UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Conservation Law Foundation, Inc., Plaintiff, v. Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, and Motiva Enterprises LLC, Defendants.	C.A. No. 1:17-cv-00396-WES-LDA

MEMORANDUM OF LAW IN SUPPORT OF CONSERVATION LAW FOUNDATION'S OBJECTION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES & REGULATIONS

FEDERAL REGISTER

OTHER AUTHORITIES

Plaintiff Conservation Law Foundation ("CLF") respectfully requests that this Court deny Shell's[1] Motion to Dismiss in its entirety for the reasons that follow.

INTRODUCTION

Shell asks the Court to dismiss a substantial part of CLF's lawsuit, twisting itself into knots attempting to explain why it is not subject to liability under the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") as CLF claims it is.[2] Noticeably absent from Shell's argument though, is any contention that it has actually *done* anything to comply with these laws. RCRA and the CWA exist to protect people and the environment from entities, like Shell, that engage in activities that, if left unchecked, pose serious risks. As CLF alleges in its Amended Complaint, impacts from precipitation, flooding, storm surge, and sea level rise exacerbate those risks, and the protective mandates of the CWA and RCRA cannot be met unless these impacts are taken into account.

It is remarkable that Shell, a company whose facilities in New Jersey and Texas were hit hard by Superstorm Sandy and Hurricane Harvey, with disastrous consequences, would use terms like "highly speculative, remote, or hypothetical" to downplay the risks to its Providence Terminal ("Terminal"). A spill here would be ecologically and economically devastating to Providence and the larger Narragansett Bay region, but rather than take action to prevent that from happening, Shell asks the Court to adopt an overly narrow interpretation of its legal obligations and dismiss

[1] As used herein, "Defendants" or "Shell" refers to Shell Oil Products US, Shell Oil Company, Shell Petroleum Inc., Shell Trading (US) Company, and Motiva Enterprises LLC, collectively.

[2] Defendants Shell Oil Products US, Shell Oil Company, Shell Petroleum Inc., and Shell Trading (US) Company move to dismiss Counts 1–7, 9, 10 and 21 of the Amended Complaint. Motiva Enterprises LLC moves to dismiss all claims brought against it. Shell's Motion does not move to dismiss Counts 8 and 11–20 of the Amended Complaint.

CLF's claims at this early stage of litigation. Such a result would be contrary to the public interest, as well as applicable law.

As alleged in CLF's Amended Complaint, the Terminal "generates, stores, handles, and disposes of . . . toxic and hazardous chemicals, metals, and compounds," including benzene and polycyclic aromatic hydrocarbons ("PAHs"), many of which are potent carcinogens. Doc. 11 at ¶ 51. The Terminal is situated on backfill—from 1939 to 2003, the area containing the East Side Tank Farm expanded by as much as 368.3 feet into the Providence River—making it especially vulnerable to flooding. *Id*. ¶¶ 180–81. Indeed, according to the Federal Emergency Management Agency ("FEMA"), almost the entire Terminal is located in the flood hazard zone. *Id.* ¶ 175. Shell lists "preventing spills and leaks of hazardous materials" among its environmental standards, *id.* ¶ 260, and claims to be "taking steps at our facilities around the world to ensure that they are resilient to climate change," *id.* ¶ 261. Despite all of this, Shell has chosen to ignore the substantial and imminent risks to the Terminal, in violation of the CWA and RCRA.

This Court has the authority to bring Shell into compliance with the law and ensure that local communities, the Providence River, and Narragansett Bay are protected from the threat posed by the Terminal. The U.S. Environmental Protection Agency's ("EPA") *Framework for Protecting Public and Private Investment in Clean Water Act Enforcement Remedies* provides useful guidance on the obligation to consider climate-related risks in the operation and management of a facility under the CWA, stating that "[i]ncreased frequency and severity of weather events are affecting the ability of communities and regulated entities to adequately protect water resources and maintain compliance with the CWA," and as a result, "EPA will consider relevant climate risks in appropriate CWA enforcement matters." EPA, *Framework for Protecting Pub. & Priv. Inv. in CWA Enf't Remedies*, at 1–2, https://www.epa.gov/sites/production/files/2016-

12/documents/frameworkforprotectingpublicandprivateinvestment.pdf (hereinafter EPA *Framework*[3]

The EPA *Framework* further provides that "[t]he obligation to maintain long-term compliance with the CWA, as well as common sense and sound engineering practices, necessitate that climate impacts be considered in CWA enforcement actions." *Id.* at 3. Accordingly,

> [i]n fashioning a remedy in an administrative or judicial enforcement action or seeking relief from a court under Section 309(b), it is both reasonable and appropriate for the Agency and the courts to take into account and address the impact of climate change on water quality and compliance. Appropriate relief in such cases may include requirements to ensure that a permittee constructs, operates, and maintains its facility in compliance with the CWA and its permit, in light of conditions as they exist now and that are likely to exist in the future as a result of climate change.

Id. at 5. In some circumstances, "EPA will require as part of the remedy that regulated entities implement resilience and adaptation measures based on the results of . . . vulnerability assessments and the expected useful life of the infrastructure in question, as needed to ensure long-term compliance with the CWA." *Id.* at 6. EPA also acknowledges that unique circumstances are present at each individual facility: "it is important for each regulated entity to assess its own vulnerability and consider a range of options that address its particular obligations and goals as well as resource challenges." *Id.* at 9.

EPA cites "broad authority under the CWA to assess and address climate risks to the Nation's water quality and the resilience of water quality infrastructure." *Id.* at 5. Because Shell has failed to meet these particular obligations, it is appropriate for this Court to enforce the CWA and its regulations by "tak[ing] into account and address[ing] the impact of climate change on water quality and compliance." *Id.*

[3] EPA specifically states that "[t]he framework applies to all sections of the Clean Water Act." *Id.* at 1 n.1.

As described herein, Shell's Motion to Dismiss should be denied.

LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "In ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) . . . the court must construe the complaint in the light most favorable to the plaintiff, taking all well-pleaded factual allegations as true and giving the plaintiff the benefit of all reasonable inferences." *Rederford v. U.S. Airways, Inc.*, 586 F. Supp. 2d 47, 50 (D.R.I. 2008) (citing *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 32-33 (1st Cir. 2007)); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–58 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Ocasio–Hernandez v. Fortuno–Burset*, 640 F.3d 1, 10–11 (1st Cir. 2011).

In considering a motion to dismiss for lack of standing under Rule 12(b)(1), the Court "accept[s] as true all well-pleaded factual averments in the plaintiff's complaint and indulge[s] all reasonable inferences therefrom in his favor." *Katz v. Pershing, LLC*, 672 F. 3d 64, 70 (1st Cir. 2012) (quotations omitted). The Court may also consider material outside the pleadings, such as affidavits, to aid in its determination. *See Gonzalez v. United States*, 284 F.3d 281, 287–88 (1st Cir. 2002). "[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact . . . in the complaint or supporting affidavits." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987) (quotations omitted).

ARGUMENT

I. CLF has Standing to Bring Its Claims.

Shell incorrectly asserts that CLF lacks Article III standing to bring its claims; specifically, that CLF's alleged injuries are not imminent and are not fairly traceable to Shell.[4] To establish Article III standing, a plaintiff must show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).[5] "Where . . . a case is in the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).[6]

The Amended Complaint satisfies the pleading requirements necessary to defeat Shell's Motion to Dismiss. However, CLF also hereby submits the declarations of five members

[4] Shell has not argued that CLF's alleged injuries are not concrete and particularized, or redressable.

[5] An organization has standing to sue on behalf of its members when: (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit. *Laidlaw*, 528 U.S. at 181. Shell does not challenge the second or third prong of the test. Thus, the only issue to be decided is whether any member of CLF would have standing to bring the claims asserted in the Amended Complaint. In any case, CLF is dedicated to protecting New England's environment and "has long worked to protect the health of New England's waterways, including addressing the significant water quality impacts of industrial and stormwater pollution." Doc. 11 at ¶ 9.

[6] The standard for a motion to dismiss is different than the heightened standard applied at the summary judgment stage. *See, e.g., Clapper v. Amnesty Intern'l USA*, 568 U.S. 398, 412 (2013) ("[A]t the summary judgment stage, such a party '*can no longer rest on . . .* "*mere allegations*," but must "set forth" by affidavit or other evidence "specific facts."'") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)) (emphasis added). Here, although CLF satisfies even this heightened standard, it is not required to do so in order to defeat a motion to dismiss.

describing their personal use of the Providence River in proximity to the Terminal, Providence Harbor, and Narragansett Bay and how they are injured by Shell's unlawful discharges and failure to take necessary action to address and adapt to climate-related impacts. *See* Declarations of Professor Timmons Roberts, Senator Joshua Miller, Captain David Monti, David Riley, and Howard Kilguss, attached hereto as Exhibits A–E, respectively. CLF has standing to bring its claims because its members have suffered an injury in fact that is fairly traceable to Shell and will be redressed by the relief sought.

A. CLF and Its Members have Sufficiently Alleged Injury in Fact.

CLF has alleged injuries in fact that are concrete and particularized and that are actual and imminent. *Laidlaw*, 528 U.S. at 180–81, 183; *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that harm to aesthetic and recreational interests is sufficient to confer standing). Environmental plaintiffs establish an injury in fact when they prove that they used the affected area and are persons for whom the aesthetic and recreational values of the area are lessened by the challenged activity. *Laidlaw*, 528 U.S. at 183. The scale of injury need not be significant and is not germane for purposes of standing; "an 'identifiable trifle' will suffice." *Pub. Int. Res. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71, 72 n.8 (3d Cir. 1990) (quoting *United States v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)); *see also Student Pub. Int. Res. Grp. of N.J., Inc. v. Georgia-Pac. Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985).

In the RCRA context, "probabilistic harms are legally cognizable." *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283–84 (1st Cir. 2006). "To establish an injury in fact based on a probabilistic harm, a plaintiff must show that there is a substantial probability that harm will occur." *Id.* at 284 (citing *Warth*, 422 U.S. at 504; *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir.

1993)); *see also Covington v. Jefferson Cty.*, 358 F.3d 626, 639 (9th Cir. 2004). A plaintiff can show a substantial probability of harm by demonstrating proximity to the source of the risks RCRA seeks to minimize. *Mallinckrodt,* 471 F.3d at 283–84.

CLF's Amended Complaint sufficiently alleges that its members reside and recreate in the affected area. *See* Doc. 11 at ¶ 10. The Amended Complaint also sufficiently alleges that CLF members are concerned that discharges and/or releases from the Terminal contain toxic pollutants, are unable to make fully-informed decisions about their use of the Providence River, Providence Harbor, and Narragansett Bay due to Shell's failure to comply with the Permit's[7] monitoring and reporting requirements, and are afraid that precipitation and flooding at the Terminal will cause discharges that will further pollute the Providence River, Providence Harbor, Narragansett Bay, and nearby communities. *Id.* ¶¶ 11–20. As in *SCRAP*, 412 U.S. at 688, these allegations satisfy the requirement that an injury be concrete and particularized. The attached declarations provide further detail about individual CLF members' use of the Providence River, Providence Harbor, and Narragansett Bay, as well as how they have been, and continue to be, harmed by Shell's actions and inactions. *Georgia-Pac. Corp.*, 615 F. Supp. at 1423.

Timmons Roberts is a Providence resident, Brown University Professor of Environmental Studies and Sociology, and frequent rower. Ex. A at ¶¶ 2, 4–6. Since 2011, Professor Roberts has been rowing with the Narragansett Boat Club ("NBC") three to five times per week in-season along the shore of either Providence or East Providence, frequently past the Shell Providence Terminal. *Id.* ¶ 6. He is concerned that when he is rowing, he regularly comes into contact with toxic and harmful pollutants in the water resulting from the pollution, runoff, and discharges

[7] Rhode Island Pollutant Discharge Elimination System ("RIPDES") Permit No. RI0001481, issued February 14, 2011 and effective April 1, 2011 (expired April 1, 2016 and administratively continued) ("the Permit"), Doc. 11-1.

generated by the Terminal. *Id.* ¶¶ 7–8. Professor Roberts' work on Rhode Island's climate change resilience efforts includes drafting legislation leading to the creation of the Rhode Island Climate Change Commission, and successfully arguing for passage of the Resilient Rhode Island Act, the first comprehensive climate change legislation in the state. *Id.* ¶ 5. He is very concerned about Shell's failure to address climate-related risks to the Terminal and the resulting likelihood of pollutants from the Terminal washing into the Providence River. *Id.* ¶ 13. Widespread contamination from the Terminal would have catastrophic impacts on him and others who use the waters surrounding the Terminal for recreation, as well as on the health of the Providence River ecosystem. *Id.* ¶¶ 13, 16.

