Motiva, the Terminal's former owner and operator. Under the CWA, citizen suits may only be brought "against any person 'alleged *to be* in violation of' the conditions of either a federal or state NPDES permit." *Gwaltney*, 484 U.S. at 53 (quoting 33 U.S.C. §

corporate affiliation. *See, e.g., Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996) ("a corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances, commonly referred to as piercing the corporate veil.").

1365(a)(1)) (emphasis added). In *Gwaltney*, the Supreme Court held that the phrase "alleged to be in violation" excludes "wholly past" violations of the CWA from federal courts' ability to exercise subject matter jurisdiction over citizen suits. *Id*. at 64. Since *Gwaltney*, courts have concluded that the prohibition on "wholly past violations" extends to former owners and operators who no longer exercise control over their facilities because they are no longer capable of causing present or future violations. *See Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 632-33 (D.R.I. 1990) ("[t]he phrase 'any person . . . who is alleged to be in violation' is clearly directed to a present violation by the person against whom the citizen suit is brought."); *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 . . . ."). Courts have similarly applied the Supreme Court's holding in *Gwaltney* to RCRA regulatory claims under 42 U.S.C. § 6972(a)(1)(A).[22]

According to CLF's own pleading, Motiva ceased ownership and operation of the Terminal in 2017. FAC ¶¶ 36-37. Thus, even accepting CLF's allegations as true, Motiva's alleged CWA and RCRA violations can only be "wholly past." Motiva cannot cause a continuing or future violation of either statute. Motiva is not alleged to have retained permit responsibilities or control over the Terminal that would make the company capable of *being* in violation of either statute. *Cf. PennEnvironment v. PPG Industries*, 964 F. Supp. 2d 429, 461 (W.D. Pa. 2013) (finding jurisdiction where entity retained interests in facility); *City of Mountain Park v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1299 (N.D. Ga. 2008) (former owner subject to citizen suit because it remained permit holder).

III. CLF'S ALLEGED INJURY-IN-FACT IS NEITHER IMMINENT NOR FAIRLY TRACEABLE TO DEFENDANTS' CONDUCT.

CLF fails to meet the requirements for Article III standing to bring its Adaptation Claims. These claims are based only on CLF's members' fears of a future injury. Rather than demonstrating that it will

[22] *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d. Cir. 1993).

suffer from a "certainly impending" or "substantial risk" of injury as is required for Article III standing based on a future injury, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013), CLF alleges injuries from potential weather events that are—on the face of the Complaint—highly speculative, remote, or hypothetical. CLF failed to amend its cookie-cutter allegations of future harm in light of the holdings of two other district courts in CLF's series of related cases, which found these allegations "flawed" and insufficient to support Article III standing. Further, CLF has failed to show a "serious likelihood" of harm in the imminent future, a requirement that the Supreme Court recently reaffirmed when damages are sought on the basis of a future harm. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211-12 (2021). CLF's allegations are based on a speculative chain of events that do not show an injury that is "fairly traceable" to the Defendants' conduct. *Id.* The Court must dismiss CLF's Adaptation Claims for lack of standing.

To demonstrate standing, an association must plead "(i) that [its members] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). With respect to the injury in fact element, "'allegations of possible future injury' or even an 'objective reasonable likelihood' of future injury are insufficient to confer standing." *McMorris v. Carlos Lopez & Assoc.*, LLC, 995 F.3d 295, 300 (2d Cir. 2021) (quoting *Clapper*, 568 U.S. at 409-10). A future threatened injury is sufficient for an Article III injury only where it is "certainly impending" or if there is "a substantial risk that harm will occur." *Id.* (citations omitted). Claims based on a "speculative chain of possibilities" fail to establish an injury that is imminent or fairly traceable to the challenged conduct of the defendant. *Clapper*, 568 U.S. at 414 n.5. "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Grace v. Am. Central Ins. Co.*, 109 U.S. 278, 284 (1883)).

A. CLF's alleged injury-in-fact is not "certainly impending."

CLF's claimed injury to aesthetic and recreational uses of waterways is alleged to be due to the following possible future weather risks: (1) flooding due to storms and storm surge (*see* FAC ¶¶ 232-66); (2) flooding due to sea level rise (*see id.* ¶¶ 267-92); (3) flooding due to increasing sea temperatures (*see id.* ¶¶ 293-303); and, (4) severe precipitation (*see id.* ¶¶ 304-14). As explained below, the bases for each of these risks provided in the Complaint do not describe an injury to CLF's members that is "certainly impending." *McMorris*, 995 F.3d at 300.

With regard to the first alleged risk, flooding due to storms and storm surge, the Complaint alleges no timeframe for these theoretical future injuries to occur. CLF relies on the Sea, Lake, and Overland Surges from Hurricanes ("SLOSH") model, which depicts "*a worst case combination* of hurricane landfall location, forward speed, and direction" generated from hypothetical simulated storms.[23] This, by definition, does not speak to the risk of an *actual* inundation event occurring. Further, the SLOSH model factors in an accuracy of *+/- 20 percent*. *Id*. The SLOSH model, which provides only a worst case scenario and allows a significant margin for accuracy, cannot support a claim for a "certainly impending" concrete injury.

According to CLF's representation of the SLOSH model, the Terminal would be inundated by storm surge from a Category 2 hurricane. *See id.* ¶ 258. Even assuming CLF's representation to be true, nowhere does CLF allege the likelihood that such a "worst case" Category 2 hurricane will hit New Haven in the imminent future. CLF *must* allege its future injury is "certainly impending" or at a "substantial risk" of occurring, *Clapper*, 568 U.S. at 409, and there simply are no allegations present to support that with regard to an injury caused by flooding due to storms and storm surge.

For the second alleged risk, flooding due to sea level rise, the Complaint cites sources describing remote future scenarios – nothing even close to "certainly impending." *See* FAC ¶ 283 (referring to global

[23] *See* description of SLOSH model, http://cteco.uconn.edu/viewers/coastalhazards.htm (emphasis added).

sea level rise "by 2100"), ¶ 284 (projections of sea level rise locally "by 2100"); and ¶ 286 (projections of sea level rise in Connecticut by 2050); *see also Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1130 (D.N.M. 2011) (climate change risks in "years or decades" are not imminent); *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (holding danger of 100-year flood was itself remote). CLF references an "intermediate high" sea level rise scenario predicting an 18 percent chance of a 6-foot flood between 2016 and 2030. *See* FAC ¶ 284. However, CLF alleges *no facts* to show that such a flood would lead to discharges or spills in violation of the CWA or RCRA.

