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CLF Connecticut

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May 6, 2024

The Honorable Thomas O. Farrish
 United States District Court
 450 Main Street
 Hartford, CT 06103

RE: *Conservation Law Foundation v. Shell Oil Co., et al.*, No. 3:21-cv-933 (D. Conn.)

Dear Judge Farrish,

Plaintiff Conservation Law Foundation (“CLF”) submits this letter brief in accordance with the Court’s Conference Order, ECF 392. The Parties have been unable to come to agreement on whether Defendants must produce the eighteen documents listed by name in CLF’s Motion to Compel (“MTC”), ECF 326-1 at 40–42, to comply with the Court’s Order on that motion, ECF 372. CLF first raised the issues presented in this letter in February 2023. After prevailing in part on its Renewed Motion to Compel, CLF raised the issues again in September 2023. And once CLF prevailed on its MTC on its Rev. RFPs, CLF again raised this issue with Defendants in April 2024. Until 10:32 p.m. on Friday, May 3, 2024, Defendants had refused to produce the documents on various grounds. On May 3rd, Defendants for the first time proposed a negotiated resolution to the issues. CLF responded to clarify the proposal and note the possibilities for agreement and counterproposal the following business day, but the Parties have yet to be able to reach an agreement. As such, CLF files this letter outlining why Defendants’ refusal to produce the documents is a violation of this Court’s Order (ECF 372), Rule 26(g) of the Federal Rules of Civil Procedure, and predicated on artificially restrictive and hypertechnical interpretations of CLF’s requests and unsupported statements of counsel that are contradicted by the deposition and document discovery in this case. CLF will continue to explore a potential agreement with Defendants and will withdraw this letter motion should an agreement be reached.

I. CLF Requested These Documents 15 Months Ago, and Defendants Have Changed the Nature of Their Objections to Avoid Production Each Time CLF Has Prevailed Before the Court on Defendants’ Prior Objections

CLF asked for these eighteen policy documents by name in February 2023. *See* Email (Feb. 2, 2023), ECF 285-1 at 12–13. Defendants refused to produce the documents based on the relevance and burden objections then pending before the Court in CLF’s Renewed Motion to Compel (ECF 149). *Id.* at 11. In CLF’s Renewed Motion to Compel, CLF asserted that the policy documents at issue in this letter were responsive to, at minimum, RFPs 8–11, 13, 15, 17–19, 21, and 24–25. *See* Renewed MTC, ECF 149 at 20–22. The Court overruled Defendants’ relevance objections in full but sustained some of Defendants’ burden objections, allowing CLF to reissue those requests. *See* ECF 277. Consequently, CLF again asked Defendants to produce the eighteen documents at issue. *See* Jordan Email (Sept. 2, 2023), ECF 285-1 at 10; Jordan Letter (Oct. 5, 2023), ECF 309-25 at 4–6. Defendants then changed their objections, asserting instead that the

documents were not responsive to the requests on which CLF obtained relief. *See* Prather Letter (Oct. 11, 2023), ECF 309-25 at 5. CLF then revised its remaining RFPs pursuant to ECF 277 in another attempt to obtain the documents at issue. For example, CLF included the Shell Manual of Authorities by name in Rev. RFP 6. *See* Table of RFP Revisions, ECF 309-5.

Once CLF prevailed on its MTC on its Rev. RFPs, in which the Court overruled all of Defendants' relevance and burden objections to Rev. RFPs 6, 7, 9, 10, 12, 17(b)–(c), 18, 20, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 53, 54, 63, and 64, *see* Order, ECF 372 at 26, CLF *again* asked Defendants to produce the documents at issue. *See* Joint Status Report, ECF 387 at 7. Now, after CLF has prevailed on nearly every RFP across two motions to compel, Defendants have once again shifted their position to avoid producing these documents, arguing that many of the documents (or portions thereof) are not *responsive* to any of CLF's requests. *Id.* at 7–8. The Court should not entertain Defendants' latest tactic to avoid producing the requested documents.