Senator Joshua Miller, a resident of Cranston, is a Rhode Island State Senator, local business owner, and recreational user of the Providence River. Ex. B at ¶¶ 2, 4, 6, 7. His District, District 28, includes three-and-a-half miles of shoreline along the Providence River and Narragansett Bay, and the eastern portion of the District is located adjacent to, and directly south of, the Terminal. *Id.* ¶ 5. Senator Miller also has a number of successful restaurants in the Providence area, including the Hot Club, located at 25 Bridge Street on a dock along the Providence River. *Id.* ¶ 6. Senator Miller also enjoys boating and fishing several times each summer in the Providence River and Providence Harbor. *Id.* ¶ 7. Given his usage of the river for personal recreation, his position as an elected official, and the fact that the success of his business depends on the Providence River being clean and healthy, Senator Miller is concerned that pollution, runoff, and discharges from the Terminal contain pollutants, including toxic pollutants that are known to be harmful to humans and the environment. *Id.* ¶¶ 9–10. He is also concerned that Shell's failure to address risks to the Terminal from precipitation and flooding will result in further negative impacts on the health of the Providence River ecosystem, nearby communities,

people who use the River, and local businesses like the Hot Club, when pollutants—including toxic and hazardous pollutants from the Terminal—wash into the Providence River. *Id.* ¶ 14.

Captain David Monti, a resident of Warwick, grew up fishing on Narragansett Bay and is a prominent member of the local fishing community. Ex. C at ¶¶ 2, 4. Captain Monti serves as 2nd Vice President of the Rhode Island Saltwater Anglers Association and as Vice Chair of the Rhode Island Marine Fisheries Council, and also writes a weekly fishing column for the Providence Journal. *Id*. ¶¶ 5, 6, 8. He is a local charter boat captain and runs fishing trips in Narragansett Bay multiple times a week in season. *Id.* ¶ 4. In the spring, he follows the menhaden and bass migrations, fishing exclusively in the Upper Bay and Providence River, *id*. ¶ 9, often within a stone's throw of the Terminal, *id*. ¶ 11. Captain Monti is concerned about the harmful impact of the pollution, runoff, and discharges from the Terminal on local fisheries, as increased levels of pollution are detrimental to habitats and can result in fish kills. *Id*. ¶ 12. He is also concerned about Shell's failure to address pollutant discharges and releases due to precipitation and flooding, because a spill or release from the Terminal would be devastating to the environment, to his livelihood as a charter boat captain, and to fishing in the entire Providence River/Narragansett Bay area. *Id*. ¶¶ 15–17.

Providence resident David Riley is a Providence River waterfront user and Co-Chair of Friends of India Point Park, an 18-acre, 3,600-foot shoreline Park that he frequents regularly. Ex. D at ¶¶ 2, 4–6. He has worked for over seventeen years to keep India Point Park clean and accessible, and regularly visits the Park both for his own use and enjoyment, and to check on projects, keep track of park maintenance needs, and participate in park clean-ups. *Id.* ¶ 6. Mr. Riley also enjoys birding at India Point Park. *Id.* ¶ 9. India Point Park is located just upriver from the Terminal, and he is concerned about the negative impacts of Shell's discharges from the Terminal

on the environment and people who use the Park, including himself. *Id.* ¶¶ 14–15. As he relies on the Park for access to the waterfront and nature, he is also very concerned about toxic pollutants washing into the Providence River as a result of Shell's failure to address risks to the Terminal from precipitation and flooding, and resulting widespread contamination. *Id.* ¶¶ 19–20.

Howard Kilguss, a resident of Rehoboth, Massachusetts, is a recreational user of the Providence River and active member of the local community, serving on the Executive, Development, and Nomination Committees of the Grow Smart Rhode Island Board. Ex. E at ¶¶ 2, 4. Mr. Kilguss is a rowing enthusiast and has rowed from the NBC for 45 years. *Id*. ¶ 5. While rowing, he is concerned about coming into contact with pollution, runoff, and discharges generated by the Terminal because he cannot avoid getting splashed by waves in his small single scull, and occasionally swallows water from the spray. *Id.* ¶¶ 6–7. Mr. Kilguss also enjoys fishing at the Fox Point Marina and from the shore at Fox Point, but he is unable to consume any fish caught from the Providence River due to his concerns that the fish contain unsafe levels of pollutants. *Id*. ¶ 8. Mr. Kilguss worries that pollution, runoff, and discharges from the Terminal jeopardize the health and safety of the Providence River and those who use it, *id.* ¶ 10, and a spill or other release of pollutants from the Terminal would only make this worse, *id*. ¶ 7.

In addition to these concrete and particularized injuries, CLF has alleged that its members' injuries resulting from Shell's violations at the Terminal are actual and imminent. The Supreme Court held in *Clapper* that an injury is imminent if it is "certainly impending" or, in the alternative, there is a "substantial risk" that the harm may occur. 568 U.S. at 414 n.5; *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017). "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Pennsylvania v.*

West Virginia, 262 U.S. 553, 593 (1923) (quoted in *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).[8]

CLF's claims are directed towards Shell's ongoing failure to comply with CWA Permit requirements and prevent imminent and substantial endangerment of public health and the environment, including failure to develop or implement engineered protective measures, stormwater controls and plans, and the development of spill prevention plans that will sufficiently prepare the Terminal against the known risks of heavy precipitation events and other events that threaten the Providence area and the Terminal. Shell's failures cause a certainly impending, and substantial risk of, injury to resources surrounding the Terminal and the CLF members that use and enjoy those resources.

In its Motion to Dismiss, Shell generically dismisses climate change-related impacts as "highly speculative, remote, or hypothetical." *See e.g.*, Doc 20-1 at 12. However, the Amended Complaint quotes researchers and scientists who discuss the trends and ongoing manifestations of climate change and indicate that trends are continuing and effects are aggregating. *See* Doc. 11 at ¶¶ 136–145, 147–149, 155–158, 167, 171–172, 184–193, 209–218, 221, 233–236. Shell's attempts to recast CLF's Amended Complaint to avoid liability are particularly puzzling because Shell has acknowledged the risks associated with climate change and has taken actions to guard against them at facilities other than the Terminal. *See id.* ¶¶ 205, 228, 229, 260–261. Shell claims to have "a rigorous approach to understanding, managing and mitigating climate risks in our facilities:" "we are taking steps at our facilities around the world to ensure that they are resilient to climate change.

[8] *See also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.") (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

This reduces the vulnerability of our facilities and infrastructure to potential extreme variability in weather conditions . . . for existing assets, we identify those that are most vulnerable to climate change and take appropriate action." *Id.* ¶ 261 (quoting Royal Dutch Shell plc, *Sustainability Rep.*, at 19 (2016)). Yet it has not taken such a "rigorous approach," or any approach, to understanding, managing, and mitigating climate risks present at the Terminal.

Furthermore, Shell has experienced these impacts firsthand in the context of Superstorm Sandy directly impacting its Sewaren, New Jersey Terminal. Doc. 11 at ¶ 239.

As described in the Amended Complaint, flooding and precipitation events are occurring at an increasing rate throughout the Northeast, including in the Providence area. These events are exacerbated by influences such as storms and storm surges, sea level rise, and increasing sea surface temperatures, which are each in turn impacted by climate change.[9] The Terminal's location makes it particularly vulnerable to flooding, as well as pollutant discharges and releases caused by flooding, thereby placing those areas surrounding the Terminal at a greater risk of harm. The frequency and severity of flooding and precipitation events in the Providence area places CLF members living, working, or recreating near the Terminal at an imminent risk of injury from discharges and releases from the Terminal because Shell has failed to take necessary action to address and adapt to climate-related impacts.[10]

[9] These events and influences make up the factors identified in the Amended Complaint as causing and/or contributing to the substantial risk of pollutant discharge and/or releases from the Terminal. *See* Doc. 11 at § IV.A.

[10] Shell cites to *Amigos Bravos v. BLM*, 816 F. Supp. 2d 1118 (D.N.M. 2011), in support of its argument that "climate change risks in 'years or decades' are not imminent." *See* Doc. 20-1 at 14. However, the injuries alleged by CLF are based on risks that exist today, not future risks. To the extent paragraphs in the Amended Complaint reference future dates, those paragraphs are actually referring to injuries and impacts that are currently happening and that will continue to get increasingly worse through those dates. *See, e.g.*, Doc. 11 at ¶ 223 ("[I]t is *virtually certain* that global means sea level rise *will continue beyond 2100* . . . .") (second emphasis added); *id.* ¶ 219

Coastal infrastructure has already been damaged by sea level rise and heavy downpours. *See* Doc. 11 at ¶ 141. The Permit requires the use of good engineering practices and the implementation of spill prevention and control measures to guard against the very risks that are now present and will be exacerbated at the Terminal because of Shell's failure to comply with the Permit's terms. CLF sufficiently alleges that increased severity and frequency of flooding and precipitation events, paired with Shell's failure to comply with its Permit terms that would prevent a discharge or release of pollutants at the Terminal resulting from these events, creates an injury that is "certainly impending."

CLF members' fears of discharges and endangerment from climate-related impacts at the Terminal are not merely hypothetical. "[P]ast wrongs are evidence bearing on whether there is real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). The very incident CLF members fear will occur has actually happened at the Terminal on at least one documented occasion. In April 2010, a DEM Investigator "discovered a heavy sheen coming out of several storm drains along the shore. This was due to the heavy rains over the last few days the spill was coming out of the drains so fast that booms will not work and the conditions are not conducive to using absorbent pads and booms on the sheen." Doc. 11 at ¶ 152 (quoting John Leo, Investigator, State of R.I. & Providence Plantations Dep't of Envtl. Mgmt., Emergency Response Rep. (Apr. 5, 2010)). Shell has failed to take any steps to prevent this from happening again.

What Shell has termed the "Adaptation Claims" concern present and ongoing violations of the Permit, specifically, the requirements that Shell disclose information to regulators, and develop, implement, and maintain an adequate SWPPP. Currently, Shell has not disclosed relevant

("In January 2017, NOAA increased its worst case sea level rise prediction to a greater-than-eight-foot increase in sea level rise in Rhode Island *by 2100*.") (emphasis added).

information, and has not developed nor implemented a SWPPP that conforms with the requirements of its Permit to reduce or prevent the discharge of pollutants, to implement best management practices, and to identify all sources of pollution reasonably expected to affect the quality of stormwater discharges, among other things as set forth in the Amended Complaint. Because Shell is unprepared to prevent discharges and releases from its Terminal, catastrophic events similar to those occurring throughout the country, *see* Doc. 11 at ¶¶ 238–252, could devastate an entire community and the resources upon which it relies.[11] This is exactly what the CWA and RCRA seek to prevent.

B. The Injuries Suffered by CLF and Its Members are Caused by Shell.

The injuries suffered by CLF's members are fairly traceable to Shell's violations of the CWA and RCRA. It is not necessary for CLF, or CLF's members, to establish "to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn*, 913 F.2d at 72.

CLF alleges that Shell discharges, and is at substantial risk of discharging and releasing, pollutants that are harmful to humans and aquatic life in areas where CLF members live, visit, walk, drive, bike, row, boat, fish, observe wildlife, and would otherwise swim, and that these discharges and risks of discharges and releases have caused and continue to cause the alleged injuries to CLF members. Doc. 11 at ¶¶ 10–20. The causal link between Shell's violations of the CWA and RCRA and CLF members' injuries is direct and immediate, and not remote or dependent upon the action or inaction of third parties. Nor are CLF's claims based on speculation or "a

[11] Shell's citation to *Shain v. Veneman*, 376 F.3d 815 (8th Cir. 2004), is misplaced. CLF's claims are not based on the possibility of a 100-year flood occurring, they are based on known increasing trends in precipitation and flooding, which are exacerbated by influences such as storms and storm surges, sea level rise, and increasing sea surface temperatures, which are each in turn impacted by climate change. *See generally* Doc. 11 at § IV.A.

speculative chain of possibilities." Doc. 20-1 at 14. As described above, CLF's claims are firmly grounded in scientific information, analysis, and observed trends, including information and analysis about risks Shell acknowledges are posed to its own facilities. Further, CLF' claims are not, as Shell argues, based on its "alleged failure to adapt to some unspecified standard," *id.* at 15; rather, they are squarely grounded on Shell's failure to use good engineering practices, the standard explicitly imposed by its own Permit. *See* Doc. 11-1, Permit at 12.