Turning to the third and fourth alleged risks, the Complaint is silent regarding the likelihood of the alleged risk of flooding due to increasing sea temperatures. *See* FAC ¶¶ 293-303. Finally, the Complaint cites only to "midcentury" and "late century" projections that address the alleged increase in precipitation in Connecticut, generally. *See id.* ¶ 309. In sum, none of the identified weather risks giving rise to CLF's alleged future injuries are supported by allegations meeting the required "certainly impending" or "substantial risk" standard for standing.

B. CLF's allegations do not show "a serious likelihood" that harm will occur as required for standing to seek penalties.

This lawsuit is one in a series of similar lawsuits (and the second filed against these Defendants) alleging nearly identical claims for violations of the CWA and RCRA based on the potential future risks to fuel terminals associated with flooding and severe precipitation. Although two federal courts have held that CLF does not have standing to bring claims based on allegations of distant future harms, CLF continues to make virtually identical allegations here. The District of Massachusetts held that CLF does not have standing "for injuries that allegedly will result from rises in sea level, or increases in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100." *Conservation Law Found., Inc. v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW, (D. Mass. Sept. 13, 2017), Order at 2-3, ECF No. 29. Similarly, the District of Rhode Island held that CLF lacked standing for flawed allegations

including those that discuss 2100 predictions based on worst-case scenarios. *See Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, No. 17-cv-00396-WES-LDA, 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020) (citation omitted). Consistent with these rulings, this Court should find that CLF lacks standing to bring any claims based on speculative future harms.

The district courts in CLF's similar lawsuits were correct in dismissing claims based on future harms, but did not go far enough by allowing CLF to continue with pared down versions of its Adaptation Claims. Subsequent to those decisions, in *TransUnion*, the Supreme Court clarified the standard under which plaintiffs must establish a sufficient risk of future harm to support Article III standing in a suit for damages. 141 S. Ct. at 2211-12. In *TransUnion*, the Supreme Court addressed claims by a class of consumers alleging that they were injured when a credit-reporting agency provided inaccurate reports to third-parties. The Supreme Court held that one group of plaintiffs, whose reports were not provided to third-parties but merely alleged a risk of this occurring in the future, lacked standing. *Id.* at 2212. In so holding, the Supreme Court clarified that without a "serious likelihood" of harm, the risk of future harm is "too speculative to support Article III standing" for a claim for damages. *Id.* In other words, merely alleging any risk (as CLF does here) is not sufficient, the risk must rise to a "serious likelihood."

This is fatal to CLF's claims for civil penalties. CLF alleges that there is some unspecified risk of flooding and severe precipitation that exists now, and increases over time. Like in *TransUnion*, CLF's allegations regarding the current risk amount to only mere possibility. And CLF fails to allege any present injury other than a "concern" about eliminating the risk of a future discharge from the Terminal, which is insufficient to support Article III standing and also calls into question whether CLF's Adaptation Claims satisfy the requirement for a "concrete and particularized" injury in fact. *See Me. People's Alliance v. Mallinckrodt*, 471 F.3d 277, 284 (1st Cir. 2006) ("neither a bald assertion of such a harm nor a purely subjective fear that an environmental hazard may have been created is enough to ground standing."). CLF

has failed to allege a serious likelihood that such harm will occur during the relevant 5-year life of the CWA permit in question and cause the alleged damage. *See TransUnion*, 141 S. Ct. at 2212) ("The plaintiffs claimed that TransUnion could have divulged their misleading credit information to a third party at any moment. But the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested . . . and provided by TransUnion during the relevant time period.").

The Supreme Court in *TransUnion* further clarified that "that in suits for damages plaintiffs cannot establish Article III standing by relying entirely *on a statutory violation* or risk of future harm: 'No concrete harm; no standing.'" *Maddox v. Bank of N.Y. Mellon Trust Co., N.A.*, 19 F.4th 58, 64 (2d. Cir. 2021) (quoting *TransUnion*, 141 S. Ct. at 2214)). Among other forms of relief, CLF seeks civil penalties. CLF's alleged harms are either based on a statutory violation, *see* Counts 10-11, or based on an alleged risk of future harm, *see* Adaptation Claims. Thus, CLF does not have standing for any claims for civil penalties.[24]

C. CLF's alleged injury-in-fact is not traceable to actions of the Defendants.

In addition, CLF's Adaptation Claims fail to satisfy the injury-in-fact and fairly traceable prongs of standing because they rest on a speculative chain of possibilities that largely lack any factual support. *Clapper*, 568 U.S. at 414 n.5 (2013); *FW/PBS*, 493 U.S. at 231 (standing cannot be inferred merely from averments in the pleadings). For CLF to be injured as alleged, the following events must occur: (1) severe precipitation and flooding of a magnitude described in the Complaint must strike the New Haven area; (2) the storm conditions will be such that the Terminal will be inundated; (3) the product storage tanks and wastewater treatment systems at the Terminal will rupture or otherwise fail; (4) secondary spill containment structures will be breached or otherwise fail; (5) spill control and emergency responses will be absent or inadequate; and finally (6) pollutants will be released and reach waterways in quantities or concentrations that will injure CLF's members.

[24] The same reasoning applies to a claim for civil penalties instead of damages. *See Conservation Law Foundation v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW (D. Mass Dec. 22, 2021), Memo. and Order, at 4, n.1 (ECF No. 131).

As discussed above, the very first link in the chain—the chance of severe precipitation and flooding occurring as described in the Complaint—is highly speculative. So too is it pure speculation that the Terminal's tanks, spill containment structures, and spill and emergency response will all catastrophically fail. *Again, there are no non-conclusory allegations specifying vulnerabilities at the Terminal.* While the Complaint alleges that one storm event in the past ten years caused the Terminal to discharge pollutants in excess of "Benchmark levels," this lone event falls far short of the catastrophic results that CLF alleges in the Complaint and is insufficient to show a "serious likelihood" of a future risk. *See* FAC ¶¶ 260-63. Accordingly, CLF's Adaptation Claims against all the Defendants must be dismissed for lack of standing.

IV. CLF'S ADAPTATION CLAIMS FAIL TO STATE A CLAIM UNDER RCRA OR CWA

CLF's lengthy Complaint alleges remarkably few facts about the operations at the New Haven Terminal. Instead, CLF lays out each of its Adaptation Claims using slight variations on a single conclusory theme: the Defendants have allegedly violated RCRA or the CWA by failing to "adapt to," "consider," or otherwise address "the factors discussed in Section IV.A" of the Complaint, in which CLF describes the (speculative and remote) risks of flooding and severe precipitation. *See, e.g.*, FAC ¶ 498.

