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.

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

JUNE 13, 2023

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Conservation Law Foundation, Inc. ("CLF") has brought a citizen suit action under the Clean Water Act ("CWA") based not on what the law presently requires but rather on what CLF wishes it to be. CLF alleges that Defendants[1] have violated the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("CT General Permit")[2] issued by the Connecticut Department of Energy & Environmental Protection ("CT DEEP") under the CWA. Defendants bring this motion for partial summary judgment on nine[3] of CLF's 11 CWA claims.

These nine claims are entirely premised on an erroneous assertion that the CT General Permit imposes a vague requirement that permittees must "consider" risks associated with a litany of climate change and weather-related factors ("Climate Factors") set forth in Section IV.A. of CLF's Amended Complaint. Am. Compl. ¶¶ 209-314 (ECF No. 47). These factors are addressed over 29 pages in the Amended Complaint, and include worst-case scenario storm surges, flooding, precipitation, sea level rise, and elevated ocean temperatures, not just as those risks are posed today – but also 50 years and beyond in the future. *Id.* CLF's claim that the CT General Permit, which has a three-year term, requires the consideration of these Climate Factors is simply wrong. CLF's position is contradicted by the CT General Permit's unambiguous plain language, which contains no such requirement. As explained below, CLF's interpretation of the

[1] For purposes of this motion, Defendants include Shell USA, Inc. (f/k/a Shell Oil Company), Equilon Enterprises LLC d/b/a Shell Oil Products US, Shell Petroleum, Inc., and Triton Terminaling LLC. The Court has dismissed the counts against the remaining defendant, Motiva Enterprises LLC, that are the subject of this motion. *See* Ruling on Motion to Dismiss 62 (ECF No. 111).

[2] The CT General Permit in effect at the time CLF filed its original Complaint was the 2019 CT General Permit. SOF ¶ 15. The CT General Permit in effect at the filing of the Amended Complaint and currently is the 2021 CT General Permit, which expires September 30, 2024. *Id.* ¶ 16. The relevant 2019 and 2021 CT General Permit language is identical. *Id.* Unless otherwise noted, "CT General Permit" refers to the 2021 CT General Permit.

[3] Specifically, Defendants move for summary judgment on CLF's Counts I – IX. The only remaining CWA claims, Counts X and XI, concern whether the Stormwater Pollution Prevention Plan ("SWPPP") must identify discharges to the sewer system that leads to New Haven Harbor and whether Defendants must conduct monitoring for discharges to that sewer system. The only other remaining claim, Count XII, is the Resource Conservation and Recovery Act ("RCRA") statutory claim against all Defendants. Unlike the counts addressed in the present motion, these remaining claims involve factual issues presently subject to further discovery.

CT General Permit runs afoul of norms of construction because it renders other terms of the permit superfluous, unreasonable, and illogical.

Although the plain language is clear and it is not necessary to look beyond the permit, extrinsic evidence compels the same conclusion. There is no evidence that CT DEEP intended that permittees consider CLF's Climate Factors as a requirement of the CT General Permit. Defendants reviewed over one hundred publicly available CT General Permit records and located no record of CT DEEP enforcing against any permittee for failing to consider CLF's Climate Factors, and no stormwater planning documents submitted by permittees that included consideration of these Climate Factors. Finally, the United States Environmental Protection Agency ("USEPA") has rejected CLF's interpretation of identical language in USEPA's CWA Multi-Sector General Permit for Stormwater Discharges from Industrial Activities ("MSGP") as requiring consideration of CLF's Climate Factors.

Interpretation of the terms of the CT General Permit is a question of law for the Court to decide. The material facts of this issue are not in any genuine dispute. CLF had no factual or legal basis prior to filing this suit to support these claims of any actual violation of the CT General Permit, and discovery has only confirmed this fact. This motion raises a threshold question of permit interpretation and is ripe for adjudication. The Court should dismiss Counts I-IX with prejudice.

BACKGROUND

I. THE NEW HAVEN TERMINAL

The subject of CLF's lawsuit is an onshore petroleum bulk storage terminal ("New Haven Terminal") located at 481 East Shore Parkway, New Haven, Connecticut 06512. Defendants' Local Rule 56(a)(1) Statement of Undisputed Material Facts ("SOF") ¶ 19. The

New Haven Terminal is subject to the CT General Permit, under Permit No. GSI002800. *Id.* ¶ 20.

II. THE CT GENERAL PERMIT AND CT DEEP'S REGULATORY PROCESS

The CT General Permit regulates stormwater discharges from industrial facilities engaged in activities listed in the CT General Permit. *Id.* ¶ 2. CT DEEP issued the CT General Permit, which is effective for three years. *Id.* ¶¶ 3, 16. The CT General Permit imposes various regulatory obligations on all facilities subject to it, including the New Haven Terminal. *Id.* ¶ 4. Such requirements include control measures, the creation of a Stormwater Pollution Prevention Plan ("SWPPP"), and monitoring and recordkeeping tasks. *Id.* The CT General Permit also imposes "Additional Requirements for Certain Sectors," none of which apply to the New Haven Terminal. *Id.* ¶ 10.

As part of the regulatory process, CT DEEP issued a Notice of Tentative Decision ("Notice") to reissue the general permit prior to the 2019 CT General Permit's expiration in 2021. *Id.* ¶ 16. This Notice was published in six newspapers statewide in April 2021. *Id.* The Notice provides the public with an opportunity to submit any comments or concerns so CT DEEP can consider those issues prior to the CT General Permit's issuance. *Id.* CT DEEP did not receive any comments from CLF on Notice; in fact, it did not receive comments from anyone. *Id.* CT DEEP reissued the CT General Permit on October 1, 2021; it will expire on September 30, 2024. *Id.*

CLF served Defendants with its Notice of Intent to File Suit on July 28, 2020 and its Supplemental Notice of Intent to File Suit on February 17, 2021. *Id.* ¶¶ 22, 23. Both letters were served on Defendants well before CT DEEP published its Notice on April 2, 2021, meaning CLF had already notified Defendants that it intended to sue them based on their alleged non-compliance with the CT General Permit before the opportunity to comment on the reissuance of

the CT General Permit. But when the opportunity did present itself, instead of participating in the regulatory process to raise any concerns about the CT General Permit's requirements (or lack thereof), CLF filed this citizen suit.

III. CASE BACKGROUND AND CLF'S CLAIMS

CLF initiated this lawsuit on July 7, 2021, and filed its Amended Complaint on February 11, 2022. Compl. (ECF No. 1); Am. Compl. (ECF No. 47). CLF brought 14 counts against Defendants, 11 under the CWA and three under RCRA. Am. Compl. ¶¶ 389-514. On February 25, 2022, Defendants filed their Motion to Dismiss CLF's Amended Complaint. ECF No 50. The Court granted in part and denied in part the motion.[4] Specifically, the Court dismissed all of the CWA claims against Motiva Enterprises, LLC, and two of the three RCRA claims against all Defendants. *Id.* at 62. Defendants now move for summary judgment on nine of CLF's 11 CWA claims, all of which hinge on the common legal question of whether Defendants' compliance with the CT General Permit requires the consideration of CLF's Climate Factors. Am. Compl. ¶¶ 389-448. Defendants' Motion for Partial Summary Judgment is ripe for consideration as there are no genuine disputes of material fact.