C. The Injuries Suffered by CLF and Its Members are Redressable.

Finally, the injuries suffered by CLF and its members are redressable by this Court, and Shell does not contend otherwise. The injunctive relief and civil penalties sought by CLF in this action provide redress for CLF's injuries through (1) requiring Shell to come into compliance with RCRA and the CWA, and (2) requiring Shell to pay appropriate civil penalties,[12] thereby deterring Shell and other industrial facility owners and operators from continuing to violate the CWA and RCRA.

For these reasons, CLF has standing to bring each Count in its Amended Complaint.

II. CLF's Claims are Ripe for Judicial Review.

For the same reasons that establish CLF's standing, Shell's ripeness challenge must fail. Shell acknowledges that an inquiry into ripeness is similar to that of standing, also designed to avoid abstract disagreements that are not squarely in front of the Court. Doc. 20-1 at 16; *see also*, Standing, Relation To Other Justiciability Doctrines, 13B Fed. Prac. & Proc. Juris. § 3531.12 (3d

[12] *Powell Duffryn*, 913 F.2d at 73 (acknowledging the connection between civil penalties and the injuries to plaintiff's members where the general public interest in clean waterways would be served by the deterrent effect of an award of civil penalties on both the defendant specifically and other NPDES permit holders generally); *Covington*, 358 F.3d at 638–39 ("[Appellees] operate[] the landfill, thus any violation of RCRA is directly caused by [appellees], and any violation can be redressed by requiring . . . compliance with RCRA or by creating a credible deterrent against future violations via the imposition of fines.").

ed.) ("The most direct connections [among justiciability doctrines] run between standing and ripeness.").

The caselaw cited by Shell does not provide support for the assertion that CLF's claims are unripe. As an initial matter, none of the cases relied upon by Shell involved citizen suit claims under the CWA or RCRA. And while the cases discuss the general issues involved in a ripeness inquiry, the contingent nature of the claim (also referred to as "fitness") and any immediate hardship occasioned by withholding determination, they are readily distinguishable factually from the circumstances here. Although some of the cases find ripeness based upon the anticipated impacts associated with the complained-of action at issue,[13] these cases involve claims that are subject to a number of unknown and speculative future contingencies unlike the certainty of the ongoing impacts of climate change as well as the risks associated with failure to plan for such impacts.[14]

---

[13] In *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78 (1st Cir. 2013), the church sought to invalidate an ordinance that created an historic-district, limiting certain activities (such as alteration of the church's façade and demolition) without the commission approval. The First Circuit found that the claim as to the adverse impact of the ordinance on the church's religious practices was a ripe controversy; however, the possible future impacts were not ripe given the high uncertainty as to how the commission might act on future, unplanned, applications by the church. *See id.* Similarly, in *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1 (1st Cir. 2012), labor unions brought an action alleging Puerto Rico campaign finance law imposed a facially unconstitutional restriction on their First Amendment rights to political free speech. The First Circuit found that the claim was ripe, as the unions "allege[d] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 9.

[14] *See City of Fall River v. FERC*, 507 F.3d 1 (1st Cir. 2007) (finding that an attempted challenge to a FERC order conditionally approving a project upon review of two additional agencies (and expressing several reservations related thereto) was not ripe); *Texas v. United States*, 523 U.S. 296 (1998) (holding that the state's request to preclear two potential educational sanctions as not violative of an Amendment to the Voting Rights Act was not ripe given the number of contingencies that would have to occur before a court would be able to evaluate the impact of the actual implementation of the Act if the sanctions were imposed); *Labor Rel. Div. of Constr. Inds. of Mass., Inc. v. Healey*, 844 F.3d 318 (1st Cir. 2016) (finding that an "unusual request for sweeping pre-enforcement relief" [employee groups suing the Massachusetts Attorney General

It is these factors that render CLF's claims ripe for the Court's consideration.

III. CLF has Properly Alleged a RCRA Claim.

Shell challenges CLF's imminent and substantial endangerment claim under RCRA, primarily arguing that there is no evidence of affirmative action on Shell's part that would lay the groundwork for such a claim. With the backdrop of a selective characterization of the Amended Complaint, Shell engages in a labored review of cases discussing the facts of particular claims that are readily distinguishable from the facts before this Court. CLF has fully and adequately pled facts supporting an imminent and substantial endangerment claim. The Court should reject Shell's bid for dismissal.

RCRA was enacted with the stated objectives of "promot[ing] the protection of health and the environment and to conserve valuable material and energy resources by," *inter alia*, "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment," and "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources." 42 U.S.C. § 6902(a)(4) & (a)(10). At the time RCRA was passed, Congressional findings with respect to the environment and health included that "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;" that "the

---

seeking declaration that Earned Sick Time Law was preempted by the Labor Management Relations Act] was not ripe as no particular claim had even been identified); *Reddy*, 845 F.3d at 497 (finding that a request for pre-enforcement review of a New Hampshire statute regulating the presence of buffer zones around abortion facilities was not ripe; no such zones had been established and "plaintiffs were not required to alter their conduct based upon the passage of the ordinance itself"); *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 66 (1st Cir. 2003) (finding that an ADA claim was unripe given the number of contingencies that would have to occur (including a potential pregnancy) in order for the complained of future injury to exist).

placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;" and that "if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming." 42 U.S.C. § 6901(b)(2), (b)(5) & (b)(6). In its RCRA Orientation Manual, EPA states that "RCRA regulates how wastes *should be managed to avoid* potential threats to human health and the environment." EPA, *RCRA Orientation Manual* at VI-9 (2014) (emphasis added), https://www.epa.gov/sites/production/files/2015-07/documents/rom.pdf.

As this Court previously explained, "[t]he intent behind RCRA is to facilitate the safe management of hazardous waste from the time it is generated to its ultimate disposal, to protect human health and the environment from the dangers of hazardous waste, and to encourage the conservation and recovery of natural resources." *United States v. S. Union Co.*, 643 F. Supp. 2d 201, 207 (D.R.I. 2009) (citing 42 U.S.C. § 6902), *aff'd*, 630 F.3d 17 (1st Cir. 2010), *rev'd on other grounds and remanded*, 567 U.S. 343 (2012); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) ("RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'") (quoting 42 U.S.C. § 6902(b)).

The First Circuit has described RCRA as "a cradle-to-grave statute providing a full range of remedies designed to protect both health and the environment." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 26–27 (1st Cir. 2011) (quotation omitted). RCRA "allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists." *Mallinckrodt*, 471 F.3d at 279. "This is expansive language, which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent

necessary to eliminate *any risk* posed by toxic wastes." *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (citations and quotation omitted); *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004) ("[T]he plaintiffs need only demonstrate that the waste disposed of 'may present' an imminent and substantial threat.").

In sum, RCRA's imminent and substantial endangerment provision was intended to address precisely the type of situation presented at the Terminal. Shell should not be allowed to handle vast quantities of highly flammable, toxic materials in the form of legacy contaminants, generated wastes, and products that, when released to the environment, present grave hazardous risks to the surrounding environment and communities without properly addressing these well-known, present, catastrophic risks. Indeed, it is both troubling and odd that Shell, which in other contexts, professes to fully acknowledge and support efforts to address and manage climate change risks, would not fully embrace the need to plan, design, and implement protective measures throughout its Terminal (and even beyond). RCRA provides the Court with the legal vehicle to assure that the people and environment of Providence and Narragansett Bay do not have to wait in the shadow of the Terminal for an environmental and human health tragedy to unfold with the next major storm. Shell's Motion to Dismiss should be denied.

A. Shell is a Past and Present Generator of Solid and Hazardous Waste.

As it must, Shell acknowledges that "CLF does allege the Terminal stores fuel products in tanks and manages some waste." Doc. 20-1 at 23. Shell is designated a Conditionally Exempt Small Quantity Generator ("CESQG") under RCRA, *see* EPA, *RCRAInfo Facility Information*, https://oaspub.epa.gov/enviro/rcrainfoquery_3.facility_information?pgm_sys_id=RID059741520 (last visited Jan. 29. 2018). When it submitted its request for CESQG status, Shell indicated

affirmatively that it was a "Generator of Hazardous Waste" and "SHELL OIL PRODUCTS US - PROVIDENCE TERMINAL" has been assigned RCRA Handler ID: RID059741520. *See* Doc. 11 at ¶ 398. The Amended Complaint includes specific allegations regarding solid and hazardous wastes generated, handled, and stored by Shell at the Terminal. Doc. 11 at ¶¶ 50–51.

Shell's own permitting documents confirm not only that it stores fuel products and manages wastes, but also the risk of "significant amounts of these pollutants reaching the Providence River":

> [t]he facility stores and handles pollutants listed as toxic under Section 307(a)(1) of the CWA or pollutants listed as hazardous under Section 311 of the CWA and has ancillary operations which could result in significant amounts of these pollutants reaching the Providence River. These operations include one or more of the following items from which there is or could be site runoff: materials storage, materials processing and handling, blending operations, intra-facility transfers, and loading/unloading of product.

Doc. 11-1, Statement of Basis at 6. In fact, EPA's website identifies a minimum of three categories of hazardous waste generated at the facility: ignitable waste, lead and benzene. *See RCRAInfo Facility Information*. Simply put, based on these well-known and admitted facts alone, Shell has been and is a generator of hazardous waste at the Terminal.

Furthermore, Shell is the successor in interest of ownership of the Terminal. Both Shell and its predecessors have generated solid and hazardous wastes at the Terminal. Shell has had an ownership interest in the Terminal for over a decade and now owns the facility outright. The 1999 Site Characterization Report and Remedial Action Plan addressing legacy contamination describes the Terminal's ownership history as follows:

> Motiva is a joint venture between Shell Oil Company, Texaco Inc., and Saudi Refining, Inc., and is the successor in interest to Star Enterprise (Star) for this facility. Star Enterprise acquired the facility on January 1, 1989 from Texaco Refining and Marketing, Inc. (TRMI) who owned the facility since 1907. In addition, Star also acquired the property formerly known as the Curran and Burton facility.

Handex of New England, Inc., *Updated Site Characterization Rep. and Remedial Action Plan: Motiva Facility Terminal, 520 Allens Avenue Providence, R.I.*, at 2 (July 1999). Under the heading "Nature and Extent of Oil/Hazardous Materials," the site characterization report further states:

> Historical records indicate the Motiva facility was used as a lubrication oil blending facility, an asphalt production facility, and a petroleum distribution facility since at least 1907. In addition, heavy oil was handled at the former Curran and Burton facility.
>
> Site assessment activities indicate that an apparent release of OHM to the subsurface occurred from historical use of the property. The compounds encountered during site assessments are common constituents of gasoline, oil, asphalt, and related petroleum compounds.

Id. at 13.

In January 1989, Texaco and Saudi Aramco formed a 50/50 joint venture known as Star Enterprise to refine, distribute, and market petroleum products in the eastern United States and the Gulf Coast.[15] On July 1, 1998, Shell Oil, Texaco Inc. and Saudi Arabian Oil Company announced the formation of a joint venture Motiva Enterprises LLC that would "combin[e] major elements of the three companies' eastern and Gulf Coast U.S. refining and marketing business including assets previously held by Star Enterprise . . . ."[16] In 1998, Shell Oil Company also formed the joint venture Equilon with Texaco, combining their Western and Midwestern United States refining and

[15] *See Saudi-Texaco Joint Venture*, THE NEW YORK TIMES (Jan. 3, 1989), http://www.nytimes.com/1989/01/03/business/saudi-texaco-joint-venture.html.

