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*.	Civil Action No. 3:21-cv-00933-SALM

PLAINTIFF CONSERVATION LAW FOUNDATION'S MOTION TO COMPEL
AND ACCOMPANYING MEMORANDUM OF LAW

ORAL ARGUMENT REQUESTED

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Plaintiff Conservation Law Foundation, Inc. ("CLF") hereby moves pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 37 for an order compelling Defendants Shell Oil Company,[1] Equilon Enterprises LLC d/b/a Shell Oil Products US, Shell Petroleum, Inc., Triton Terminaling LLC, and Motiva Enterprises LLC's ("Defendants") to produce documents responsive to CLF's First Set of Interrogatories ("First Interrogatories")[2] and Requests for Production ("First RFPs").[3] On April 13, 2022, CLF served its First Interrogatories and First RFPs on Defendants. In response, Defendants have produced some documents, but maintain several meritless objections.

As detailed in the attached Affidavit of Attorney Alexandra St. Pierre,[4] CLF and Defendants have met and conferred and exchanged letters in an attempt to limit disputes and avoid the necessity of filing a motion to compel production; the Parties have nevertheless reached an impasse on several issues.[5] CLF thus moves for an order overruling Defendants' objections detailed herein and compelling production of documents responsive to CLF's First RFPs.

[1] Shell Oil Company has changed its name to Shell USA, Inc. ECF No. 56.
[2] Attached hereto as Exhibit A.
[3] Attached hereto as Exhibit B.
[4] Attached hereto as Exhibit C
[5] As noted in the Parties' Joint Status Report (ECF No. 67), filed on May 27, 2022, almost all of the issues presented in the instant Motion were briefed in a similar fashion in CLF's case filed in the United States District Court for the District of Rhode Island, *Conservation Law Foundation v. Shell Oil Products US, et al.*, No. 17-cv-00396-WES-LDA. *See* 17-cv-00396 ECF Nos. 72, 78, 83, 85, 90, 92. On July 21, 2022, the court in the District of Rhode Island entered an order denying the Parties' discovery motions without prejudice and directing the Defendants to continue with rolling productions and to make available James Kent Yeates, Defendants' East Coast Lead Facility Engineer who submitted an affidavit in conjunction with Defendants' discovery briefing, for deposition "regarding 'how the . . . Terminal manages the precipitation and flooding risks identified in [Plaintiff's] complaint, and who makes those decisions for the Terminal ([including the] applicability of corporate policies to the Terminal).'" No. 17-cv-00396-WES-LDA, ECF No. 94, 3 (quoting No. 17-cv-00396-WES-LDA, ECF No. 92 at p. 4). The court then ordered the Parties to "utilize the results of such discovery to continue to confer in good faith regarding the scope of document production." *Id.* CLF is open to following a similar approach in this case, but files the instant Motion to preserve the issues given the approaching fact discovery deadline.

I. CONCISE STATEMENT OF NATURE OF CASE

CLF filed this action to halt Defendants' longstanding and ongoing violations of the Clean Water Act and Resource Conservation and Recovery Act ("RCRA") at their bulk petroleum storage terminal (the "Terminal") in the Port of New Haven. CLF alleges that Defendants have failed to evaluate and address the reasonably foreseeable risks to the Terminal posed by severe weather, including risks associated with climate change, which threaten to flood the Terminal and release millions of gallons of oil and other toxic chemicals into surrounding neighborhoods and the environment. Defendants' actions (i) violate various terms of Defendants' Clean Water Act permit, (ii) the "open dumping" provision of the RCRA regulations, (iii) present an imminent and substantial endangerment to human health and the environment under RCRA, and (iv) violate the requirement to "maintain and operate [their] facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment," 40 C.F.R. § 262.16(b)(8)(i); *see also* CONN. AGENCIES REGS. § 22a-430-3(h).

II. BACKGROUND

CLF filed this case under the citizen suit enforcement provisions of the Clean Water Act and RCRA, seeking declaratory, injunctive, and other relief to remedy Defendants' violations of these statutes by their failure to evaluate and address the reasonably foreseeable risks to the Terminal posed by severe weather exacerbated by climate change. On January 21, 2022, Defendants moved to dismiss a number of the claims in CLF's Complaint. *See* Defs. Mot. to Dismiss, ECF No. 41. CLF filed an Amended Complaint on February 11, 2022, rendering Defendants' Motion to Dismiss moot. Am. Compl., ECF No. 47; Order on Defs. Mot. to Dismiss, ECF No. 48. Defendants again moved to dismiss certain of CLF's claims on February 25, 2022. ECF No. 50.

On April 13, 2022, CLF served the First Interrogatories and First RFPs on Defendants. On May 13, 2022, Defendants served their Responses to CLF's First Interrogatories ("Responses to First Interrogatories")[6] and First RFPs ("Responses to First RFPs").[7] They also sent CLF a letter to discuss search terms and privilege logs. On June 6, 2022, CLF sent Defendants a letter responding to Defendants' Responses to First Interrogatories and First RFPs, highlighting issues with Defendants' objections and offering to meet and confer to avoid Court intervention.[8] On June 24, 2022, Defendants responded to CLF's letter.[9]

On July 1, 2022, the Parties held a meet and confer where (i) the Parties partially resolved the time period dispute; (ii) agreed on a way to proceed with the use of search terms; and (iii) planned forthcoming productions. Defendants sent an email summarizing the Parties' meet and confer on July 6, 2022.[10] On July 21, 2022, the Parties confirmed that each would produce privilege logs within one week of any production in which privileged documents were withheld.

