

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

**DEFENDANTS' LOCAL RULE 56(a)(1) STATEMENT OF UNDISPUTED MATERIAL
FACTS**

Pursuant to Federal Rule of Civil Procedure 56 and Rule 56(a)(1) of the Local Rules for the United States District Court for the District of Connecticut, Defendants¹ submit this statement of undisputed material facts in support of its Motion for Partial Summary Judgment.

**I. CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL
PROTECTION'S GENERAL PERMIT**

1. The Connecticut Department of Energy and Environmental Protection ("CT DEEP") is the agency responsible for implementing the requirements of and administering the Clean Water Act ("CWA") for Connecticut. *National Pollutant Discharge Elimination System Memorandum of Agreement Between Connecticut Department of Environmental Protection and the United States Environmental Protection Agency, Region I* (Sept. 24, 1973), at 3-4 (Ex. 1).

¹ Defendants include Shell Oil Company (now known as Shell USA, Inc.), Equilon Enterprises LLC d/b/a Shell Oil Products US, Shell Petroleum, Inc., Shell Trading (US) Company, and Triton Terminaling LLC.

The United States Environmental Protection Agency (“EPA”) granted Connecticut the power to issue and condition general permits, which is memorialized in a Memorandum of Agreement in 1992. *Amendment to the National Pollutant Discharge Elimination System Memorandum of Agreement Between Connecticut Department of Environmental Protection and the United States Environmental Protection Agency, Region I* (Mar. 11, 1992), at 11-12 (Ex. 1). Connecticut agreed to be bound by annual commitments dictated by EPA. *Id.* at 12.

2. CT DEEP regulates stormwater discharges through its General Permit for the Discharge of Stormwater Associated with Industrial Activity (“CT General Permit”), a general permit issued under the CWA and Connecticut’s implementing statutes and regulations. Conn. Stat. Sec. 22-a-230b; *General Permit for the Discharge of Stormwater Associated with Industrial Activity*, Conn. Dep’t of Energy & Environmental Protection (Oct. 1, 2021), at 3 (Ex. 2).

3. CT DEEP issued its first stormwater permit for industrial activities based on EPA’s draft model permit. *In re General Permit: Discharge of Stormwater Associated with Industrial Activity*, DEP-PERD-GP-014, Conn. Dep’t of Environmental Protection (proposed July 1, 2010), at 2 (Ex. 3); *see also In re General Permit: Discharge of Stormwater Associated with Industrial Activity*, DEP-PERD-GP-014, Conn. Dep’t of Environmental Protection (adopted by Commissioner Aug. 23, 2010) (Ex. 4). Over the years, CT DEEP modified the CT General Permit, and in 2003, the CT General Permit was modified to reflect changes made to the EPA’s stormwater program. Ex. 3, at 2-3. EPA made changes, including “significant changes” to monitoring provisions when it reissued the MSGP in 2008. *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) – Fact Sheet*, EPA (2008), at 11 (Ex. 5). CT DEEP incorporated these changes in 2010 and created “a hybrid between the original Connecticut general permit format[, a copy of EPA’s 1992 model permit,] and the 2008

EPA...MSGP[.]” Ex. 3, at 3. CT DEEP reissued the CT General Permit in 2016, 2018, 2019, and 2021, stating each time that it was doing so without modification. *See, e.g., Notice of Reissuance without Modifications*, Conn. Dep’t of Energy & Environmental Protection (2018), at 1 (Ex. 6).

4. The CT General Permit sets forth prescribed requirements applicable to all facilities subject to it, including a list of thirteen control measures, the development of a Stormwater Pollution Prevention Plan (“SWPPP”), and monitoring and recordkeeping tasks. Ex. 2, at 17-69.

5. Section 5(b) of the CT General Permit, entitled “Control Measures,” states “Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term ‘minimize’ 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.* at 18. The definition of “minimize” in the CT General Permit is essentially a verbatim copy of the MSGP’s definition. *Compare id.* at 18 with *U.S. EPA National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity*, EPA (2021), at 17-18 (Ex. 7).