[16] Shell Oil Co Form 8-K, SEC (Jul. 1, 1998), https://www.sec.gov/Archives/edgar/data/89629/0000089629-98-000004.txt; *see also* Texaco Annual Report, at 56 (2000), http://www.nioclibrary.ir/free-e-resources/Cheveron%20Texaco/Texaco%20Annual%20Report%202000.pdf ("Motiva is a joint venture that combined Texaco's and Saudi Aramco's interests and major elements of Shell's East and Gulf Coast U.S. refining and marketing businesses. Texaco's and Saudi Aramco's interests in these businesses were previously conducted by Star Enterprise (Star), a joint-venture partnership owned 50% by Texaco and 50% by Saudi Refining, Inc., a corporate affiliate of Saudi Aramco.").

marketing.[17] On February 8, 2002, Chevron Corporation acquired Texaco Inc., and Texaco divested all interests in Equilon Enterprises LLC and Motiva Enterprises LLC to Shell.[18] Since 2002, Motiva has been a 50/50 refining and marketing joint venture held by Shell Oil Company and Saudi Aramco, in which the Star Enterprise operations were previously merged with the Eastern and Gulf Coast United States refining and marketing operations of Shell.[19] Thus, Shell owns all historical and legacy interests in the Terminal dating back to Texaco Refining and Marketing's original purchase in 1907, and all entities and interests that have contributed to the legacy contamination of the site are now wholly owned by Shell.[20] As the Eighth Circuit explained

---

[17] Shell Oil Co Form 8-K, SEC (Jul. 1, 1998), https://www.sec.gov/Archives/edgar/data/89629/0000089629-98-000004.txt. Equilon, a joint venture between Shell and Texaco, began operation on January 1, 1998. *See* Texaco Annual Report, at 32 (1998), https://chevroncorp.gcs-web.com/static-files/7d0a057d-301c-4d73-96c6-24bd82a63e80. Texaco's interest was 44%. *Id.*

[18] *See Letter Approving Application to Divest Texaco Refining and Marketing Inc. to Shell Oil Company and Saudi Refining, Inc.*, FTC (Feb. 5, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/02/ftc.gov-chevronltr.htm; *see also Announced Actions for February 8, 2002*, FTC (Feb. 8, 2002), https://www.ftc.gov/news-events/press-releases/2002/02/announced-actions-february-8-2002.

[19] *See* Shell Global, *Saudi Refining, Inc. and Shell sign letter of intent to separate Motiva assets* (Mar. 16, 2016), https://www.shell.com/media/news-and-media-releases/2016/saudi-refining-inc-and-shell-sign-letter-of-intent-to-separate-motiva-assets.html. *See also Announced Actions for February 8, 2002*, FTC (Feb. 8, 2002), https://www.ftc.gov/news-events/press-releases/2002/02/announced-actions-february-8-2002.

[20] In a variation of its arguments related to liability under RCRA, Shell contends that the Amended Complaint does not include any allegations as to the connection of four of the Defendants—Shell Oil Co, Shell Petroleum Inc., and Shell Trading (US) Co., as well as Royal Dutch Shell plc, which was dismissed without prejudice with agreement of the parties as of February 1, 2018, *see* Doc. 22—to the Terminal. Shell asserts that the allegations in the Amended Complaint—which it admits include each of these Defendants—are insufficient proof of a role in the operations at the Terminal. However, the cases Shell cites in support of its position are legally and factually distinct from the claims before this Court. *See Prisco v. A & D Carting Corp.*, 168 F.3d 593, 607, 609 (2d Cir. 1999) (finding that a plaintiff could not establish liability for imminent and substantial endangerment where she had been allowing others to dispose of waste on her property and admitted she "lacked direct knowledge of what was specifically contained in each waste hauler's materials"); *Kaladish v. Uniroyal Holding, Inc.*, No. CIV.A. 300CV854CFD, 2005 WL 2001174, at *5–6 (D. Conn. Aug. 9, 2005) (finding that a plaintiff could not survive defendants' summary judgment motion where had not put forward enough evidence to prove that an imminent and substantial

in the context of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"):

> corporate successors are plainly within the meaning of "person" in 42 U.S.C. § 9607. CERCLA is a remedial environmental statute with two essential purposes: 1) to provide swift and effective response to hazardous waste sites; and 2) to place the cost of that response on those responsible for creating or maintaining the hazardous condition. When including corporations within that set of entities which must bear the cost of cleaning up the hazardous conditions they have created, Congress could not have intended that those corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities. It would serve little purpose to include corporations responsible for hazardous waste sites, but not their corporate successors, within the class of "covered persons."[21]

United States v. Mexico Feed & Seed Co., 980 F.2d 478, 486–87 (8th Cir. 1992).

In addition to owning and contributing wastes to the Terminal, Shell also has generated, and continues to generate, waste through grading, construction, and demolition in contaminated areas. Shell claims that it cannot be held accountable for the risks of wastes generated through mobilization, management, and transport of legacy contamination. However, as the present

---

endangerment existed or that it was caused by the defendant where site assessment that found "trace" amounts of contamination almost 25 years prior that had not been subsequently corroborated, and an old letter from the state environmental agency noting it was listed under Superfund, without any further evidence linking defendant to particular and presently threatening contamination, did not create a genuine dispute of material fact as to whether defendant contributed to imminent and substantial endangerment to health or the environment). Unlike these cases, CLF's Amended Complaint alleges facts properly identifying the Defendants and connecting them to the imminent and substantial endangerment at the Terminal.

[21] *Compare* CERCLA, 42 U.S.C. § 9601(21) (defining the term "person" to mean "an individual, firm, **corporation**, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body") (emphasis added) *with* RCRA, 42 U.S.C. § 6903(15) (defining the term "person" to mean "an individual, trust, firm, joint stock company, **corporation** (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States") (emphasis added).

contaminants are further subjected to Shell's control through intentional processes of action or inaction, Shell is generating such wastes. Shell routinely collects and conveys legacy contaminants in the soils on the site through grading, excavation, and other Terminal construction and management activities.

Further, the definition of "hazardous waste generation" explicitly includes "the *process* of producing hazardous waste" and is not limited to the "act" of producing such waste. 42 U.S.C. § 6903(6) (emphasis added). All words in a statute must be construed to have meaning and therefore this distinction in the definition is notable. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) ("We must read statutes, whenever possible, to give effect to every word and phrase."); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751–52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous."). In addition to acknowledging the obvious and admitted generation of wastes at the Terminal, consistent with RCRA's preventative purposes, the Court should find that, through Shell's process of failing to act to address well-known risks that would result in large-scale catastrophic releases from the Terminal's piping and storage infrastructure, Shell is undertaking a "process of producing hazardous waste" and therefore further engaged in "hazardous waste generation."

For similar reasons, Shell's products stored and transferred through the Terminal are solid wastes. Shell argues its currently useful products are not solid wastes, but, contrary to this argument, "the definition of solid waste under RCRA is very broad. Once 'petroleum leak[s] into soil or groundwater [it] ceases to be useful.' Moreover, petroleum left behind from commercial operations comports with being abandoned." *Waldschmidt v. Amoco Oil Co.*, 924 F. Supp. 88, 90

(C.D. Ill. 1996) (citations omitted); *see also Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.,* 81 F. Supp. 2d 359, 365 (D.R.I. 2000) (same); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc*., 877 F. Supp. 476, 482 (D. Minn. 1995) (same).

EPA has formally determined that useful products fall within the definition of waste at the time that an "intent to discard" those materials is ascertained. 62 Fed. Reg. 6622, 6626 (1997) ("Unused military munitions, in EPA's view, are unused 'products' comparable to unused commercial products stored by manufacturers or their customers. Under RCRA, unused products do not become 'waste' until they become 'discarded material.' EPA believes that an unused product becomes 'discarded' when an intent to discard the material is demonstrated."); *see also United States v. Asrar*, Nos. 93-50610, 93-50623, 1995 WL 579646, *6 (9th Cir. Oct. 3, 1995) ("Under the RCRA, the *intent to discard* a usable material renders it hazardous waste."). Further, it is well settled that, absent an admission, intent can only be discerned through inference:

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

Mann v. United States, 319 F.2d 404, 410 (5th Cir. 1963) (emphasis added).[22] Lastly, "discard" is not defined in RCRA but should be accorded its ordinary meaning "to cast aside or dispose of; get rid of." "discard," Dictionary.com (2012)

[22] *See also United States v. Fulmer*, 108 F.3d 1486, 1494 (1st Cir. 1997) ("When we talk about a defendant's—about the defendant's intent, we are talking about what he meant to do and what was in his mind. This is difficult to prove directly, because there is no way directly to scrutinize the works of someone else's mind or his state of mind. But you may infer . . . the defendant's intent from the surrounding circumstances, that is to say, you may rely on circumstantial evidence in determining the defendant's intent. You may consider any statement made, act done, or omitted by the defendant and all other facts and circumstances in evidence which indicate his intent.").

http://www.dictionary.com/browse/discard (last visited Feb. 10, 2018). *See L.S. Starrett Co. v. F.E.R.C.*, 650 F.3d 19, 25 (1st Cir. 2011) ("When Congress chooses 'not to define [a] phrase . . . in the statute itself, we can look to the dictionary for clarification of the plain meaning of the words selected by Congress.'" (quoting *Perez–Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005)).

Shell knows full well the imminent risks associated with severe precipitation, extreme weather, storm surge, and sea level rise and its failure to act to prevent releases of products and materials at the Terminal due to these factors will result in generation and handling of solid and hazardous waste when these foreseeable events occur.[23] Shell's inaction in the face of its own knowledge regarding these risks represents an "intent to discard" useful products because the outcome of this inaction is certain to occur. Therefore, the Court should find, consistent with the purpose of RCRA, that products at the Terminal fall within the very broad definition of "solid waste."

B. Shell has Contributed to and is Contributing to the Past and Present Handling, Storage, Transportation, and Disposal of Solid and Hazardous Waste.

Shell has been, and is, contributing to the handling, storage, transportation, and disposal of wastes at the Terminal. Though conveniently ignored in the litany of cases cited by Shell, courts have expansively interpreted these terms used in the statute:

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

[23] Shell's intent may be inferred, in part, by its blatant disregard for its obligations under RCRA. *See* R.I. Code R. 25-15-102:5.15(G)(1) (requiring that Shell "minimizes the possibility of . . . any unplanned spill or release of hazardous waste or hazardous waste constituents to the air, soil, or surface waters of the State."); *see also* 40 C.F.R. § 262.16(b)(8)(i). Shell has not minimized the possibility of any unplanned spill or release of hazardous waste or hazardous waste constituents to the air, soil, or surface waters of the State due to its inaction in the face of known risks.

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

Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1229 (E.D. Wash. 2015) (quotations and citations omitted). Shell has control over and is actively engaged in all aspects of hazardous waste generation, disposal, remediation, management, and planning at the Terminal.

Shell has been and is actively engaged in storage, handling, transportation, and disposal of solid and hazardous wastes at the Terminal. Again, courts have interpreted these terms expansively:

> The term "storage," when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste. 42 U.S.C. § 6903(33); *see also* 40 C.F.R. § 260.10 (storage includes holding until later treated, disposed of, or stored elsewhere). The broadest of the statutory terms, "handling," is not defined in RCRA. It should therefore be given the ordinary dictionary meaning of "to manage, operate, or use with the hand or hands; . . . to manage, control, direct, train, etc." Webster's New World Dictionary at 611 (3d Coll. Ed.1988); *In Matter of Marin Motor Oil, Inc*., 740 F.2d 220, 228 (3d Cir. 1984) ("Since Congress used the word 'demand' and did not define it in the statute, normally we would give the word its ordinary dictionary meaning."). Similarly, the term "transportation" is not defined in RCRA, but is defined in CERCLA as the ordinary "movement of a hazardous substance by any mode." 42 U.S.C. § 9601(26).

United States v. Union Corp., 259 F. Supp. 2d 356, 401 (E.D. Pa. 2003). Shell meets all of these tests regarding its activities at the Terminal. In a similar vein:

> "Handling" is not defined in the relevant statute or regulations, but its ordinary definition is broad, "[t]he action or an act of dealing with a . . . thing; treatment; management[.]" *Oxford English Dictionary.* "Disposal," which is defined by regulation, is similarly expansive: "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the

> air or discharged into any waters, including ground waters." 40 C.F.R. § 260.10; COMAR 26.13.01.03.
>
> . . . the Complaint allege[s] that the City engaged in various activities on the Casino Site that would involve "handling" or "disposal." These activities include allowing leaks, spills, and releases of hazardous or solid waste to occur on the property; excavating and mixing contaminated soil and groundwater; "addressing" and "remov[ing]" contaminated items from the property in a manner that "exacerbated the known contamination at and under the Casino Site and/or the off-site migration of contamination in the soils, soil vapors and/or groundwater."
>
> …
>
> What is relevant in reviewing the claims at the motion to dismiss juncture is that the Complaint sets forth conduct that could plausibly, if proven, constitute "handling" or "disposal." As such, the Complaint adequately alleges this component of a subsection (a)(1)(B) claim.

Goldfarb v. Mayor & City Council of Baltimore, 791 F.3d 500, 514–15 (4th Cir. 2015).

Further, "RCRA's definition of 'disposal,' . . . is quite broad." *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). "The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof *may* enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3) (emphasis added).

