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., SHELL TRADING (US) COMPANY, TRITON TERMINALING LLC, and MOTIVA ENTERPRISES LLC, *Defendants*.	Civil Action No. 3:21-cv-00933-SALM

PLAINTIFF CONSERVATION LAW FOUNDATION INC.'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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I. Introduction

Plaintiff Conservation Law Foundation, Inc. ("CLF") respectfully submits this memorandum of law in support of its opposition to Defendants Shell Oil Company, Equilon Enterprises LLC d/b/a Shell Oil Products US, Shell Petroleum, Inc., Triton Terminaling LLC, and Motiva Enterprises LLC's (hereinafter, collectively, "Defendants" or "Shell") Motion to Dismiss (ECF No. 50) and Memorandum in Support (ECF No. 50-1), (hereinafter "Motion" & "MTD Mem." respectively), and requests the Court deny Defendants' Motion in its entirety for the following reasons.[1]

As CLF's Amended Complaint ("AC") describes, flooding and precipitation events are occurring at an increasing rate in the Northeast, including in the New Haven area. These ongoing impacts from climate change increase the frequency and intensity of storms and storm surges and lead to sea level rise and increasing sea surface temperatures, all of which exacerbate flooding and precipitation.[2] The Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") were designed to protect people and the environment from pollutant discharges and releases caused by, among other things, precipitation and flooding. Defendants have not prepared their bulk storage terminal located at 481 East Shore Parkway, New Haven, Connecticut (hereinafter the "Terminal") against foreseeable severe flooding and weather-related risks and therefore have violated the terms of their discharge permit, the CWA, and RCRA. CLF's so-called Adaptation Claims (MTD Mem. 1) allege that Defendants have committed numerous violations of federal law, including: (1) past and ongoing failures to comply with Connecticut Industrial Stormwater Permit No. GSI002800 (the "Permit"), and the CWA; (2) improper management of

[1] CLF removed Shell Trading (US) Company from the Amended Complaint. CLF is no long pursuing claims against that entity.

[2] These events and influences are detailed in the AC as causing and/or contributing to the substantial and imminent risk of pollutant discharge and/or release from the Terminal. AC, Factual Background § IV.

and susceptibility to washout of solid waste at a Terminal located in a floodplain, posing a hazard to human life, wildlife, and land and water resources; (3) past and present contribution to handling, storage, treatment, transportation, or disposal of solid and hazardous wastes, which may present an imminent and substantial endangerment to health or the environment in violation of RCRA; and (4) failure to operate and maintain its facility to minimize the possibility of a fire, explosion, or any unplanned release of hazardous waste or hazardous waste constituents to air, soil, or surface water which threatens human health or the environment.

Defendants' Motion should be denied for the reasons stated below. *First*, Defendants' Memorandum does not conform to the requirements of the Local Rules and is, therefore, five pages over the forty-page limit. *Second*, CLF has adequately alleged injury-in-fact sufficient to establish standing. *Third*, CLF has plausibly alleged that Defendants have violated the CWA by failing to consider and address the risks of foreseeable severe weather at the Terminal. *Fourth*, CLF has sufficiently alleged Defendants have and continue to violate RCRA's open dumping prohibition and generator rule, and that they are presenting an imminent and substantial endangerment to human health and the environment. *Fifth*, CLF has adequately alleged that Defendants Shell Oil Company and Shell Petroleum, Inc., (the "Parent Defendants") exercise sufficient control within Shell's centralized corporate structure to be independently liable for the CWA and RCRA violations. *Sixth*, this Court has subject-matter jurisdiction over Defendant Motiva. *Finally*, *Burford* abstention is inapplicable to CLF's claims.

II. Background

A. Procedural History

Following the issuance of the Notice of Intent consistent with the provisions of Section 505 of the CWA and Section 7002(1)(1)(B) of RCRA, CLF filed this action on July 7, 2021 to halt Defendants' longstanding and ongoing violations of the CWA and RCRA. CLF seeks declaratory

and injunctive relief, civil penalties, and other relief the Court deems proper to remedy Defendants' violations of federal law that have occurred and are occurring at the Terminal.

B. Climate Change in New Haven

Climate change is happening in New Haven now, and its effects will only continue to worsen. AC ¶¶ 232-50. These climate changes lead to more frequent and intense precipitation events, storm surges, flooding, and higher sea surface temperatures and sea levels. *Id.* ¶¶ 267-86. Already, "New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms." *Id.* ¶ 253. The Port of New Haven is especially vulnerable to flooding because it is "partly within the 100-year floodplain with a base elevation equal to the coastal inundation. Topography and drainage problems cause flooding, and residents have reported frequent inconveniences due to street flooding." *Id.* ¶ 173.

Coastal flooding in the Northeast has increased because of an approximate one-foot rise in sea level over the past 120 years, and "[t]his trend is projected to continue." *Id.* ¶¶ 274-275. Even incremental amounts of sea level rise of between 1 to 10 centimeters can double the odds of flooding, and one study concluded that this leads to the odds of extreme flooding doubling "every 5 years into the future." *Id.* ¶ 278. Over that same time span, precipitation in the Northeast also "increased by approximately five inches, or more than 10% (0.4 inches per decade)." *Id.* ¶ 311. And the effects of climate change will only continue to worsen. The Federal Emergency Management Administration ("FEMA") "estimates that a 100-year flood in Connecticut would cause over $13 billion in property damage," and "climate scientists estimate that by 2050 this '100 year flood' will revisit the Connecticut coast, on average, not once every 100 years, but once every twelve-and-a-half to twenty-five years." *Id.* ¶ 210. CLF cites an analysis that concluded that New Haven has an 18 percent chance of at least one flood over six feet between 2016 and 2030, with the odds growing to 49 percent by 2050. *Id.* ¶ 284.

C. Defendants' Terminal

Defendants operate the Terminal in the Port of New Haven pursuant to the Permit as part of Connecticut's implementation of the CWA's National Pollutant Discharge Elimination System ("NPDES") program. AC ¶¶ 67, 106. The Terminal has been granted coverage under Connecticut's General Permit for Discharge of Stormwater Associated with Industrial Activity ("CT General Permit")—a permit that applies to a variety of industrial facilities that register for coverage. AC ¶¶ 175-78. The Terminal is also regulated under RCRA as a Small Quantity Generator of hazardous waste pursuant to RCRA. *Id.* ¶¶ 143-144; *see also* 40 C.F.R. § 262.16; 42 U.S.C. § 6922. Many toxic and hazardous wastes, some of which are highly carcinogenic, are present at the Terminal, including petroleum hydrocarbons and other hazardous waste constituents. AC ¶¶ 145, 489, 504 (listing toxic chemicals). The Terminal is vulnerable to climate change-associated flooding risks because of its geographic location, design, and operation. The National Oceanic and Atmospheric Administration's ("NOAA") tool for mapping floodplains places the Terminal is in the middle of the FEMA Flood Zones. *Id.* ¶ 476. NOAA's SLOSH (Sea, Lake, and Overland Surges from Hurricanes) modeling also indicates that the Terminal would be inundated by a Category 1 hurricane. *Id.* ¶¶ 257-258.

D. Summary of Claims

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

CLF has alleged that the Permit places affirmative duties on Defendants to evaluate the risks posed to the Terminal by severe weather events, including climate change-induced risks, and to take action to address those risks, and that Defendants have failed to do so. In particular, Defendants are obligated to "minimize the discharge of pollutants" from the Terminal by, among

other things, implementing control measures to (i) eliminate any non-stormwater discharges, (ii) manage stormwater runoff, and (iii) minimize the risk of spills. AC ¶¶ 390, 422-423, 428, 433; Permit §§ 5(b)(11), 5(c)(2)(E), 5(b)(7), 5(b)(9). Defendants must evaluate conditions that could result in pollutant discharges and develop control measures to mitigate those risks. *See, e.g.*, AC ¶ 197 (quoting Permit § 5(b)(7) (Defendants must "investigate the need for stormwater management or treatment practices," "consider the potential of various sources at the facility to contribute pollutants to stormwater discharges," and "implement and maintain" those measures). Defendants must also develop and implement a stormwater pollution prevention plan ("SWPPP") that identifies the potential pollutant sources and describes the control measures Defendants have implemented to address the risk of discharges. AC ¶¶ 201-03, 206. Defendants are further required to update the SWPPP as conditions change and to disclose known risks to regulators. *Id.* ¶¶ 413, 444-47; Permit § 5(c)(5). Defendants have violated their Permit by failing to disclose or address climate change risks at the Terminal. AC ¶¶ 410-13, 438, 445, 455-56, 501, 513. By failing to take climate change into account, Defendants are violating their Permit's requirements.

Defendants are also violating similar duties under RCRA. RCRA requires Small Quantity Generators of hazardous waste—like the Terminal—to "to minimize the possibility" of hazardous waste releases, AC ¶ 512; 40 C.F.R. § 262.16(b)(8)(i) (the "Generator Rule"). It also requires all facilities in floodplains to avoid "open dumping," which includes allowing the washing out of solid waste "so as to pose a hazard to human life, wildlife, or land or water resources." AC ¶ 471; 40 C.F.R. § 257.3-1(a). RCRA allows a citizen suit to be filed against any person that has contributed or "is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" if the waste "may present an *imminent and substantial endangerment* to health or the environment." AC ¶¶ 89, 91; 42 U.S.C. § 6972(a)(1)(B) (emphasis

added). Given the location of the Terminal and its structural deficiencies, there is no way that Defendants can meet these obligations without considering severe weather and climate change in how the Terminal operates; yet Defendants have failed to do so.