6. Section 5(b) lists thirteen control measures, including good housekeeping, vehicle or equipment washing, floor drains, roof areas, minimize exposure, sediment and erosion control, management of runoff, preventive maintenance, spill prevention and response procedures, employee training, non-stormwater discharges, and solid de-icing material storage. CT General Permit § 5(b). Many of the control measures in the CT General Permit are similar to the control measures found in the MSGP. *Compare Ex. 2, at 18-22 with Ex. 7, at 18-24.*

7. Each of these Best Management Practices (“BMPs”) provides specific detail on what a permittee must do to comply with the CT General Permit. Ex. 2, at 18-22. None of the BMPs states a requirement to consider sea level rise, increased severity or frequency of storms, or any other climate factor listed in Section IV.A. of CLF’s Amended Complaint. *Id.*

8. One of the BMPs is entitled “Management of Runoff,” which states, “The permittee shall investigate the need for stormwater or treatment practices that shall be used to divert, infiltrate, reuse, or treat stormwater runoff in a manner that minimizes pollutants in stormwater discharges from the site.” *Id.* at 19. It also states, “The permittee shall implement and maintain stormwater management or treatment measures determined to be reasonable and appropriate to minimize the discharge of pollutants from the site.” *Id.* It states further, “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.”). *Id.*

9. Best Management Practices only appears in the CT General Permit in connection with CT General Section 5(b), which pertains to control measures. *Id.*

10. The CT General Permit also requires “Additional Requirements for Certain Sectors.” *Id.* at 39-67. The New Haven Terminal does not fall under any of the sectors for which the CT General Permit imposes additional requirements. *Id.*

11. Sectors that fall under the Additional Requirements for Certain Sectors include asphalt plants, non-metallic mines and quarries and stone cutting, refuse systems, auto salvage yards, scrap recycling facilities, steam electric power generation, transportation and public works facilities, marinas, yacht clubs and boat dealers, ship and boat building and repair, and small-scale composting facilities. *Id.*

12. For small-scale composting facilities, CT DEEP requires the additional control measure that 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.* at 65. The CT General Permit defines “25-year, 24-hour rainfall event” as 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.” *Id.* at 5.

13. Section 5(c) of the CT General Permit requires the permittee to “develop a Stormwater Pollution Prevention Plan (‘Plan’) for each site.” *Id.* at 23-30. It also requires the permittee to “document the location and type of control measures installed and implemented at the site in accordance with ‘Control Measures’ (Section 5(b))” and “include a schedule for implementing such controls [sic] measures if not already implemented.” *Id.* at 26. The SWPPP must “also be certified...by a professional engineer licensed in the State of Connecticut or a Certified Hazardous Materials Manager.” *Id.* The SWPPP does not impose additional control measures, except for “those additional control measures that may be required in ‘Additional Control Measures for Certain Sectors’ (Section 5(f)).” *Id.*

14. Section 5(b)(9)(A)(i)(2), which falls under the Spill Prevention and Response Procedures control measures, states, “For any storage area, tank or container installed prior to the date of authorization of this general permit, an impermeable secondary containment area which will hold at least 100% of the volume of the largest tank or container or 10% of the total volume of all tanks and containers in the area, whichever is larger, without overflow from such secondary containment area.” *Id.* at 20.

15. On October 1 2019, CT DEEP reissued its CT General Permit without any modifications to the prior CT General Permit. *Notice of Reissuance without Modifications*, Conn. Dep’t of Energy & Environmental Protection (2019), at 1 (Ex. 8). The effective period for this CT General Permit was October 1, 2019 to September 30, 2021. *Id.* Prior to issuing this CT General Permit, CT DEEP published a Notice of Tentative Decision to reissue the CT General Permit in six newspapers throughout Connecticut in August 2019. *Id.* CT DEEP did not receive any comments within the 30-day public comment period. *Id.*