Consistent with the expansive definition of disposal, Shell's failure to implement protective measures to address the present and known risks of extreme precipitation, severe storms, storm surge, and sea level rise will result in materials and products at the Terminal discharging, spilling, and/or leaking into or on the land and into the Providence River such that they may enter the environment, be emitted into the air, and into already contaminated groundwaters on the site. "Not only is this definition quite broad but, significantly, it includes within its purview leaking, which

ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions." *Price*, 523 F. Supp. at 1071. In other words, "disposal need not result from affirmative action by the defendants but may be the result of passive inaction." *Id.* Accordingly, "[a] history of migration and the potential for future migration of the contamination is also a relevant consideration in an imminent and substantial endangerment inquiry." *Exxon Educ. Found.*, 81 F. Supp. 2d at 367; *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 287 (D.P.R. 2009) ("[P]assive migration at an inactive disposal site constitutes an imminent and substantial endangerment under the RCRA.").

Shell's RIPDES Permit expressly defines areas of the Terminal that handle, store, transport, and/or dispose of hazardous waste. Doc. 11-1, Permit at 11 ("Process or work areas are defined for the purpose of this permit as all those areas subject to spills and leaks of raw materials or products containing toxic or hazardous substances, (i.e., diked areas, docks, loading or unloading areas, yard areas, etc.)."). There is no reasonable dispute that Shell contributes to the handling, storage, transportation, and disposal of solid and hazardous waste at the Terminal.

C. Shell's Inaction in Preparing for Currently Occurring and Well-known Risk Factors Presents an Imminent and Substantial Endangerment to Health and the Environment.

Shell attacks CLF's Amended Complaint by asserting that "glaring is the omission of any factual allegations explaining how these activities are inadequate or improper . . . such that they may present an endangerment." Doc. 20-1 at 23. However, the Amended Complaint underscores the lack of preparedness at the Terminal for extreme precipitation, severe storms, storm surge, and sea level rise. Doc. 11 at ¶¶ 17–19, 79, 115–118, 164–165, 206–207, 230–231, 237, 253, 262–264. Without adequate protective measures, these well-understood factors, known to Shell, will result in discharges, releases, spills, and leaking of solid and hazardous wastes when the Terminal is

flooded, inundated, or otherwise physically compromised. Indeed, given Shell's own recent experiences with Superstorm Sandy and the catastrophic effects of Hurricane Harvey, the Court need not imagine such a scenario playing out; it has in fact, and unfortunately will again. *Id.* ¶¶ 238–252.

Furthermore, as detailed in the Amended Complaint, Shell is well aware of these risks and yet has failed to act to address them. Indeed, Shell's Motion is predicated on a detailed recounting of these very risks and the actions of various governmental entities to address them. Shell's own documents demonstrate the risks of spills, leaks, and releases at this Terminal as well as the company's failure to remedy the weaknesses of which it is aware.[24] Shell has actually identified specific areas of the Terminal that are "subject to spills and leaks of raw materials or products containing toxic or hazardous substances." Doc. 11-1, Permit at 11.

With regard to whether this risk is imminent, "[i]mminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately." *Mallinckrodt,* 471 F.3d at 288; *see also Dague*, 935 F.2d at 1356 ("A finding of imminency does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: An imminent hazard may be declared at any point in a chain of events which may ultimately result in harm to the public.") (quotations and citations omitted).

[24] *See, e.g.*, Doc. 11 at ¶¶ 152–54 (citing *Emergency Response Report* by Investigator John Leo, stating that "I checked the area around the facility and discovered a heavy sheen coming out of several storm drains along the shore. This was due to the heavy rains over the last few days the spill was coming out of the drains so fast that booms will not work and the conditions are not conducive to using absorbent pads and booms on the sheen; explaining that the heavy rains referenced had occurred a full week earlier on March 29 and 30; and noting that RIDEM has admitted that "[t]he circumstances at the facility have not substantially changed since the issuance of the last RIPDES permit . . . .").

Similarly, "the term 'endangerment' means a threatened or potential harm, and does not require proof of actual harm."[25] *Parker*, 386 F.3d at 1015. As summarized by the First Circuit, "the combination of the word 'may' with the word 'endanger,' both of which are probabilistic, leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)(1)(B) so long as the threat is near-term and involves potentially serious harm." *Mallinckrodt*, 471 F.3d at 296. CLF has met these requisites here.

Shell's effort to cast CLF's climate-related claims as "premised on scenarios occurring at the end of the century," with a low risk of occurring, or as "wholly contingent upon a long sequence of events," Doc. 20-1 at 29, is belied by established science and recent experience, as described in the Amended Complaint. *See* Doc. 11 at ¶¶ 117–237. The threat CLF and its members have identified "is present *now*, although the impact of the threat may not be felt until later." *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

Shell selectively refers to an assemblage of cases in its attempt to dismiss the complaint. In particular, Shell seeks to convince the Court that it cannot be held accountable under RCRA for inaction that may create a grave and imminent risk of harm.[26] Shell inaccurately asserts that

[25] The requirement that an endangerment be substantial "does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that excess deaths will occur, or that a water supply will be contaminated to a specific degree) . . . . Rather, an endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken." *United States v. Union Corp.*, 259 F. Supp. 2d 356, 400 (E.D. Pa. 2003) (citations and quotations omitted).

[26] Shell's focus on passive conduct and migration is questionable in any case because the releases of wastes that would occur as a result of climate change-related risks are not the result of passive conduct and migration of wastes, but rather the result of inadequate planning, engineering, and design of protective measures in the face of a well-known, and recently experienced, risk of release. The cases relied on by Shell are therefore inapposite. *See, e.g., Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 852 (9th Cir. 2011) (manufacturers of dry cleaning equipment did not have a measure of control over hazardous waste emitted from equipment at time of waste's disposal, as required to state claim for contributor liability under RCRA: "[m]ere design of equipment that generated waste, which was then improperly discarded by others, is not sufficient."); *Sycamore*

liability for the failures alleged in the Amended Complaint, which it terms "inaction," would "render RCRA's citizen suit provision illogical." Doc. 20-1 at 21. Actually, RCRA is designed to address the appropriate handling, containment, and disposal of solid and hazardous wastes, and a failure to act (for example to secure a tank) could be just as catastrophic as an intentional release of pollutants. Indeed, documents such as a SWPPP are designed in part to require that an owner/operator consider and appropriately guard against weaknesses in their systems.[27] To suggest that failure to act in a certain manner could not be a source of liability is contrary to the statute's

---

Indus. Park Assocs. v. Ericsson, Inc., 546 F.3d 847, 850–52 (7th Cir. 2008) (abandonment of boiler-based heating system and subsequent sale of industrial property was not "handling, storage, treatment, transportation or disposal of any solid or hazardous waste," as required by RCRA; no disposal had occurred when the system had been abandoned in place because the asbestos was contained in piping and buildings "[t]here is no real threat that asbestos "or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water"); *ABB Indus. Sys., Inc. v. Prime Tech., Inc*., 120 F.3d 351, 356 (2d Cir. 1997) (addressing question of what occurred during each owner's control of site and what could be proven with respect to each such period, and dismissing claims against owners who provided sufficient evidence that they did not contaminate environment); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 846 (D.N.J. 2003) (finding no RCRA liability for certain defendants because neither had ever "owned, operated or taken any action regarding the [property] specifically related to pollution or environmental compliance" and RCRA liability could only be imposed "upon a showing that they actively engaged in the management or disposal of [chromium ore processing residue] . . . and not upon evidence that they merely displayed alleged 'studied indifference' to pre-existing chromium contamination"). Notably, Shell chose to ignore an important aspect of the *Hinds* court's decision: RCRA's citizen suit provision "requires that a defendant be actively involved in or *have some degree of control* over the waste disposal process to be liable under RCRA." *Id.* at 851 (emphasis added). It is this degree of control—and in this instance, ability to armor against the apparent weaknesses in the Terminal's systems as demonstrated in Shell's CWA violations and failure to meet its obligations under RCRA—that forms the basis of CLF's RCRA claims and that Shell seeks to have this Court read out of the jurisprudence.

[27] For example, "[t]he SWPPP in Part I.C. shall specifically address the adequacy of containment of leaks and spills in storage areas (from Drums, Additive Tanks, Petroleum Product Tanks, etc.) and truck loading area(s). Adequate containment must exist at these locations so as to prevent untreated discharges from reaching any surface water." Doc. 11-1, Permit at 11. Similarly, the SWPPP must: "identify potential sources of pollutants, which may reasonably be expected to affect the quality of storm water discharges" at the Terminal and "describe and ensure the implementation of Best Management Practices (BMPs) which are to be used to reduce or eliminate the pollutants in storm water discharges associated with industrial activity." *Id.* at 12.

design and counter-indicated by the types of injunctive relief available to a RCRA plaintiff.[28] Put simply, RCRA is designed with broad authority to provide redress for imminent and substantial endangerments whether they are caused by acts or omissions.

Similarly, Shell's assertion that the Amended Complaint is "devoid" of any allegations of mishandling, other than the facility's location at sea level, is a contrivance. Doc. 20-1 at 22. While the increased severity and frequency of weather events is arguably not within Shell's control, it is the decisions made by Shell to consciously ignore the known increasing climate-related impacts on its operations at this Terminal that violate its obligations under both the CWA and RCRA. These failures exacerbate the known near term risks facing the Terminal and create an imminent and substantial endangerment under RCRA if not addressed.

For these reasons, CLF has sufficiently alleged that the endangerment to human health and the environment caused by Shell's acts and omissions is imminent and substantial and can be abated by an order from this Court.

IV. CLF Properly Alleges Claims Under the CWA.

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

Shell attempts to argue that te NPDES program's five-year permit term forecloses any obligation it has to consider climate-related impacts on the Terminal. *See* Doc. 20-1 at 32. However, Shell is wrong that it only has short-term compliance obligations under the CWA, *see*

[28] *See, e.g.*, *Mallinckrodt*, 471 F.3d at 298 (requiring, as part of injunctive relief, that defendant fund and perform a scientific study demonstrating environmental impacts associated with its contamination and stating that "Congress sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threaten [ ] human health.") (citing *Price*, 688 F.2d at 211); *City of Bangor v. Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 220 (D. Me. 2006) (ordering a mandatory injunction to abate substantial and imminent endangerment presented by tar contamination in Dunnett's Cove with specifics to be determined at later proceeding); *Envtl. Def. Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir. 1983) (granting injunction, which in part required defendant to allow for inspection and sampling at his property).

id.; EPA has been clear that "[t]he obligation to maintain long-term compliance with the CWA, as well as common sense and sound engineering practices, necessitate that climate impacts be considered" in the context of CWA enforcement. EPA *Framework* at 3.

Additionally, no honest argument can be made that Shell constructed its Terminal with an intention to only operate it for five years and had no intention of operating beyond the term of a single permit; one only has to look at Shell's pending application to extend the Permit to conclude that is not a serious argument. And while it is true that NPDES permits are statutorily limited to five-year terms, Shell's position ignores the reality that permits are commonly expired and administratively continued for years, and in some cases, nearly indefinitely. *See, e.g.*, *United States v. Zenon-Encarnacion*, 387 F.3d 60, 63–64 (1st Cir. 2004) (finding that a permit that expired in 1989 was administratively continued through 2002 because application for new NPDES permit had been filed). It is simply not true that permits are reevaluated on a consistent five-year schedule. In fact, the Permit at issue in this case expired on April 1, 2016—nearly two years ago—and remains in effect because it has been administratively continued. Regardless of whether the Permit is reissued in one year, five years, or ten years, the injuries alleged in the Amended Complaint have in fact happened and are "certainly impending."