III. Argument

A. Defendants' Memorandum Exceeds the Maximum Page Limit and Should Be Denied on That Basis

As a threshold matter, Defendants' Motion should be denied because their Memorandum violates the maximum page limit set by the Local Rules. The Local Rules set a default page limit for memoranda in support of a motion at forty double-spaced pages. D. Conn. L. Civ. R. 7(a)(5). Each page must have "left and right margins of at least 1 [inch]." D. Conn. L. Civ. R. 10; Pretrial Preferences (Merriam, J.) ("All submissions to the Court . . . must bear a formal case caption and comply with Local Rule 10.").[3] The left and right margins on Defendants' Memorandum are substantially smaller than the required 1 inch.

Defendants' violation is readily apparent when comparing Defendants' Memorandum to their cover motion. Defendants' Motion (ECF No. 50) complies with the one-inch margin requirement. The margins on Defendants' Memorandum, however, are approximately half the size of the margins on Defendants' Motion. The reduced margins allowed Defendants to write five additional pages while superficially appearing to satisfy Rule 7's 40-page limit. A recreation of Defendants' Memorandum with the required 1-inch margins—attached as Exhibit 1, hereto—demonstrates the true length of Defendants' Memorandum under the Local Rules.

Defendants' Memorandum does not conform to the Local Rules and, therefore, Defendants' Motion should be denied. In the alternative, the Court should decline to consider

[3] *See also* D. Conn. Electronic Filing Policies and Procedures § I.F.1 (requiring all electronically-filed documents to meet the requirements of Local Rule 10).

Defendants' abstention argument, which appears almost exclusively on the excess pages.

B. CLF Has Adequately Alleged Injury-in-Fact Necessary for Article III Standing for Its Adaptation Claims[4]

CLF has standing to bring its Adaptation Claims.[5] "Where, as here, a case is in the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). "[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact—not proof—in the complaint or supporting affidavits." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987) (internal quotations omitted). To have standing under Article III, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely cause by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).[6]

CLF has sufficiently alleged an imminent or actual injury in its AC. "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). And "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion*, 141 S.Ct. 2190, 2210 (2021) (citations

[4] CLF is only addressing the injury-in-fact prong of the standing test here because Defendants' challenge to CLF's standing is based exclusively on that prong. While Defendants' Memorandum includes a section challenging the traceability prong of standing, Defendants' argument is wholly derivative of their injury-in-fact argument. *See* MTD Mem. 20-21 ("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.").

[5] Defendants only challenge CLF's standing for its Adaptation Claims, not its other claims. *See* MTD Mem. 15.

[6] An organization has standing to sue on behalf of its members when: (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim nor the relief requested requires an individual member's participation in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

omitted).[7]

Here, CLF has sufficiently alleged that the risks of severe weather to—and resultant pollutant discharges from—the Terminal are both "substantial" and "certainly impending." "CLF members live near, recreate on, and regularly visit the area and waters near Shell's Terminal," and its members "use and enjoy these waters for recreational and aesthetic purposes, including, but not limited to, boating, swimming, fishing, observing wildlife, and sightseeing; they intend to continue to engage in these activities in the future." AC ¶ 10. "CLF and its members are concerned about, and have an interest in eliminating the risk from the discharge and/or release of pollutants from the Terminal into the New Haven Harbor, the Quinnipiac River, and the Mill River, as well as into nearby communities and ecosystems." AC ¶ 12. These risks and discharges are not theoretical—the Terminal has "been inundated by storm surge in the past," and "discharge[d] several pollutants well beyond Benchmark levels." AC ¶ 259-60.

As explained in Section II.B, the effects of climate change are already being felt in New Haven, and they are continuing to increase. AC ¶¶ 68-69, 72. Storm surge has been "steadily increasing" due to sea level rise. AC ¶¶ 244, 250. There have been more frequent record-breaking precipitation events, causing threats of flooding and major snowstorms. AC ¶¶ 250, 331-32. "As a coastal town, New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms." AC ¶ 253. Already, "precipitation [in the Northeast] increased by approximately five inches, or more than 10% (0.4 inches per decade)." AC ¶ 311.

[7] The Supreme Court determined decades ago that certain citizen suit provisions "make plain that the interest of the citizen-plaintiff is primarily forward-looking," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987); *see also Conservation L. Found., Inc. v. ExxonMobil Corp.*, No. 16-cv-11950-MLW, 2021 WL 6066432, at *1 (D. Mass. Dec. 22, 2021) ("The Supreme Court in *TransUnion* noted that *Spokeo* cited *Clapper*, a suit for injunctive relief, which is materially different for standing purposes than a suit for damages….") (internal citation omitted). *Exxon* followed *TransUnion* and *Gwaltney* when it determined that "*TransUnion* did not alter the standard this court used in denying the motion to dismiss the claims for prospective injunctive relief…." *Exxon*, 2021 WL 6066432, at *2.

NOAA's model on hurricane surge values shows that "much of the Port of New Haven, including the Terminal, would be inundated by a Category 1 hurricane, while the remainder of the Port would be inundated by storm surge from a Category 2 hurricane." AC ¶ 258. The City of New Haven itself has determined that it is "particularly vulnerable to all hurricanes forecasted to track to New England . . . due to the ability of Long Island Sound to amplify hurricane surges." AC ¶ 252. Moreover, "[t]emperatures in Connecticut have risen about 3.5°F since the beginning of the 20th century." AC ¶ 282.

These AC paragraphs show that heightened risks from climate change are already here, and CLF alleges that they will continue to increase in the near term. The Connecticut Legislature "has adopted a sea level change scenario of 20 inches by 2050."AC ¶ 190. One study has concluded that, in general, sea level rise contributes to an anticipated doubling of the odds of extreme flooding "every 5 years into the future." AC ¶ 278. The Connecticut Governor's Steering Committee on Climate Change has noted that sea level rise and storm surges can lead to "devastating impact[s]" on dredging, national security, commercial transport and fishing, recreational boating, infrastructure, flooding of roads, energy fuel transportation, and more. AC ¶ 251. One analysis concluded that New Haven has an 18 percent chance of at least one flood over six feet between 2016 and 2030, with a 49 percent chance by 2050. AC ¶ 284. In a news report after Superstorm Sandy, a Harvard geology professor said, "[b]y midcentury, . . . a 13-foot storm surge with be the new norm on the Eastern seaboard." AC ¶ 317. The harms to CLF's members for Defendants' violations at the Terminal are current, ongoing, and "certainly impending."

Indeed, two federal district courts have already found similar allegations by CLF to be sufficient for standing. As Defendants note in their brief, CLF has filed several similar suits related to oil terminals in New England, including one against the same Defendants here. *See* MTD Mem.

1 and n.1. Both courts to reach the issue found that CLF had standing to bring these claims.

In *Conservation L. Found., Inc. v. Shell Oil Prod. US*, CLF alleged substantially identical claims against Defendants in the case at bar related to their bulk oil terminal in Providence, Rhode Island. *See* No. 17-cv-396 WES, 2020 WL 5775874, at *1 (D.R.I. Sept. 28, 2020) ("*Shell RI*"). The District of Rhode Island rejected the same arguments Defendants make again here, finding that CLF had "asserted certainly impending harm":

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

Shell RI, 2020 WL 5775874, at *1 (internal citations omitted).

In *Conservation L. Found., Inc. v. ExxonMobil Corp*, the District of Massachusetts denied Exxon's motion to dismiss for lack of standing, finding that "CLF plausibly alleges that foreseeable severe weather events, including climate change-induced weather events, pose an imminent risk to the terminal." No. 16-cv-11950-MLW (Mar. 19, 2019) Hearing Tr. at 129 (hereinafter "Exxon Hr'g Tr.") (attached as Exhibit 2). The court held that "CLF has standing for 'near term harms' from climate change . . . [and] other foreseeable weather events." *Id.* at 127. The same result is mandated here.

None of Defendants' arguments to the contrary alter this conclusion.

First, Defendants argue that CLF cannot have standing for harms that will not occur for many years, categorizing them as "highly speculative, remote, or hypothetical" (MTD Mem. 16), but this argument is beside the point. As stated, CLF is not alleging harm for risks in the far future—CLF alleges that the risk to the Terminal is present now and is increasing over time. As discussed above, CLF cites certain future projections to support the inference that risks are

increasing. The AC makes clear that "[w]hile many of the projections discuss harms in 2050 and 2100, it is clear that the acceleration of the negative impacts of climate change is happening now and will only get more pronounced as each year goes by." AC ¶ 72. As the court in *Shell RI* found, these events "could happen at virtually any time." *Shell RI,* 2020 WL 5775874, at *1. Therefore, the risks are "certainly impending" or have a "substantial risk" of coming to pass and CLF has adequately alleged an injury-in-fact.