16. On October 1, 2021, CT DEEP reissued the current CT General Permit without any modifications to the CT General Permit issued in 2019. *Notice of Reissuance without Modifications*, Conn. Dep’t of Energy & Environmental Protection (2021), at 1 (Ex. 9). The effective period for the current CT General Permit is October 1, 2021 to September 30, 2024. *Id.* Prior to issuing the current CT General Permit, CT DEEP published a Notice of Tentative Decision to reissue the CT General Permit in six newspapers throughout Connecticut in April 2021. *Id.* CT DEEP did not receive any comments within the 30-day public comment period, including any comments from CLF. *Id.*

17. In March 2011, CT DEEP issued Guidance, which was prepared to “assist [permittees] in complying with the requirements of the [CT General Permit].” *Guidance Document for Preparing a Stormwater Pollution Prevention Plan*, Conn. Dep’t of Environmental Protection (Mar. 2011), at 2 (Ex. 10). The Guidance states, “Much of the information in this document has been taken from EPA documents....” *Id.* Under the section Spill Prevention and Response Procedures (Section 5(b)(9)), the document states that the CT General Permit “spells out specific containment requirements for the storage of liquid chemicals

and wastewater, management practices regarding dumpsters and other waste containers, and the protection of loading dock areas.” *Id.* at 18.

18. CT DEEP has been aware and actively regulating the various topics pertaining to climate change since at least January 2005. *See, e.g., Connecticut Climate Change: Connecticut Climate Change Action Plan*, Conn. Dep’t of Environmental Protection et al. (Jan. 2005) (Ex. 11).

II. NEW HAVEN TERMINAL

19. Triton Terminaling LLC (“Triton Terminaling”) owns the onshore petroleum bulk storage terminal (“New Haven Terminal”) located at 481 East Shore Parkway, New Haven, Connecticut 06512. Defs.’ Answer to Am. Compl. ¶ 107 (ECF No. 20).

20. Equilon Enterprises LLC d/b/a Shell Oil Products US (“Equilon”) operates the New Haven Terminal. *Id.* ¶ 29. Equilon Enterprises LLC holds the CT General Permit for the New Haven Terminal’s operations and stormwater discharges under Permit No. GSI002800. *CT DEEP Industrial Stormwater Registration Status*, Conn. Dep’t of Energy & Environmental Protection (May 2023), at 145 (Ex. 12).

21. Pursuant to the CT General Permit, Triton Terminaling and its contractor have prepared and submitted to CT DEEP a Stormwater Pollution Prevention Plan (“SWPPP”). *Stormwater Pollution Prevention Plan, New Haven Terminal*, Triton Terminaling LLC (May 2020) (Ex. 13). The most recent SWPPP was prepared in May 2020. *Id.*

22. CLF served Defendants with its Notice of Intent to File Suit on July 28, 2020. Letter from Christopher M. Killian, Vice President and Director of Strategic Litigation, CLF, to Michael Sullivan et al., Complex Manager, New Haven Terminal (July 28, 2020) (Ex. 14).

23. CLF served Defendants with its Supplemental Notice of Intent to File Suit on February 17, 2021. Letter from Christopher M. Killian, Vice President and Director of Strategic

Litigation, CLF, to Michael Sullivan et al., Complex Manager, New Haven Terminal (Feb. 17, 2020) (Ex. 15).

24. Defendants served CLF with two rounds of interrogatories. In response to Defendants' First Set of Interrogatories specifically requesting the factual basis for CLF's Amended Complaint allegations, CLF repeated the climate change factors found in Section IV.A. of its Amended Complaint. CLF's Responses to Defs.' First Set of Interrogatories (June 9, 2022), at 6-18, 42-49 (Ex. 16).

III. CONNECTICUT FACILITIES' CT GENERAL PERMIT SWPPPS

25. In November 2022, counsel for Defendants retained Ms. Renee Bourdeau, a Principal Water Resources Engineer at Geosyntec Consultants, Inc., for the purpose of "review[ing] all publically [sic] available Stormwater Pollution Prevention Plans in the state of Connecticut for entities that are covered under the" CT General Permit. Bourdeau Dep. 17:7-11; 18:14-21; 44:13-16 (Ex. 17).