Defendants failed to argue these documents were non-responsive to the Rev. RFPs in their Opposition to the MTC; thus, that argument was waived. CLF stated in its MTC that these documents are relevant and responsive to Rev. RFPs 6, 10, 11, 17(b)–(c), 24, 25, 46 and, depending on their content, Rev. RFPs 27, 28, 48, and 64. *See* ECF 326-1 at 40–42. Defendants' Opposition only argued that “CLF has never established the relevance of these Shell plc investment and financial related documents” and “the documents regarding Motiva's formation and dissolution as a joint venture are not relevant.” ECF 325-1 at 35. Because Defendants' Opposition did not argue that these documents were not responsive to the Rev. RFPs, the Court's consideration and resolution of Defendants' relevance objections is determinative of whether Defendants are required to produce the requested documents. Defendants' new argument, that these documents were never even responsive to the Rev. RFPs, is an attempt to re-litigate the relevance of these documents by narrowly construing the RFP language, and the Court should reject this tactic.

Furthermore, Defendants cannot currently support their position that the requested documents are non-responsive. In the proposal Defendants sent CLF on May 3, Defendants stated that they will produce, in part or in whole, several documents *if* Defendants determine them to be responsive.¹ *See* Papetti Email (May 3, 2024), Ex. A at 2–5. Defendants' eleventh-hour proposal once again demonstrates that Defendants have not complied with Federal Rule of Civil Procedure 26(g), because Defendants are withholding documents without knowing whether they are responsive *fifteen months* after CLF requested them and Defendants first refused to produce them. Defendants' failure to have previously made and raised this determination is inexcusable, and the Court should order production of the requested documents in conformance with its Order (ECF 372) and as a sanction under Rule 26(g). *See* ECF 372 at 27 (reserving decision on CLF's request for sanctions under Fed. R. Civ. P. 26(g)).

¹ This statement was made in reference to portions of Shell's HSSE & SP Control Framework, Terminal Operations Manual, and Design Engineering Manuals (DEM)-1, as well as Metocean DEPs, corporate guidance for the Business Assurance Letters, and three Investment Management Guide linked documents (Opportunity Realization Standards, Opportunity Delivery Manual, and Pre-Final Investment Decision Guidelines). *See* Papetti Email (May 3, 2024), Ex. A at 2–5.

II. The Documents Are Responsive to Rev. RFPs 6, 10, 17(b)–(c), 24, 25, 27, 28, 46, and 48.

In Defendants’ May 3rd email, Defendants stated that the following documents may not be responsive to CLF’s Rev. RFPs:

Shell’s HSSE & SP Control Framework; Complete Terminal Operations Manual; Design Engineering Manuals (DEM)-1; Metocean DEPs from 2011 to present; corporate guidance for the Business Assurance Letters; and Investment Management Guide linked documents: Opportunity Realization Standards, Opportunity Delivery Manual, and Pre-Final Investment Decision Guidelines.

Papetti Email (May 3, 2024), Ex. A at 2. Defendants listed the first three documents as both “have already produced” and “will produce if responsive.” *Id.* Defendants have only produced portions of these three documents thus far. *Id.* To the extent that Defendants are refusing to produce chapters, sections, or portions of the eighteen documents at issue in this letter as “non-responsive,” such an approach is impermissible and has already been rejected by this Court: “redactions on grounds of non-responsiveness or irrelevance are generally impermissible, especially where . . . a confidentiality stipulation and order . . . is in place.” ECF 277 at 11 (quoting *Durling v. Papa John’s Int’l, Inc.*, No. 16-cv-3592 (CS) (JCM), 2018 WL 557915, at *9 (S.D.N.Y. Jan. 24, 2018)).

Defendants further stated that the following documents are not responsive to CLF RFPs:

Joint venture agreements regarding the Terminal between SOPC Holdings East LLC and Saudi Refining, Inc.; Agreement governing SOPC Holdings East LLC’s “separation” of interest in Defendant Motiva; Business Assurance Letters for the Terminal and other Shell group terminals; Learning from Incidents Guidance; and Investment Management Guide² linked documents: Manual of Authorities Tool, Investment Proposal Checklist, Routing Matrix, Shell Joint Venture Website, and Downstream Joint Venture Website.

Papetti Email (May 3, 2024), Ex. A at 2. Defendants have claimed these documents are not responsive to the identified Rev. RFPs because they either are not a policy and/or do not address activities at the New Haven Terminal. *See id.* at 3–5. As an initial matter, CLF disagrees with Defendants’ characterization that these are not policies, as they are all documents that authorize or constrain actions Defendants take, or do not take, with regard to the Terminal. Whether a document says “policy” in its title does not determine whether the document is treated as a policy, and Defendants treat many such documents as policies. For example, Defendants responses to Interrogatories 9 and 14 indicate the “HSSE & SP Control Framework” is a central Shell policy, notwithstanding the fact it its title does not use the word policy. *See* Defs.’ Resps. CLF Interrogs., ECF 149-5 at 18 (“The Terminal’s process for risk assessment begins with the [HSSE Control

² Should the Court require specific descriptions of the Business Assurance Letters and documents referenced in the Investment Management Guide, CLF believes the Court should direct the Parties to re-file the Guide under seal. The Guide was originally filed under seal at ECF 231 as Exhibit D in of support CLF’s Opposition to Defendant’s Cross-Motion for Protective Order and for Sanctions, ECF 227. However, the Guide was withdrawn from the docket by Joint Motion, ECF 246, in an effort by the Parties to limit motion practice over sealed documents.