Defendants also attempt to use the Supreme Court's *Transunion* opinion to argue that CLF has not alleged a sufficient harm to seek civil penalties (MTD Mem. 19-20), but Defendants' arguments are meritless. *First*, Defendants argue that *Transunion* changed the standard for alleging risk of harm, but *Transunion*'s holding is expressly limited to actions seeking *damages*, *TransUnion*, 141 S.Ct. at 2210, whereas CLF seeks *civil penalties* (and declaratory and injunctive relief). AC p. 99. Unlike damages, which are paid to a plaintiff to remedy a plaintiff's economic harms, civil penalties are paid to the U.S. Treasury and citizen plaintiffs like CLF have standing to seek civil penalties because they deter future violations. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-88 (2000). Defendants assert in conclusory fashion that "the same reasoning applies to a claim for civil penalties instead of damages," but Defendants do not develop this argument and their single citation does not support their proposition. MTD Mem. 20 n.24 (citing *Conservation L. Found., Inc. v. ExxonMobil Corp.*, No. 16-cv-11950-MLW, 2021 WL 6066432, at *2 n.1 (D. Mass. Dec. 22, 2021)). The court in *Exxon* chose not to decide whether *Transunion* applies to civil penalties, instead deciding that CLF's allegations, substantially similar to those here, were sufficient to establish standing. *Exxon*, 2021 WL 6066432, at *2-*3.

Second, Defendants argue that under *Transunion*, CLF cannot base standing solely on a

"statutory violation," (MTD Mem. 20), but this proposition is not novel. *TransUnion* simply reiterates a well understood principle of standing: a private plaintiff without a personal stake in a case does not have standing to "enforc[e] a defendant's general compliance with regulatory law." *TransUnion LLC*, 141 S.Ct. at 2207, 2205-07, 2213 (2021) (citing *Lujan*, 504 U.S. at 577). As explained, CLF's members allege concrete injuries as a result of Defendants' conduct.

C. CLF Plausibly Alleges that Defendants Have Violated the Clean Water Act Permit for the Terminal

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

1. Consideration of Current and Certainly Impending Impacts is Appropriate Under the CWA

CLF has alleged that the Terminal is currently at risk from the effects of severe weather and climate change and that the risk is only increasing as the effects of climate change aggregate over time. Nevertheless, in their Motion, Defendants mischaracterize CLF's AC as seeking "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." MTD Mem. 30. However, the AC quotes researchers and scientists at length who discuss the current trends and ongoing manifestations of climate change, as well as the indications that the trends are continuing and the effects are aggregating. *See* AC ¶¶ 228–30, 237–41, 250–53, 274–288, 299–302, 308–311. Defendants' attempts to recast CLF's AC to avoid liability are particularly puzzling because Defendants have acknowledged the present risks associated with climate change, have experienced severe weather damage and pollutant releases at their own facilities, and have taken actions to guard against them at facilities

other than the Terminal. *See id.* ¶¶ 318, 291, 372–373. As explained in Section III.B., CLF's "Adaptation Claims" concern present and ongoing violations of the Permit, specifically, the requirements that Defendants disclose information to regulators and develop, implement, and maintain an adequate stormwater pollution prevention plan ("SWPPP"). The court in *Shell RI* rejected similar arguments in the defendants' motion to dismiss: "The Complaint makes clear that a major weather event, magnified by the effects of climate change, could happen *at virtually any time*, resulting in the catastrophic release of pollutants due to Defendants' alleged failure to adapt the Terminal to address those impending effects. While it might not occur for many years, the fact that it is certainly impending is enough to meet the standard." 2020 WL 5775874, at *1.

To address these risks, the Permit requires Shell to develop and implement a SWPPP to describe its evaluation of potential risks and the actions it has taken to address those risks. For example, the SWPPP must include a "Summary of Potential Pollutant Sources" which requires Defendants to, among other things, (i) identify any pollutants that could be mobilized by stormwater, and (ii) describe "existing structural and non-structural control measures to reduce pollutants in stormwater runoff." AC ¶ 205 (quoting Permit § 5(c)(2)(D)(iii)). The SWPPP must also describe all the control measures implemented at the site, including "the appropriateness and priorities of control measures in the [SWPPP] and how they address identified potential sources of pollutants at the site." AC ¶ 206 (quoting Permit § 5(c)(2)(E)). The SWPPP must include a signed certification by a professional engineer attesting to the completeness and sufficiency of the SWPPP contents. AC ¶ 207 (citing Permit § 5(c)(2)(F)). As the *Exxon* court put it when dealing with a similar CWA permit, the CT Permit requires Defendants "to consider foreseeable severe weather events, including any climate change-induced weather events, in developing and maintaining [their SWPPP] . . . . [and] proactively address potential discharges of pollutants."

Exxon MTD Hr'g Tr. at 132–33 (emphasis added).

Defendants attempt to argue that the NPDES program's five-year permit term forecloses any obligation it has to consider climate-related impacts on the Terminal, (*see* MTD Mem. 30–31), but the CWA does not impose only short-term compliance obligations. "The obligation to maintain long-term compliance with the CWA, as well as common sense and sound engineering practices, necessitate that climate impacts be considered" in the context of CWA enforcement. U.S. Envtl. Prot. Agency, *Framework for Protecting Public and Private Investment in Clean Water Act Enforcement Remedies* 1–2, *available at* https://www.epa.gov/sites/production/files/2016-12/documents/frameworkforprotectingpublicandprivateinvestment.pdf.

Additionally, no honest argument can be made that Defendants constructed or maintain the Terminal with the intent to operate it for only five years, with no intention of operating beyond the term of a single permit. And while it is true that NPDES permits are statutorily limited to five-year terms, Defendants' position ignores the reality that permits are commonly expired and administratively continued for years. *See, e.g., United States v. Zenon-Encarnacion*, 387 F.3d 60, 63–64 (1st Cir. 2004) (NPDES permit administratively continued from 1989 to 2002). The CT General Permit is a perfect example: it was issued in October 2011 and has been extended without modifications four times since that date. AC ¶ 175. It is simply not true that permits are reevaluated on a consistent five-year schedule. Regardless of when the Permit will be reissued, the injuries alleged in the AC have in fact happened and are "certainly impending."

Defendants have long known of the threats posed by precipitation and flooding, which are exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures, as well as the present impacts and risks of climate change. *See* AC ¶¶ 209–314, 364–88. Shell's current corporate position on climate change is as follows: "We have recognised the importance

of the climate challenge for a long time now, and we share our knowledge, experience and understanding of the energy system with policymakers." *Id.* ¶ 214. According to Shell, it was "one of the first energy companies to recognize the climate change threat and to call for action." *Id.* ¶ 216. Yet Shell has made no effort to consider or address such threats with respect to the Terminal.

2. CLF's Suit Properly Seeks to Enforce Shell's Existing Permit Obligations

CLF seeks to hold Defendants accountable to the terms of the Permit. Defendants argue CLF is trying to expand the scope of the Permit obligations, but CLF has alleged that the Permit imposes an affirmative duty on Defendants to consider and address risks of pollutant discharges from foreseeable severe weather events, including those driven by climate change. Each of CLF's CWA claims related to Defendants' failure to disclose, consider, and address climate-related impacts on the Terminal specifies the precise Permit conditions Defendants have violated and CLF is enforcing. AC ¶¶ 389–448. "[I]f 'the language [of a permit] is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Fola Coal*, 845 F.3d at 139 (citations omitted). CLF's claims are entirely founded on the plain language of the Permit. For example, Shell has the duty to implement "control measures" to "*minimize* the discharge of pollutants" from the Terminal. AC ¶ 193 (quoting Permit § 5(b)). The Permit defines "minimize" to mean "reduce and/or eliminate *to the extent achievable* using control measures that are technologically available and economically practicable and achievable *in light of best industry practice*." *Id.* (emphasis added); *see also id.* ¶ 194. This duty to apply "best industry practice" to eliminate discharges as much as possible places an affirmative duty on Shell to both (i) evaluate the potential risk of discharges, and (ii) take actions to reduce those risks.

The Permit and CWA regulations that require Defendants to develop, implement, and update the facility plans to account for identified potential pollution sources and associated risks,

and prepare the plans in accordance with good engineering practices, obligate Defendants to consider and address climate-related impacts. The court in *Exxon* held that "the permit requires [the permittee] to proactively address potential discharges of pollutants." *Exxon* Hr'g Trans., 133:17–18. The court continued: "[T]he permit does not impose static or only static requirements. Rather it requires Exxon to constantly review and update its practices in the terminal's SWPPP to reflect or address any material changing circumstances." *Id.* at 135:23–136:1. Shell has known of climate change risks for decades, acknowledged action is required to address those risks, and has engineered other facilities to address those risks. Defendants, as part of the Shell corporate structure, *see* Section III.D below, are required to disclose this information to regulators, and to act on information in their possession to implement, amend, and update their SWPPP accordingly.[8]

However, Defendants have not considered or addressed the risks of pollutant discharge from the more frequent and severe foreseeable weather events described in Sections II.B and III.B. The SWPPP does not analyze the potential for flooding from severe weather, so: (i) Defendants cannot have implemented control measures to "minimize the discharge of pollutants" and to eliminate non-stormwater discharges (Counts 1, 5, 6, 7); (ii) the Terminal is not in accordance with the Connecticut Coastal Management Act (Count 2); (iii) the SWPPP does not identify all potential pollutant sources (Count 4); (iii) the SWPPP certification was false and has not been amended (Counts 3, 9), and (iv) Defendants have not given all relevant facts to CT Department of Energy and Environmental Protection ("CT DEEP") regarding risks to the Terminal (Count 8).