Each of these allegations states a legal conclusion consistent with the Defendants' potential liability and is '"not entitled to the presumption of truth."' *Dejesus v. HF Management Services, LLC*, 726 F.3d 85, 87-88 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 679) (declining to credit allegations that "tracked the statutory language . . . but alleging no particular facts sufficient to raise a plausible inference of . . . [a] violation"); *see also Harris v. Mills*, 572 F.3d 66, 75 (2d Cir. 2021) (finding the failure to state a claim where there were no allegations "beyond ipse dixit"). CLF's allegations must "assert enough nonconclusory factual matter to nudge [the] claim across the line from conceivable to plausible." *Mandala*, 975 F.3d at 208. The Court's analysis must take two steps: (1) "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth", and (2) determine whether "well-pleaded

factual allegations . . . plausibly give rise to an entitlement of relief." *Iqbal*, 556 U.S. at 679; *see also Whiteside*, 995 F.3d at 321 (same). After stripping away these conclusory legal statements, what remains of the Adaptation Claims are threadbare factual allegations that fail to state a claim.

A. CLF Has Failed to State a Claim Under RCRA.

To survive a motion to dismiss a claim under RCRA § 7002(a)(1)(B), a plaintiff must plausibly allege that a defendant has "contributed or [] is 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." 42 U.S.C. § 6972(a)(1)(B). To establish a claim for a regulatory violation under RCRA § 7002(a)(1)(A), a plaintiff must plausibly allege that a defendant is "in violation of any permit, standard, regulation, condition, requirement, prohibition, or order. . . ." 42 U.S.C. § 6972(a)(1)(A). Each claim requires plausible allegations concerning the Defendants' involvement with solid or hazardous waste. *Iqbal*, 556 U.S. at 678. Here, multiple elements of CLF's RCRA claims lack factual support. The Court must dismiss Counts 12, 13 and 14 in their entirety as a matter of law.

1. Saleable products are not waste as a matter of law.

CLF's RCRA claims fail because its allegations do not concern "waste." 42 U.S.C. § 6972(a)(1). As CLF acknowledges, the Terminal stores and distributes saleable fuel and other "products." FAC ¶¶ 113-16. Courts have uniformly held that useful products are not wastes under RCRA, and as a matter of law cannot provide the basis for liability under § 7002(a)(1). Faced with the fact that RCRA liability is limited to waste, CLF abandons common sense and alleges that the products qualify as "solid waste" because Defendants' alleged failure to address flooding and precipitation risks means that the products will be waste in the future. *See* FAC ¶¶ 466, 491, 506. This theory contradicts the entire weight of RCRA case law. It is also implausible under the Complaint, the facts of which allege Defendants' intent to sell the products in the tanks, not discard them. Because saleable products cannot be waste, CLF's RCRA claims fail.

CLF alleges that Defendants are "generators" of hazardous waste such that they fall under the purview of RCRA, *see* FAC ¶¶ 467, 488, 512, and lists the types of hazardous constituents that it alleges Defendants generates, stores, handles or disposes of, *see id.* ¶¶ 465, 489, 504. However, CLF's RCRA allegations have nothing to do with the hazardous waste that they allege Defendants generate. Instead, CLF premises its RCRA claims on the release of oil (saleable product) from the Terminal's storage tanks. CLF alleges that "infrastructure failures and inadequate infrastructure design" relating to product storage tanks at the Terminal will cause releases, and that an imminent and substantial endangerment exists because of the potential for these releases. FAC ¶¶ 491-98, 508. Yet, CLF's Complaint acknowledges that these tanks contain various saleable "products." *Id*. ¶¶ 113-16.

To skirt the fact that these products do not fall within RCRA's definition of "solid waste",[25] CLF contends that Defendants' alleged failure to adapt the Terminal to address the remote possibility of flooding or extreme precipitation represents an "intent to discard" saleable product. This allegation is preposterous. It essentially asserts that any product located in an area with a risk of flooding is transformed into "waste." This is wrong as a matter of law and would dramatically expand RCRA beyond its intended scope. Nearly every seller of products situated near a coastline would be subject to RCRA citizen suits.

RCRA defines "solid waste" as "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* . . . ." 42 U.S.C. § 6903(27) (emphasis added). The plain meaning of "discard" is to "'cast aside; reject; abandon; give up.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (quoting The New Shorter Oxford English Dictionary 684 (4th ed.1993)); *see also Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1184 (D.C. Cir. 1987) (defining "discarded" as "disposed of, thrown away or abandoned").

[25] "Under RCRA 'hazardous wastes are a subset of solid wastes.'" *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co*., Inc., 989 F.2d 1305, 1313 (2d Cir. 1993) (citing 42 U.S.C. § 6903(5) (defining "solid waste"). Thus, if a material is not a solid waste, by definition it is also not a hazardous waste under RCRA.

The products stored in tanks at the Terminal are sold and distributed in commerce. *See supra* n. 6. As such, they cannot reasonably be considered garbage, refuse, or sludge. Nor does CLF allege that the products in the tanks are rejected or otherwise abandoned; thus, they are not "discarded." Numerous courts have recognized that non-leaked or spilled fuel product does not constitute "solid waste" under RCRA. *See, e.g., United States v. Union Corp.*, 259 F. Supp. 2d 356, 401-402 (E.D. Pa. 2003); *Craig Lyle Ltd. P'ship v. Land O' Lakes Inc.*, 877 F. Supp. 476, 481 (D. Minn. 1995); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 675 (N.D. Ga. 1993); *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991).

Moreover, useful products are not wastes. Courts have consistently held that where a product (such as the fuel stored in the tanks) is capable of being used for its intended purpose and is still wanted by the consumer, it is not a waste. *See, e.g., Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) ("[t]he key to whether a manufactured product is a 'solid waste,' then, is whether that product has served its intended purpose and is no longer wanted by the consumer"); *see also No Spray Coal, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001). CLF has not alleged that the products in the tanks have already served their intended purpose and are not wanted by the consumer.

Instead, CLF alleges that Defendants' demonstrate an "intent to discard" saleable product. As explained above, this flies in the face of the well-established legal distinction between products and waste for purposes of RCRA. Further, there are no allegations supporting this so-called "intent to discard". CLF's allegation is contradicted by the Complaint itself, and the documents attached to CLF's Complaint. FAC ¶¶ 113-16. Lastly, CLF's allegation that Defendants intend to discard their saleable product simply defines common sense. As the Complaint acknowledges, the entire purpose of the Terminal is to store and sell fuel products for use by consumers – not discard it. *Id.* The material in the tanks is product, not waste. CLF has failed to state a claim under RCRA § 7002(a)(1). *Twombly*, 550 U.S. at 560.