LEGAL STANDARD

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c)." *June v. Town of Westfield, New York*, 370 F.3d 255, 257 (2d Cir. 2004). To

[4] The threshold permit interpretation question raised by the present motion was not addressed by the Court's ruling on Motion to Dismiss. Ruling on Motion to Dismiss 60-61 (ECF No. 111). In its ruling, the Court concluded that CLF's suit is not challenging the terms of the CT General Permit, and therefore, Defendants could not invoke the permit shield defense. In that discussion, the Court acknowledged that CLF's claims "entail interpreting the Permit – asking, for example, whether Best Management Practices requires defendants to prepare the Terminal for the immediate effects of climate change, including rising tides and catastrophic storms." *Id.* at 61 (internal quotation marks omitted). That question of permit interpretation is now being raised by Defendants here.

overcome a motion for summary judgment, "a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment,…and show more than 'some metaphysical doubt as to the material facts.'" *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 101 (2d Cir. 2010) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *see also Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (stating that the party opposing summary judgment motion must come forward with more than "conjecture or surmise" and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible").

ARGUMENT

This Court should grant partial summary judgment in favor of Defendants on CLF's Counts I – IX because there is no genuine dispute of the relevant material facts and Defendants are entitled to judgment as a matter of law that the CT General Permit does not require the consideration of CLF's Climate Factors.

Courts interpret a CWA permit like a contract – by first looking at the plain language. Then, if and only if the plain language is ambiguous, courts turn to extrinsic evidence to determine the intent of the agency, in this case CT DEEP. The plain language of the CT General Permit and general principles of permit interpretation leave no doubt that the CT General Permit does not require the consideration of CLF's Climate Factors. And even if the unambiguous language were ambiguous, extrinsic evidence, such as CT DEEP's enforcement practices, reviews of other entities' CT General Permit SWPPPs, and USEPA's rejection of a nearly identical argument raised by CLF regarding USEPA's MSGP likewise confirms that the CT General Permit does not require the consideration of CLF's Climate Factors. As Defendants have maintained from the very beginning of this case, CLF's claims are inappropriate for a citizen suit because CLF is not enforcing an actual requirement of the CT General Permit.

I. INTERPRETING THE CT GENERAL PERMIT IS A QUESTION OF LAW FOR THE COURT.

It is well-settled that courts interpret permits just like any other contract. *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not – NPDES permits are treated like any other contract."); *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 139 (4th Cir. 2017) (interpreting a NPDES permit as a contract); *Piney Run Pres. Ass'n v. Cnty. Commissioners of Carroll Cnty., Md.*, 268 F.3d 255, 269 (4th Cir. 2001) (same); *Altamaha Riverkeeper, Inc. v. Rayonier, Inc.*, No. CV214-44, 2015 WL 1505971, at *3 (S.D. Ga. Mar. 31, 2015) (same). And like a contract, it is the prerogative of this Court to interpret what the CT General Permit does and does not require. *Ohio Valley Envtl. Coal.*, 845 F.3d at 139; *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 41 (D.D.C. 2004) ("[I]nterpretation of a NPDES permit provision is a question of law for the courts[.]").

When courts interpret CWA permits, they engage in a two-part analytical framework. First, "[i]f the language of the permit, considered in light of the structure of the permit as a whole, 'is plain and capable of legal construction, the language alone *must* determine the permit's meaning.'" *Cnty. of Los Angeles*, 725 F.3d at 1204-05 (quoting *Piney Run Pres. Ass'n*, 268 F.3d at 270) (emphasis added). If the Court determines that the language of the permit is plain and capable of legal construction, then the analysis is finished. "If, however, the permit's language is ambiguous, [the Court] may turn to extrinsic evidence to interpret its terms" as the second part of the analysis. *Id.* at 1205.

II. THE PLAIN LANGUAGE OF THE CT GENERAL PERMIT IS UNAMBIGUOUS AND DOES NOT REQUIRE THE CONSIDERATION OF CLF'S CLAIMED "CLIMATE FACTORS."

A. Compliance with the Permit Constitutes Compliance with the Clean Water Act.

"[C]ompliance with an authorized permit is deemed compliance with [the] CWA…." *Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008); *see* 33 U.S.C. § 1342(k); *Californians for Alternatives to Toxics v. Schneider Dock & Intermodal Facility, Inc.*, 374 F. Supp. 3d 897, 911 (N.D. Cal. 2019) ("As a general rule, compliance with an NPDES permit equates to compliance with the CWA."). A "permit holder is shielded from CWA liability for discharges in compliance with its permit, and is liable for any discharges not in compliance with its permit…." *Piney Run Pres. Ass'n*, 268 F.3d at 268.

Thus, as long as a defendant is acting in compliance with the permit, they cannot be liable in a citizen suit for CWA violations. *Willet Dairy, LP*, 536 F.3d at 173. "The Supreme Court has explained that the permit shield's purpose is 'to relieve permit holders of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, the permit shield serves the purpose of giving permits finality.'" *Wisconsin Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 706 (7th Cir. 2013) (quoting *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977)). The New Haven Terminal's compliance with the CT General Permit is compliance with the CWA. That concept has importance here because CLF's CWA Counts I-IX are entirely premised on the theory that the CT General Permit requires consideration of its Climate Factors. If CLF is incorrect, and no such requirement exists, Defendants necessarily are in compliance with the CT General Permit and by extension the CWA.

Courts have also considered "general permits as [they] would a regulation." *Alaska Cmty. Action on Toxics v. Aurora Energy Services, LLC*, 765 F.3d 1169, 1172 (9th Cir. 2014) (citing "*Natural Res. Def. Council*, 279 F.3d at 1183 (noting that general permits are 'issued pursuant to administrative rulemaking procedures"); USEPA, *General Permit Program Guidance* 21 (1988), *available at* http://www.epa.gov/npdes/pubs/owm0381.pdf ('G]eneral permits are considered to be rulemakings....')"). To the extent CLF is seeking that Defendants comply with standards that are not in the currently effective CT General Permit, the proper time and place for raising such issues is during the notice and comment period after the permit is proposed. Conn. Gen. Stat., Chapter 54, § 4-168(a). Once the permit is issued, the permit and its requirements have finality. *Train*, 430 U.S. at 138 n.28. Thus, if the operation of the New Haven Terminal, including its SWPPP, complies with the CT General Permit, then the Defendant operators are in compliance with the CWA.