[8] The Permit requires that the SWPPP be amended within 120 days of certain events, including: "(A) [when] there is a change at the site which has an effect on the potential to cause pollution of the surface waters of the state . . . [and] (F) [when] necessary to address any significant sources or potential sources of pollution identified as a result of any inspection or visual monitoring." Permit § 5(c)(5); *id.* § 6(g) ("Within fifteen (15) days after the date a permittee becomes aware of a change in any of the information submitted pursuant to this general permit, becomes aware that any such information is inaccurate or misleading, or that any relevant information has been omitted, such permittee shall correct the inaccurate or misleading information or supply the omitted information in writing to the commissioner."); *id.* § 5(b)(7) ("The permittee shall implement and maintain stormwater management or treatment measures determined to be reasonable and appropriate to minimize the discharge of pollutants from the site.").

Defendants' half-hearted argument that CLF seeks to force "Defendants to go above and beyond the obligations of the General Permit to control pollutants from possible storm surge and sea level rise" (MTD Mem. 31), must be rejected for these reasons. Defendants' argument that it is protected by the "permit shield" doctrine similarly misses the mark. CLF is not challenging the terms of Shell's Permit; CLF is enforcing those terms to remedy ongoing violations of the CWA and RCRA. As the court in *Shell RI* held, "[CLF]'s claims entail interpretating the Permit—asking, for example, whether 'good engineering practices' require preparing the Terminal for catastrophic weather, or whether the current SWPPP would be 'ineffective' during such events—and state plausible claims under the CWA. And because this suit does not challenge the Permit's terms (as Defendants suggest), the Court has jurisdiction over it, and Defendants cannot invoke the permit shield to avoid it." 2020 WL 5775874, at *3 (internal citation omitted).

3. CLF Has Alleged Sufficient Facts to Sustain its CWA Claims

Though Defendants devote a significant portion of their brief to supporting their repetitive assertions that CLF alleges "no facts" supporting its claims, Defendants' argument essentially boils down to an attempt to hold CLF to a higher pleading standard than is required. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citation omitted). "For a claim to withstand a motion to dismiss, it need not show that recovery is probable, but it must show 'more than a sheer possibility' of liability." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

The allegations in CLF's Complaint are not "conclusory," and are more than sufficient to withstand Defendants' Motion. As discussed above, each of CLF's claims specifies the precise

term(s) of the Permit Defendants are violating. Each claim also describes the factual basis for the alleged violation. *See, e.g.*, AC ¶¶ 393–395, 417–420, 424–426, 429–431, 434–436 (Counts 1, 4, 5, 6, 7); 409–414, 438–442, 445–448 (Counts 3, 8, 9); 398–404 (Count 2). Underlying these claims are detailed factual allegations in Section IV.A. about current trends, impacts, and risks related to precipitation, flooding, storms and storm surge, sea level rise, and sea surface temperature, and the fact that they are further exacerbated by climate change. AC ¶¶ 209–314. Sections IV.A, IV.B, and V also describes how Shell has known of these trends and risks for decades, has publicly acknowledged the threat posed by climate change impacts, and yet has failed to take action to address risks at the Terminal. *See id.* ¶¶ 212–230, 291 312–314, 323–325, 371–388.

Defendants argue that CLF was required to plead the exact control measures (or BMPs) they were required to include in their SWPPP (MTD Mem. 33–34), but Defendants have the obligations backward. The Permit requires *Defendants* to develop control measures to minimize foreseeable risk of pollutant discharges and to describe those control measures in the SWPPP. AC ¶¶ 192–200, 202. CLF has adequately alleged that the Terminal faces an imminent risk from severe weather, *see* Sections II.B above, and that Defendants do not address those risks in the SWPPP, AC ¶¶ 405–26. The burden is not on CLF to detail what specific control measures should have been implemented, at least not *at the pleadings stage*. Indeed, the courts in both *Exxon* and *Shell RI* rejected identical arguments. *Exxon* MTD Order at 3; Exxon MTD Hr'g Tr. at 125; Shell MTD Mem., *Shell RI*, ECF 46-1 at 43–50 (D.R.I. Oct. 11, 2019); *Shell RI*, 2020 WL 5775874, at *4.

The ongoing requirement to comply with the "best industry practice" standard is consistent with the statutory scheme of the CWA, which places rigorous demands on dischargers to achieve higher and higher levels of pollution abatement.

> [T]he most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-

> forcing . . . . This policy is expressed as a statutory mandate, not simply as a goal . . . . [T]he nature of the statutory scheme . . . pushes all dischargers to achieve ever-increasing efficiencies and improvements in pollution control.

Nat. Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 123–24 (D.C. Cir. 1987). CLF sufficiently alleges that Defendants have failed to follow best industry practice at the Terminal, in part because they have not designed or adapted the Terminal to address precipitation and/or flooding, which is exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures. AC ¶¶ 334–88. The AC contains numerous allegations of the Terminal's inadequate infrastructure design and the well-known risks associated with inadequate infrastructure. *Id.* ¶¶ 15, 228, 230, 236–37, 251, 273, 283, 298, 307, 373, 374, 381–82, 508. Statements from engineers, including those at Shell, confirm that best industry practice would address these risks when designing and/or updating facilities. *Id.* ¶¶ 364–74.

Similarly misplaced are Defendants' arguments that (i) CLF does not allege which facts Defendants needed to disclose to regulators, and (ii) that climate risks were already known to regulators. *See* MTD Mem. 34-35. Regardless of what exactly Defendants were required to disclose—a matter for discovery—the SWPPP demonstrates that Defendants disclosed *nothing* regarding climate-changed induced severe weather risk to the Terminal. Also, the Permit contains no exception for disclosure of information Defendants think regulators might possess—especially information about risks to the Terminal specifically. Shell is a sophisticated, global company that has been studying changing weather patterns, rising sea levels, warming sea temperatures, and increasing severity of climate-related events for decades. Yet, Defendants' SWPPP, and other documents related to the Terminal are devoid of reference to any of this information. At this stage of the litigation, these allegations are sufficient to survive Defendants' Motion.

D. CLF Plausibly Alleges that Defendants Have Violated RCRA

CLF has alleged three RCRA claims: Count 12—open dumping, Count 13—imminent and

substantial endangerment, and Count 14—violation of the RCRA generator rule. "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204–05 (2d Cir. 2009). The purpose of RCRA is to protect human health and the environment from current and future threats by "reduc[ing] the generation of hazardous waste and [] ensur[ing] the proper treatment, storage, and disposal of that waste which is nonetheless generated." *Id.* at 205 (quoting *Meghrig v. KFC W.*, 516 U.S. 479, 483 (1996)). RCRA's citizen suit provision allows private parties to bring suit "to enforce waste disposal regulations promulgated under the Act." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 22 (1989).

1. CLF Has Sufficiently Alleged Waste at the Terminal

CLF has alleged that the Terminal is a Small Quantity Generator of hazardous waste. AC ¶¶ 143–44, 467. Many toxic and hazardous wastes are present at the Terminal, including "1,2,4-Trimethylbenzene, Anthracene, Benzene, Cumene, Cyclohexane, Ethylbenzene, Lead Compounds, Naphthalene, Polycyclic Aromatic Compounds, Toluene, Xylene (mixed isomers), and n-Hexane," *id.* ¶¶ 145, 465, 489, 504, many of which constitute hazardous waste constituents. *See generally* 40 C.F.R. § Pt. 261, App. VIII ("Hazardous Constituents"). The soil and groundwater at the Terminal are also contaminated with hazardous waste constituents, "including benzene, lead, copper, arsenic, zinc, phenanthrene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, and Benzo(k)fluoranthene," *id.* ¶ 151, *see also id.* ¶ 490, likely resulting in part from various chemical spills that have occurred at the site since at least the 1970s, *id.* ¶ 149.

Because Defendants cannot get around these clearly stated allegations, they argue that these hazardous wastes have "nothing to do with" CLF's RCRA allegations because the "infrastructure failures and inadequate infrastructure design" alleged in Paragraphs 491 through 498 and 508 of the AC relate solely to product storage tanks. MTD Mem. 23. However, review of the paragraphs

immediately preceding these paragraphs of the AC makes clear that the infrastructure and operational failures alleged at the Terminal from Defendants' lack of consideration of climate change risks, as described in Section IV.A of the AC, encompass *all* of the waste at the Terminal, not just waste related to the product storage tanks. *See, e.g.,* AC ¶¶ 487–90; 504–07. The District of Rhode Island found similar allegations to be adequate to bring Shell's terminal in Providence, Rhode Island within the ambit of RCRA: "Foundationally, Plaintiff has pleaded the existence of solid and hazardous waste at the Terminal." *Shell RI*, 2020 WL 5775874, at *2 (citing complaint paragraphs "describing alleged waste at the Terminal and status as generator of hazardous waste"). Defendants wholly ignore these allegations.