2. CLF alleges no facts identifying how the Terminal's infrastructure fails to comply with RCRA.

Even if CLF made plausible allegations that Defendants' saleable product is waste, CLF's RCRA claims still fail to meet *Iqbal*'s basic pleading standard. *See* 556 U.S. at 678. CLF alleges that Defendants have violated RCRA by not properly adapting the Terminal to address the allegedly imminent risks from flooding and severe precipitation, but CLF provides no specific factual support detailing *how* Defendants have allegedly failed to address these risks. The Complaint does not allege that the tanks are poorly constructed, it does not allege any Terminal infrastructure has a history of leaks or spills, it does not allege any specific vulnerability at all. Instead, CLF makes conclusory legal statements that do little more than repeat the language of RCRA.[26] CLF's attempts at factual allegations are too general to provide the basis for a plausible claim. Such threadbare and speculative statements cannot provide the basis for a well-pleaded allegation. *See Dejesus*, 726 F.3d at 89 (an allegation may be "so threadbare or speculative that it fail[s] to cross the line between the conclusory and the factual") (internal citations and punctuation omitted).

Further, CLF's conclusory statements contradict the language in the SWPPP, which shows that Defendants have considered that stormwater could be impacted by petroleum products from storage tanks should the BMPs described in those documents not be considered. *See* FAC, Ex. G, at 18; *Matusovsky v. Merrill Lynch*, 186 F.Supp.2d 397, 400 (S.D.N.Y. 2002) ("If a plaintiff's allegations are contradicted by [documents attached to the complaint], those allegations are insufficient to defeat a motion to dismiss.") (citation omitted)). As is the case in CLF's similar citizen suits against other coastal fuel terminals, this

[26] Compare FAC ¶ 4465 ("Shell's Terminal generates, stores, handles, and disposes of refined petroleum products"), ¶ 490 ("Shell's past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste"), ¶ 500 ("Shell's operation of the Terminal presents an 'imminent and substantial endangerment to health or the environment'"), ¶ 502 ("Shell has contributed and is contributing to the past or present handling, storage, treatment, transportation, or disposal of solid and hazardous wastes which may present an imminent and substantial endangerment to the health or the environment") with 42 U.S.C. § 6972(a)(1)(B) ("any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is 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").

Complaint appears to be no more than a fishing expedition with the hopes of later identifying deficiencies. This Court should dismiss CLF's RCRA claims.

3. CLF has failed to allege that Defendants have engaged in an activity that is "contributing to" an endangerment or that an endangerment is "imminent".

CLF's claim under RCRA's endangerment provision also fails because the Complaint identifies no *act* by any Defendant that is "contributing to" the endangerment from the highly speculative flooding and severe precipitation risks and fails to show how any such endangerment is "imminent." *See generally* FAC ¶¶ 486-502. The Second Circuit has interpreted "contributing to" to require *active* conduct to impose liability under RCRA § 7002(a)(1)(B). In contrast, CLF claims an endangerment in the form of possible future "discharges and/or releases" due to (1) the risks of flooding and severe precipitation, and (2) the Defendants' alleged failure to consider those risks in its stormwater management practices. *See generally* FAC ¶¶ 486-502. Neither the entirely independent risks of flooding and severe precipitation (which Defendants are not alleged to have a hand in causing) nor an alleged "failure to consider" are affirmative acts that can give rise to liability under RCRA.

The Second Circuit has concluded that RCRA's "contributing to" language speaks in *active* terms about "handling, storage, treatment, transportation, or disposal" of waste. *ABB Indus. Sys., Inc. v. Prime Tech., Inc. et al.*, 120 F.3d 351, 359 (2d Cir. 1997) ("[b]ecause ABB cannot show that General Resistance or Zero- Max *spilled* hazardous chemicals or *otherwise contaminated* the site, ABB cannot establish that the defendants have contributed or are contributing to an endangerment") (emphasis added). Two other federal courts of appeal have come to similar conclusions. *See Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011) ("handling the waste, storing it, treating it, transporting it, and disposing of it are all *active functions* with a direct connection to the waste itself."); *Sycamore Indus. Park Assocs. v. Ericsson, Inc*., 546 F.3d 847, 854 (7th Cir. 2008) ("The vast majority of courts that have considered this issue read RCRA to require affirmative action rather than merely passive conduct[.]").

CLF's claimed endangerment on the other hand is premised on the Defendants' alleged *inaction* and an intervening act that is not "imminent." CLF's attempt to assert a claim based on acts the Defendants have not undertaken contradicts the plain meaning of "contributing to" and must be rejected. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 831, 844 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005) (concluding "only active human involvement with waste is subject to liability under § 7002(a)(1)(B)" and rejecting argument that defendant was liable based on alleged "studied indifference" to contamination). Moreover, allowing "contributing to" to mean inaction would render RCRA's citizen suit provision illogical as "contributing to" modifies the active terms "handling," "storage," "treatment," "transportation," and "disposal" in the statute. *Id*.; *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principal of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

Further, the Complaint makes explicit that the alleged discharges and/or releases, *i.e.*, the alleged endangerment under RCRA, are "caus[ed] and/or contribut[ed] to" by the potential impacts of future flooding and severe precipitation on Shell's saleable product. These allegations are directly related to Shell's stormwater management under its General Permit and *not* Shell's past or present handling, storage, treatment, transportation, or disposal of waste. *See* FAC § IV.A. As described above, CLF's Complaint is devoid of *any* specific allegations regarding failures with respect to the waste generated at the Terminal, much less how (if at all) those activities are presenting any endangerment. *See supra* III.A.2. CLF merely states in a conclusory fashion that Shell has failed to take certain unnamed steps with respect to its stormwater management, and that these activities occur "at or near sea level in close proximity to major human population centers, the New Haven Harbor, and the Quinnipiac and Mill Rivers." FAC ¶ 492.

For the same reasons CLF fails to establish an imminent injury under Article III standing, CLF fails to establish an "imminent" injury under RCRA. "[A]n endangerment can only be 'imminent' if it threatens

to occur immediately . . . . [T]here must be a threat which is present *now* . . . ." *Meghrig*, 516 U.S. at 480 (1996). The alleged threat must be "near-term and involve[] potentially serious harm." *Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2d. Cir. 2009) (quoting *Mallinckrodt*, 471 F.3d at 289 (1st Cir. 2006)). It cannot be "remote in time, completely speculative in nature, or de minimis in degree." *Mallinckrodt*, 471 F.3d at 289 (citation omitted).