26. Defendants' retention of Ms. Bourdeau was to provide fact testimony as to research on publicly available SWPPPs. *Id.* 17:23-18:10. Ms. Bourdeau is not rendering an expert opinion; she only reviewed SWPPPs for the purpose of identifying CLF's Climate Factors. *Id.* at 68:6-69:14; 74:18-75:6.

27. On May 25, 2023, Defendants and CLF deposed Ms. Bourdeau. *Id.* at 1:20.

28. Ms. Bourdeau reviewed all of the files at CT DEEP for facilities covered by the CT General Permit. *Id.* at 22:22-23:3. Ms. Bourdeau also searched online for publicly available SWPPPs. *Id.* at 19:12-19; 37:10-12. In total, Ms. Bourdeau was able to find for review 152 SWPPPs prepared pursuant to the CT General Permit. *Id.* at 19:5-9. She reviewed each SWPPP "to determine if the permittees who prepared the SWPPP[s] took climate change into consideration when preparing those SWPPP documents." *Id.* at 18:22-19:2. By "climate change,"

Ms. Bourdeau refers to “sea level rise, storm surge[,] and extreme precipitation event.” *Id.* at 19:2-4.

29. None of the SWPPPs Ms. Bourdeau reviewed in the files at CT DEEP or that she received electronically contained any language pertaining to climate change, storm surge, severe storm risk, rising sea levels, melting sea ice, climate effects, hurricanes, or increased precipitation or winds due to climate change. *Id.* at 30:10-31:23; 34:21-36:8; 39:14-40:18.

30. Defendants produced to CLF all of the SWPPPs Ms. Bourdeau reviewed, with some of the SWPPPs produced in full and others produced in relevant part with photographs Ms. Bourdeau took at CT DEEP. *Id.* 33:19-34:2. Defendants also produced the spreadsheet Ms. Bourdeau used to index her review. *Id.* 36:9-13.

31. Ms. Bourdeau reviewed all of the CT DEEP Notices of Violation that were in the files she reviewed at CT DEEP. *Id.* at 40:24-41:5; 43:11-20. None of the Notices of Violation that Ms. Bourdeau reviewed reflect violations for not including in the SWPPP any discussion of climate change, storm surge, severe storm risks, rising sea levels, melting sea ice, climate effects, hurricanes, or increased precipitation or winds due to climate change. *Id.* at 41:16-43:14.

32. A CT DEEP environmental analyst, Karen Abbott, informed Ms. Bourdeau while she was reviewing SWPPPs at CT DEEP that over the approximately 15 years that she has worked for CT DEEP, she was not aware of any SWPPP containing language or of permittees considering the impacts of climate change in the SWPPPs. *Id.* at 23:24-24:7. Ms. Abbott also indicated that she had never prepared a Notice of Violation for any permittees for failure to contain language with respect to climate change in their SWPPPs. *Id.* at 24:8-13.

IV. THIRD-PARTY ENVIRONMENTAL CONSULTANTS

33. Triton Environmental, Inc. (“Triton”) and Witt O’Brien, LLC (“Witt O’Brien”) are environmental consultants who offer engineering services by professional engineers who

certify SWPPPs. Triton Dep. 135:13-23; 137:8-12 (Ex. 18); Witt O'Brien Dep. 33:1-4 (Ex. 19). CLF noticed and took the depositions of Triton and Witt O'Brien on February 16, 2023, and March 16, 2023, respectively. Ex. 18, at 1:18; Ex. 19, at 1:19.

34. Triton has approximately 25 years of experience in drafting and reviewing SWPPPs in Connecticut and evaluating whether SWPPPs meet the legal requirements of the CT General Permit. Ex. 18, at 135:13-23; 137:8-12. Triton has worked on approximately 100 SWPPPs. *Id.* at 135:17-23. Of those approximately 100 SWPPPs, approximately half of them have been for facilities located in Connecticut. *Id.* at 136:8-13. Triton has been routinely hired to prepare such documents, including for the New Haven Terminal. *Id.* at 22:18-22.