Instead, Defendants argue that the petroleum products in the Terminal's above-ground storage tanks cannot be considered "solid waste" because they are still useful, MTD Mem. 23–24, but Defendants' argument is incorrect because their failure to prepare the Terminal for the risks of foreseeable severe weather events manifests an "intent to discard" that product. "[T]he definition of solid waste under RCRA is very broad." *Waldschmidt v. Amoco Oil Co.*, 924 F. Supp. 88, 90 (C.D. Ill. 1996) (citations omitted). EPA has formally determined that even useful products fall within the definition of waste once an "intent to discard" those materials has been manifested: "EPA believes that an unused product becomes 'discarded' when an intent to discard the material is demonstrated." 62 Fed. Reg. 6622, 6626 (1997); *see also United States v. Asrar*, Nos. 93-50610, 93-50623, 1995 WL 579646 at *6 (9th Cir. Oct. 3, 1995) ("Under the RCRA, the intent to discard a usable material renders it hazardous waste."). Absent an admission, this intent can only be discerned through inference:

> There can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged . . . In determining the issue as to intent, the jury is entitled to consider *any statements made and acts done or omitted* by the

> accused, *and all facts and circumstances in evidence which may aid in determining state of mind*.

Mann v. United States, 319 F.2d 404, 407 n.3 (5th Cir. 1963) (emphasis added).

Defendants know full well the imminent risks associated with severe precipitation, extreme weather, storm surge, and sea level rise, *see generally* AC Section IV.A, and their failure to act to prevent releases of products and materials at the Terminal caused by these factors will result in release, handling, and disposing of solid and hazardous waste when these foreseeable events occur. Defendants' inaction in the face of their knowledge regarding these risks represents an "intent to discard" useful products because the outcome of this inaction is certain to occur.

Defendants made the same arguments in their motion to dismiss in *Shell RI*, No. 17-cv-00396, ECF 46-1 at 27-29, and the District of Rhode Island rejected them, 2020 WL 5775874, at *2–*3 (allowing RCRA claims to proceed). This Court should do the same and find, consistent with the purpose of RCRA, that products at the Terminal also fall within the very broad definition of "solid waste."

2. CLF Has Sufficiently Alleged Its Imminent and Substantial Endangerment Claim

Citizens may bring suits against "certain responsible persons, including former owners, 'who ha[ve] contributed or who [are] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which *may present* an *imminent* and substantial endangerment to health or the environment.'" *Meghrig v. KFC W.*, 516 U.S. 479, 484 (1996) (quoting 42 U.S.C. § 6972(a)(1)(B)) (emphasis in original). To plead an imminent and substantial endangerment claim, a plaintiff must allege "that a risk of threatened harm is present," that the risk is "substantial" or "serious," and that there be "a reasonable prospect of future harm." *Simsbury-Avon*, 575 F.3d at 210–11 (internal quotation marks omitted). "This is expansive language, which is intended to confer upon the courts the authority to grant affirmative

equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Id.* at 210 (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (emphasis in original)).

As with the CWA claims, RCRA places affirmative duties on Defendants to prevent an imminent and substantial endangerment. As CLF has alleged, the very first step Defendants should have taken is to consider the effects of climate change in their design, maintenance, and operation of the Terminal. Not having done so creates a "risk of threatened harm" that is both "substantial" and "serious" given the proximity of the Terminal to the water and the solid and hazardous waste contained at the Terminal. *Simsbury-Avon*, 575 F.3d at 210–11. The Terminal is at imminent risk from severe weather and Defendants have taken no action to evaluate or address those risks, AC ¶ 173, thereby presenting an "imminent and substantial endangerment to human health and the environment." AC ¶¶ 489–502 (Count 13).[9]

CLF has adequately alleged that Defendants are "contributing to the past and present handling, storage, transportation, and disposal of solid and hazardous waste"— Defendants are (i) "contributing" by controlling all waste at the Terminal, and (ii) "handl[e]," "stor[e]," and "dispos[e]" of the waste as defined by the statute.

First, Defendants have been, and are, contributing to the handling, storage, transportation, and disposal of wastes at the Terminal. AC ¶¶ 490, 502. Courts have expansively interpreted the term "contribution":

> [T]o state a claim predicated on RCRA liability for contributing to the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process. *Congress intended that the term contribution be liberally*

[9] This also does away with Defendants' argument that CLF's imminent and substantial endangerment claim is premised on "potential impacts of future flooding and severe precipitation on Shell's saleable product" from Defendants' stormwater management instead of their handling of waste. *See* MTD Mem. 27. Defendants' failures related to evaluation and planning for foreseeable severe weather impacts, not merely their "stormwater management." Also, the waste underlying Defendants' RCRA violations is not limited to the so-called useful products.

> *construed, and such term includes a share in any act or effect giving rise to disposal of the wastes that may present an endangerment.*

Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, L.L.C., 80 F. Supp. 3d 1180, 1229 (E.D. Wash. 2015) (quotations and citations omitted) (emphasis added). Hazardous waste is present on the site. AC ¶¶ 143-47. There is a history of spills at the Terminal resulting in contamination of the soil and groundwater. AC ¶¶ 148-51; Ex. F at 11-18; *see also* AC ¶ 260 ("After investigation, Motiva believes that extensive rainfall, wind and flooding associated with tropical storm Irene on August 28 and 29 contributed to the unusual results detected in samples collected the following week" (citations omitted).) Defendants have control over and, as generators of hazardous waste, are actively engaged in all aspects of hazardous waste generation, disposal, remediation, management, and planning at the Terminal, and have therefore also contributed to contamination on site.

While CLF agrees with Defendants the term "contribute" generally requires "active" contribution, Defendants are incorrect in arguing that the active contribution must relate to the "endangerment." *See* MTD Mem. 26. Contribution relates to the handling, storage, treatment, transportation, or disposal of hazardous waste. For example, in *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, cited by Defendants, the Second Circuit affirmed the dismissal of RCRA claims against a defendant on summary judgment where the defendant submitted evidence, including sworn affidavits, that it "generated a *de minimis* amount of hazardous waste" (and therefore was not a generator of hazardous waste), and "specifically swore that [it] 'never contaminated the environment or soil.'" 120 F.3d 351, 355 (2d Cir. 1997). Accordingly, the defendant could not have been said to have contributed to waste at the site in any of the above-listed ways. Here, not only has CLF pleaded that Defendants are generators of hazardous waste, and that hazardous waste is present at the Terminal, but CLF has alleged instances of spills during the tenure of Defendants'

ownership and operation of the Terminal.

In denying a motion to dismiss similar RCRA claims in *Shell RI*, the District of Rhode Island noted that CLF had, "as necessary . . . allege[d] Defendants exercise control over the Terminal and its waste disposal processes, and have 'contribut[ed] to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste', 42 U.S.C. § 6972(a)(1)(B)." *Shell RI*, 2020 WL 5775874, at *3 (internal citations omitted); *see also Hinds Invs., L.P. v. Angiolo*, 654 F.3d 846, 851 (9th Cir. 2011) (courts have allowed claims to continue "with some allegation of defendants' continuing control over waste disposal"); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (holding explicit allegations of control not required)). It cannot be reasonably disputed that CLF's AC sufficiently alleges facts that support an inference that Defendants contribute to the handling, storage, transportation, and/or disposal of solid and hazardous waste at the Terminal.

Second, Defendants' actions also meet the statute's definitions of "storage," "handling," and "transportation" of waste. Courts have interpreted these terms expansively, as well:

> The term "storage," when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste. The broadest of the statutory terms, "handling," is not defined in RCRA. It should therefore be given the ordinary dictionary meaning of "to manage, operate, or use with the hand or hands; . . . to manage, control, direct, train, etc." Similarly, the term 'transportation' is not defined in RCRA, but is defined in CERCLA as the ordinary "movement of a hazardous substance by any mode."

United States v. Union Corp., 259 F. Supp. 2d 356, 401 (E.D. Pa. 2003) (citations omitted). Defendants meet all of these tests regarding their activities at the Terminal. Indeed, RCRA itself outlines that "[a] generator that accumulates hazardous waste on site is a person that stores hazardous waste." 40 C.F.R. § 262.10(a)(2).

Further, "RCRA's definition of 'disposal,'. . . is quite broad." *United States v. Price*, 523

F. Supp. 1055, 1071 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982). "The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3); *accord Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009) (quoting 42 U.S.C. § 6903(3)). "Not only is this definition quite broad but, significantly, it includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions." *Price*, 523 F. Supp. at 1071. Consistent with the expansive definition of disposal, Defendants' failure to implement protective measures to address the present and known risks of extreme precipitation, severe storms, storm surge, and sea level rise will result in materials and products at the Terminal discharging into the New Haven Harbor.

Also, CLF has adequately alleged that Defendants' failure to prepare the Terminal for the known risks of climate change creates a risk of imminent harm. The Second Circuit has stated that:

> "[I]mminency" requires a showing that a "risk of threatened harm is present." Nonetheless, liability under 42 U.S.C. § 6972(a)(1)(B) is not 'limited to emergency-type situations,' and '[a] finding of 'imminency' does not require a showing that actual harm will occur immediately.' 'An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public.'