CLF has not alleged an endangerment that threatens to occur immediately or is present now. CLF's Complaint alleges an injury that is premised on scenarios occurring at the mid-century or end of the century, or projections through 2030 based on an "intermediate high" sea level scenario. *See* FAC ¶¶ 283-86. CLF's alleged endangerment is also contingent upon a long sequence of events consisting of, *inter alia*, flooding and severe precipitation, multiple containment failures at the Terminal, and a release of materials that reaches nearby waterways in sufficient quantities or concentrations to cause harm. Absent that speculative domino effect occurring just as projected, CLF will not be injured. Without factual allegations that plausibly indicate present conditions—including specifically at the Terminal—may be creating an endangerment, CLF has failed to plead imminence under RCRA. *See Crandall v. City & Cty. of Denver*, 594 F.3d 1231, 1239 (10th Cir. 2010) ("It is not enough under RCRA that in the future someone may do something with solid waste that, absent protective measures, can injure human health.").

In sum, there is no basis for the Court to infer that an imminent and substantial endangerment is presented by the Defendants' operations with nothing more than an allegation that these activities occur near sea level and populations. *Iqbal*, 556 U.S. at 678. Under CLF's theory, the scope of liability under § 7002(a)(1)(B) would reach all entities with facilities that manage products near sea level. Such an unprecedented use of RCRA is contrary to the statute and should be rejected.

4. CLF has failed to allege a RCRA regulatory violation.

CLF's Counts 12 and 14 likewise fail to state a claim under RCRA § 7002(a)(1)(A) for alleged violations of federal and state RCRA regulations. As an initial matter, CLF's claim under Count 12 fails because it relies on inapplicable federal regulations. CLF alleges that Defendants are in violation of 40 C.F.R. § 257.1(a)(2) and § 257.3-1(a) (regulations establishing "open dumping" criteria). FAC ¶¶ 470-71. However, Connecticut has obtained approval to maintain its own waste management program regulating generators of hazardous waste, *see* Conn. Agencies Regs. § 22a-449(c)-100 *et seq*., and has its own regulation pertaining to open dumps, *see* Conn. Agencies Regs. § 22a-209-1. For this reason alone, CLF cannot allege a violation of the federal hazardous waste regulations at 40 C.F.R. § 257.1(a)(2).

Moreover, 40 C.F.R § 257.1(a)(2) and § 257.3-1(a) are simply inapplicable here based the allegations in CLF's own Complaint. These regulations are a part of the "Criteria for Classification of Solid Waste Disposal Facilities and Practices." *See* 40 C.F.R. § 257.3. CLF has never alleged that Shell operates a "disposal facility" – it alleges that Shell is a generator of hazardous waste.

With respect to CLF's allegations in Count 14, CLF alleges violations of two regulations: Conn. Agencies Regs. § 22a-430-3(h) and 40 C.F.R. § 262.16(b)(8)(i). As to the first, Connecticut Reg. § 22a-430-3(h) has nothing to do with the management of solid or hazardous waste – it sets forth the duty to mitigate applicable to water discharge permits. This regulation cannot provide the basis for a claim under RCRA. As to the second, 40 C.F.R. § 262.16(b)(8)(i) (conditions for exemption for a small quantity generator that accumulates hazardous waste),[27] CLF's claim is nearly word-for-word the legal standard set forth in the regulation.[28] *But, as described above, there are no facts anywhere in the Complaint to support*

[27] This section of 40 C.F.R. Part 262 was incorporated by reference in the Connecticut regulations. *See* Conn. Agencies Regs. § 22a-449(c)-102(a).

[28] *Compare* 40 C.F.R. § 262.16(b)(8)(i) ("A small quantity generator must 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."), *and* FAC ¶ 513 ("Shell's ongoing failure to disclose information in its possession regarding the factors discussed in Section IV.A. . . . has resulted in an inability to maintain and operate the Terminal to minimize the possibility of a fire, explosion, or any unplanned sudden or non-

this claim, or how the failure to disclose information would correct this alleged violation. This type of pleading, which contains no specific supporting facts, cannot provide the grounds to withstand a motion to dismiss. *Twombly*, 550 U.S. at 555 ("formulaic recitation of the elements of a cause of action will not do.").

B. CLF has failed to state a claim under the CWA.

1. CLF inappropriately seeks to require consideration of impacts beyond the reasonable life of any NPDES permit.

CLF's CWA Adaptation Claims are, like its RCRA claims, fundamentally at odds with the statute it seeks to enforce. Specifically, CLF's CWA Adaptation Claims ask the Court to impose long-term planning obligations through the facility's permit, ignoring how Congress structured the NPDES program. Each CWA Adaption Claim is premised on an unspecified failure to address "discharges resulting from the factors discussed in Section IV.A" of the Complaint. *E.g.*, FAC ¶ 394. Thus, CLF seeks to hold the Defendants liable for failing to consider and act upon information concerning sea level rise and changes in the risks posed by storm surge, flooding, and other inundation that CLF admits are mere possibilities or far off in the future. *See, e.g., id.* ¶ 283 (referring to global sea level rise "by 2100"), ¶ 284 (projections of sea level rise locally "by 2100"); and ¶ 286 (projections of sea level rise in Connecticut by 2050).

CLF disregards the basic structure of the NPDES program, which by design imposes short-term compliance obligations. NPDES permits, including the General Permit under which the Terminal is regulated, are limited to terms of no more than five years. 33 U.S.C. §§ 1342(a)(3), (b)(1)(B); 40 C.F.R. § 122.46(a); *Manasola-88 Inc. v. Thomas*, 799 F.2d 687, 688 n.1 (11th Cir. 1986) ("NPDES permits are issued for a fixed term not to exceed five years"); Conn. Agencies Regs. § 22a-430-4(b).[29] Congress could have opted to make NPDES permits long-term planning documents, but provided for periodic "reevaluation

sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.")

[29] The only exception to this rule is when an application for reissuance has been filed at least 180 days prior to a permit's expiration, in which case the permit is administratively extended to allow sufficient time for the new permit to be issued. *See* 40 C.F.R. §§ 122.6(a), 122.46(a)-(b).

of the relevant factors" in order to allow "for the tightening of discharge conditions" in response to new information. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 22 (1st Cir. 2012).

CLF's CWA Adaptation Claims allege that the facility's General Permit requires the Terminal to plan for conditions that may (or may not) exist decades from now. This is simply not correct. The General Permit's requirements apply for a defined period of time. The CWA created a mechanism for dealing with changes to a discharger's conditions over time: the five-year permitting term and the opportunity it provides to evaluate changed conditions. The Court should not entertain this invitation to set aside the CWA's structure—put in place by Congress—in favor of CLF's regulatory policy preferences and agenda.