B. The Language of the CT General Permit Is Plain and Unambiguous.

The first step in interpreting the CT General Permit is reviewing the plain language of the permit. "'When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract.'" *Crocker v. Chapdelaine*, No. 3-18-cv-613, 2019 WL 2269944, at *2 (D. Conn. May 28, 2019) (quoting *Konover v. Kolakowski*, 200 A.3d 1177, 1186 (Conn. 2018)). A "party may not create ambiguity in otherwise plain language by urging different interpretations of the agreement in the course of litigation." *Sparveri v. Town of Rocky Hill*, 656 F. Supp. 2d 297, 309 (D. Conn. 2009) (citing *Lee v. BSB Greenwich Mortg. Ltd. P'ship*, 267 F.3d 172, 178 (2d Cir. 2001)). "Any ambiguity in a contract must emanate from the language

used in the contract rather than from one party's subjective perception of the terms." *Lee*, 267 F.3d at 179.

The language of the CT General Permit is unambiguous. The CT General Permit contains a comprehensive and specific set of requirements ranging from control measures to requirements for reporting, record keeping, and monitoring. SOF ¶ 4. Nowhere among this list of requirements are any of CLF's claimed Climate Factors. CLF's CWA permit claims rest entirely CLF's subjective perception of the meaning of best management practices ("BMPs"). For the reasons described below, this meaning of this term is plain, unambiguous, and CLF's attempts to manufacture an interpretation that requires the consideration of its Climate Factors is erroneous. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) (NPDES permit "terms are to be given their ordinary meaning, and when the terms of a [permit] are clear, the intent of the parties must be ascertained from the [permit] itself.").

1. The Required "Best Management Practices" Are Expressly Enumerated in the CT General Permit.

Section 5(b) of the CT General Permit, entitled "Control Measures," states that "[c]ontrol measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility." SOF ¶ 5. The CT General Permit then provides an enumerated list of 13 BMPs[5] permit-holders are required to implement, including good housekeeping, vehicle or equipment washing, floor drains, management of runoff, and spill prevention and response procedures. *Id.* ¶ 6. BMPs only appears in the CT General Permit in this context, and not one of these 13 BMPs requires the consideration of CLF's Climate Factors. *Id.* ¶ 9. Each of these BMPs provides specific detail on what the permittee must do to comply with the CT General Permit, and nowhere is there any requirement

[5] CLF also acknowledges that there are only 13 control measures (*i.e.*, BMPs). Am. Compl. ¶ 195.

to consider sea level rise, increased severity or frequency of storms, or any of the other Climate Factors claimed by CLF. *Id.* ¶ 7.

For example, among these control measures is one specifically directed to the management of runoff from stormwater at Section 5(b)(7). *Id.* ¶ 8. Section 5(b)(7) sets forth in unambiguous language the requirements on the permittee. *Id.* The permittee must determine whether there is a "need for stormwater management or treatment practices…to divert, infiltrate, reuse, or treat stormwater runoff in a manner that minimizes pollutants in stormwater discharges…." *Id.* The permittee must implement such "stormwater management or treatment measures determined to be reasonable and appropriate to minimize the discharge of pollutants from the site." *Id.* This provision also states what information "the permittee shall consider" when determining what measures are reasonable and appropriate. *Id.* ("The permittee shall consider the potential of various sources at the facility to contribute pollutants to stormwater discharges associated with industrial activity when determining reasonable and appropriate measures.").

CT DEEP is explicit regarding what actions should be taken by the permittee (divert, infiltrate, reuse, or treat), and explicit regarding what information should be considered (the potential for sources at the facility to contribute pollutants to discharges). There is no requirement to consider CLF's Climate Factors, such as sea level rise from increasing ocean surface temperatures, or undertake any actions related to these factors. CLF's claims that Defendants have violated the CT General Permit by not considering its Climate Factors, but

nowhere in the plain and specific language of the CT General Permit is a requirement that Defendants must consider those Climate Factors.

CLF will likely argue that its Climate Factors are implicitly incorporated into the BMPs and need not be specified. As explained below, this argument is not supported by the actual text of the CT General Permit. Further, CT DEEP is required by statute to specify the circumstances under which it is imposing a requirement for a permittee to undertake a particular activity (other than treatment). Conn. Gen. Stat. § 22a-430(b) ("The regulations shall specify the circumstances under which procedures, criteria and standards for activities other than treatment will be required."). If CT DEEP were requiring the activity of consideration of CLF's Climate Factors under the CT General Permit, it would need to specify the circumstances when this is required.[6] But the CT General Permit fails to include consideration of the Climate Factors in the 13 BMPs, and it certainly contains no descriptions of circumstances under which such activity is required. CT DEEP cannot simply imply a particular activity must be undertaken – it must do so with specificity and that is absent here.

2. The CT General Permit Does Not Require That a SWPPP Consider CLF's Climate Factors

Section 5(c) of the CT General Permit requires the permittee to "develop a Stormwater Pollution Prevention Plan ('Plan') for each site[,]" which must "includ[e] implementation of the Control Measures in Section 5(*b*)…." *Id.* ¶ 13. Specifically, the "permittee must document the location and type of control measures installed and implemented at the site in accordance with 'Control Measures' (Section 5(*b*))." *Id.* As discussed above, none of the 13 BMPs impose a requirement to consider the Climate Factors. The SWPPP must "include a schedule for

[6] *See, e.g.*, SOF ¶ 12 (where the CT General Permit specifies the circumstances to consider such risks for small-scale composting facilities).

implementing such controls [sic] measures if not already implemented." *Id.* The SWPPP requirement incorporates by reference the BMP control measures listed in Section 5(b). *Id.* The SWPPP does not impose any additional BMPs, except for "those additional control measures that may be required in 'Additional Control Measures for Certain Sectors' (Section 5(*f*))," which do not apply to the New Haven Terminal. *Id.* The plain language of the CT General Permit's SWPPP requirements does not require CLF's Climate Factors, and CLF cannot point to any language providing for such requirement.

3. "Best Industry Practice" Does Not Impose Additional Requirements; It Modifies the Term "Minimize"

CLF attempts to incorporate its Climate Factors into the CT General Permit by conflating the term "best industry practice" and the BMPs. This argument also fails under a plain reading of the CT General Permit.

Section 5(b) of the CT General Permit requires the permittee to implement the BMPs "to minimize the discharge of pollutants from the permitted facility." *Id.* ¶ 5. The permit then 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.* CLF claims that in "furtherance of this condition" – referring to minimizing pollutants through best industry practices – Defendants must obtain certification from an engineer that discusses CLF's Climate Factors. Am. Compl. ¶¶ 362-365. CLF then claims that because Defendants have not discussed CLF's Climate Factors, Defendants are not implementing best industry practices. *Id.* ¶¶ 386-387.

The plain language of the provision containing the term "best industry practice" belies CLF's interpretation. "Best industry practice" is not an independent requirement of the CT General Permit. The requirement is to implement "control measures," which are the "required

Best Management Practices." SOF ¶ 5. As described above, those BMPs are specific and enumerated and are implemented "to minimize the discharge of pollutants from the permitted facility." *Id.* ¶¶ 5, 6. This clause is simply to provide the purpose of the BMPs.