Shell has long known of the threats posed by precipitation and flooding, which are exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures, *see* Doc. 11 at ¶¶ 117–237, 253–264, and has long been well-aware of the present impacts and risks of climate change, *see id.* Shell's current corporate position on climate change is that "[w]e have recognised the importance of the climate challenge for a long time now, and we share our knowledge, experience and understanding of the energy system with policymakers." *Id.* ¶ 122. According to Shell, "[w]e were one of the first energy companies to recognise the climate change

threat and to call for action." *Id.* ¶ 123. Yet Shell has made no effort to consider or address such threats with respect to the Terminal.[29]

The ongoing requirement to comply with the good engineering practices standard is consistent with the statutory scheme of the CWA, which places rigorous demands on dischargers to achieve higher and higher levels of pollution abatement. *See Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 123–24 (D.C. Cir. 1987) ("[T]he [CWA] regulatory scheme is structured around a series of increasingly stringent technology-based standards . . . . Thus, the most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing . . . . This policy is expressed as a statutory mandate, not simply as a goal . . . . the nature of the statutory scheme . . . pushes all dischargers to achieve ever-increasing efficiencies and improvements in pollution control."). CLF sufficiently alleges that Shell has failed to use good engineering practices at the Terminal, in part because it has not designed or adapted the Terminal or its wastewater treatment system to address

[29] Shell's arguments essentially amount to a "*force majeure*" or "act of God" argument with respect to climate-related impacts, but no such exemption from the CWA sections applicable to NPDES permit holders exists. *See* 40 C.F.R. § 122.41(m) & (n) (describing the two exceptions to the requirement to comply with NPDES permits, bypass and upset: "[b]ypass is prohibited . . . unless . . . (A) [b]ypass was unavoidable to prevent loss of life, personal injury, or severe property damage; (B) [t]here were no feasible alternatives . . . ; and (C) [t]he permittee submitted [required] notices;" "[u]pset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee . . . [a]n upset constitutes an affirmative defense to an action brought for noncompliance with . . . effluent limitations" if certain requirements are met). Neither the "upset" nor "bypass" exceptions are met here, and it is telling that Shell has not attempted to argue that they are. Further, even where courts have considered acts of God in other Clean Water Act contexts, they have found that the defense does not apply. *See, e.g., Liberian Poplar Transps., Inc. v. U.S.*, 26 Cl. Ct. 223, 226 (1992) (rejecting plaintiff's act of God argument where it *could* have anticipated and taken precautions against a storm even though it did not in fact do so, explaining that "the statute and the legislative history do not subscribe to a subjective test for anticipation"); *Sabine Towing & Transp. Co. v. U.S.*, 666 F.2d 561, 565 (Ct. Cl. 1981) (no act of God "where the dangers are expected and where the losses are normally worked into the cost of doing business").

precipitation and/or flooding, which is exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures. Doc. 11 at ¶¶ 113–115. The Amended Complaint contains numerous allegations of Shell's inadequate infrastructure design, *id.* ¶ 19, as well as statements setting forth the well-known risks associated with inadequate infrastructure, *id.* ¶¶ 160, 170, 189–191, 214–217, and statements from engineers, including those at Shell, confirming that good engineering practices account for these risks when designing and/or updating facilities. *Id.* ¶¶ 253–261.

B. Sea Level Rise and Storm Surge are Necessary Considerations in CWA Compliance.

The Permit authorizes Shell to discharge from the Terminal to the Providence River. Doc. 11-1, Permit at 1. The Terminal's discharge is not limited solely to stormwater runoff, it also includes groundwater, holding pond drainage, hydrostatic/hydraulic test water, and treated tank bottom draw-off water. Doc. 11-1, Statement of Basis at 1. Under the CWA, "discharge" means "discharge of a pollutant," which in turn means "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2. "Point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged." *Id.*

Due to the nature of the Terminal's infrastructure, virtually all of its component parts, including its stormwater drainage system, fall within the definition of point source.[30] Those parts

[30] Point source is interpreted broadly under the CWA. *See Red River Coal Co., Inc. v. Sierra Club*, No. 2:17CV00021, 2018 WL 491668, at *9 (W.D. Va. Jan. 19, 2018) ("EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States.") (quoting NPDES Permit Application Regs. for Storm Water Discharges, 55 Fed. Reg. 47990-01 (Nov. 16, 1990)). *U.S. Pub. Int. Res. Grp. v. Atl. Salmon of*

consist of pipes, ponds, ditches, contoured landscapes, containers such as tanks, and rolling stock such as trucks and railcars that contain, store, transport, and/or shed substances that fall within the definition of "pollutant."[31] These pollutants are added to the Providence River and other receiving waters via any number of conveyances either as a result of pumping, runoff, spills, or direct contact such as inundation by flood, tide, or storm surge.

Unquestionably, the Terminal's stormwater drainage system collects and conveys pollutants and adds them to the Providence River as a result of precipitation, groundwater collection, and other identified pollutant sources. Pollutants are also added through the stormwater drainage system at times when the treatment structures and other drainage areas are inundated by flooding, tides, or storm surges. Pollutant sources on the Terminal include paved and contoured areas, containment structures, pipe systems, tanks, treatment systems, and rolling stock. These areas would be potent sources of pollutants during floods and storm surge, even absent failures of infrastructure. However, the Permit and stormwater regulations clearly address accidental failures and spills as well as pollutants that are present on a day-to-day basis for reasons that seem patently obvious to all, except apparently Shell. As water associated with these events discharges from the

Me., LLC., 215 F. Supp. 2d 239, 254–55 (D. Me. 2002) ("the term 'point source' covers a broader means of discharging. . . . the courts find that a point source exists where there is an *identifiable* source from which the pollutant is released."); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2nd Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995) (manure spreader which distributed manure in field deemed a point source); *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 308 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998) (barge from which cement blocks were dumped and paint chips from sandblasting were projected is a point source).

[31] Discharge of a pollutant is similarly broadly defined. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006) ("'The discharge of a pollutant' is defined broadly to include 'any addition of any pollutant to navigable waters from any point source,' and 'pollutant' is defined broadly to include not only traditional contaminants but also solids such as 'dredged spoil, . . . rock, sand, [and] cellar dirt.'") (quoting 33 U.S.C. § 1362).

Terminal, it carries pollutants with it through and off of conveyances at potentially catastrophic contamination levels. These discharges fall squarely within the Clean Water Act's definitions.

Shell advocates for an overly-narrow interpretation of its Permit obligations whereby discharges related to inundation are not subject to regulation. *See* Doc. 20-1 at 33–35. Such interpretation defies the plain language of the CWA regarding what constitutes a discharge, and would produce the absurd result of discharges connected with inundation being completely uncontrolled and unregulated, a result wholly inconsistent with the CWA's goal of "restoration and maintenance of chemical, physical and biological integrity of Nation's waters." 33 U.S.C. § 1251. People, communities, and the environment would be placed at greater risk, and those left to clean up Shell's pollution would bear the burden of Shell's failure to control all of its discharges.

Moreover, Shell's arguments that the definition of stormwater includes only precipitation and not inundation from sea level rise and storm surge, Doc. 20-1 at 33–35, entirely miss the point.[32] CLF does not, as Shell claims, "implicitly ask[] this Court to rewrite the facility's permit and the NPDES stormwater program" in Counts One through Six. Doc. 20-1 at 33. The violations alleged in those counts pertain to Shell's obligations to consider and address—in the design, operation, and maintenance of its stormwater treatment system and development of its SWPPP and other facility plans that address pollution and spill prevention—information relevant to Shell's compliance with its Permit and the CWA, and to disclose such information to regulators.

As EPA has warned, "[e]xtreme weather events, such as storms, floods, and droughts, pose significant risks to water infrastructure and water pollution control measures, and these risks are likely to affect the ability of regulated entities to comply with CWA requirements over time." EPA

[32] Shell also ignores the fact that the relevant counts are based on precipitation impacts in addition to impacts from flooding. Trends and risks related to increasingly severe and intense precipitation are discussed in the Amended Complaint at ¶¶ 150–164.

Framework at 1; *see also id.* at 6 (a vulnerability assessment is appropriate as part of enforcement remedies in CWA enforcement actions involving industrial entities where certain circumstances exist, including proximity to water bodies and areas that may be impacted by flooding, storm surge, and sea level rise; capacity of the collection or treatment system to handle more frequent or more intense precipitation; and possible downstream impacts); *id.* at 8–9 ("Heavy rains and flooding made more intense by climate change can damage . . . storm water infrastructure, which may increase the risk of water contamination and illness.").[33]

Counts One through Six are based on the risks posed to the Terminal, including its stormwater treatment system, by the climate-related impacts discussed in the Amended Complaint and the fact that Shell has failed to consider, address, or adapt to those risks. For example, Shell is violating the condition of its Permit requiring that "[t]he SWPPP shall be prepared in accordance with good engineering practices" because it has not considered risks posed by climate-related impacts to the Terminal, including impacts of sea level rise and storm surge. *See* Doc. 11 at ¶¶ 278–284. Similarly, Shell is violating the Permit requirement that "the SWPPP shall describe and ensure implementation of Best Management Practices (BMPs) which are to be used to reduce or eliminate the pollutants in storm water discharges associated with industrial activity at the facility," because any BMPs it does have in place do not consider risks posed by climate-related impacts to the Terminal, including impacts of sea level rise and storm surge. *See id.* ¶¶ 293–296. The same is true for the remaining counts.[34]

---

[33] *See also* EPA, *Climate Change Indicators in the United States: River Flooding* at 1 (Aug. 2016), www.epa.gov/climate-indicators ("Large flood events can damage homes, roads, bridges, and other infrastructure . . . . By inundating water treatment systems with sediment and contaminants, and promoting the growth of harmful microbes, floods can directly affect the water supplies that communities depend on.").

[34] Ironically, in support of its argument that the Court should defer to the State and abstain from CLF's so-called "CWA Adaptation Claims," Shell readily admits that "Rhode Island's regulatory

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

Shell's Permit does not shield it from liability in this case. Under the CWA, "if a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will 'shield' its holder from CWA liability." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., MD*, 268 F.3d 255, 266 (4th Cir. 2001). However, the mere existence of a permit does not shield a discharger from all liability under the CWA. As the Fourth Circuit recently made clear, *Piney Run* "expressly held that a permit shields 'its holder from liability . . . *as long as* . . . *the permit holder complies with the express terms of the permit* and with the Clean Water Act's disclosure requirements.'" *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 142 (4th Cir. 2017) (quoting *Piney Run*, 268 F.3d at 259) (emphasis added).

Each of CLF's claims related to Shell's failure to disclose, consider, and address climate-related impacts on the Terminal specifies the precise Permit conditions Shell has violated and CLF is enforcing. *See* Doc. 11 at ¶¶ 265–330. "[I]f 'the language [of a permit] is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Fola Coal*, 845 F.3d at 139 (quoting *Piney Run*, 268 F.3d at 270). CLF's claims are entirely founded on the plain language of the Permit. The Permit's mandate that Shell use "good engineering practices" establishes a duty of care based on information known to reasonable engineers during the applicable timeframe and requires annual certifications under penalty of perjury that this standard, among other Permit requirements, is met. These conditions directly relate to compliance with Permit conditions governing the Terminal SWPPP. Doc. 11-1, Permit at 12–16.

---

agencies are actively evaluating new measures for controlling the flow of stormwater discharges attributable to potential severe precipitation *and flooding* related to climate change." Doc. 20-1 at 45 (emphasis added).

The Permit and CWA regulations that require Shell to develop, implement, and update its facility plans to account for identified potential pollution sources and associated risks, and prepare its plans in accordance with good engineering practices obligate Shell to consider and address climate-related impacts. Shell has been aware of climate change risks for decades, has acknowledged that action is required to address those risks on numerous occasions, and has engineered facilities other than the Terminal to address those risks. Shell is under an express duty to disclose this information to regulators, and to act on information in its possession to implement, amend, and update its SWPPP accordingly.[35]

Shell's half-hearted argument that CLF seeks to force Shell "to go above and beyond the obligations of the Terminal's RIPDES permit," Doc. 20-1 at 36, must be rejected for these reasons. Shell's arguments about the Court's lack of jurisdiction over challenges to the terms of state-issued permits, and implied argument that CLF is collaterally attacking the Permit, similarly miss the mark. CLF is not challenging the terms of Shell's Permit; CLF is enforcing those terms to remedy ongoing violations of the CWA and RCRA.