2. The CWA prohibits CLF's attempt to expand the scope of the facility's permitting obligations through this lawsuit.

The limits on what constitutes stormwater under the CWA – and the Terminal's permit – reveal this suit, and the series of related lawsuits, for what it really is: an attempt by CLF to impose its own set of novel obligations rather than a citizen enforcement action. The CWA's text and structure do not allow for this and this attempt should be rejected by the Court.

The CWA's permit shield expressly bars CLF's attempt to impose requirements beyond those in the permit. Under section 402(k) of the Act, "[c]ompliance with a permit issued pursuant to this Section shall be deemed compliance . . . ." with the CWA. 33 U.S.C. § 1342(k). Congress intended this provision to insulate permit holders from '"having to litigate in an enforcement action the question whether their permits are sufficiently strict."' *See, e.g.*, *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 285 (6th Cir. 2015) (quoting *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977)). CLF's suit seeks to achieve this prohibited outcome. Its Complaint seeks the Defendants to go above and beyond the obligations of the General Permit to control pollutants from possible storm surge and sea level rise.

CLF's CWA Adaptation Claims are premised on the notion that Shell has failed to provide certain information related to the potential for inundation of the Terminal to its regulators. *See, e.g.*, FAC ¶ 394.

Presumably, CLF believes that this information would lessen the chances of a discharge of pollutants. However, CLF acknowledges that the risk and impacts of such inundation are widely known. *See generally id.* ¶¶ 209-314. The regulators know that New Haven is susceptible to inundation, *see id.* ¶¶ 251-58 (City of New Haven acknowledging that "New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms"), and that oil terminals may face impacts due to flooding from storm surges, *see id.* ¶¶ 316-32 (detailing "analogous risks" from "severe weather events all over the country"), yet they have not explicitly addressed inundation in the General Permit or Shell's SWPPP.[30] It is not CLF's prerogative to re-write Shell's permit, and that is not the purpose of the CWA citizen suit provision. This is precisely why the permit shield exists. *See ICG Hazard, LLC*, 781 F.3d at 285.

Shell's SWPPP fully complies with the requirements of General Permit. CLF's allegations otherwise are an improper attempt to expand Connecticut's permitting scheme. The General Permit, which was reissued effective October 1, 2021 *without modification*, is explicitly devoid of any references to "storm surge," "sea level rise," "hurricanes," "severe weather," or "sea surface temperatures."[31] The General Permit does not require the consideration of inundation caused by severe weather events and rising sea levels.[32] This attempt to hold the Defendants liable for conduct that does not violate the permit involves no violation of "a permit or condition thereof" on which CLF can sustain a citizen suit. 33 U.S.C. § 1365(f)(7).

3. The Complaint lacks facts sufficient to sustain the CWA Adaptation Claims.

CLF's CWA Adaptation Claims also fail because they continue the conclusory refrain that Defendants have allegedly failed to address the potential for severe precipitation and flooding, but allege

[30] CLF could have provided comments on Shell's SWPPP before approval by the regulator, but it chose not to. *See* GP § 4(d)(2).
[31] https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/industrial/20210316-Industrial-General-Permit-As-Is-Renewal---CleanSIGNED.pdf. The only references to "flooding" are in regard to drydock activities.
[32] Connecticut could have included this information in its General Permit. In October 2021, EPA amended its Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity to specifically include stormwater control measures to minimize impacts from stormwater discharges resulting from major storm events such as hurricanes, storm surge, extreme/heavy precipitation, and flood events." *See* https://www.epa.gov/sites/default/files/2021-01/documents/2021_msgp_-_permit_parts_1-7.pdf?VersionId=zxl7R9hlJhJsFpWLcrH6YKUXWz9d2jBu at 2.1.1.8.

no facts to substantiate these claims. Bare legal conclusions do not state a plausible claim for relief. *Twombly*, 550 U.S. at 555. The Court should dismiss CLF's CWA Adaptation Claims.

a. Contents of the SWPPP (Counts 1, 4, 5, 6, 7)

The Complaint contains no factual allegations from which the Court can infer deficiencies in the Terminal's SWPPP. Five of CLF's causes of action allege inadequacies with the SWPPP:

- "[d]escribe or ensure implementation of BMPs that will be used to ensure that non-stormwater pollutant discharges . . . do not occur in the future and are eliminated," General Permit § 5(b)(11) (Count 1);
- "identify sources of pollutants . . . as sources of pollution reasonably expected and anticipated by Shell to affect the quality of the storm water discharges," General Permit § 5(c)(2)(D) (Count 4);
- "[d]escribe or ensure implementation of BMPs that will be used to address pollutant discharges," General Permit § 5(b) (Count 5);
- "[d]escribe or ensure implementation of BMPs that will be used to address run-on to avoid areas that may contribute pollutants," General Permit § 5(b)(7) (Count 6); and
- "[d]escribe or ensure implementation of BMPs that will be used to minimize the potential for leaks and spills," General Permit § 5(b)(9) (Count 7).

However, the Complaint falls short of the plausibility threshold because it is devoid of references to what, if anything, has been omitted from the SWPPP. Nowhere in the Complaint does CLF allege which pollutant sources should have been included in the SWPPP but were not (Count 4). CLF alleges no facts concerning which control measures or BMPs are missing from the SWPPP that will prevent non-stormwater discharges (Count 1), address pollutant discharges (Count 5), address run-on (Count 6), or minimize the potential for leaks and spills (Count 7). CLF does nothing more than repeat the requirements in the General Permit.[33]

[33] *Compare* General Permit § 5(b)(11) ("The Permittee must eliminate non-stormwater discharges") with Count 1; *Compare* General Permit § 5(c)(2)(D) ("The Plan shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site") with Count 4; *Compare* General Permit § 5(b) ("Control Measures are required [BMPs] that the permittee must implement to minimize the discharge of pollutants from the permitted facility.") with Count 5; *Compare* General Permit § 5(b)(7) ("Where feasible, the permittee shall divert uncontaminated run-on to avoid areas that may contribute pollutants") with Count 6; *Compare* General Permit § 5(b)(9) ("The permittee must minimize the potential for leaks and spills.") with Count 7.