The CT General Permit defines "minimize" for purposes of implementing the BMPs at Section 5(b) as follows: "means 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.* ¶ 5. "Best industry practice" is used narrowly and simply informs the extent or level to which a permittee must "minimize" pollutants. Using a simple hypothetical illustration in the example above of the permit's BMP for management of stormwater runoff, a particular stormwater diversion technique may only be able to achieve 99% diversion, rather than 100%, as a matter of best industry practice. This is a consistent and logical plain reading of "best industry practice," which only modifies the term "minimize." It does not impose a broad and independent requirement that an engineer consider CLF's Climate Factors in "their facility planning, decision-making, construction and design, engineering certification, and operation processes…." Am. Compl. ¶ 364. CLF's interpretation has no support in the language of the CT General Permit and should be rejected.

C. CLF's Interpretation Is Unreasonable, Violates Rules of Interpretation, and Is Contrary to Law.

In interpreting the CT General Permit, the Court must accept an "interpretation which gives a reasonable, lawful, and effective meaning to all the terms [rather than] an interpretation which leaves a part unreasonable, unlawful, or to no effect." *Cnty. of Los Angeles*, 725 F.3d at 1206 (quoting the Restatement (Second) of Contracts § 203(a) (1981)) (internal quotation marks omitted). Moreover, "'[A] court must give effect to every word or term' in an NPDES permit 'and reject none as meaningless or surplusage….'" *Id.* (quoting *In re Crystal Props., Ltd., L.P.*,

268 F.3d 743, 748 (9th Cir. 2001)). An agency's use of a term or language in one area of a permit or regulation but not in another is evidence of the agency's intent to include and exclude such language. *See Halchak v. Dorrance Twnship Bd. of Supervisors*, 2019 WL 4795650, at *7 n.2 ("[O]mission of the same term or phrase from a similar section is significant to show different legislative intent for the two sections." (citing 2A Sutherland Statutory Construction § 46:6 (7th ed.)). CLF's interpretation of BMPs and the SWPPP to require consideration of CLF's Climate Factors renders other CT General Permit terms meaningless and unreasonable, contradicts a statutory mandate that CT DEEP itself must determine which BMPs are acceptable, and violates CT DEEP's Uniform Administrative Procedure Act.

1. CT DEEP Determines Best Management Practices, Not Defendants.

CLF cannot evade the plain language of the CT General Permit by arguing, as it has in prior filings with the Court, that BMPs and best industry practice are permit standards that are defined by Defendants' corporate policies, or practices used at other facilities operated by Defendants or their corporate affiliates. *See, e.g.*, Pl. CLF's Motion to Compel 7-20 (ECF No. 84). This interpretation of the permit is contrary to the law.

The CT General Permit is applicable to thousands of entities across various industries and sectors. By statute, CT DEEP must issue the CT General Permit with general applicability, and for any BMPs CT DEEP requires, it must make *its own* determination such BMPs are acceptable. Conn. Gen. Stat. § 22a-430(b) (CT DEEP "shall…establish procedures, criteria and standards…for determining if…a discharge would cause pollution to waters of the state…provided [CT DEEP] consider[s] best management practices[,]" where " best management practices' means those practices which reduce the discharge of waste into the waters of the state and which have been determined by [CT DEEP] to be acceptable based on, but not limited to, technical, economic, and institutional feasibility.").

In other words, the law requires a BMP requirement of CT DEEP to be based on what *CT DEEP* requires and deems acceptable, as it is the regulatory authority charged with implementing the requirements of the CWA. SOF ¶¶ 1, 2. Defendants do not set the regulatory standard for what BMPs are. This is only logical, and CLF's interpretation is unreasonable and would create numerous problems in the State's administration of a uniform permitting scheme. For example, if two permittees have neighboring facilities, is each expected to know and follow the (non-public) corporate policies of the other? Or do different standards apply to each depending on each's own corporate policies? If Defendants define BMPs and set the best industry practice, that would necessarily mean Defendants' non-public internal policies (or lack thereof) set the standard for the other thousands of facilities governed by the CT General Permit. This is inconsistent with Section 22a-430(b), which mandates that CT DEEP determine which BMPs are acceptable.

Finally, CLF's interpretation also undermines the purpose of a general permit, where the "permitting agency has held that it can properly regulate a class of dischargers without detailed information about individual discharges…." *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 290 (6th Cir. 2015) (internal quotation marks and citation omitted). "[I]f a general permit is insufficient in some respect, the compliant should be directed at the permitting authority[,]" not the permittee. *Id.* (internal quotation marks and citation omitted).

2. CLF's Interpretation of the CT General Permit Would Render Other Terms Meaningless

This Court should reject CLF's interpretation of BMPs to require consideration of CLF's Climate Factors as such interpretation would give no effect to other terms of the CT General Permit. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) ("Connecticut…law instruct[s] us not to interpret words or provisions in [a contract] as mere

surplusage if, under a reasonable interpretation of such words, they may be given independent meaning.").

Section 5(b)(9)(A)(i)(2) is a BMP requirement in the CT General Permit that would lose independent meaning under CLF's theory. Section 5(b)(9)(A)(i)(2) addresses the containment that is required around fuel storage tanks, which in the event of a spill or rupture of a tank, contains the contents of the tank in order to prevent entry of such contents into the environment. SOF ¶ 14. This known as "secondary containment." *Id.* Section 5(b)(9)(A)(i)(2) provides an express quantitative requirement for the size of secondary containment: "an impermeable secondary containment area which will hold at least 100% of the volume of the largest tank…or 10% of the total volume of all tanks and containers in the area, whichever is larger…." *Id.*

CLF alleges that the New Haven Terminal's containment is non-compliant because it is not designed "to accommodate extreme precipitation or coastal flooding, including reasonably foreseeable impacts of climate change" (*i.e.*, the Climate Factors). Am. Compl. ¶ 265. Per CLF's Amended Complaint, these impacts include for sea level rise beyond 2100, increased annual precipitation for the next 50 years, and increased storm surges from statistically rare storm events. *See, e.g.*, Am. Compl. ¶¶ 280, 306. But if CLF's interpretation were correct, then this analysis of the Climate Factors would determine the necessary volume of secondary containment required for storage tanks, and the CT General Permit would not need to have a provision that secondary containment must hold "at least 100% of the volume of the largest tank."[7] SOF ¶ 14. A permittee cannot install containment that meets two different quantitative requirements. Insofar as CLF is arguing an interpretation that requires something more stringent than the 100% (to account for extreme precipitation), it is effectively reading that requirement right out of the

[7] In requiring this provision, CT DEEP had in mind what should be required in the event of a significant spill, by "spell[ing] out specific containment requirements….." SOF ¶ 17.

CT General Permit. This interpretation is unreasonable and defies norms of regulatory and contract construction.

3. If CT DEEP Wanted to Include Consideration of CLF's Climate Factors, It Knows How To.

The list of BMPs does not include the requirement that Defendants must consider CLF's Climate Factors, and CLF's claim that BMP should be interpreted to include such requirement is tantamount to adding requirements to the regulatory scheme. As with interpreting Congressional intent with a statute, this Court should "'not lightly assume that [CT DEEP] has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when [CT DEEP] has shown elsewhere in the same statute that it knows how to make such a requirement manifest.'" *Pharaohs GC, Inc. v. U.S. Small Bus. Admin.*, 990 F.3d 217, 227 (2d Cir. 2021) (quoting *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 342 (2005)).