CLF and Defendants have met and conferred pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule of Civil Procedure 37(a) and have been unable to reach a resolution on the issues below. *See* Affidavit of Alexandra St. Pierre. The primary remaining dispute between the Parties centers on the relevance of documents outside the fence-line of the New Haven Terminal. As described in detail in Section III.B.1. below, Defendants' parent company, Shell plc (formerly Royal Dutch Shell), has represented to the public and to government regulators that it relies on mandatory, centralized approaches and processes—applicable to the entire Shell family of companies such as Defendants—to evaluate and address risks to the physical infrastructure of Shell

[6] Attached hereto as Exhibit D.
[7] Attached hereto as Exhibit E.
[8] Attached hereto as Exhibit F.
[9] Attached hereto as Exhibit G.
[10] Attached hereto as Exhibit H.

companies' facilities. These representations indicate that this control framework includes setting and utilizing engineering standards for infrastructure and employing what it calls a "Metocean Team" to create regional climate projections (such as projections of precipitation and sea level rise) and to evaluate climate preparedness at Shell facilities. For purposes of environmental compliance activities in the United States, including the risks of severe weather and climate change, each of the Defendants are both bound by these corporate frameworks and obligated to enforce and implement them. Further, Defendants are subject to periodic audits and performance reporting to parent entities and management employed by and housed in parent entities. Accordingly, CLF seeks documents including Shell corporate policies that set standards for the resilience of its infrastructure to severe weather risks and climate change, as well as analyses of infrastructure and operational vulnerabilities leading to pollution discharges during major storms at other Shell facilities, such as during Superstorm Sandy.

However, despite these representations and control frameworks, and despite publicly available documents indicating that Shell has known about and studied climate risks for decades, Defendants object that documents that do not directly address the Terminal itself are not discoverable. Defendants claim that all climate change and severe weather risk analyses are conducted by management at the individual facilities without centralized corporate policies, processes, or standards. In light of these conflicting representations, it appears only one of two possibilities is true: either (i) Shell plc's representations to the public and to its regulators are false, or (ii) Defendants are violating Shell's policies in the operation of the Terminal. Either way, these documents are highly relevant for determining whether Defendants have satisfied their obligations under the Clean Water Act and RCRA to adequately prepare the Terminal for severe weather so as to prevent pollutant discharges.

Documents showing corporate policies and pertaining to facilities other than the Terminal are also highly relevant to several issues in this case including, among others, (i) the evaluation of what actions are required under the "best industry practice" standard and whether Defendants have complied with that standard, (ii) Defendants' knowledge of the risks to the Terminal, and their failure to disclose or address those risks as required under the Clean Water Act and RCRA, and (iii) the egregiousness of Defendants' violations. To the extent that there is a disconnect between Shell's public representations about how it evaluates and prepares for climate change risks and Defendants' actions with respect to the Terminal, CLF is entitled to production of documents to probe that discrepancy.

III. ARGUMENT

The material sought through the instant Motion lies at the heart of CLF's claims. The Motion broadly seeks to compel production of documents concerning (i) Defendants' knowledge and analyses of the severity and imminence of risks posed to their infrastructure by severe weather and climate change, (ii) corporate policies and practices governing the climate resilience of Shell's other infrastructure, and (iii) actions taken at and severe weather impacts already affecting Shell's other facilities. As described below, this material is relevant to various issues in this case including, among others: (i) the severity and imminence of risks to the Terminal, (ii) the requirements of "best industry practice," including appropriate "best management practices," and (iii) whether Defendants are satisfying the "best industry practice" standard.

The instant Motion divides the relevant Interrogatories and Requests into categories based upon the type of documents sought and the type of objections raised by Defendants.

A. Standard for a Motion to Compel

The basic standard for discoverability is provided by Federal Rule of Civil Procedure 26:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

The rules of discovery are to be accorded broad and liberal construction. *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This principle of broad and liberal construction is applicable to the Court's consideration of whether discovery is "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Information that is reasonably calculated to lead to the discovery of admissible evidence is considered relevant for the purposes of discovery. *See Daval Steel Prods. v. M/V Fakredine,* 951 F.2d 1357, 1367 (2d Cir.1991); *Morse/Diesel, Inc. v. Fidelity & Deposit Co.*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988). "The party resisting discovery bears the burden of showing why discovery should be denied." *Cole v. Towers Perrin Forster & Crosby*, 256 F.R.D. 79, 80 (D. Conn. 2009).

When adjudicating discovery disputes, courts are guided by the principle that "[a] party must be afforded a meaningful opportunity to establish the facts necessary to support his claim." *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2008). "A district court has wide latitude to determine the scope of discovery, … [and] abuses its discretion only when the discovery is so limited as to affect a party's substantial rights." *Id.* (internal citations and quotation marks omitted).

B. Defendant's Knowledge of, Policies on, and Reactions to Climate Change Risks Are Relevant

Interrogatories and Requests seeking information on Shell's (i) analyses of climate change and knowledge of risks posed to infrastructure from the effects of climate change, (ii) corporate policies regarding how to analyze and address climate-change risks to infrastructure, and (iii) documents concerning climate change preparation taken, and severe weather damages suffered, at other facilities owned by Shell, are relevant to CLF's claims.