CLF will likely argue that such detail is not required at the pleading stage. However, conclusory recitations of the law are insufficient to show a plausible claim. *Dejesus*, 726 F.3d at 87-88. Pleading factual averments with specificity is essential because the SWPPP does contain the requested information. Defendants pointed this out to CLF in their September 2020 response to CLF's Notice of Intent to file suit, *see* Ex. 1, but CLF never engaged in further discussion. Importantly, CLF does not allege, other than an alleged one-off stormwater discharge in 2011, prior to the date of the 2017 SWPPP, that the BMPs are insufficient and leading to ongoing discharges of pollutants from the Terminal. CLF's own allegations show that even the alleged discharge in 2011 did not give rise to the harm that CLF alleges is possible as a result of a future, speculative storm event. CLF asks the Court to assume that there are deficiencies in the SWPPP rather than provide well-pled facts from which the Court might infer that the SWPPP in *any* way failed to address the risks of potential severe precipitation and flooding.

b. Submission of information to regulators (Counts 3, 8, 9)

CLF's claims related to the information disclosed in its SWPPP or to the State must also fail. In Count 3, CLF claims that Defendants violated the requirement to certify that its SWPPP was "true, accurate, and complete" because it was not based on "the factors discussed in Section IV.A." FAC ¶¶ 407-08, 410-13; GP § 6(d), 5(c)(7). In Count 8, CLF alleges that Defendants should have submitted information about their knowledge of the factors in Section IV.A under General Permit § 6(g), which requires that within 15 days of becoming aware of new information, the permittee submit that information to the State. FAC ¶ 439. Finally, in Count 9, CLF alleges that Shell failed to amend the SWPPP to include information on the factors discussed in Section I.V. in accordance with General Permit § 5(c)(5), which requires that a permittee amend the SWPPP under certain, specific circumstances. FAC ¶¶ 444-45.

CLF's pleadings contain no facts to support its theory that Defendants failed to disclose information to the State. CLF never alleges what facts should have been disclosed. The Complaint itself makes clear that the information possessed by Shell was widely understood by the regulators. *See, e.g.*, FAC ¶¶ 284-

88. CLF has failed to plead what "change in information" or "circumstance" occurred that would require an update to the State or an amendment to the SWPPP. CLF has again merely concluded a violation exists without alleging specific facts to support the existence of one.

c. Compliance with the Coastal Management Act (Count 2)

CLF's claim arising under the CMA lacks sufficient specificity to allege a plausible claim. CLF alleges that Defendants' "activity at the Facility" violates the General Permit because it is inconsistent with the goals and policies of the CMA, and that the New Haven Terminal "is designed and operated in a manner that will cause adverse impacts to coastal resources". FAC ¶¶ 397, 403.

CLF fails to allege what "activity" violates the Permit. While CLF alleges certain factors that Defendants have allegedly failed to consider ("rise in sea level, coastal flooding, and erosion patterns"), and certain control measures or BMPs that Defendants have allegedly failed to implement, *see id.* ¶¶ 397-402, CLF nowhere alleges that the CMA requires the consideration of those factors in development of the SWPPP.[34] As described above, CLF has failed to plead facts sufficient to support any conclusion with respect to the plausibility of whether the Defendants considered these potential risks in creation of the SWPPP. Further, CLF's Complaint is completely devoid of allegations showing how the Terminal will cause adverse impacts to coastal resources as defined in the CMA, which refers to impacts like significant alterations of tidal patterns, significant alteration of groundwater flow, or significant alteration of shoreline configurations. *See* Conn. Gen. Stat. § 22a-93. CLF has not alleged facts giving rise to a plausible claim under Count 2 and, like the other CWA Adaptation Claims, this claim should be dismissed.

V. THE COURT SHOULD DEFER TO THE STATE AND ABSTAIN FROM CLF'S CWA AND RCRA ADAPTATION CLAIMS.

Through this litigation, CLF seeks to disrupt the purposefully established state stormwater

[34] As discussed above, the General Permit specifically does not require the inclusion of these factors. *See supra* IV.B.2. The General Permit's requirement that the permittee's stormwater discharge be consistent with the goals and policies of the CMA does not change that.

permitting system and impose new permitting obligations beyond that which the State requires. CLF's CWA Adaptation Claims and RCRA Regulatory Claims require this Court to venture into an arena in which Connecticut's regulatory agencies are actively evaluating new measures for controlling the flow of stormwater discharges attributable to potential flooding and severe precipitation related to climate change. Under the abstention doctrine set out in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), a federal court may exercise its discretion to abstain from hearing a case it has jurisdiction over "if its adjudication in a federal forum 'would be disruptive to state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996).

In its most recent articulation of the doctrine in *Quackenbush*, the Supreme Court emphasized that there is no "formulaic test" for determining whether *Burford* abstention is appropriate, and that,

> [u]ltimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the "independence of the state action," that the State's interests are paramount and the dispute would best be adjudicated in a state forum.

Id. at 728-29 (internal citations omitted). The Second Circuit has identified:

> three factors to consider in connection with the determination of whether a federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public . . . (1) the degree of specify of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern.

Liberty Mutual Ins. Co. v. Hurlburt, 585 F.3d 639, 650 (2d. Cir. 2009). Courts will also consider whether their involvement is inappropriate because plaintiffs sought federal review "as a means to avoid an order issued pursuant to a constitutionally sound administrative scheme." *Dittmer v. County of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998).

Abstention is appropriate in this case, where a citizen suit threatens to intrude on the State's "overriding interest in protecting its environment from the effects of contaminated discharges . . . ." *Starlink*

Logistics, Inc. v. ACC, LLC, 2013 WL 212641, at *8 (M.D. Tenn. 2013) (abstaining from RCRA and CWA claims). Deference to important state interests is consistent with the CWA, in which Congress sought to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . ." 33 U.S.C. § 1251(b).

The CWA Adaptation Claims and RCRA Regulatory Claims will require the Court—before any state agency has a chance to do so—provide direction for how a coastal fuel terminal must address potential effects of climate change. The Court will have to interpret and delineate the scope of regulatory obligations that are currently under evaluation by state agencies, and assess novel obligations that are not required by the Terminal's permit. The statutes and regulations in place governing water quality and stormwater discharges are highly specific and require a significant degree of expertise. *See* Conn. Gen. Stat. ch. 446k *et seq.* (Connecticut Water Pollution Control Act); Conn. Agencies Regs. §§ 22a-426-1 through 22a-426-9 (Connecticut Water Quality Standards); Conn. Gen. Stat. §§ 22a-416 through 22a-438 (Stormwater Industrial General Permit); Conn. Agencies Regs. § 22a-430-4 (Procedures and criteria for issuing water discharge permits); *see, e.g.*, *Liberty Mutual Ins. Co.*, 585 F.3d at 651 (finding that the New York Workers' Compensation Law is "a statute with a high level of specificity"). These regulations and the General Permit represent the state regulatory agency's decision on public policy questions in a subject matter that has been specifically delegated by the EPA to the State. 39 Fed. Reg. 26,061.