Climate change is not a secret to CT DEEP, which is aware and actively regulating the various effects it causes. SOF ¶ 18. CT DEEP knows how to include precipitation-related requirements like those CLF claims exist in the CT General Permit when it wants to, and it indeed has done so with respect to one category of facilities in the exact same CT General Permit, small-scale composting facilities. *Id.* ¶ 12. For small-scale composting facilities, CT DEEP requires an additional control measure pertaining to the management of runoff. *Id.* This control measure states, "Where composting operations are exposed to rainfall or runoff, the permittee must retain the runoff from the 25-year, 24-hour rainfall event." *Id.* This requirement, which is located in the *same General Permit at issue here*, identifies a specific category of

rainfall event that must be satisfied for these small-scale composting facilities – a 25-year, 24-hour event.[8]

Thus, if CT DEEP wanted permittees to consider a certain category of rainfall (*e.g.*, a more extreme 500-year event) it knows how to impose such a requirement. But it has not. CT DEEP included this rainfall event requirement only for small-scale composting facilities but not in the general requirements of the CT General Permit (*i.e.*, those requirements applicable to the New Haven Terminal). This demonstrates that there is no such general requirement in the CT General Permit; rather, rainfall events are an *additional* control measure not applicable to the New Haven Terminal. CLF's claim that the CT General Permit's general requirements required the consideration of such storm events violates basic principles of contract/permit interpretation as such interpretation would render the additional requirement for small-scale composing facilities superfluous. *Pharaohs GC, Inc.*, 990 F.3d at 227.

4. CLF's Interpretation Runs Afoul of the Connecticut Uniform Administrative Procedure Act.

Courts have interpreted a general permit as a regulation subject to notice and comments. *Alaska Cmty. Action on Toxics*, 765 F.3d at 1172. Under standard administrative law principles, a "final rule need not be an exact replica of the rule proposed in the notice, only a logical outgrowth." *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 61 (2d Cir. 2018) (internal quotation marks and citation omitted). The test that has been set forth is whether the agency's notice would "fairly apprise interested persons of the subjects and issues of the

[8] A "25-year, 24-hour rainfall event" is itself defined in the permit, leaving no uncertainty regarding what information a permittee should consider in order to comply. SOF ¶ 12 ("means the maximum 24-hour precipitation event with a probable recurrence interval of once in 25 years, as defined by the National Weather Service in Technical Paper Number 40, 'Rainfall Frequency Atlas of the United States,' May 1961, and subsequent amendments, or equivalent regional or state rainfall probability information developed therefrom.").

rulemaking." *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (internal quotation marks omitted).

CLF's interpretation of BMPs as requiring consideration of the risks from CLF's Climate Factors violates this basic tenet of administrative law that an entity subject to a new regulation must be given fair notice of the content of that rule. The CT General Permit imposes obligations on those subject to it, and if CT DEEP required the consideration of CLF's Climate Factors as part of the CT General Permit's BMPs, then CT DEEP must specify as such in its notice. The public notice, Notice of Tentative Decision, for the CT General Permit simply indicated that it gave notice of the reissuance of the CT General Permit "*without modifications*." SOF ¶¶ 15, 16 (emphasis in original). The Notice of Tentative Decision does not mention any modifications to the CT General Permit let alone any indication that it considers the consideration of the Climate Factors part of the CT General Permit's BMPs. *Id.* CLF's interpretation of BMPs is nowhere to be found in CT DEEP's public notice of the issuance of the CT General Permit, or any prior notices. SOF ¶¶ 3, 15, 16. As CLF's interpretation imposes an expansive and onerous requirement to consider CLF's Climate Factors, the notice must provide "the range of alternatives being considered with reasonable specificity" and must give the public reasonable notice to anticipate the requirements. *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (internal quotation marks and citation omitted). Because CLF's interpretation would violate this basic principle of administrative law, this Court should reject it. *Id.* (finding inadequate notice where "solicitations [were] too general to provide adequate notice" that the particular requirement was under consideration.").

5. CLF's Interpretation "Hides Elephants in Mouseholes"

CLF's interpretation is also flawed because it requires the Court to accept that there is a hidden meaning beyond the CT General Permit's specific terms; however, it is axiomatic that

"[a]gencies may 'not seek to hide elephants in mouseholes.'" *Brown v. U.S. Dep't of Educ.*, -- F. Supp. 3d --, No. 4:22-cv-0908, 2022 WL 16858525, at *13 (N.D. Tex. Nov. 10, 2022) (quoting *West Virginia v. EPA*, 142 S.Ct. 2587, 2622 (2022) (Gorsuch, J. concurring) (quoting *Whitman v. Am. Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001)); *see also, e.g., Mei Xing Yu v. Hasaki Restaurant, Inc.*, 944 F.3d 395, 409-10 (2d Cir. 2019) ("Congress does not hide elephants in mouseholes." (internal quotation marks and citation omitted)). CLF's interpretation of BMPs and best industry practice to require "consideration" of CLF's Climate Factors results in that exact impermissible effect. CLF's Climate Factors are far more than just elephants – their claimed factors span 125 paragraphs and 29 pages in its Amended Complaint – and would impose onerous and complex analyses related to extreme weather, threats to human health, flooding, sea level rise, increasing ocean temperatures, coastal flooding in New England, storm surges, and severe or intense flooding over 50 years and beyond. Am. Compl. ¶¶ 209-333; SOF ¶ 26. And when Defendants interposed interrogatories specifically tailored to better understand CLF's factual basis for its Amended Compliant allegations, CLF simply copied, pasted, and cited the paragraphs in the Amended Complaint. SOF ¶ 24.

This lawsuit would not be the first where CLF has argued an interpretation that tries to "hide elephants in mouseholes." *Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 32 (1st Cir. 2018). In *Pruitt*, CLF attempted to "hid[e] a herd of elephants in a mousehole" by arguing that USEPA's development and approval of total maximum daily loads ("TMDLs")[9] for a water body required it to notify all dischargers to that water body of its decision and the dischargers' alleged requirement to obtain a discharge permit. *Id.* at 28-29. "TMDLs are developed by state

[9] The total maximum daily load, or TMDL, is the maximum amount of a pollutant "established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(c).

agencies and are incorporated into the state's planning process for overall water quality." *Id.* at 29. CLF argued that USEPA's involvement in the TMDL process "expand[ed] the scope of the express determination the [US]EPA makes in approving a TMDL," by requiring USEPA to "send notice and application forms to specific…dischargers…." *Id.* at 29. The First Circuit rejected CLF's interpretation because such an interpretation would be as though "EPA hid a herd of elephants in a mousehole…a herd that remained unnoticed for several decades." *Id.* at 32.