In response to Interrogatory No. 9 and Request Nos. 7, 10, 12–15, 17–28, 63, 64,[11] Defendants have maintained that only documents that refer to the Terminal's design and operation are relevant and any other documents are outside the scope of CLF's claims. However, as explained below, many categories of documents from outside the Terminal's fence-line are relevant and discoverable, including information regarding Shell's engineering policies and practices, whether those policies and practices were followed at the Terminal, and Defendants' understanding of the risks associated with climate change. Shell has a long and extensive history of research and analysis of climate impacts, as well as declarations calling for governments and companies to address those impacts, and has made many public statements suggesting that its own consideration of severe weather and climate change risk and resilience is centralized. These documents are relevant and discoverable for the following reasons.

1. Defendants' Knowledge of Climate Change Risks Is Relevant

Defendants' knowledge of climate change is relevant to the severity and imminence of the risks posed to the Terminal from climate change, as well as Defendants' knowledge about those risks. CLF has alleged that Defendants' failure to address the risks to the Terminal presents an

[11] The remaining Requests and Interrogatories are ones that explicitly reference the Terminal in the Request. *See, e.g.*, RFP No. 37 ("All Documents regarding potential for flooding *at the Terminal*." (emphasis added)). However, as explained below in Section III.D., Defendants have still objected to the relevance of such documents.

"imminent and substantial endangerment to human health and the environment." Am. Compl. ¶¶ 486–502. Similarly, CLF has also alleged that Defendants have failed to disclose to Terminal regulators relevant information regarding the risks to the Terminal, thereby misleading regulators such as the Connecticut Department for Energy and Environmental Management ("CT DEEP") and the public by failing to disclose and address these risks in their Storm Water Pollution Prevention Plan ("SWPPP"), Clean Water Act permit application, and other filings with CT DEEP. *See, e.g.*, Am. Compl. ¶¶ 405–14, 421–26, 437–48. CLF additionally alleges that Defendants' extensive history of public statements about the risks posed by climate change demonstrate that they are well aware of the corresponding substantial danger to all of their infrastructure, including the Terminal; yet despite this knowledge, Defendants have failed to address those risks at the Terminal in violation of the Clean Water Act and RCRA.

a. Shell's History of Climate Study

CLF requested documents concerning Shell's study of climate change. *See e.g.*, Request No. 26 ("All Documents related to the study of climate change and/or weather-related risks created, used, or relied on by Defendants, including but not limited to any Documents relating to: (a) the incidence, frequency, and magnitude of flooding or inundation from extreme weather events, sea level rise, or other events induced by climate change Shell has long been aware of the present impacts and risks of climate change . . . .). CLF requested these documents because Shell has long been aware of the present impacts and risks of climate change. Am. Compl. ¶ 212. In 1988, Shell published a confidential report entitled "The Greenhouse Effect," which includes a thorough review of climate science literature, an analysis of the contribution of Shell's own products to global carbon dioxide emissions, and a detailed analysis of potential climate impacts, including rising sea levels, ocean acidification, and human migration. Am. Compl. ¶ 213 (citing R.P.W.M. Jacobs, *et al.*, Shell Internationale Petroleum, *The Greenhouse Effect* (1988)). The report

summarizes that "[m]an-made carbon dioxide, released into and accumulated in the atmosphere, is believed to warm the earth through the so-called greenhouse effect." *The Greenhouse Effect* at 1. The report predicts the impacts of such warming, stating that "[m]athematical models of the earth's climate indicate that if this warming occurs then it could create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather." *Id.* The report further acknowledges that "[w]ith fossil fuel combustion being the major source of CO2 in the atmosphere, a forward looking approach by the energy industry is clearly desirable . . . ." *Id.*

Also, Shell itself "has long recognized the importance of the climate challenge along with the ongoing critical role energy plays in enabling a decent quality of life for people across the globe." Am. Compl. ¶ 214 (quoting Shell, *A Better Life with a Healthy Planet – Pathways to Net-Zero Emissions* 3 (2016)). Shell has acknowledged that "[t]he need for urgent action in response to climate change has become ever more obvious since the signing of the Paris Agreement in 2015." Am. Coml. ¶ 215 (quoting Royal Dutch Shell plc, *Industry Associations Climate Review* 2 (Apr. 2019)). Shell even boasts about being "one of the first energy companies to recognize the climate change threat and to call for action." Am. Compl. ¶ 216 (quoting Royal Dutch Shell plc, *Responsible Energy Sustainability Report* 12 (2008)).

In 1991, Shell made a twenty-eight minute educational film entitled "Climate of Concern," which warned about the risks of climate change. Am. Compl. ¶ 217 (citing Damian Carrington & Jelmer Mommers, *Shell's 1991 Warming: Climate Changing 'at Faster Rate Than at Any Time Since End of Ice Age'*, THE GUARDIAN, Feb. 28, 2017, https://www.theguardian.com/environment/2017/feb/28/shell-film-warning-climate-change-rate-faster-than-end-ice-age). In the film, Shell claimed the warning about climate change was "endorsed by a uniquely broad consensus of scientists in their report to the United Nations at the end of 1990." *Id.* The film says that "global

warming is not yet certain, but many think that to wait for final proof *would be irresponsible*. Action now is seen as the only safe insurance." *Id.* (emphasis added). When commenting on the Paris Climate Agreement, Shell CEO Ben Van Buerden announced, "We believed climate change is real; We believed that the world needs to go through an energy transition to prevent a significant rise in global temperatures. And we need to be part of that solution in making it happen." Am. Compl. ¶ 227 (quoting Samantha Raphelson, *Energy Companies Urge Trump to Remain in Paris Climate Agreement*, Nat'l Pub. Radio, May 18, 2017).