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

Though Shell devotes a significant portion of its brief to supporting its convoluted and repetitive assertions that CLF alleges "no facts" supporting its claims, Shell's argument essentially

[35] *See* Doc. 11-1, Permit Part II at 6 ("Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, they shall promptly submit such facts or information."); *id*. at 2 ("The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment."); Doc. 11-1, Permit at 12 ("The permittee shall immediately amend the SWPPP whenever there is a change in design, construction, operation, or maintenance, which has a significant effect of the potential for the discharge of pollutants to the waters of the State; a release of reportable quantities of hazardous substances and oil; or if the SWPPP proves to be ineffective in achieving the general objectives of controlling pollutants in storm water discharges associated with industrial activity.").

boils down to an attempt to hold CLF to a higher pleading standard than is required. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 677–78. "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "For a claim to withstand a motion to dismiss, it need not show that recovery is probable, but it must show 'more than a sheer possibility' of liability." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

The allegations in CLF's Amended Complaint are not "conclusory," Doc. 20-1 at 37, and are more than sufficient to withstand Shell's Motion to Dismiss. As discussed throughout, each of CLF's claims specifies the precise term(s) of the Permit Shell is violating and CLF is enforcing through this suit. Each claim also describes the basis for the alleged violation.[36] Underlying these claims are ample detailed factual allegations about current trends, impacts, and risks related to

[36] *See, e.g.*, Doc. 11 at ¶¶ 280–82 ("Shell's SWPPP for the Providence Terminal was not prepared in accordance with good engineering practices because the SWPPP was not based on information consistent with the duty of care applicable to engineers . . . was not prepared based on information known to reasonably prudent engineers, such as information about the factors discussed in Section IV.A, *supra*, and the substantial risks of pollutant discharges associated with these factors . . . [and] was not prepared based in information known to Shell; such as information about the factors discussed in Section IV.A, *supra*, and the substantial risks of pollutant discharges associated with these factors."); *id.* ¶ 287 ("Shell has failed to identify sources of pollutants resulting from the factors discussed in Section IV.A, *supra*, as sources of pollution reasonably expected and anticipated by Shell to affect the quality of the stormwater discharges from the Providence Terminal."); *id.* ¶ 305 ("Shell has not amended or updated its SWPPP based on information in its possession regarding the factors discussed in Section IV.A, *supra*, and the substantial risks of pollutant discharges and/or releases associated with these factors, in violation of the Permit and the Clean Water Act."). *See also id*. ¶¶ 272–275, 289, 295, 300, 311, 322–23, 328.

precipitation, flooding, storms and storm surge, sea level rise, and sea surface temperature, as well as the aggregating nature of these factors and the fact that they are further exacerbated by climate change, all of which is collectively referred to throughout the remainder of the Amended Complaint as "Section IV.A." *See* Doc. 11 at ¶¶ 117–237. Section IV.A also describes the fact that Shell has been well-aware of these trends, impacts, and risks for decades, has publicly acknowledged the threat posed by climate change impacts and the need for action, and yet has failed to take action to address these trends, impacts, and risks at the Terminal. *See id.* ¶¶ 118–134, 161–164, 204–206, 226–230, 237.

Shell, a company acutely aware of changing weather patterns, rising sea levels, warming sea temperatures, and increasing severity of climate-related events—including the foreseeable risks thereof—neglected its legal obligation to protect the residents of Providence, surrounding communities, and the environment from these risks. Shell has for years studied the trajectories of climate changes in order to understand the real-world impacts of these increases day-by-day and year-by-year. Despite this knowledge, Shell has not disclosed information about associated impacts on the Terminal to regulators, nor has it adjusted the Terminal's SWPPP or other facility response documents to address spill prevention measures and adapt to these growing risks. Indeed, Shell's Permit, SWPPP, and other documents related to the Terminal are devoid of reference to any of this information.

At this stage of the litigation, these allegations are sufficient to survive Shell's Motion to Dismiss; CLF need not propose an alternate design to the Terminal, and discovery will be needed to uncover further specifics as to the Terminal's inadequacies and how those must be remedied to protect CLF members from further injury.

V. Motiva's Transfer of Ownership/Operations in 2017 Does Not Absolve it from Liability Under the CWA.

Shell asks the Court to dismiss Motiva Enterprises LLC from the Clean Water Act claims in the Amended Complaint due to its formal transfer of the Terminal's RIPDES Permit to Triton Terminaling, Inc. in May of 2017, the month prior to CLF's Notice of Intent to Sue. As an initial matter, the transfer of the Permit from Motiva to Triton Terminaling[37] was in name only, i.e., the terms of the Permit and the individuals carrying out responsibility under the Permit remain the same. Further, while *Gwaltney* stands for the proposition that "wholly past" violations are excluded from CWA liability, the violations that occurred under Motiva's ownership and operation of the Terminal are not, in fact "wholly past;" they have been occurring since at least 2012, continued to occur through 2017 when CLF issued its Notice, and persist through the present.

As CLF explained in the Amended Complaint, "Motiva Enterprises LLC was a joint venture between Royal Dutch Shell plc and Saudi Aramco" until "Shell formally announced the completion of the dissolution of Motiva Enterprises LLC on May 1, 2017." Doc. 11 at ¶ 26. "Per the dissolution agreement, Shell maintained control over the Northeastern region of the U.S., including ownership of the Providence Terminal." *Id.* Accordingly, while the corporate name on the Permit changed, it had no substantive effect on the Terminal or its operations. For example, the contact individual for the Terminal was the same under Motiva as it is under Triton Terminaling, though his affiliation has been changed from Motiva to Shell. *Compare* Doc. 20-8

[37] Pursuant to agreement by the parties, Defendants have stipulated not to oppose the amendment of CLF's complaint to add Triton Terminaling LLC. *See* Doc. 22. Concurrent with the filing of this Objection, CLF is sending a Supplemental Notice of Intent to Sue under the CWA and RCRA to Triton Terminaling LLC and Equilon Enterprises LLC for the same violations alleged in the Amended Complaint, Doc. 11. The Supplemental Notice also places all parties, including Defendants, Triton Terminaling LLC, Equilon Enterprises LLC, and Royal Dutch Shell plc, on notice of an additional violation of RCRA.

(Letter from A. Mello, RIDEM to Michael J. Sullivan, Complex Manager, Motiva Enterprises LLC, RE: Reapplication for Motiva Enterprises LLC - Providence Terminal, RIPDES Application No. RI0001481 (Nov. 18, 2015)) *with* Doc. 20-3 (Letter from J. Haberek, RIDEM to Kevin Nichols, Vice President, Triton Terminaling LLC, RE: Transfer of RIPDES Permit for Motiva Enterprises Providence Terminal, RIPDES Permit # RI0001481 (May 15, 2017) (listing as a cc: Michael Sullivan, Shell Oil Products US).[38]

The cases relied upon by Shell do not address the issue presented here. *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1990), involved discharges of raw sewerage from a privately owned septic system. Two prior owners of the system who had sold their ownership in the system to an unrelated third party at least two years prior to the commencement of suit were dismissed by the court consistent with *Gwaltney*, as they could not be held liable for wholly past violations. *Id.* at 636.[39] The *Friends of Sakonnet* court explained that "[i]n the present Sakonnet situation, the polluting continues, although the actor polluting has changed." *Id.* at 632. Here, the "actor"—Shell—remains the same (despite the name change of its subsidiary). To suggest otherwise would allow a party to escape responsibility for its violations simply by effecting corporate name change.[40] Similarly, *Brossman Sales, Inc. v. Broderick*, 808 F. Supp. 1209, 1210 (E.D. Pa. 1992),

[38] *See* complete details on the corporate relationship between Shell and Motiva discussed *supra* at 21–23.

[39] *See also Paolino v. JF Realty*, C.A. No. 12–039–ML, 2013 WL 3867376, *5 (D.R.I. July 24, 2013) (distinguishing, in the context of a motion to dismiss, the circumstances of *Friends of Sakonnet* given unresolved questions regarding the *Paolino* defendants' ongoing control over the property despite defendants no longer being the record owners); *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1295 (2008) (discussing, in the context of a summary judgment motion, the difficulty of such a determination: "Very few reported decisions address situations in which CWA citizen suit defendants no longer owned the property in question at the time of the lawsuit. Even within that small sampling of cases, however, the courts reached widely divergent conclusions.").

[40] The *Friends of Sakonnet* court noted its reservation with the implications of its holding, stating that it did "not believe that Congress contemplated a specific situation or outcome" such as the

involved a sale to an unrelated third party, where the violations alleged by the purchasing plaintiffs against the prior owner operators were wholly past at the time of purchase, let alone when the complaint was filed.[41] *Id.* at 1214. ("Since defendants in this case have relinquished ownership of the source of the alleged violation and no longer have the control to abate it, the statute is likewise inapplicable to them.").

For these reasons, Motiva Enterprises LLC should not be absolved from liability and is a proper defendant in this case.

VI. The Court Should Not Abstain from Hearing Any of CLF's Claims.

The rarely implicated doctrine of *Burford* abstention is not appropriate under the circumstances of this case and does not provide a basis for dismissal of CLF's CWA claims. "The *Burford* abstention doctrine stands as a narrow exception to the rule that federal courts 'have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.'" *Holden v. Connex-Metalna Mgmt. Consulting Co.*, 302 F.3d 358, 363 (5th Cir. 2002) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)); *see also Chico Serv. Station*, 633 F.3d at 31 (finding of the court strongly affirming that the circumstances justifying abstention in a citizen suit "will be exceedingly rare").

"Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Servs., Inc. v. Council of City of New*

---

one it faced. *Id.* at 633. The court explained that "[f]reeing [prior operators] from liability for their violations simply because they have ceased controlling the pollution source impedes achievement of the Clean Water Act's purpose. This result encourages violators to transfer control of their property to avoid liability. Although the transfer . . . may not have been motivated by the threat of a suit, it was done with the knowledge that the septic system they were selling was in continuous violation of the federal and state Clean Water Acts." *Id.* at 633 n.22

[41] The *Brossman* plaintiffs' allegations related to the disposition of construction debris as fill material during defendants' time of ownership in areas on the property designated as wetlands.

Orleans, 491 U.S. 350, 359 (1989) ("*NOPSI*") (citation omitted). Congress authorized citizen suits where environmental officials "fail to exercise their enforcement responsibility," *Gwaltney*, 484 U.S. at 60–61; *see also Atl. States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) ("The purpose of the citizen suit is to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities."), and granted federal courts with exclusive jurisdiction to hear citizen suits seeking to enforce the terms of a NPDES permit, as CLF seeks to do here. 33 U.S.C. § 1365(a). "'[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" *NOPSI*, 491 U.S. at 358 (citation omitted); *see also id.* at 359 ("[F]ederal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'") (citation omitted); *Chicot Cty. v. Sherwood*, 148 U.S. 529, 534 (1983) ("[T]he courts of the United States are bound to proceed to judgment and to afford to redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."). As explained below, it is not appropriate for this Court to decline to exercise the jurisdiction given to it by Congress over CLF's CWA claims.

Under the *Burford* abstention doctrine,

> [w]here timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public importance whose importance transcends the result in that case then at bar, or (2) where the exercise of federal review of the question in a case and in a similar case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

NOPSI, 491 U.S. at 360.

The First Circuit considers three factors in determining whether abstention is proper: (1) the availability of timely and adequate state-court review, (2) the potential that federal court jurisdiction over the suit will interfere with state administrative policymaking, and (3) whether conflict with state proceedings can be avoided by careful management of the federal case. *Chico Serv. Station*, 633 F.3d at 31. Here, each factor weighs against abstention, and CLF's claims should not be dismissed.

First, there is no opportunity for a timely and adequate review of Shell's CWA Permit violations in state courts; there is no other lawsuit pending in state court, nor is there any other proceeding under state administrative review. Further, there is no judicial or administrative review available at the state level where CLF could pursue or obtain the relief sought here.

Second, this case will not interfere with state policymaking. In *Chico Service Station*, the First Circuit examined "whether there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case . . . at bar." 633 F.3d at 33. Here, like in *Chico Service Station*, the claims at issue "rest heavily on a framework of federal law." *Id.* at 34. Further, there is no particular difficulty in addressing CLF's claims that would be beyond the ability of this Court to manage, as courts routinely hear cases for permit violations under the CWA.

Third, there is no likelihood that litigating Shell's Permit violations will conflict with any state proceeding. As discussed above, there is no pending state proceeding to intrude upon. CLF is not seeking "dual review" of an agency's decision; rather, as stated throughout, CLF is seeking to enforce the terms of the Permit. Further, CLF's citizen suit will not impact Rhode Island's efforts to regulate the flow of stormwater discharges within the State. CLF seeks a ruling from this Court addressing the specific circumstances present at the Terminal, including injunctive relief to address

Shell's Permit violations. This will in no way impact, conflict with, or "short-circuit" RIDEM's efforts to create a framework for resiliency. Moreover, as the First Circuit has recognized, "[s]hould the threat of conflict arise [when granting plaintiff relief], [there is] no reason why federal court relief could not be structured so as to avoid interference" with the State's efforts with regard to regulation of stormwater flow. *Chico Serv. Station* 633 F.3d at 34.