Simsbury-Avon Pres. Club, Inc., 575 F.3d at 210 (internal citations omitted). As explained in Section III.B above, CLF has alleged that risks of foreseeable severe weather events are present now and increasing. Defendants accuse CLF of alleging injury 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," MTD Mem. 28, but this misses the mark. These scenarios and projections all support CLF's allegation that the effects of climate change are occurring *now* and are worsening. *See* AC ¶ 72.

The sea level along the Connecticut coast will not simply jump 20 inches in 2050 or as high as four feet in 2100, *Id.* ¶¶ 139, 283-84; nor will the 100-year storm magically become a 12.5–25-year storm on January 1, 2050. *Id.* ¶ 69. The changes are gradual, meaning there are changes happening now that will only aggregate with the passage of time.[10] *See Shell R.I.*, 2020 WL 5775874, at *3 (holding that RCRA "allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists", emphasizing "[i]t is the threat that must be close at hand, even if the perceived harm is not"); *see also Crandall v. City & Cty. of Denver*, 594 F.3d 1231, 1238 (10th Cir. 2010) ("No harm will result for years, but the endangerment already exists because that harm can result if remedial action is not taken in the interim." (internal quotation marks and citation omitted)).

Moreover, contrary to Defendants' assertions that CLF has not specified the Terminal's deficiencies (MTD Mem. 25–26), CLF is not required to identify every way that Defendants could change their facility to become RCRA-compliant *in addition* to considering and preparing for the impacts of climate change, especially at this early stage of the case. The District of Rhode Island found similar allegations to be sufficient to allege an imminent and substantial endangerment. *See Shell RI*, 2020 WL 5775874, at *2 ("Plaintiff has pleaded facts satisfying this standard (even if the harm may be well in the future) where Plaintiff theorizes that Defendants' failure to prepare the Terminal for the threat of foreseeable weather events is an imminent endangerment.").

3. CLF Has Sufficiently Alleged Regulatory Violations Under RCRA

To state a RCRA regulatory violation, a plaintiff must allege violations of any RCRA "standard, regulation, condition, [or] requirement . . . ." 42 U.S.C. § 6972(a)(1)(A). CLF has

[10] Also, many climate change effects are already "committed," meaning they will occur regardless of any future human action. *See, e.g.*, AC ¶¶ 279–81 ("Researchers have found that the greenhouse gases emitted by the year 2000 have already committed global mean sea level rise to approximately 1.7 meters (range of 1.2 to 2.2 meters)."). Therefore, even predictions out into the future are far from speculative.

adequately alleged its Open Dumping Claim (Count 12) and its Generator Claim (Count 14).

First, open dumping is "prohibited by [42 U.S.C.] § 6945(a), and because failing any criterion listed in [40 C.F.R.] §§ 257.1 through 257.4 automatically renders a facility an open dump, *failure to satisfy any one criterion itself violates RCRA*." *S. Rd. Assocs. v. Int'l Bus. Machs. Corp.*, 216 F.3d 251, 256 (2d Cir. 2000) (emphasis in original). One of the open dumping criteria provides that: "Facilities or practices in floodplains shall not . . . result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources." 40 C.F.R. § 257.3-1(a). Consequently, it is a violation of RCRA for any facility located in a floodplain to engage in practices that could result in the release of solid waste into the environment—exactly what CLF has alleged. *See* AC ¶¶ 471-85.

Defendants argue that because "Connecticut has obtained approval to maintain its own waste management program regulating generators of hazardous waste . . . . CLF cannot allege a violation of the federal hazardous waste regulations at 40 C.F.R. § 257.1(a)(2)." MTD Mem. 29 (internal citations omitted). However, Defendants cite no case law or statutory support for this proposition and do not otherwise develop this argument, despite modifying the margins to add five extra pages. They have therefore waived this argument. *Lima v. Hatsuhana of USA, Inc.*, No. 13-cv-3389-JMF, 2014 WL 177412, at *1 (S.D.N.Y. Jan. 16, 2014) ("It is well established that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (cleaned up and citations omitted)); *cf. United States. v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013) (announcing and enforcing similar rule on appeal).

Defendants next argue that the regulations apply only to solid waste disposal facilities, MTD Mem. 29, but Defendants cite no supporting law, and the Second Circuit has made clear that the regulations prohibiting open dumping apply to *any facility* failing the open dumping criteria.

See S. Rd. Assocs., 216 F.3d at 256. More specifically, "[f]acilities and practices that fail to fulfill the criteria delineated in §§ 257.1 through 257.4 are considered (respectively) open dumps and open dumping." *S. Rd. Assocs.*, 216 F.3d at 256 (citing 40 C.F.R. § 257.1(a)(1)-(2)). CLF has alleged that the Terminal operates in a floodplain, and is susceptible to washout because of failure to consider the risks associated with climate change, so the Terminal is an open dump under the regulations. AC ¶¶ 471-85.

Second, the RCRA generator rule places additional duties on Defendants to avoid discharges of hazardous waste. As a Small Quantity Generator of hazardous waste, AC ¶ 144, Defendants are required to "maintain and operate [their] facility to minimize the possibility of . . . any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents . . . which could threaten human health or the environment." 40 C.F.R. § 262.16(b)(8)(i); *see also* Conn. Agencies Regs. § 22a-430-3(h) (requiring facilities to "take all reasonable steps to minimize or prevent any discharge . . . which has a reasonable likelihood of adversely affecting human health or the environment."). Whether the federal regulation or the state regulation applies, *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 415 F. Supp. 2d 261, 271 (S.D.N.Y. 2005) ("Rule 8 . . . allows for pleading in the alternative."), CLF has adequately stated a claim that Defendants' failure to consider the risks of climate change, such as increasingly frequent and severe storms, storm surge, and sea level rise, in the maintenance and operation of the Terminal plausibly leads to an inference that Defendants have failed to minimize the risks of unplanned releases of hazardous waste into surface waters, and that Defendants have therefore violated the generator rule.

E. The AC Sufficiently Alleges Violations by the Parent Defendants and Does Not Violate the Group Pleading Doctrine

CLF's allegations are sufficient to state a claim against the Parent Defendants because (i) CLF's use of "Defendants" and "Shell" makes clear that CLF is asserting all claims against all

Defendants, and (ii) CLF sufficiently alleges that the Parent Defendants exercise control over environmental safety at the Terminal.

CLF's claims against the Parent Defendants are not improper group pleading. It is settled law in the Second Circuit that while a complaint "must give each defendant fair notice of what the plaintiff's claim is and the ground upon which it rests . . . nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant." *New York Am. Water Co., Inc. v. Dow Chem. Co.*, No. 19-cv-2150NGRLM, 2020 WL 9427226, at *4 (E.D.N.Y. Dec. 11, 2020) (quotation marks omitted and cleaned up) (citing *Atuahene v. City of Hartford*, 10 F. App'x. 33, 34 (2d Cir. 2001); *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 771 (S.D.N.Y. 2018)). The rules around group pleading "are fact-dependent and far from absolute." *Arias v. East Hartford*, No. 3:20-CV-00895 (JCH), 2021 WL 3268846, at *4 (D. Conn. July 30, 2021). "[M]otions to dismiss for improper 'group pleading' fail when, even though the plaintiff refers to 'defendants' generally rather than a particular defendant individually, it is sufficiently clear that in the particular factual context of [the] case . . . the complaint furnishes adequate notice for initial pleading purposes of plaintiff's claim of wrongdoing." *Id.* (citations omitted) (cleaned up). Also, group pleading is permissible where "given the specific circumstances of the case and drawing all reasonable inferences in the plaintiff's favor, there was an understandable explanation for why the Complaint was not more particularized." *Id.*

Here, while Defendants claim that CLF's "chosen shorthand" of "Defendants" or "Shell" is "ambiguous and misleading" (MTD Mem. 12), the AC clearly asserts all claims against all the Defendants.[11] CLF has alleged that "Shell, acting through officers, managers, subsidiary

[11] Defendants argue that CLF has not alleged sufficient facts to pierce the corporate veil (MTD Mem. 13–14), but this

companies, and instrumentalities, owns and operates the Terminal," AC ¶ 106, and that "Defendants are, and/or have been, responsible for the operation and maintenance of the Providence Terminal, including compliance with the Permit." AC ¶ 121. These pleading paragraphs apply equally to all Defendants and are drawn from the Shell corporate governance structure that applies to environmental compliance at the Terminal, including compliance with the CWA and RCRA.

Moreover, the shorthand and any resultant ambiguity derives from how the Shell entities describe and present themselves to the public. *See* Royal Dutch Shell plc., *Sustainability Report 2016* at 2 (2016), *available at* https://reports.shell.com/sustainability-report/2016/servicepages/downloads/files/entire_shell_sr16.pdf ('Shell', 'Shell group' and 'Royal Dutch Shell' are sometimes used for convenience where references are made to Royal Dutch Shell plc and its subsidiaries in general."). Equilon and Triton are direct owners, operators, and permittees of the Terminal and the Parent Defendants simultaneously act as operators by exercising control over environmental compliance and corporate policies and procedures at the Terminal.[12]

While the Parent Defendants are neither owners or named permittees of the Terminal, CLF plausibly alleges that the Parent Defendants had sufficient control over the Terminal to be considered "operators" that are independently liable for the violations alleged in the AC. Liability for violations of a CWA permit is not restricted to owners and permittees; it applies to "any *person*

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argument is beside the point. CLF alleges that the Parent Defendants are individually directly liable for the violations in the AC; CLF is not seeking to hold the Parent Defendants vicariously liable for the violations of the other Defendants.