In addition, for more than 50 years, Shell claims to have developed "scenarios" to make "crucial choices in uncertain times and tackle tough energy and environmental issues." Am. Compl. ¶ 218 (quoting *Earlier Scenarios*, Shell, https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/new-lenses-on-the-future/earlier-scenarios.html). Since the 1990s, Shell claims to have "helped other organizations in developing their own scenarios in various subject areas," including "climate change with the Intergovernmental Panel on Climate Change [("IPCC")]," an international body tasked with providing the world with a clear scientific view of the current state of climate change knowledge and its impacts. Am. Compl. ¶ 219, 220 (quoting Peter Knight, Shell, *The Shell Report 1998: Profits and Principles – Does There Have to Be a Choice?* 25 (1998)). "Shell has contributed to these IPCC reports since 1995 and as recently as 2014." Am. Compl. ¶ 221. "Shell scientists have contributed to IPCC Assessment Reports in the capacities of Reviewer, Contributing Author, Expert Reviewer, and Lead Author since the Second Assessment Report and up until the most recent Fifth Assessment Report. Shell scientists served in Working Groups I and III on the topics of Scientific Basis and Mitigation of Climate Change, respectively." Am. Compl. ¶ 222. "Shell scientists have further contributed to IPCC Special Reports, including working on the 1994 report entitled 'Radiative Forcing of Climate Change and

An Evaluation of the IPCC IS92 Emission Scenarios'; the 2000 report entitled 'Methodological and Technological Issues in Technology Transfer'; and the 2005 report entitled 'Carbon Dioxide Capture and Storage.'" Am. Compl. ¶ 223.

Some of these reports to which Shell contributed have information that is specific to New England and applicable to the Terminal. For example, the Fifth IPCC Assessment stated, "it is virtually certain [i.e., there is a 99–100% probability] that intense tropical cyclone activity has increased in the North Atlantic since 1970." Am. Compl. ¶ 238 (quoting IPCC, *Climate Change 2014 Synthesis Rep. Fifth Assessment Rep.*, at 2 n.1, 53 (2015)); *see also*. Other reports, while more general, are easily applicable to the Terminal and the surrounding surface waters. "Continued sea level rise is 'committed' as a result of past change in atmospheric composition, due to historical greenhouse gas and aerosol emissions, as well as the inertia and timescales of climate systems." Am. Compl. ¶ 279 (quoting IPCC, *Climate Change 2007: The Physical Science Basis, Working Grp. I Contribution to the Fourth Assessment Rep. of the IPCC*, at 68, 77 (2007)). This information is relevant to the risks to the Terminal posed by climate change and includes information that should have been disclosed to CT DEEP to help the agency determine, among other things, whether Defendants' SWPPP is adequate to prevent pollutant discharges. *See, e.g.,* Request Nos. 12–22.

b. Shell's Corporate Policies on Sustainability and Climate Adaptation Apply Across All Shell Companies, Including Defendants

CLF served Requests for documents concerning centralized climate change preparation and decision making. *See, e.g.*, Request Nos. 10 (addressing climate change, including "engineering, design, and management of facilities" and "corporate policy, management, or decision-making"); 17 (Shell's Metocean Team); 24 ("Shell's consideration of climate change in

its design and engineering of terminals, refineries, and other infrastructure."). These documents are relevant as described below.

Shell's 2012 Sustainability Report stated, "[W]e are working to understand the potential physical impact of climate change in the future on our facilities and new projects." *Sustainability Report, Royal Dutch Shell plc Sustainability Report 2012* at 10 (2013), *available at* https://reports.shell.com/sustainability-report/2012/servicepages/downloads/files/entire_shell_sr12.pdf. The focus on adaptation continued in 2014:

> Adaptation reduces the vulnerability of assets, infrastructure, environmental systems and societies to climate change, and is a response to the risks associated with changes in weather patterns. Governments, communities and businesses will need to prepare for severe changes in the weather. Shell is currently identifying our facilities and locations that are most exposed to the physical impacts of climate change.

Sustainability Report: Royal Dutch Shell plc Sustainability Report 2014 at 17 (2015), *available at* https://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/entire_shell_sr14.pdf; *see also* Am. Compl. ¶ 374.

This focus on adaptation and resiliency planning for Shell's infrastructure is repeated throughout Shell's sustainability reports and demonstrates a practice of planning for climate risks that applies to all Shell entities and infrastructure, including the Terminal. The structural controls enforced through Shell's corporate management structure are clearly set forth in the 2016 Sustainability Report:

> Shell has strong governance structures, supported by standards, policies and controls. These are the foundations of our decisions and actions at every level of the company. We have put clear and effective governance structures in place throughout Shell, along with many performance standards and other controls. These influence the decisions we make and the actions we take, at every level of our company.
>
> Our governance procedures involve the Board of Royal Dutch Shell plc, four Board Committees, our Executive Committee (EC), and the teams and individuals who

> work in our operations. We take rigorous care to ensure decisions are cascaded within the business.
>
> The overall accountability for sustainability within Shell lies with the Chief Executive Officer and the EC. They are assisted by the health, safety, security, environment and social performance (HSSE&SP) executive team. Our standards are set out in our HSSE&SP Control Framework and apply to every Shell company. The process safety and HSSE&SP assurance team, with a mandate from the Corporate and Social Responsibility Committee (CSRC), provides independent assurance on compliance with the Control Framework.

Sustainability Report: Royal Dutch Shell plc Sustainability Report 2016 at 14 (2016), *available at* https://reports.shell.com/sustainability-report/2016/servicepages/downloads/files/entire_shell_sr16.pdf; *see also* Am. Compl. ¶ 373.