35. In certifying a SWPPP, Triton must ensure that the SWPPP follows the applicable rules and regulations that the CT General Permit prescribes. *Id.* at 136:5-7; 137:3-7. During its work preparing SWPPPs, Triton has had ongoing discussions with CT DEEP to confirm what information must be taken into account when following the applicable. *Id.* at 67:16-68:2; 98:15-24; 99:9-13; & 139:4-13.

36. Triton testified that the CT General Permit does not require consideration of climate change, storm surge, storm risk, sea level rise, melting sea ice, or climate effects. *Id.* at 137:13-138:6. Triton also testified that in its communications with CT DEEP, the agency never indicated that climate change, storm surge, storm risk, sea level rise, melting sea ice, or climate effects should be considered. *Id.* at 139:9-140:3. None of the Connecticut SWPPPs Triton has prepared have had any discussion of climate change, storm surge, storm risk, sea level rise, melting ice, or climate effects. *Id.* at 136:8-137:2. Furthermore, Triton testified that the CT General Permit does not require consideration of a 100-year or 500-year storm in evaluating the adequacy of spill containment. *Id.* at 141:2-12.

37. Witt O'Brien has approximately 25 years of experience in drafting and reviewing CWA documents. Ex. 19, at 33:1-4. Witt O'Brien has prepared approximately 2,000 Spill Prevention, Control, and Countermeasure ("SPCC") Plans. *Id.* at 47:12-17. Witt O'Brien has been routinely hired to prepare such documents (*e.g.*, Facility Response Plan), including for the New Haven Terminal. *Id.* at 76:23-77:2.

38. Witt O'Brien testified that more frequent or severe storms or rising sea levels are not required to be considered in preparation for its CWA documents. *Id.* at 185:24-186:17; 200:9-15. It also testified that 100-year or 500-year storm events are not required to be considered for the adequacy of spill containment. *Id.* at 201:8-22.

V. EPA'S PROPOSED MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES FROM INDUSTRIAL ACTIVITIES

39. On March 2 2020, pursuant to the CWA, the United States Environmental Protection Agency ("EPA") proposed its National Pollution Discharge Elimination System (NPDES) Proposed Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity. National Pollutant Discharge Elimination System (NPDES) 2020 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, 85 Fed. Reg. 12,288 (Mar 2, 2020). Among its proposals, EPA proposed adding the requirement to the control measures section of the MSGP that permittees "implement[] enhanced measures for facilities located in areas that could be impacted by stormwater discharges from major storm events that cause extreme flooding conditions." *Id.* at 12,292. The final 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.” Ex 7, at 19.

40. EPA received comments from many entities, including CLF. Letter from C. Killian, CLF, to E. Halter, EPA, (June 1, 2020) (Ex. 20). CLF argued that the proposed MSGP violated the CWA’s anti-backsliding provision “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.* at 5. CLF specifically cited the MSGP’s provisions to “minimize pollutant discharges” using “good engineering practices” to the extent “economically practicable and achievable in light of best industry practice” to support its argument that the MSGP requires consideration of its Climate Factors. *Id.* at 4.

41. On January 15, 2021, EPA responded to the comments it received, including CLF’s. EPA disagreed with CLF’s comments, stating that its proposed provisions were “a new effluent limitation or condition” and “the 2015 MSGP did not include a similar provision.” *Responses to Public Comments, EPA NPDES 2021 Multi-Sector General Permit (MSGP)*, Docket No. EPA-HQ-OW-2019-0372, EPA, at 398 (Ex. 21). EPA “disagree[d]” that requiring facilities to “consider implementing mitigation measures to minimize impacts from major storm events constitutes backsliding.” *Id.* EPA stated that it “does not agree [with CLF] that permanent, structural control measures are necessary to mitigate risks of pollution from major storm events.” *Id.*

Dated: June 13, 2023

Respectfully submitted,

/s/ Bina R. Reddy

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, a copy of the foregoing Defendants' Local Rule 56(a)(1) Statement of Undisputed Material Facts 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

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