Like in *Pruitt*, CLF's interpretation that BMPs and best industry practice include the requirement to consider the litany of CLF's Climate Factors would be unreasonable given such an expansive interpretation contradicts the plain language of the CT General Permit and would mean that CT DEEP hid CLF's Climate Factors in the CT General Permit's BMP mousehole, a tactic consistently rejected by courts in interpreting regulations. *See, e.g.*, *Envtl. Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020) (rejecting to "hide elephants in mouseholes" by interpreting language to include more requirements than applicable); *Natural Res. Def. Council v. EPA*, 661 F.3d 662, 665 (D.C. Cir. 2011).

III. EVEN IF THE EXPRESS PERMIT TERMS WERE AMBIGUOUS, EXTRINSIC EVIDENCE DEMONSTRATES CT DEEP DOES NOT REQUIRE THE CONSIDERATION OF CLF'S CLIMATE FACTORS.

Only if the language of the CT General Permit were ambiguous does the Court reach the second part of the analysis, which allows for consideration of extrinsic evidence "to determine the intent of the permitting authority," CT DEEP. *Cnty. of Los Angeles*, 725 F.3d at 1207 (internal quotation marks and citation omitted); *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, 98 F. Supp. 3d 1279, 1299 (S.D. Ga. 2015) (turning to extrinsic evidence where permit language is ambiguous). "Where a permit condition is ambiguous…courts 'must look to extrinsic evidence to determine the correct understanding of the permit.'" *Ctr. for Biological Diversity v. Univ. of N. Carolina at Chapel Hill*, No. 1:19-cv-1179, 2021 WL 3861388, at *8 (M.D.N.C.

Aug. 30, 2021) (quoting *Piney Run Pres. Ass'n v. Cnty. Commissioners of Carroll Cnty.*, 268 F.3d 255, 270 (4th Cir. 2001)).

Here, the language of the CT General Permit is unambiguous, but even if the Court were to find that the language was somehow ambiguous, the extrinsic evidence overwhelmingly shows that the CT General Permit does not require the consideration of CLF's Climate Factors. First, none of the publicly available SWPPPs prepared pursuant to the CT General Permit contain any discussion of any of CLF's Climate Factors. And, CT DEEP's lack of enforcement against any of these SWPPPs for failing to consider CLF's Climate Factors provides strong evidence of the agency's intent when it drafted the language of the CT General Permit, practices that this Court should give significant weight. Second, USEPA specifically rejected CLF's argument that the federal MSGP requires consideration of its Climate Factors. Although the permitting authority here is CT DEEP, USEPA's interpretation of its stormwater permit is instructive and persuasive because not only is USEPA the agency charged with implementing the CWA, but the relevant language of the CT General Permit largely replicates USEPA's MSGP. SOF ¶¶ 3, 5. Third, because CLF is seeking to enforce a requirement that does not exist, its claims belong not in a citizen suit, but in the notice and comment process as with any other rulemaking. The Court should reject CLF's attempt to inappropriately regulate by litigation.

A. CT DEEP's Practices Demonstrate That It Does Not Require Consideration of CLF's Climate Factors in the CT General Permit.

Courts "give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit." *Cnty. of Los Angeles*, 725 F.3d at 1207 (citing *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 985 (9th Cir. 1995)). The following extrinsic evidence provides strong evidence of how the agency understands and interprets the BMPs requirement of the CT General Permit. First, publicly-available records reviewed by

Defendants demonstrate that other facilities subject to the CT General Permit do not include in their SWPPPs consideration of CLF's Climate Factors. A review of over 150 SWPPPs from other facilities reveals that not a single one includes these considerations. Review of publicly-available enforcement records shows that CT DEEP has never brought an enforcement action against any entity subject to the CT General Permit for failing to consider CLF's Climate Factors. Second, third-party consultants deposed by CLF and who regularly develop SWPPPs for entities subject to the CT General Permit have never considered or understood the CT General Permit's BMP requirements to involve the consideration of CLF's Climate Factors.

1. None of the Publicly Available SWPPPs Developed Under the CT General Permit Includes Consideration of CLF's Climate Factors.

If the CT General Permit required consideration of CLF's Climate Factors, presumably such consideration would be evident in the SWPPPs of the many other facilities subject to the CT General Permit. The review of numerous SWPPPs drafted and certified pursuant to the CT General Permit, however, reveal that not a single entity includes the discussion of CLF's Climate Factors. Defendants retained a consultant, Ms. Renee Bourdeau, an engineer with a major environmental consulting firm, to conduct a factual investigation[10] into whether SWPPPs for other facilities, including coastal facilities, governed by the CT General Permit include a discussion of CLF's Climate Factors. SOF ¶¶ 25, 26. Ms. Bourdeau visited CT DEEP's offices and reviewed the files for all facilities covered by the CT General Permit. *Id.* ¶ 28. She also searched online for additional SWPPPs. *Id.* In total, she reviewed all publicly available SWPPPs, constituting 152 SWPPPs for facilities other than the New Haven Terminal. *Id.*

[10] Ms. Bourdeau is not an expert witness for Defendants. She conducted factual research and a factual investigation. Bourdeau Dep. SOF ¶ 26. To the extent CLF wishes to argue Ms. Bourdeau is proffering an expert opinion, and that, as a result, this Motion is not timely, CLF is mistaken. Ms. Bourdeau has offered no opinion; she merely reviewed the SWPPPs to determine whether they contain any consideration of CLF's Climate Factors. *Id.* ¶¶ 26, 28.

On May 25, 2023, Ms. Bourdeau was deposed in this case. *Id.* ¶ 27. She testified that none of the SWPPPs she obtained and reviewed contain discussions of the type CLF alleges is required by the CT General Permit. *Id.* ¶ 29.[11] None of the SWPPPs considers the litany of Climate Factors CLF alleges Defendants must consider in their SWPPPs or as part of the CT General Permit's BMPs. *Id.*

If this practice by well over a hundred facilities, including other petroleum storage facilities, violated the CT General Permit, one would expect CT DEEP to have brought an enforcement action, but, as Ms. Bourdeau testified, none of the files she examined at CT DEEP that had SWPPPs contained a Notice of Violation issued to facilities covered by the CT General Permit for failing to consider CLF's Climate Factors. *Id.* ¶ 31. Moreover, in response to a question posed by CLF's counsel, Ms. Bourdeau testified that she spoke with a CT DEEP environmental analyst and that individual stated that the consideration of CLF's Climate Factors was not a permit requirement. *Id.* ¶ 32.

CT DEEP and the entities covered by the CT General Permit are uniformly acting in a manner inconsistent with CLF's interpretation of the terms of the CT General Permit. CT DEEP's conduct is considered evidence of its intent, and as such, this extrinsic evidence refutes CLF's interpretation of BMPs and best industry practice under the CT General Permit. *See, e.g.*, *Univ. of N. Carolina at Chapel Hill*, No. 1:19-CV-1179, 2021 WL 3861388, at *9 (finding agency's intent that conduct is not violation where agency did not bring action against entity that provided evidence of exceedances).