The 2020 Annual Report says that HSSE&SP Control Framework "applies to every Shell entity and Shell-operated venture, including all employees and contract staff. The CF defines standards and accountabilities *at each organisational level* and sets out the procedures and processes that we require people to follow." Am. Compl. ¶ 62 (quoting Royal Dutch Shell plc, *Powering Progress: Annual Report and Accounts 2020* at 96 (2021) (emphasis added), *available at* https://reports.shell.com/annual-report/2020/servicepages/downloads/files/shell-annual-report-2020.pdf. These corporate-wide policies and procedures indicate that not only are all Shell entities required to comply, but that there is standardization of processes and standards across the company, meaning lessons learned at one facility and climate science developed by one entity are, or should be, shared throughout the Shell family.

Indeed, Shell's decades-long development of scenarios suggests an embedded company practice dedicated to understanding climate and severe weather risks, and Shell has made numerous statements describing centralization of climate change risk and resilience consideration. According to its 2020 Annual Report, "Shell has established specialist forums at different levels of the organisation where climate change and GHG-related matters are addressed, monitored and

reviewed. Each Shell entity and each Shell-operated venture is responsible for implementing climate change policies and strategies." Royal Dutch Shell plc, *Powering Progress: Annual Report and Accounts 2020* at 96; *see also* Am. Compl. ¶¶ 375–87. Shell has also stated that it has established global teams that "support the businesses in monitoring and addressing certain physical risks of climate change," including by providing "direct technical assistance to facilities, based on their analysis of the potential impacts of climate change in different operating environments." *Powering Progress: Annual Report and Accounts 2020* at 97; *see also* Am. Compl. ¶ 377. Shell's teams also incorporate "considerations of certain potential physical climate change risks in the internal Design and Engineering Practice (DEP) requirements for new projects" and then periodically reviews these DEPs "to take account of changes in the risk environment, including emerging weather and climate factors." *Powering Progress: Annual Report and Accounts 2020* at 97.

In its 2020 statement to the CDP, Shell repeats that it has "set up several dedicated climate change and GHG-related forums at different levels of the organisation where climate change issues are addressed, monitored and reviewed."[12] In the same document, Shell acknowledges that "[g]lobal rising sea levels could potentially impact Shell's coastal facilities (e.g. refineries, ports, terminals, etc.) and our offshore platforms. Changes in the global hydrological cycle caused by climate change could potentially impact Shell's assets, for example by causing flooding . . . ." *Id.* at 11.

Additional confirmation of Shell's centralized approach to assessment and management of climate change and associated risks can be found in a recent court decision from the Netherlands. In that case, the Hague District Court was asked to decide whether Shell plc was liable for the

[12] Relevant excerpt attached hereto as Exhibit I.

emissions of its subsidiaries in the Shell group. Rechtbank Den Haag [The District Court of The Hague], 26 May, 2021, Rechtspraak.nl, ECLI:NL:RBDHA:2021:5339 (Neth.), *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339. The court noted that Shell has stated that its CEO "has ultimate responsibility for the general management" of the company and is responsible for Shell's climate change plan. *Id.* at 2.5.6. The court also noted that Shell had stated that the Shell plc Board is responsible for overseeing and implementing policies related to climate change issues. *Id.* at 2.5.7. The court found that individual Shell companies have the responsibility to implement corporate policy, but Shell plc determines the policies of the Shell group. *Id.* at 4.4.4. Following its findings, the court held that Shell plc was obligated to reduce the emissions of the entire Shell group, through corporate policies, to meet the level of emissions set by the court. *Id.* at 4.4.55.

The Hague District Court's findings are borne out by many of Shell's statements. Of particular note for this case, Shell has made clear that it incorporates climate preparedness into updates of design standards for new infrastructure and reviews the vulnerability of existing facilities to determine if they need to be retrofitted:

> Shell has long life assets that will last many decades. Some of these might have been designed according to outdated climate parameters. We are taking steps at our facilities to help make sure that they are resilient to climate change. We progressively adjust our design standards for projects while, for existing as-sets, we identify those that are most vulnerable to climate change and take appropriate action.

Royal Dutch Shell plc, *CDP Climate Change 2018 Information Request* (2018) at 26.[13]

Shell tasks a specialized team with considering climate preparedness for its infrastructure—the "Metocean Team." This team is responsible for (i) generating climate change projections, (ii) establishing climate preparedness standards for Shell infrastructure, and

[13] Relevant excerpt attached hereto as Exhibit J.

(iii) evaluating the preparedness of Shell's existing infrastructure. Examples of the Metocean Team's climate change projections for the years from 2030 to 2050 include a "Regional Temperature Increase Review," a "Global Sea Level Rise Review," and a "Regional Increased Precipitations Review." *See, e.g.*, Ex. J, *CDP Climate Change 2018 Information Request* (2018) at 23–25. According to Shell, the Metocean Team "influences ongoing engineering design standards," and therefore its "new projects' resilience is always based on the latest climate science outlook." *Id*. at 24. In addition to setting standards for new infrastructure, the Metocean Team also evaluates the climate preparedness of Shell's existing infrastructure to determine which facilities need to be retrofitted to meet modern standards. *Id.* As Shell describes: "The most vulnerable existing assets, designed under previous standards, are identified and any adaptation plans will be integrated into Shell existing procedures and processes such as the asset reference plans that guide their ongoing maintenance schedules." *Id.* Even if the Metocean Team has not evaluated the Terminal, their "ongoing engineering design standards," as well as their "latest climate science outlook," would be relevant to how climate risk should be managed at the Terminal. *See* Request No. 17.