Framework]. This is an overarching, general framework that provides a high-level set of goals and objectives for all companies within the Shell group to identify risks.”). As discussed below, Defendants’ assertions that the documents at issue do not fit within their (unstated) definition of “policy,” despite being documents that inform and constrain Defendants’ activities, are artificially restrictive interpretations of CLF’s requests and the Court should not entertain them.

Defendants’ current positions on responsiveness are not supported by the record before the Court, in which CLF has repeatedly briefed why these documents are responsive and relevant to its claims and applicable to the operation and control of the Terminal based on the testimony of Defendants’ employees and Defendants’ own productions. CLF identified the documents at issue from the limited production Defendants made based on their original and most narrow relevance objections. That these documents were cited and discussed in Defendants’ first productions itself strongly supports the basic applicability of these documents as policies applied at the Terminal.

Shell’s HSSE & SP Control Framework – Defendants have already produced portions of this document but have withheld full production of all sections by claiming certain sections are not responsive to any Rev. RFP. CLF and Defendants have repeatedly discussed this Framework and are in agreement that it controls many basic operations at the Terminal. *See* ECF 326-1 at 18 & n.3, 41; ECF 325-1 at 14. As CLF noted in the MTC, however, each section of the Framework cross-references definitions and standards in other sections and therefore Defendants’ choice to withhold sections based on page-by-page determinations of responsiveness operates as a form of relevance redaction based on Defendants’ unilateral decisions on where CLF needs or does not need added context. *See* ECF 326-1 at 41 (describing missing cross-references in the Managing Risk section). The Court has already overruled such a practice as impermissible. *See* Order, ECF 277 at 11.

Complete Terminal Operations Manual – Defendants have already produced portions of this document but have withheld full production of all sections by claiming certain sections are not responsive to any Rev. RFP. CLF and Defendants have repeatedly discussed this Manual and are in agreement that it controls many basic operations at the Terminal. *See* ECF 149 at 28–29; Defs.’ Resps. CLF Interrogs., ECF 149-05 at 20 (“terminal operations are governed by the Terminal Operations Manual.”). Defendants’ current position appears to be that they will produce the complete manual if they determine it is responsive. *See* Papetti Email (May 3, 2024), Ex. A at 2. But Defendants also recently stated they would produce the entire manual; thus, CLF is unclear what additional responsiveness review Defendants are undertaking. *See* Papetti Email (Apr. 24, 2024), Ex. A at 7.

Design Engineering Manuals (DEM)-1 – Defendants have already produced portions of this document but have withheld full production of all sections by claiming certain sections are not responsive to any Rev. RFP. CLF has repeatedly discussed this document and the ways it incorporates by reference the DEPs described below and is applicable to the Terminal. *See, e.g.,* CLF Mot. for Deps., ECF 181 at 22, 32–33.

Metoccean DEPs from 2011 to present – Defendants have already produced a draft version of this document (which they claim was inadvertent), *see* ECF 149 at 21; ECFs 153–154, but have withheld full production of all versions, including any final versions, by claiming they may not be

responsive to any Rev. RFP. CLF has repeatedly discussed this document and the ways it establishes standards that are applicable to the Terminal through the DEM-1. *See* CLF Mot. for Deps., ECF 181 at 35–37. CLF’s Renewed Motion to Compel references testimony from Mr. Yeates’ deposition to explain the relevance of Defendants’ Design and Engineering Practice specifications to its claims. *See* ECF 149 at 21. While Defendants have denied their role in setting policies to manage risks at the Terminal, Yeates testified that Shell group uses “literally thousands” of DEPs, Yeates Tr. at 142:13–143:7, ECF 152 at 36, which “set the standard for good design and engineering practice to be applied by Shell companies . . . to help achieve maximum technical and economic benefit from standardization,” Yeates Deposition Exhibit 1015, ECF 153 at 2.