The structure of federal court jurisdiction in citizen suit claims makes courts reluctant to allow abstention. *See Chico Serv. Station*, 633 F.3d at 31 ("To abstain in situations other than those identified in the statute . . . threatens an end run around RCRA . . . and would substitute our judgment for that of Congress about the correct balance between respect for state administrative processes and the need for consistent and timely enforcement of RCRA.") (quotation and citation omitted). Additionally, the First Circuit is "leery of abstaining where litigants may be unable to press their federal claims in a state forum." *Id.* at 31. As described above, the CWA provides for citizen suits where state or federal agencies have failed to enforce the terms of the permit. Such claims are under the exclusive jurisdiction of federal courts. 33 U.S.C. §1365(a). This "plainly reflects an emphasis by Congress on the availability of a federal forum for consistent and timely review of" CLF's CWA claims. *Chico Serv. Station*, 633 F.3d at 31.

In each case cited by Shell where abstention was found to be proper, plaintiffs were challenging a decision of a state agency regarding the *issuance* of a permit, a decision for which there was a concentrated and comprehensive relief process that addressed the very subject of the plaintiffs' federal claims.[42] Here, however, where CLF seeks to enforce the terms of an existing

[42] *See Sierra Club Inc. v. Futuregen Indus. All. Inc.*, Case No. 13-CV-3408, 2014 WL 2581027 (C.D. Ill. June 9, 2014) (holding that abstention was proper where plaintiffs challenged Illinois Environmental Protection Agency's decision to not require defendant to obtain a Clean Air Act permit first through public notice and comment process and then again by filing a federal suit; federal suit merely resurrected objections to agency's decision and plaintiffs had timely and

permit, the proper avenue is through a citizen suit in federal court. Even where a federal citizen suit involves questions of state law, "difficult state law questions alone are not enough for *Burford* abstention." *Sevigny v. Emp'rs Ins. of Wausau*, 411 F.3d 24 (1st Cir. 2005).

As explained previously, CLF's lawsuit is not a collateral attack on the state permitting process or the terms of the CWA Permit; CLF is simply seeking to enforce the Permit as written.[43] Further, Shell's argument that CLF's suit would require the Court to adjudicate concerns related to the process of reviewing the Terminal's permit is a red herring. As previously discussed, CWA regulations establish that the conditions of an expired permit continue in force until the effective

---

adequate system of administrative and judicial review through filing complaint with Illinois Pollution Control Board); *Starlink Logistics, Inc. v. ACC, LLC*, No. 1:12-cv-0011, 2013 WL 212641 (M.D. Tenn. 2013) (holding abstention was proper where plaintiff alleging defendant had not obtained required discharge and dredging and filling permits had also participated in proceedings before Tennessee Solid Waste Disposal Control Board (and on appeal to the Chancery Court) challenging decision to not require permit; plaintiff's claims were based on assertions that state agency had failed to apply or misapplied its lawful authority under state law and under RCRA and federal review would have disrupted state's efforts to establish coherent policy with respect to licensing of hazardous waste facilities); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004) (finding that federal review of state agency's decision regarding what permits were required would be disruptive of state's efforts to establish coherent policy with respect to permitting of emitting facilities where federal suit was filed while state administrative proceedings were pending to determine whether party had obtained proper permits, and in particular, state agency and courts were reviewing the precise issue raised by plaintiffs' federal claims at time of district court's opinion).

[43] *C.f. Sugarloaf Citizens Ass'n v. Montgomery Cty., Md.*, 1994 WL 447442 (4th Cir. 1994) (upholding district court's decision to abstain from hearing case in which environmental organization challenged Maryland Department of Environment's decision to grant certain construction and disposal permits to defendants, reasoning that plaintiff's citizen suit under the CAA merely resurrected objections previously raised in the state's review process, and was thus actually a collateral attack on the decisions made by Department under state regulatory law); *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188 (6th Cir. 1995) (dismissing case challenging state agency's permitting decisions on abstention grounds where state provided a scheme for administrative and judicial review of permitting decisions); *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786 (N.D. W. Va. 2007) (finding plaintiff's claim to be a collateral attack on state agency decision made under state regulatory law where the permitting decisions being challenged involved matters of substantial local concern, state provided a timely and adequate system of administrative and judicial review, and exercise of control over state's permitting decisions would disrupt state's comprehensive scheme for issuing permits).

date of a new permit, 40 C.F.R. § 122.6(a), and continued permits remain fully effective and enforceable. *Id.* § 122.6(b). Thus, any changes RIDEM may make to a future permit have no bearing on the current suit, as CLF is seeking only to enforce the operative Permit. *Student Pub. Int. Res. Grp. of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1537 (D.N.J. 1984) (finding, in the context of primary jurisdiction, "no justification for weakening the effectiveness of the [CWA] citizen's suit by finding that the mere filing of a renewal application ousts the district court's jurisdiction for the time that the EPA spends considering the application"). Similarly, any opportunities to participate in a future comment period, for a future permit, do not address the concerns raised in the current suit.

There is no basis for dismissal of CLF's CWA claims under the abstention doctrine.

VII. The Doctrine of Primary Jurisdiction Does Not Apply to CLF's RCRA Claims.

Shell's argument that the questions raised by CLF's RCRA claims should be deferred to RIDEM under the doctrine of primary jurisdiction should also be rejected by this Court. "'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63–64 (1956).

The doctrine of primary jurisdiction is to be invoked sparingly where it would serve to preempt a citizen suit. *See, e.g.*, *Student Pub. Int. Res. Grp. of N.J.*, 579 F. Supp. at 1537. Various courts interpreting the primary jurisdiction doctrine in both RCRA and CWA citizen suit cases have found that it ordinarily does not apply, because it contradicts the purpose of citizen suits and

is not among the expressly delineated circumstances under which such suits may be barred.[44] RCRA citizen suits "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment occurred," subject to a handful of limitations, which fall into two categories: the first requires written notice to state and federal regulators prior to filing suit, and the second bars suits where a responsible state or federal agency is diligently pursuing one of several enumerated judicial or administrative enforcement actions under RCRA

[44] *See, e.g., PMC, Inc. v. Sherwin-Williams Co.,* 151 F.3d 610, 619 (7th Cir. 1998) (Posner, J.) ("[A]ppl[ying] the doctrine of primary jurisdiction . . . would be an end run around RCRA.... [Although] there may be room for applying the doctrine[ ] . . . in cases in which a state has a formal administrative proceeding in progress that the citizens' suit would disrupt, [t]here is nothing like that here. The state proceedings (if they can even be called that) are informal . . . ."), *cert. denied*, 525 U.S. 1104 (1999); *Craig Lyle Ltd. P'ship,* 877 F. Supp. at 483 (finding primary jurisdiction doctrine inapplicable in RCRA suit because "Congress has expressly set forth those situations in which a citizen suit under section 6972(a)(1)(B) is precluded"); *Williams v. Alabama Dep't of Transp.,* 119 F. Supp. 2d 1249, 1255–58 (M.D. Ala. 2000) ("In enacting RCRA's citizen suit provisions, Congress has chosen to allocate federal judicial resources to the oversight of this nation's waste disposal problem. The court is reluctant to reallocate those resources through the use of questionable escape valves and procedural devices."); *Wilson v. Amoco Corp.,* 989 F. Supp. 1159, 1170 (D. Wyo. 1998) ("There is an additional, overriding reason for courts to hear RCRA and CWA cases despite their supposed unique nature: Congress has told us to. Both RCRA and the CWA explicitly empower citizens to enforce the Acts' provisions except in certain circumstances not present here. This Court could not in good faith unilaterally strip United States citizens of rights given them by their government."); *Sierra Club v. U.S. Dep't of Energy,* 734 F. Supp. 946, 951 (D. Colo. 1990) ("[T]he doctrine of primary jurisdiction does not permit a federal court to defer to a state agency on a matter of federal law" and "RCRA specifically sets forth the narrow circumstances under which agency action may interfere with citizen enforcement"); *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 183 (M.D. Pa. 1988); *Maine People's Alliance v. Holtrachem Mfg.*, 2001 WL 1704911 at *6–9 (D. Me. Jan. 8, 2001); *Trident Inv. Mgmt., Inc.-Meyer Inv. Properties, Inc. v. Bhambra*, 1995 WL 736940 at *2 (N.D. Ill. Dec. 11, 1995) ("[T]he judicial restraint which is required in RCRA cases in the absence of proper notice is compelled not by the common-law concept of primary jurisdiction, but by the specific statutory mandate of Congress"); *La. Envtl. Action Network v. LWC Mgmt. Co., Inc.*, No. 07–595, 2007 WL 2491360, at *7 (W.D. La. Aug. 14, 2007) ("numerous courts have held that the doctrine of primary jurisdiction is inapplicable to environmental citizen suits under statutes such as the CWA"); *Stewart–Sterling One LLC v. Tricon Glob. Rests., Inc.,* No. 00–477, 2002 WL 1837844, at *5 (E.D. La. Aug. 9, 2002) ("the majority of courts to address the [primary jurisdiction] doctrine in the context of a RCRA citizen suit have concluded either that application of the doctrine is inappropriate except in truly extraordinary circumstances or that it is wholly inapplicable in light of RCRA's express delineation of what agency action will preclude a citizen suit").

or CERCLA.[45] 42 U.S.C. § 6972. In *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, the court explained the significance of the absence of the primary jurisdiction doctrine from these limitations to citizen suits:

> The primary jurisdiction doctrine is not listed among the specifically delineated circumstances under which CWA and RCRA may be barred. Where Congress creates specific exceptions to a broadly applicable provision, the proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth. If Congress had intended for the primary jurisdiction doctrine to bar citizen suits, it would have included the doctrine among the specifically delineated circumstances under which citizen suits are barred. That Congress did not do so means the doctrine is not included among the bars to a citizen suit. The doctrine does not bar this citizen suit.

954 F. Supp. 2d 448, 460 (E.D. La. 2013) (quotations and citations omitted). Further the First Circuit has recognized that "[a]s Congress noted in the course of amending RCRA to broaden its citizen suit authority, citizen suits complement, rather than conflict with agency enforcement of the laws." *Chico Serv. Station*, 633 F.3d at 27–28 (quotation and citation omitted).

No other considerations would weigh in favor of dismissing CLF's claims under primary jurisdiction. *See Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 205–206 (1st Cir. 2000). CLF's claims regarding the imminent and substantial endangerment posed by Shell's actions at the Terminal are brought in a straightforward RCRA citizen suit action and resolution of this case will not affect rights of others than the parties (except in the traditional legal effect that opinions may have as precedent). Further, the facts of this case are not so technical as to be beyond the understanding of this Court, nor are the facts in the nature of legislative policy decisions. Any

[45] This statutory bar to citizen suits applies only where a regulatory agency has filed a formal action in state or federal court or is pursuing one of a handful of remedial actions under CERCLA. *See* 42 U.S.C. § 6972(b)(1)(B), (b)(2)(B), (b)(2)(C). None of those limitations applies here, and Shell does not attempt to argue as such.

science-based issues can be addressed by expert testimony, making agency expertise unnecessary. Finally, there is a "[s]trong public interest in the prompt resolution" of the case, and thus, this Court should not "defer to administrative action of uncertain aid and uncertain speed." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979).

This Court should not stray from the long line of cases finding that application of the primary jurisdiction doctrine is inappropriate in a citizen suit, and should deny Shell's request to dismiss CLF's RCRA claim.

CONCLUSION

For all the foregoing reasons, Shell's Motion to Dismiss should be denied.

ORAL ARGUMENT REQUEST

CLF respectfully requests oral argument on Shell's Motion to Dismiss, and estimates that approximately 45 minutes would be required for such argument.

Respectfully submitted,

CONSERVATION LAW FOUNDATION, INC.

By its attorneys:

/s/ Jerry Elmer
Jerry Elmer, Esq., RI Bar # 4394
Staff Attorney
Conservation Law Foundation
235 Promenade St, Suite 560, Mailbox 28
Providence, RI 02908
(401) 228-1904
Fax (401) 351-1130
jelmer@clf.org

/s/ Heather A. Murray
Heather A. Murray*
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1716
Fax (617) 350-4030
hmurray@clf.org

/s/ Christopher M. Kilian
Christopher M. Kilian, Esq.*
Vice President and Director,
Clean Water Program
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992
Fax (802) 223-0060
ckilian@clf.org

/s/ Allan Kanner
Allan Kanner*
Elizabeth B. Petersen*
Allison S. Brouk*
Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
(504) 524-5777
Fax (504) 524-5763
a.kanner@kanner-law.com
e.petersen@kanner-law.com
a.brouk@kanner-law.com

**Admitted Pro Hac Vice*