[11] Defendants produced to CLF all of the SWPPPs, some in full and some with photographs of the relevant portions of the SWPPPs, that Ms. Bourdeau reviewed, as well as her relevant project files. SOF ¶ 30.

2. Licensed Third-Party Consultants Do Not Consider CLF's Climate Factors Because It Is Not Required by the CT General Permit

CLF noticed the depositions of two third-party consultants, Triton Environmental, Inc. ("Triton") and Witt O'Brien, LLC ("Witt O'Brien"), that have collectively prepared hundreds Connecticut SWPPPs and other CT General Permit-related documents. SOF ¶ 33. Their testimony provides further extrinsic evidence that consideration of CLF's Climate Factors is not required by the CT General Permit. *Id.* ¶¶ 36, 38. The General Permit requires SWPPPs to "be certified…by a professional engineer licensed in the State of Connecticut or a Certified Hazardous Materials Manager." *Id.* ¶ 13. Triton and Witt O'Brien are such certified professional engineers. *Id.* ¶ 33. These environmental consultants have decades of experience preparing many SWPPPs and other plans not only for the New Haven Terminal, but also for many other facilities across Connecticut and other states. *Id.* ¶¶ 34, 37. They have routinely been hired to prepare the New Haven Terminal's SWPPPs and other documents, such as the Terminal's Spill Prevention, Control, and Countermeasure Plan ("SPCC Plan") and Facility Response Plan ("FRP"). *Id.* Both consultants were also hired to ensure the New Haven Terminal is in compliance with applicable regulations and requirements. *Id.*

On February 16, 2023, and March 16, 2023, CLF deposed both Triton and Witt O'Brien, respectively. *Id.* ¶ 33. The environmental consultants testified that in the course of their work, they have never understood the CT General Permit to require the consideration of CLF's Climate Factors when ensuring regulatory compliance or preparing the relevant documents. *Id.* ¶¶ 36, 38. Concerning SWPPPs specifically, Triton testified that over approximately 25 years, it has prepared approximately one hundred SWPPPs. *Id.* ¶ 34. Of those one hundred plans, approximately half of them have been for facilities located in Connecticut. *Id.* Triton confirmed that a SWPPP in Connecticut must follow the applicable rules and regulations, which the CT

General Permit dictates. *Id.* ¶ 35. In addition to preparing SWPPPs, Triton's 25 years of experience also involves evaluating and ensuring whether such plans meet the legal requirements of the CT General Permit. *Id.* ¶ 34. Throughout Triton's extensive time preparing plans and ensuring regulatory compliance, it has had ongoing discussions with CT DEEP to confirm what factors must be taken into account when following the applicable regulations. *Id.* ¶ 35.

When asked about CLF's Climate Factors, Triton testified that the CT General Permit simply does not require consideration of any of them when preparing a SWPPP or ensuring compliance with the regulations. *Id.* ¶ 36. Further, Triton confirmed that the CT General Permit does not contain or reference any of the phrases "climate change," "storm surge," "storm risk," "rising sea levels," "melting sea ice," or "climate effect" within its text. *Id.*

Triton also confirmed that at no time over its 25 years of experience working with CT DEEP has the agency ever indicated that "climate change," "storm surge," "storm risk," "rising sea levels," "melting sea ice," or "climate effect" should be taken into account when preparing a SWPPP. *Id.* Accordingly, none of the Connecticut SWPPPs Triton has prepared or with which it has assisted have had any discussion or perspective on "climate change" or any of the above-referenced phrases.

Witt O'Brien's testimony is consistent with Triton's. Although Witt O'Brien's work at the Terminal concerned plans other than the SWPPP, Witt O'Brien's stated in its testimony that CLF's Climate Factors such as "more frequent or severe storms" or "rising sea levels" are not considerations for "site plans" or "documents" based on its experience with thousands of plans. *Id.* ¶¶ 37, 38.

CLF's asserts that the Terminal must consider 100-year or even 500-year storms in its permit planning and compliance. Am. Compl. ¶¶ 320-321. However, Triton indicated that the CT

General Permit does not require consideration of a 100-year storm event or a 500-year storm event when evaluating a site's adequacy of containment for a SWPPP. SOF ¶ 36. Similarly, Witt O'Brien stated that CT DEEP has never required it to utilize either a 100-year or 500-year storm event standard in addressing a site's adequacy of containment. *Id.* ¶ 38. With decades of collective experience dealing with the CT General Permit's requirements involving many SWPPPs and other key permit-related documents, neither Triton nor Witt O'Brien has been required by CT DEEP to require consideration of CLF's Climate Factors as mandated by the CT General Permit. *Id.* ¶¶ 36, 38.

B. USEPA Has Rejected CLF's Interpretation of Climate Factor Consideration in a Foundational Federal Permit[12]

CLF has made a previous unsuccessful try to interpret the terms of a CWA permit to require the consideration of its Climate Factors. USEPA rejected CLF's very same attempt to read these requirements into the language of USEPA's MSGP. Although the CT General Permit is issued and regulated by CT DEEP, courts look to USEPA's guidance to determine what the CWA requires, even when those requirements are contained in a state-issued permit. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) (relying on USEPA memoranda and regulatory comments to interpret state-issued CWA permit, stating "[US]EPA's reasonable interpretations of [the CWA] are due deferential treatment in the courts"). Thus, USEPA's response to CLF's Climate Factors argument is persuasive and instructive extrinsic evidence of the terms of the CT General Permit.

[12] USEPA has delegated its CWA authority to CT DEEP. SOF ¶¶ 1, 2.

1. USEPA Soundly Rejected CLF's Assertion That MSGP Permittees Have Been Required to Account for "Climate-Change-Induced Severe Weather."

In 2020, USEPA proposed new language in the control measures section of the draf MSGP to implement "enhanced measures for facilities located in areas that could be impacted by stormwater discharges from major storm events that cause extreme flooding conditions." SOF ¶ 39. CLF submitted comments and argued the new proposed language violated the anti-backsliding[13] rule "by narrowing the scope of the control measures to exclude consideration of all climate change related impacts, including sea-level rise and storm surge…." *Id.* ¶ 40. CLF's argument to USEPA mirrors its argument here – that these wide-reaching mandates were hidden in the existing requirement that "control measures" should "minimize pollutant discharges" using "good engineering practices" to the extent "economically practicable and achievable in light of best industry practice." *Id.*

USEPA disagreed, responding that the proposed provisions were "a *new* effluent limitation or condition" and "the 2015 MSGP did not include a similar provision." *Id.* ¶ 41 (emphasis added). Importantly, USEPA was clear in its responses to comments that it prior versions of the MSGP did not require permittees to consider a heightened future risk of severe weather impacts. *Id.*

USPEA finalized the proposed MSGP in 2021, declining to make changes that CLF wanted and disagreeing with CLF's arguments. Specifically, USEPA "disagree[d]" that requiring facilities to "consider implementing mitigation measures to minimize impacts from major storm events constitutes backsliding." *Id.* USEPA stated that it "does not agree [with CLF] that

[13] Under the CWA's anti-backsliding provision, "a permit may not be renewed, reissued, or modified…to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o)(1).

permanent, structural control measures are necessary to mitigate risks of pollution from major storm events." *Id.* The 2021 MSGP contains a simple new BMP for major storm events,[14] but it does not include CLF's alleged pre-existing requirements to consider sea-level rise, flood risk over the design life of a facility, or stronger control measures for facilities handing hazardous substances. Since USEPA concluded the final permit was not backsliding, its rejection of these measures equates to a statement that they were not required by any prior MSGP.