[12] Defendants cite *Gillespie v. St. Regis Residence Club*, and *Automated Transaction LLC v. N.Y. Comm. Bank*, in support of their argument that group pleading is improper and the entire AC should be dismissed as to the Parent Defendants. MTD Mem. 13. However, *Gillespie* specifically noted that the plaintiffs' group pleading was only fatal as to one claim, not all of them. 343 F. Supp. 3d 332, 352-53 (S.D.N.Y. 2018). Moreover, *Automated Transaction* dismissed certain claims because it was unclear whether the plaintiff was alleging a "pierce the corporate veil" theory and whether the plaintiff asserted all claims against all the defendants. 2013 WL 992423, at *4 (E.D.N.Y. Mar. 13, 2013). Here, it is clear CLF is alleging that all Defendants are directly liable and that all claims apply to all Defendants.

who violates any permit condition." 40 C.F.R. § 122.41(a)(2) (emphasis added).[13] A parent is directly liable as an "operator" where the parent is involved "with 'operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 102 (1st Cir. 2001) (quoting *United States v. Bestfoods*, 524 U.S. 51, 68 (1998).[14]

In *Bestfoods*, the Supreme Court found that a parent could be directly liable as an operator for violations of environmental laws where its agent "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant" and "actively participated in and exerted control over a variety of . . . environmental matters." *Bestfoods*, 524 U.S. at 72. In *Kayser-Roth Corp.*, the parent was liable where it "directed [the subsidiary]'s activities with respect to environmental matters, in general, and operation of the facility utilizing [the pollutant], in particular." *Kayser-Roth Corp.*, 272 F.3d at 103.

CLF has plausibly alleged that the (i) Shell group of companies has centralized climate change policies and strategies, and (ii) the Parent Defendants are independently responsible for implementing these policies through their subsidiaries. *First*, climate change policies and strategies are centrally managed in the Shell group of companies. Shell plc establishes "policies that are binding on all companies in the Shell group" including (i) "climate change policies and strategies," and (ii) "policies for managing and mitigating climate risks to facilities owned by companies in the Shell group." AC ¶¶ 41-45; *see also id.* ¶¶ 58-59. For example, Shell has a "HSSE & SP

[13] Similarly, RCRA imminent and substantial endangerment liability extends to "any person, . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . ." 42 U.S.C. § 6972(a)(1)(B).

[14] While *Kayser-Roth Corp.* and *Bestfoods* interpret the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), their interpretation also applies to questions of RCRA and Clean Water Act liability. *See, e.g.*, *LeClercq v. Lockformer Co.*, No. 00-C-7164, 2002 WL 908037, at *2 (N.D. Ill. May 6, 2002) ("[T]he statutory definition of 'owner' and 'operator' are the same under RCRA and CERCLA, and the standards for owner and operator liability under the two statutes are identical."); *United States v. Jones*, 267 F. Supp. 2d 1349, 1355 (M.D. Ga. 2003) (applying CERCLA caselaw to question of direct operator liability in Clean Water Act and Oil Pollution Act case).

Control Framework that specifies the standards for health, safety, security, environment and social performance (HSSE & SP) and the scope for applying these standards for all entities in the Shell group." *Id.* ¶ 60. Similarly, Shell's "Group Carbon" is responsible for managing greenhouse gas related strategies and risk management across the Shell group. *Id.* ¶¶ 65-66.

Second, each Shell entity, including *all* the Defendants, are required to implement these climate change policies and strategies. *Id.* ¶¶ 51-54. All Shell entities must abide by the Control Framework and periodic audits are performed of each Shell entities' compliance. *Id.* ¶ 62. Shell plc holds its subsidiaries and executives accountable for implementing all centralized climate change policies and strategies. In fact, a portion of the compensation for executives of the Shell subsidiaries is based on their successful implementation of these policies. *Id.* ¶¶ 47-50. Indeed, the President of Shell Oil Company recently testified before Congress on behalf of Shell Oil Company and its subsidiaries regarding Shell's "policies and strategies, emissions targets and goals, investment and lower-carbon energy initiatives, and the overall approach to the challenge of climate change within the broader Shell companies . . ." *Id.* ¶ 57 (citations omitted).

Shell Petroleum is the top-level United States subsidiary of Shell plc and serves as the connective tissue assuring that mandatory corporatewide structures, policies, and standards are followed by all Defendants. *See* AC ¶¶ 18-21. "Shell Oil Company is Shell plc's primary operating subsidiary in the United States." *Id.* ¶ 24. Shell Oil Company has the power to direct or cause the direction of the management or policies of Defendant Equilon Enterprises LLC and Defendant Triton Terminaling, LLC, *id.* ¶ 25, and "Shell Oil Company exercises control over Triton and Equilon to ensure implementation of Shell plc's climate change policies and strategies," *id.* ¶ 56.

This integrated, top-down corporate oversight structure, when viewed in the light most favorable to CLF, supports a plausible inference that the Parent Defendants are actively involved

in environmental compliance at the Terminal, including the design, maintenance, and operation of the Terminal. One aspect of the Parent Defendants' control can be inferred from Shell's 2016 Sustainability Report, which explains how the corporate promulgation of design standards is applied to existing infrastructure, such as the Terminal, to ensure it is resilient to climate change:

> At Shell, *we are taking steps at our facilities around the world to ensure that they are resilient to climate change*. This reduces the vulnerability of our facilities and infrastructure to potential extreme variability in weather conditions.
>
> We take different approaches to adaptation for existing facilities and new projects. We progressively adjust our design standards for new projects *while, for existing assets, we identify those that are most vulnerable to climate change and take appropriate action.*

AC ¶ 373 (emphasis added). In sum, these management structures apply to all Defendants and are enforced through chain of command of parent entities over subsidiaries. CLF has stated a claim against all Defendants because, taken in the light most favorable to CLF, the AC's allegations support an inference that each Defendant exercises control and oversight over environmental compliance activities at the Terminal through this management structure. At the pleading stage, CLF does not need to *prove* that the Parent Defendants are liable, but simply support an inference of liability. *Stafford v. CSL Plasma, Inc.*, 504 F. Supp. 3d 9, 12 (D.R.I. 2020) (quoting *Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007)). CLF has done so here.

F. The Court Has Subject Matter Jurisdiction Over Motiva

Defendants ask the Court to dismiss Motiva Enterprises LLC ("Motiva") from the AC due to its formal transfer of the Terminal's RIPDES Permit to Triton Terminaling, Inc. in May of 2017. *See* MTD Mem. 14–15. As an initial matter, the transfer of the Permit from Motiva to Triton was in name only, *i.e.*, the terms of the Permit and the individuals carrying out responsibility under the Permit remain the same. *Compare* AC, Ex. C (2017 letter listing Michael Sullivan as Facilities Manager with cc to J. Bothwell, Shell) *with* AC, Ex. I (2011 letter listing Michael Sullivan as

Complex Manager with cc to J. Bothwell, Motiva). Further, while *Gwaltney* stands for the proposition that "wholly past" violations are excluded from CWA liability,[15] the violations that occurred under Motiva's ownership and operation of the Terminal are not, in fact, "wholly past"; they have been occurring since at least 2016 when Motiva had ownership and control, continued to occur through 2020 when CLF issued its Notices, and persist through the present.

As CLF explained in the AC, Motiva was previously a joint venture between Shell Oil Company and the Saudi Arabian Oil Company. AC ¶ 35. In 2017, Motiva transferred ownership of the Terminal solely to Shell and, per the formal transfer agreement, "references to Shell herein include any predecessors, successors, parents, subsidiaries, affiliates, and divisions of Shell, including Motiva Enterprises LLC." *Id.* Accordingly, while the corporate name on the Permit changed, it had no substantive effect on the Terminal or its operations.

The cases relied upon by Defendants do not address the issue presented here. In *Friends of Sakonnet v. Dutra*, two prior owners of a septic system were dismissed from the case because they had sold their ownership to an unrelated third party at least two years prior to suit commencing because they could not be held liable for wholly past violations. 738 F. Supp. 623, 636 (D.R.I. 1990).[16] Here, by contrast, Shell has maintained a consistent ownership interest in the Terminal by owning half of Motiva and then owning the Terminal outright after the transfer. The "actors"—Defendants—remains the same (despite the name change of the permittee). Otherwise, a violator

[15] Defendants cite *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d. Cir. 1993) ("*CCFA*") to argue *Gwaltney* applies to CLF's RCRA claims (MTD Mem. 15 n.22), but that court expressly states that *Gwaltney* does not apply to RCRA imminent and substantial endangerment claims. 989 F.2d at 1316.

[16] *See also City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1295 (N.D. Ga. 2008) (noting in the context of a summary judgment motion, the difficulty of such a determination: "Very few reported decisions address situations in which CWA citizen suit defendants no longer owned the property in question at the time of the lawsuit. Even within that small sampling of cases, however, the courts reached widely divergent conclusions.").

could escape liability simply through corporate name change.[17] Similarly, in *Brossman Sales, Inc. v. Broderick*, purchasers' claims against the unrelated prior owner-operators were wholly past at the time of purchase, let alone when the complaint was filed. 808 F. Supp. 1209, 1211-14 (E.D. Pa. 1992). Where, as here, there is a connection between the current and former Terminal operators, Motiva should not be absolved from liability and is a proper defendant in this case.