Corporate guidance for the Business Assurance Letters – Defendants have indicated that they are reviewing the responsiveness of this document to RFPs 6, 10, and 17(b)–(c), and may produce it if it is responsive. Papetti Email (May 3, 2024), Ex. A at 2. CLF understands Business Assurance Letters to be an element of the asset management and risk assessment systems. *See* CLF Opp. to Prot. Order, ECF 246-1 at 13; Yeates Tr., 126:12–13, 134:10–11, 245:1–20; ECF 152 at 32, 34, 62. In this context, CLF understands these letters are provided to higher level entities within Shell to demonstrate that Shell’s overarching control framework requirements, including those related to environmental concerns, are being met. *See* Ledbetter Tr., 129:1–132:3, ECF 181-7 at 66–69. CLF believes additional information could be provided if needed. *See supra*, n. 2.

Investment Management Guide linked document: Opportunity Realization Standards – Defendants have indicated that they are reviewing the responsiveness of this document to RFPs 6, 17(b), 24, and 25, and may produce it if it is responsive. Papetti Email (May 3, 2024), Ex. A at 2. CLF has established the connections between the Guide and its linked documents with activities at the Terminal in prior briefing. *See* CLF Opp. to Prot. Order, ECF 246-1 at 15–17. CLF understands that the Opportunity Realization Standards are a set of policies related to investment decisions focused on more costly projects. *See* Reddy Aff., ECF 246-2 at 3. CLF believes additional information could be provided if needed as described in footnote 2.

Investment Management Guide linked document: Opportunity Delivery Manual – Defendants have indicated that they are reviewing the responsiveness of this document to RFPs 6, 17(b), 24, and 25, and may produce it if it is responsive. Papetti Email (May 3, 2024). CLF has established the connections between the Guide and its linked documents with activities at the Terminal in prior briefing. *See* CLF Opp. to Prot. Order, ECF 246-1 at 15–17. CLF believes additional information could be provided if needed. *See supra*, n. 2.

Investment Management Guide linked document: Pre-Final Investment Decision Guidelines – Defendants have indicated that they are reviewing the responsiveness of this document to RFPs 6 and 25 and may produce it if it is responsive. Papetti Email (May 3, 2024), Ex. A at 2. CLF has established the connections between the Guide and its linked documents with activities at the Terminal in prior briefing. *See* CLF Opp. to Prot. Order, ECF 246-1 at 15–17. CLF believes additional information could be provided if needed. *See supra*, n. 2.

Joint venture agreements regarding the Terminal between SOPC Holdings East LLC and Saudi Refining, Inc. – The Motiva “Joint Venture Agreement” likely dictates how Shell and Saudi Refining, Inc. *divided* responsibility for operations and revenues at Motiva properties including

the Terminal. *See* CLF Mot. for Deps., ECF 181 at 28. Defendants have stated that “this is an agreement, not a policy.” Papetti Email (May 3, 2024), Ex. A at 3. CLF does not believe, however, that the document’s title, “agreement,” makes it non-responsive to Rev. RFPs seeking policies. The Investment Management Guide states that Joint Venture Agreements control the participation of each investor, and “[f]or JV’s in which we are the operator, we have a majority share or we have defined rights in the decision, the [Opportunity Realization Standards] or the [Investment Management Guide] guidelines should be used based on the level of the investment.” Reddy Aff., ECF 246-2 at 3. In addition, CLF noted in the MTC that Shell plc’s 2020 Annual Report states that Shell’s mandatory policies apply to joint ventures. ECF 326-1 at 31. Defendants’ claim that an agreement is not a policy ignores that Defendants’ own documents clearly specify that various Shell group policies may or must be applied to joint ventures based on certain parameters and as specified in the joint venture agreement.

Agreement governing SOPC Holdings East LLC’s “separation” of interest in Defendant Motiva – Similar to the Joint Venture Agreement, the separation agreement describes and re-allocates responsibility for operations and ownership at Motiva properties such as the Terminal in light of the separation of the Motiva joint venture. *See* CLF Mot. for Deps., ECF 181 at 28. Defendants have stated that “this is an agreement, not a policy.” Papetti Email (May 3, 2024), Ex. A at 3. For the same reasons as the Joint Venture Agreement, the separation agreement is a policy responsive to Rev. RFP 6.