2. USEPA's Interpretation Refutes CLF's Interpretation of the CT General Permit.

USEPA's general permit standards are the foundation of the CT General Permit. *Id.* ¶ 3. The CWA is a top-down cooperative regime through which the federal government may conditionally delegate authority to states. *See, e.g.*, 33 U.S.C. § 1251(g); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017) (stating the CWA is "a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation"). Connecticut's power to issue and condition general permits is based exclusively on USEPA's conditional authorization. SOF ¶ 1. As a contingency of that delegation, Connecticut agreed to be bound by annual commitments dictated by USEPA. *Id.* Through this and other oversight programs, USEPA enforces standards and priorities on CT DEEP. The relationship between the agencies' policies is reflected in the shared language in federal and state documents. *Id.* ¶ 3. Given this symmetry, USEPA's interpretation of the MSGP (upon which the CT General Permit is based) informs CT DEEP's understanding of the permit's requirements.

[14] The MSGP requires permittees to "consider…when selecting and designing control measures" that "[i]mplementing structural improvements, enhanced/resilient pollution prevention measures, and other mitigation measures can help to minimize impacts from stormwater discharges from major storm events such as hurricanes, storm surge, extreme/heavy precipitation, and flood events" where "[h]eavy precipitation refers to instances during which the amount of rain or snow experienced in a location substantially exceeds normal." SOF ¶ 39.

Connecticut relied on USEPA standards to develop and maintain the CT General Permit. *Id.* (approving 2010 general permit because, in part, its criteria was "based on [US]EPA standards"). In 1992, CT DEEP (then DEP) and USEPA signed a Memorandum of Agreement conditionally delegating the issuance and enforcement of general permits. *Id.* ¶ 1. Connecticut's first stormwater permit for industrial activities "was based on [US]EPA's draft model permit." *Id.* ¶ 3. CT DEEP modified the CT General Permit in 1995 to include target metrics and extend coverage. *Id.* The CT General Permit was renewed in 1997 and 2002 with minor revisions. *Id.* In 2003, "the permit was modified to reflect changes made to the [US]EPA program." *Id.* USEPA made "significant changes" to the monitoring provisions when it reissued the MSGP in 2008. *Id.* In 2010, CT DEEP incorporated these changes, creating "a hybrid between the original Connecticut general permit (a copy of USEPA's 1992 model permit) format and the 2008 MSGP." *Id.* Connecticut reissued its CT General Permit in 2016, 2018, 2019, and 2021, certifying each time that it was doing so "without modification." *Id.* The 2015 MSGP contained only minor changes from the 2008 version. *See* 80 Fed. Reg. 115 at 34,405 (June 16, 2015). At its inception and through its development, the CT General Permit has sought to reflect USEPA's standards from the MSGP.

EPA and CT DEEP's shared policy is revealed when one compares provisions at the core of CLF's claims. CLF asserts in its Amended Complaint that Defendants failed to implement BMPs that "minimize" "potential unpermitted discharge [from flooding]," Am. Compl. ¶ 84, "the discharge of pollutants from the site," *id.*, and "the potential for leaks and spills," *Id.* ¶ 85. Fundamentally, CLF claims that the requirement to "minimize" under the CT General Permit creates a duty to anticipate climate-related severe weather impacts, just as they asserted the term mandated in the 2015 USEPA MSGP. The definition of "minimize" in the Connecticut Permit is

essentially a verbatim copy of the MSGP's definition. SOF ¶ 5.[15] Similarly, the CT General Permit and MSGP have similar categories of "Control Measures," the provisions that articulate BMPs for permittees. *Id.* ¶ 6. The resemblance between the permits' language and control measures support reading CT DEEP's general permit in light of USEPA's understanding of what it means to "minimize" discharges and risks.

CLF does not state when, why, or how CT DEEP's interpretation deviated so radically from the nearly identical USEPA standards. CT DEEP has never stated that the CT General Permit was being modified to require far-reaching requirements that USEPA has explicitly stated are not contained in the MSGP. Consideration of CLF's Climate Factors may well be reflected in future CT DEEP or USEPA permits, but it is quite evident that they are not now.

C. CLF's Issues Are Inappropriate for a Citizen Suit and Attempt to Impermissibly Regulate Through Litigation.

CLF's CWA claims are based on what CLF wishes the law were, but not what it presently is. As demonstrated above, the plain language of the CT General Permit and extrinsic evidence, show that the current CT General Permit does not require consideration of CLF's Climate Factors. In advocating its theory, CLF is in effect asking this Court to usurp the role of the legislative and executive branches of Connecticut and impose the requirements CLF believes should be in the CT General Permit (but are not). However, it is not the role of the courts to create regulations but, instead, to interpret them. "[T]o read the rule in the way [CLF] suggest[s] would require the Court to exceed its authority in support of [CLF's] animating policy

[15] Connecticut acknowledges that the permit's standards are sourced in federal policy. One need look no further than the second page of CT DEEP's current Guidance Document for Preparing a SWPPP," which states "[m]uch of the information in this document has been taken from [US]EPA documents." SOF ¶ 17.

preference." *Rowe v. Old Dominion Freight Lines, Inc.*, Nos. 21-CV-4021, 21-CV-8040, 2022 WL 2181619, at *6 (S.D.N.Y. June 16, 2022).

To the extent CLF wishes the CT General Permit to contain additional climate change-related requirements, the proper avenue for CLF is not through a citizen suit, but was with the prior notice and comment period in 2021 in which CLF decided not to participate.[16] With the upcoming notice and comment period associated with the reissuance of the CT General Permit in 2024, CLF can then properly raise its argument that the CT General Permit should include the consideration of CLF's Climate Factors. But for CLF to ask this Court to impose those requirements in contravention of the CT General Permit's plain language, the extrinsic evidence of CT DEEP's intent, and the administrative regulatory regime in Connecticut is improper and should be rejected.

CONCLUSION

This Court should grant summary judgment in Defendants' favor and dismiss CLF's Counts I – IX on the ground that as a matter of law the CT General Permit does not require the consideration of CLF's Climate Factors.

Dated: June 13, 2023

Respectfully submitted,

/s/ Bina R. Reddy

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[16] CLF chose not to participate in the notice and comment period for the CT General Permit, even though USEPA had rejected its interpretation of the MSGP to require consideration of its Climate Factors on January 15, 2021, approximately four months prior to CT DEEP's notice and comment period on the CT General Permit. SOF ¶¶ 16, 41.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, a copy of the foregoing Defendants' Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Anthony G. Papetti

Anthony G. Papetti