Shell's own climate change projections, climate preparedness standards, climate vulnerability analyses, and remedial actions at other facilities are highly relevant to determining what a reasonable engineer would do at the Terminal. Even though the ultimate application of the "best industry practice" standard is an objective issue to be decided by the Court and the jury, evidence of Defendants' similar evaluations at other facilities is relevant and discoverable. *See, e.g.*, a *City of Wilmington v. United States*, 141 Fed. Cl. 558, 563–64 (2019) (holding that the defendants' assessments of whether a charge was "reasonable" was relevant even though the court makes the ultimate determination *de novo*). Shell is a large, sophisticated energy company that has

been researching climate change and managing severe weather risks for decades. The depth of Shell's knowledge of climate and severe weather impacts, such as sea level rise and increased frequency of severe storm events, and the risks of those impacts to infrastructure including the Terminal is probative of both what Defendants were required to do to safely operate the Terminal and what Defendants needed to disclose to CT DEEP. It is, therefore, relevant and discoverable here.

2. The Requested Materials Are Relevant to Determine What "Best Industry Practice" Requires and Whether Defendants Have Met This Standard at the Terminal

CLF also requested documents specifically concerning other Shell facilities. *See, e.g.*, Request Nos. 27 and 28 (effects of Hurricanes Sandy and Ike "on Defendants' infrastructure and on Defendants' engineering, design, and management of terminals, refineries, and other infrastructure"). The requested material is relevant for evaluating (i) what is required by the "best industry practice" standard, including which "best management practices" should apply to the Terminal, and (ii) whether Defendants have violated that standard. CLF's claims require interpretation of what qualifies as a "best industry practice"—language from Defendants' Permit—to analyze and address climate change risks at facilities like the Terminal. Shell's policies and procedures for analyzing and addressing such risks are clearly relevant to the inquiry of what qualifies as "best industry practice." The Terminal is not an isolated entity that receives zero guidance or information from any team, individual, or other entity within Defendants' corporate structure. Documents already turned over in discovery bear this out. For example, [redacted]

[redacted]

[redacted]:[14]

[14] Attached hereto as Exhibit K.

[redacted] Accordingly, Defendants' experience with other facilities being negatively impacted by climate change are relevant to what it knows about potential severe weather risk at the Terminal. For example, the Sewaren Terminal in New Jersey, [redacted], *e.g.*, *id.* at 7, suffered a spill of 378,000 gallons of oil into the Arthur Kill during Superstorm Sandy. Am Compl. ¶ 316. Any investigation Defendants conducted into the cause and source of that spill (or spill at any other facility resulting from severe weather), any efforts Defendants engaged in to respond to and clean up the spill, as well as any subsequent efforts to address any needed improvements or modifications at the facility to minimize and/or eliminate the risk of a future spill, should have been disclosed to CT DEEP to help CT DEEP assess and monitor the application of best industry practice at the Terminal, as well as monitor and identify spill risks, including addressing the sufficiency or insufficiency of best management practices at the Terminal. *See* Request Nos. 27-28.

Similarly, this information is also highly relevant to Defendants' defenses in this case. Defendants maintain that they are satisfying all of their obligations at the Terminal and that they have done everything required by the Permit. Evidence regarding Defendants' process for making these pertinent legal and factual determinations, as well as an examination of whether Defendants' actions at the Terminal are consistent with their established policies, including as evidenced by actions taken at other facilities, is clearly relevant for the purpose of evaluating that defense. *See City of Wilmington*, 141 Fed. Cl. at 563-64 ("The process Defendant follows to evaluate the

reasonableness of stormwater charges is relevant for discovery purposes. . . . Defendant presumably marshalled facts that led it to determine the charges were unreasonable, and Plaintiff is entitled to discovery of those facts . . . .").

Shell's climate resilience policies and compliance therewith are also relevant for assessing the credibility of Defendants' defenses, as well as their assertions and expert testimony on the subject. *See id.* at 563–64 (finding that the defendants' evaluations of "reasonableness" may be used to impeach the defendants' experts); Fed. R. Civ. P. 26(b)(1) Advisory Committee's Note (2000) ("[I]nformation that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable."). Indeed, whether or not formal policies exist is of the utmost relevance. If a sophisticated entity like the Shell group of companies has not developed broadly applicable policies—despite Shell plc's statements to the public and regulators—it casts doubt on any post hoc assurances of compliance in this litigation. Conversely, if such policies exist but the Terminal has not satisfied them, that fact is also relevant to whether Defendants are satisfying "best industry practice" at the Terminal.

3. The Requested Materials Are Relevant to Civil Penalties

The requested material is also relevant to CLF's request for civil penalties. A substantial component of the civil penalty calculation is the egregiousness of Defendants' conduct, and the duration of the violations is relevant to that analysis. *See, e.g.*, 33 U.S.C. § 1319(d) ("In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, ..."). Failing to prepare the Terminal for climate change is particularly egregious if Defendants have extensive information about the likelihood and severity

of risks and have not taken any measures to mitigate those risks. Even if the actual violations are limited by a five-year statute of limitations (which CLF does not concede), Defendants' long history of studying climate risks but ignoring them at the Terminal would be relevant to the appropriate penalty calculation.