Business Assurance Letters for the Terminal and other Shell group terminals – Defendants have stated that the Business Assurance Letters for the Terminal are not responsive because “Business Assurance Letters are not policies.” Papetti Email (May 3, 2024), Ex. A at 4. CLF understands that Business Assurance Letters to be involved in the assessment of policy application and audits regarding environmental concerns, as described above, that depending on their content may be policies requested by Rev. RFP 6 and 48 or actions or plans requested by Rev. RFPs 10 and 17(c). CLF believes additional information could be provided if needed. *See supra*, n. 2.

Learning from Incidents Guidance – CLF has referenced the connections of the Learning from Incidents guidance in this case to clarify reporting and management controls within Defendants’ subsidiary corporations and how incidents at facilities are evaluated and applied to other facilities. *See* CLF Mot. for Deps., ECF 181 at 27–28. Defendants agree that the Learning from Incidents information relates to their operation and control over the Terminal. *See* Prather Decl., ECF 177-1 at 5 (describing documents relevant to Terminal management to include communications “regarding storms and major weather events at other facilities and learnings from prior incidents.”). And yet, while Defendants agree there *exist* learning from incidents documents relevant to the Terminal, they now refuse to produce the guidance describing how to evaluate and apply those learnings on the grounds that the “guidance does not concern Defendants’ authority over activities at New Haven Terminal.” Papetti Email (May 3, 2024), Ex. A at 4.

Investment Management Guide linked document: Manual of Authorities Tool – The Manual of Authorities tool is a document referenced in the Investment Management Guide and Defendants claim it “is not a policy.” Papetti Email (May 3, 2024), Ex. A at 5. The Manual of Authorities is explicitly referenced in Rev. RFP 6, on which CLF obtained relief. Defendants may

not refuse this Court's order to produce it. Furthermore, CLF has described the connection of the Manual of Authorities to the Terminal in prior briefing. *See* CLF Opp. to Prot. Order, ECF 246-1 at 15–17; CLF Mot. for Ext. Time, ECF 299 at 9–10.

Investment Management Guide linked document: Investment Proposal Checklist – The “Investment Proposal Checklist” is a document referenced in the Investment Management Guide and Defendants claim it is a “checklist not a policy.” Papetti Email (May 3, 2024), Ex. A at 4. CLF has established the connections between the Guide and its linked documents with activities at the Terminal in prior briefing. CLF Opp. to Prot. Order, ECF 246-1 at 15–17. CLF understands this checklist to involve requirements for investment proposals and the designation as a checklist does not render it nonresponsive to Rev. RFPs 6, 24, or 25. CLF believes additional information could be provided if needed. *See supra*, n. 2.

Investment Management Guide linked document: Routing Matrix – The Routing Matrix is a document referenced in the Investment Management Guide and Defendants claim it “is not a policy.” Papetti Email (May 3, 2024), Ex. A at 5. CLF has established the connections between the Guide and its linked documents with activities at the Terminal in prior briefing. CLF Opp. to Prot. Order, ECF 246-1 at 15–17. CLF understands the Routing Matrix to be involved in routing proposals and authorization regarding investments and the designation as a matrix does not render it nonresponsive to Rev. RFP 6. CLF believes additional information could be provided if needed. *See supra*, n. 2.

Investment Management Guide linked document: Shell Joint Venture Website and Downstream Joint Venture Website – Shell’s internal Joint Venture websites include guidance on how to operate and apply policies to Joint Ventures, but Defendants claim that a “website is not a policy.” Papetti Email (May 3, 2024), Ex. A at 5. The Investment Management Guide states that the Joint Venture Agreements control the participation of each investor, and “[f]or JV’s in which we are the operator, we have a majority share or we have defined rights in the decision, the [Opportunity Realization Standards] or the [Investment Management Guide] guidelines should be used based on the level of the investment.” Reddy Aff., ECF 246-2 at 3. This same section of the guide specifies that “[m]ore information on the governance and management of joint ventures can be found at . . . : Shell JV website and Downstream JV website.” *Id.* Defendants’ claim that there is no policy information on these internal websites ignores the fact that Defendants’ own documents clearly direct their employees to go to these websites when determining government and management issues at joint ventures.

To the extent the Court considers Defendants’ bare assertions that the requested documents are not responsive, such assertions should be rejected in favor of the ample, concrete examples cited above that CLF has provided over the past year demonstrating that these documents are relevant and responsive and applicable at the Terminal. Alternatively, this Court could request additional information or review the contested documents *in camera* to determine whether they should be produced in response to the requests. *See supra*, n. 2.

Sincerely,

s/ James Y. Meinert

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