Connecticut is also deeply involved in addressing these specific issues on an ongoing basis. *See supra* Sec. IV. Effective July 2021, any municipality may establish a stormwater authority to develop a stormwater management program. Conn. Pub. Act No. 21-115, 1-2.[35] DEEP is obligated to provide technical assistance to municipalities on areas including the creation of these stormwater authorities, and to

[35] The City of New Haven already has its own Stormwater Management Plan. *See* https://www.newhavenct.gov/civicax/filebank/blobdload.aspx?blobid=24759.

update design criteria for stormwater management systems. *See* Exec. Order No. 21-3, Sec. 10, 12 (2021).[36] DEEP has also published a report discussing the impact of sea level rise and stormwater runoff, and the State publishes sea level change scenarios to guide this municipal and state planning. *See supra* n. 15, 16.

While the EPA has recently issued a stormwater permit that specifically include measures designed to address the risks CLF raises in this litigation, including storm surge and severe weather, Connecticut has not done so. This Court should not step into the shoes of the regulator and make this decision for it. In September 2021, EPA amended its Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("MSGP").[37] The modification, for the first time, specifically address mitigation measures that can help minimize impacts "from stormwater discharges from major storm events such as hurricanes, storm surge, extreme/heavy precipitation, and flood events." MSGP, at 2.1.1.8. Although Connecticut adopted a new General Permit in October 2021, the new General Permit includes no such language. Instead, Connecticut has stated its intent to reissue a new General Permit *with modifications* prior to the expiration of the current General Permit in September 2024. *See* General Permit Fact Sheet. If Connecticut wishes to address these mitigation measures it can do so in the next modification to the General Permit. This suit should not be allowed to short-circuit the well-established administrative process.

Lastly, CLF's lawsuit is an attempt to circumvent the state permitting scheme. Under the state permitting system, Connecticut must issue a General Permit at least once every five years. Conn. Agencies Regs. § 22a-430-4(b). On April 2, 2021, DEEP published a Notice of Tentative Decision to reissue the General Permit without modification. *See* Notice of Reissuance without Modifications.[38] Interested parties were able to comment on the requirements of the permit during a 30-day public comment period. *Id.* No

[36] https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-21-3.pdf.
[37] https://www.epa.gov/sites/default/files/2021-01/documents/2021_msgp_-_permit_parts_1-7.pdf?VersionId=zxl7R9hlJhJsFpWLcrH6YKUXWz9d2jBu
[38] https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/industrial/20210614-GSI_ReissuanceNotice-websiteSIGNED.pdf

comments were received. *Id.* CLF could have commented on the General Permit and requested the State to include the exact type of information that it improperly seeks from Shell through this lawsuit.[39]

CLF will likely argue that it had no need to comment because the obligations it seeks to impose are already a part of the General Permit. CLF also had an opportunity to comment on the Terminal's SWPPP. *See* GP § 4(d)(2). The SWPPP was received by the agency on July 10, 2017 and approved on December 5, 2017. *See* Industrial Stormwater Registration Status Report. CLF did not comment. Through the ordinary state administrative process, CLF could have presented these arguments to the appropriate state agency for determination. CLF failed to do so and instead attempts to disregard the administrative process through this litigation. Indeed, this case is a classic example of "regulation via litigation." Through this case, CLF seeks to challenge the permitting decision of DEEP. Federal courts do not have jurisdiction to hear challenges to the terms of state-issued NPDES permits. *E.g.*, *Rose Acre Farms, Inc. v. N.C. Dep't of Envt. & Nat. Res.*, 131 F. Supp. 3d 496, 504-05 (E.D.N.C. 2015) ("Congress chose state courts to be the means by which parties may challenge permitting decisions."); *Nat. Res. Def. Council v. Outboard Marine, Inc.*, 702 F. Supp. 690, 694 (E.D. Ill. 1988) (prohibiting federal review of state NPDES permit in citizen suit).

In sum, Connecticut is actively engaged in addressing stormwater management. The Court should reject CLF's invitation to usurp the State's efforts to create and implement a coherent plan addressing climate change adaptation.

CONCLUSION

The Court should dismiss CLF's RCRA and CWA Adaptation Claims, and all claims against Shell Oil Company, Shell Petroleum, Inc., and Motiva. Disposing of these claims as set forth in Defendants' Motion would result in only causes of action 10 and 11 remaining as to Defendants Equilon (d/b/a Shell Oil

[39] The General Permit that became effective on October 1, 2018 was available for public comment from March 29, 2018 through April 29, 2018. *See* Public Notice, https://www.epa.gov/ct/public-notice-draft-general-permit-discharge-stormwater-associated-industrial-activity-state-ct.

Products US) and Triton. CLF improperly names Shell Oil Company and Shell Petroleum, Inc. without any specific factual allegations linking the Defendants to the Terminal or permit in question. Motiva, as a former owner/operator, is not subject to any current regulatory obligations and all CWA and RCRA regulatory claims against it must be dismissed.[40] The RCRA and CWA Adaptation Claims should also be dismissed as to all Defendants on their substance. CLF lacks an imminent injury-in fact that is traceable to the Defendants' conduct, and, therefore lacks standing to assert its Adaptation Claims. CLF's "failure to adapt" theory is fatally lacking in factual support and fails to state a claim under RCRA or the CWA. Additionally, the Court should dismiss these claims in deference to Connecticut's ongoing efforts to address the impacts of climate change under the doctrine of abstention.

The Court should see this suit for what it is: an improper attempt by CLF to bypass Connecticut's administrative permitting scheme and pursue regulation through litigation against fuel terminal operators. Accepting CLF's novel use of a federal citizen suit here in effect would subject facilities—merely because of their location near sea level—to liability for "failing to adapt" to the evolving and uncertain impacts of climate change. Whether and to what extent such measures are necessary are quintessential legislative and administrative determinations, rather than judicial. CLF's attempt to expand the scope of RCRA and the CWA in this manner should be rejected.

[40] All causes of action, except for 13, requiring ongoing obligations related to ownership or operation of the Terminal must be dismissed as against Motiva. Cause of action 13, arising under RCRA § 7002(a)(1)(B), must be dismissed for failure to state a claim and for lack of standing.

Dated: February 25, 2022

Respectfully submitted,

/s/ Bina R. Reddy

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2022, the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Bina Reddy
Bina Reddy