* * * * *

For the reasons described above, CLF's Interrogatories and Requests seeking documents concerning Defendants' knowledge of climate change risks, corporate policies concerning climate preparedness, and climate change actions taken at other Terminals are relevant and discoverable. *See* Interrogatories Nos. 1–9, 11 and Requests Nos. 8–22, 24–28, 48–50, 63–64.

C. The Court Should Overrule Defendants' Objections to "Climate Change" and Related Terms

Defendants assert that "climate change" is "not defined and is an extraordinarily broad term that may refer to myriad processes over significantly varying periods of time" and is not relevant to CLF's claims in Interrogatories Nos. 2–4, 6, 8, 9 and Request Nos. 8, 10–13, 15, 19, 20, 21, 22, 24–26. As stated in CLF's Amended Complaint, climate change is the result of "[h]uman emissions of greenhouse gases [that] have been causing changes to Earth's climate"—changes for which Defendants must plan at the Terminal. Am. Compl. ¶¶ 334–65. CLF makes clear in its Amended Complaint that this case is about severe weather and flooding risks to the Terminal, including how the prevalence of these risks has increased and continues to increase over time due to climate change—posing foreseeable harm to the Terminal's infrastructure and the surrounding area—and whether Defendants have adequately prepared the Terminal to withstand those events as the Clean Water Act and RCRA require. *E.g.*, Am. Compl. ¶¶ 68–76. Therefore, climate change and its effects are relevant to CLF's claims and the supposed breadth of the term cannot justify Defendants' objections.

D. Defendants' Improper "Overbroad" and "Undue Burden" Objections and Improper Attempts to Narrow Discovery

Defendants made a variety of general, non-specific burden and proportionality objections purportedly tied to their assertion that CLF's requests seek information that is "not relevant," yet provided no details as to how the information is not relevant, nor any factual bases for the supposed burden such production would impose on Defendants. Instead, in response to Request Nos. 4, 7, 6, 8, 9, 10, 11, 23, 24, 26, 27, 28, 31, 32, 33, 36, 37, 38, 40, 42, 53, 54, 58, 63, Defendants improperly assert they will produce documents that are "relevant to Plaintiff's claims."[15] *See e.g.,* Response to Request No. 8. The Parties do not agree on what is related or relevant to CLF's claims, and thus Defendants' circular Response is improper and confusing. For example, Defendants take issue with several of CLF's Requests that are, in their view, "unrelated to the Terminal, issues beyond the CWA/RCRA claims, [and] broad global warming/climate change issues." General Objection No. 5. However, as explained above in Section III.B.1, Defendants' knowledge of, policies on, and reactions to climate change risks are relevant to CLF's claims.

Even in response to Requests that are specific to the Terminal, Defendants inappropriately attempt to narrow their response. For example, in response to CLF's Request No. 11 seeking "[a]ll documents concerning risks to the Terminal's physical infrastructure from climate change, flooding, sea level rise, and/or severe weather," Defendants stated

> [s]ubject to the foregoing general and specific objections, Defendants will produce responsive, non-privileged documents in their possession, custody, and control related to the particular risks that are relevant to Plaintiff's claims regarding the New Haven Terminal based upon the document search terms to be negotiated and agreed upon by the parties.

[15] Other iterations of Defendants' circular response are "related to the issues implicated by Plaintiff's CWA and RCRA claims," *see e.g.*, Response to Request No. 4, and "pertaining to the issues and allegations in this suit as they pertain to the New Haven Terminal," Response to Request No. 6.

Response to Request No. 11. The documents requested in Request No. 11 are related to CLF's claims, as CLF alleges Clean Water Act and RCRA violations stemming from Defendants' failure to account for climate-change related extreme weather events. All documents responsive to Request No. 11 *as written* would be related to CLF's claims—there is no basis for Defendants to qualify their response with the language "relevant to Plaintiff's claims."

CLF's Requests are sufficiently specific under Rule 34, yet Defendants attempt to unduly narrow their responses. Therefore, the Court should overrule Defendants' responses to the extent they improperly narrow discovery by cabining their responses as "relevant to Plaintiff's claims."

E. CLF's Time Period is Reasonable for Both its Clean Water Act and RCRA Claims

For those Requests where a time period applies, CLF's Requests primarily apply two responsive time periods. The majority of CLF's requests apply a default time period of 2011 to the present. Ex. B, ¶ 12. Two Request apply a time period of 2000 to the present. *See* Request Nos. 1 & 7. As explained below, these time periods are relevant and appropriate, and Defendants' objections should be overruled.

Defendants assert that for Requests that relate to CLF's regulatory claims,[16] they will only produce documents dated after July 10, 2017, "the date that Defendant Equilon Enterprises LLC d/b/a Shell Oil Products US applied for the relevant Clean Water Act permit" in Interrogatories Nos. 1–10 and Requests No. 29, 39, 41, 43–46, 51, 52. Defendants relatedly asserted they will produce documents "during the time [period] [related] to Plaintiff's claims" rather than the time frame CLF set out in its First RFPs for Request Nos. 1, 2, 3, 6, 7, 18, 23, 30–32, 34, 35, 47–50, 53, 55–57, 59, 60, 62, 65. After discussing with Defendants, CLF understands that for all Requests

[16] Defendants have stated that they will produce documents that relate to CLF's RCRA imminent and substantial endangerment claim dating back to January 1, 2011.

except those related to CLF's RCRA imminent and substantial endangerment claim, Defendants will produce documents dating back to July 10, 2017.[17]

1. Default Time Period

The Default Time Period from 2011 to the present is relevant and appropriate for all of CLF's Requests, including its Clean Water Act claims, because that was the first issuance of the Clean Water Act General Permit under which Defendants are registered. A version of the Permit became effective on October 1, 2011 and has been renewed three times. Am. Compl. ¶ 175. Most recently, the Permit was extended without modification through September 20, 2024. *See* CT DEEP, *Industrial Stormwater General Permit Page*, https://portal.ct.gov/DEEP/Water-Regulating-and-Discharges/Stormwater/Industrial-Stormwater-GP (last visited on June 7, 2022). CLF has alleged that Defendants are violating the Clean Water Act permit by, among other things, (i) failing to prepare the Terminal for the reasonably foreseeable risks of climate change, and (ii) failing to disclose known climate change risks to its regulators.