G. Abstention Does Not Apply to CLF's Claims, As the First Circuit and the District of Rhode Island Have Previously Ruled

The rarely implicated doctrine of *Burford* abstention is not appropriate under the circumstances of this case and does not provide a basis for dismissal of CLF's claims. "[F]ederal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" *New Orleans Pub. Servs., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 59 (1989) ("*NOPSI*") (citation omitted). The Second Circuit has emphasized that "[a]bstention is the exception, exercise of jurisdiction the rule." *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998) (citations omitted). Courts in the Second Circuit consider three factors when deciding whether to apply *Burford* abstention: "(1) the degree of specificity 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." *Id.*

As a threshold matter, *Burford* abstention does not apply to citizen enforcement suits like CLF's. Where the statutory prerequisites to filing a citizen suit are met,[18] as is the case here,

[17] The *Friends of Sakonnet* court noted its concern that "[f]reeing [prior operators] from liability for their violations simply because they have ceased controlling the pollution source impedes achievement of the Clean Water Act's purpose. 738 F. Supp. at 633 n.22.

[18] Before filing suit, a plaintiff must provide written notice to state and federal regulators, among others, and complete a waiting period. *See* RCRA, 42 U.S.C. § 6972(b)(1)(A), (b)(2)(A); CWA, 33 U.S.C. § 1365(b)(1)(A). Also, the CWA limits citizen suits where EPA or the State is "diligently prosecuting a civil or criminal action" in court "to require compliance with the standard, limitation, or order" alleged in the citizen suit. 33 U.S.C. § 1365(b)(1)(B). RCRA includes similar provisions, 42 U.S.C. § 6972(b)(1)(B), (b)(2)(B)(i), (b)(2)(C)(i), with some other CERCLA-based limits, *id.* § 6972(b)(2)(B)-(C).

"Congress has expressed its intent that the citizen suit should proceed. Use of a judge-made abstention doctrine to refuse to hear the case can easily amount to 'an end run around RCRA' and is essentially an end-run around congressional will." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 497 (7th Cir. 2011) (collecting cases). The citizen suit provisions of the CWA and RCRA "share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62. "The majority of courts to have considered it have found abstention, whether under *Burford* or related doctrines such as primary jurisdiction, to be improper" for a citizen enforcement suit like CLF's. *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20 (1st Cir. 2011). For these reasons, the Court should deny Defendants' request for the court to abstain from hearing this case.

But even if *Burford* abstention could apply to citizen suits like this one, the facts here do not fit within the "exceedingly rare" circumstances where it might be justified. *Chico Serv. Station*, 633 F.3d at 31–32; *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 695 (3d Cir. 2011). None of the factors identified by the Second Circuit are met here.

Specificity of State Regulatory Scheme: The specificity of regulation factor weighs against abstention. This factor "focuses [] on the extent to which the federal claim requires the federal court to *meddle* in a complex state scheme." *Hachamovitch*, 159 F.3d at 697 (emphasis in original). Here, CLF's claims are (i) enforcing the terms of the Permit, *as written*, and (ii) enforcing the state's promulgation of regulations pursuant to the federal RCRA statute.[19] CLF is not challenging the adequacy of that Permit or asking the Court to find those regulatory actions improper. *Contrast Liberty Mut. Ins. Co. v. Hurlburt*, 585 F.3d 639, 650 (2d Cir. 2009) (holding *Burford* abstention

[19] CLF's RCRA imminent and substantial endangerment claim (Count 13) is brought directly under federal statute and does not implicate state law or regulations. CLF's regulatory claims (Counts 12 and 14) have also been brought under the federal version of the RCRA regulations.

was proper in suit challenging changes to the New York worker's compensation law). Because CLF is enforcing, not challenging, the express terms of the Permit, Defendants' argument that CLF did not participate in the process of reissuing that Permit (MTD Mem. 38-39) is beside the point.

Defendants' Motion attempts to justify abstention by citing a grab-bag of Connecticut regulations, statutes, and executive orders unrelated to CLF's claims (*see* MTD Mem. 37-38), but these citations do nothing to support Defendants' argument. CLF's claims seek to enforce the express terms of the Permit, federal RCRA regulations, and Connecticut regulations promulgated under RCRA. The Connecticut Clean Water Act, criteria for issuing permits, Connecticut water quality standards, and requirements for local stormwater authorities (*see* MTD Mem. 37) are irrelevant to these claims. As such, this case is a far cry from *Liberty Mutual Ins. Co.*, cited by Defendants, where the plaintiff sought an order invalidating the New York state legislature's amendments to the New York Workers' Compensation Law. *See* 585 F.3d at 641.

Defendants' confusing argument that CLF's citation of the SWPPP essentially amounts to a challenge to the terms of the Permit approved by CT DEEP (MTD Mem. 39) is also meritless. *First*, Defendants cite nothing for their assertion that the SWPPP somehow transforms into a provision of the Permit, and no provision of the Permit supports that assertion. Indeed, the SWPPP is a document drafted solely by Defendants and periodically updated by Defendants without review by CT DEEP. Permit § 5(c)(5). A document that may be unilaterally amended by the permittee cannot be considered a part of the Permit itself. *Second*, contrary to Defendants' assertion (MTD Mem. 39), CT DEEP does not approve the contents of a SWPPP as part of approving a permit application. In fact, an applicant is not even required to send a copy of the SWPPP to CT DEEP during the approval process unless a member of the public requests a copy. *See* Permit § 4(d)(2). The only circumstance where CT DEEP reviews a SWPPP at any time is if it expressly requests a

copy from a permittee and the permittee pays a "plan review fee." *See* Permit § 5(c)(4)(B)-(C).[20] Therefore, challenging Defendants' SWPPP is not a challenge to the terms of the Permit.

Debatable Construction of State Statute: The "discretionary interpretation of state statutes" factor, *Hachamovitch*, 159 F.3d at 697, also does not favor abstention. As explained, CLF is not relying on any state statutes; CLF's case is based on *federal* law and the Permit issued to Defendants pursuant to the requirements of the federal CWA.

Subject Matter Traditionally State Concern: The issues raised by CLF's case are not "traditionally [] of state concern." The Permit and regulations addressed in CLF's case were promulgated by the state to comply with federal law under the CWA and RCRA. Indeed, the state only issued the Permit and regulations pursuant to an express delegation of authority from the EPA. The entire regulatory regime at issue is a federal regime, not a state regime.

Moreover, there is no state proceeding in favor of which this Court should abstain. *Burford* abstention is only available "[w]here timely and adequate state-court review is available." *NOPSI*, 491 U.S. at 361; *see also Liberty Mut. Ins. Co.,* 585 F.3d at 650. *Federal* courts have exclusive jurisdiction over CWA citizen suits like CLF's. *See Baykeeper*, 660 F.3d at 693. Defendants' motion identifies no alternative state mechanism for reviewing Defendants' violations of the CWA and RCRA, so *Burford* abstention is inapplicable on the face of the Motion. *See id.* at 694.

Lastly, Defendants' improper challenge to the merits of CLF's claims does nothing to bolster their argument. Defendants assert that CLF's claims will require the Court to "assess novel obligations that are not required by the Terminal's permit" (MTD Mem. 37) and that Connecticut permits do not currently impose any requirements for considering the risks of "storm surge and

[20] Defendants claim that "[t]he SWPPP was received by the agency on July 10, 2017 and approved on December 5, 2017" (MTD Mem. 39), but they provide no support for this assertion. Defendants cite something they describe as "Industrial Stormwater Registration Status Report," but they do not describe what the document is, where it could be found, or attach it to their filing. *See id.*

severe weather," *see* MTD Mem. 38. But this argument rests on the fundamental disputed issue in this case—whether the Permit, as written, requires Defendants to analyze and address the reasonably foreseeable risks that climate change poses to the Terminal. Resolution of that disputed issue is a merits determination, not a basis for abstention at the pleadings stage.

* * * * *

Therefore, none of the three factors established by the Second Circuit favor abstention. Indeed, it is telling that while Defendants quote *Liberty Mutual* for these factors, they make no effort to apply them or demonstrate how they are met in this case. *See* MTD Mem. 36-39. Defendants' failure to apply these factors is unsurprising given that two federal courts have already rejected identical arguments. *Shell RI* questioned whether *Burford* abstention is applicable to citizen enforcement suits and concluding that even if it was, "its application is not justified in this case." 2020 WL 5775874 at *4. Meanwhile, in *Conservation L. Found., Inc. v. Exxon Mobil Corp*., the First Circuit reversed an order by the District of Massachusetts staying CLF's case under the related doctrine of primary jurisdiction, holding that any changes by EPA in issuing a new permit "seem[] to us largely irrelevant to whether ExxonMobil has violated the conditions of the permit currently in effect." 3 F.4th 61, 73 (1st Cir. 2021).

For these reasons, *Burford* abstention is inapplicable to this case, and the Court should deny Defendants' Motion.

IV. Conclusion

For the foregoing reasons, the Court should deny the Motion to Dismiss in its entirety.

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Respectfully submitted,

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