Defendants' knowledge and actions throughout the course of the Permit, and Defendants' statements to CT DEEP during the Permit term, are relevant for evaluating the state of Defendants' knowledge and experience at the start of the current permit term and during their application for registration under the Permit. Defendants' knowledge about the risks posed by climate change—including what Defendants knew and when they knew it—is highly relevant to several important issues in the case. For example, CLF has alleged Defendants failed to disclose knowledge in their possession about the risks posed by climate change. Documents, even those dating back to 2011, are likely to demonstrate the depth of Defendants' knowledge about climate change and are

[17] At the Parties' meet and confer on July 1, 2022, "Defendants agreed to produce documents dated January 1, 2017 to the present related to the development of the July 10, 2017 permit application or related materials." CLF is unable to accept this offer and stands by its position that documents from throughout the default time period are relevant and discoverable.

relevant to determine what Defendants were obligated, and failed, to disclose. *Cf. Mercer v. Rovella*, No. 3:16-CV-329 (CSH), 2022 WL 1514918, at *20 (D. Conn. May 12, 2022) (allowing the plaintiff's request for information related to the treatment of employees he supervised for the duration of five years before the plaintiff's demotion because such information had "importance . . . in resolving the issues" and shed light on whether the plaintiff was treated differently by the employer than others in similar situations); *Gunning v. N.Y. State Justice Ctr. for Prot. of People with Special Needs*, No. 1:19-CV-1446 (GLS/CFH), 2022 WL 783226, at *10 (N.D.N.Y. Mar. 15, 2022) (same).

In addition, CLF's claims require interpretation of what qualifies as "best industry practice" and a determination of whether Defendants have utilized that standard at the Terminal. Defendants' past policies and procedures for analyzing and addressing climate change-related risks at oil terminals, including the New Haven Terminal, show how "best industry practice" may have evolved over time and whether Defendants have complied with the standard. Further, as cited in CLF's Amended Complaint, Defendants' past experience at the Terminal during Hurricane Irene in 2011 would be relevant to informing what measures should be taken at the Terminal during severe weather events to protect against discharges. Am. Compl. ¶¶ 221-24.

Moreover, while each of CLF's claims alleges a singular Clean Water Act or RCRA violation, CLF's Requests cannot be so neatly parsed. For example, Request No. 11 seeks "[a]ll Documents concerning risks to the Terminal's physical infrastructure from climate change, flooding, sea level rise, and/or severe weather." Documents about the Terminal's physical vulnerabilities to climate change are relevant to both the Clean Water Act *and* RCRA claims. Accordingly, Defendants should be required to produce documents from 2011 to the present for all of CLF's Requests where the default time period applies.

2. Requests Seeking Documents from 2000 to the Present

Request No. 1 seeks "[a]ll document or record retention policies applicable to the operations and remediation efforts at the Terminal from 2000 through present," while Request No. 7 seeks "[a]ll contracts and related Documents, including relevant scope(s) of work, related to environmental monitoring, sampling, analysis, and/or assessment at the Terminal from 2000 to present." Both Requests seek a limited set of documents. The record retention policies inform what documents Defendants can be expected to have retained over that period, and documents concerning environmental monitoring and analysis by contractors at the Terminal are highly relevant to CLF's claims that (i) Defendants failed to disclose relevant information to CT DEEP, and (ii) Defendants' failure to prepare the Terminal for climate change will result in discharge of toxic pollutants into the environment. Any environmental analysis or sampling could inform both the likelihood of prohibited releases and the nature of material that could be released. Given the limited nature of the Requests, Defendants' objections regarding burden and overbreadth, as well as lack of relevance, *see also* Section III.D., should be overruled.

F. Defendants' First Amendment Objections are Insufficient

Defendants' First Amendment objections are improper.[18] Objections must be stated with specificity, Fed. R. Civ. P. 34(b)(2)(B), and "[a] party resisting discovery" on the basis of the First Amendment "must at least articulate some resulting encroachment on their liberties." *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989). Here, Defendants assert that they will not produce documents in response to requests that seek "information in violation of Defendants' First Amendment right of assembly" and "right to petition the government" in

[18] Defendants have stated that they are not currently withholding documents on this basis. CLF includes this argument solely to preserve it in the event that Defendants determine that some documents should be withheld in the future under this objection.

Requests Nos. 10 and 12. While the burden of "making out a prima facie case of harm" is light, *id.*, Defendants do not state how production of these Requests Nos. 10 and 12 will result in any infringement of their associational rights; Defendants simply name the rights that are purportedly violated. Accordingly, Defendants have not demonstrated a *prima facie* showing of an arguable First Amendment infringement. The Court should overrule Defendants' First Amendment objections.

IV. CONCLUSION

For the foregoing reasons, CLF asks the Court to overrule Defendants' Objections to CLF's First Interrogatories and First RFPs and order Defendants to respond to the requests as written.

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Respectfully submitted,

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