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 Motiva Enterprises LLC, Triton Terminaling LLC, and Equilon Enterprises LLC Defendants.	)	No. 1:17-cv-00396-WES-LDA

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. CLF Has Not Shown It Suffers from An Imminent Injury 2

A. CLF Has Failed To Allege Facts Demonstrating Its Alleged Injury Is "Certainly Impending" Or At A "Substantial Risk" Of Occurring 2

B. Standing Cannot Be Premised On A Speculative Chain of Possibilities 6

II. CLF's Members' Affidavits Confirm The Adaptation Claims Are Not Ripe 6

III. CLF Has Failed To Identify Actions Or Wastes Necessary To Sustain The RCRA Claim 7

A. Mere "Generation" Of Waste Is Not Sufficient To Sustain An Imminent And Substantial Endangerment 7

B. CLF's Baseless Successor Liability Theory Does Not Rescue the RCRA Claim 8

C. Saleable Petroleum And Other Products Are Not "Waste" 10

D. CLF Remains Unable To Identify Any "Handling, Storage, Treatment, Transportation, Or Disposal" Of "Waste" That Is Presenting An Imminent And Substantial Endangerment 10

E. CLF Has Not Alleged Defendants "Contributed To" An "Imminent And Substantial Endangerment" 12

IV. CLF's CWA Adaptation Claims Seek To Impose Novel Legal Obligations On Defendants And Are Insufficiently Pled 14

A. CLF'S CWA Adaptation Claims Attempt To Hold Defendants To Requirements Not Found In The Terminal's Permit 16

1. The Terminal's Permit Does Not Impose Obligations Beyond Its 5-Year Term 16

2. The Definition Of "Stormwater" Limits The Scope Of CLF's Claims 18

3. CLF's Relies On An Inapplicable, Outdated EPA Document To Expand Defendant's Obligations Beyond What The Terminal's Permit Requires 20

B. The Amended Complaint Does Not Contain Allegations Sufficient To Infer Plausible Violations Of The Terminal's Permit 21

C. Motiva's Transfer Of The Terminal And Its Permit Precludes Jurisdiction Under The CWA's Citizen Suit Provision 22

V. The Doctrines Of Abstention And Primary Jurisdiction Should Be Applied In This Case 24

A. CLF Seeks Rulings That Will Impact Ongoing State Regulatory Proceedings, Warranting Abstention 25

B. Primary Jurisdiction Applies To CLF's RCRA Claim 28

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL COURT CASES

A.G. ex rel. Maddox v. Elsevier, Inc.,
732 F.3d 77 (1st Cir. 2013).....21
Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006).....3
Ashcroft v. Iqbal,
556 U.S. 662 (2009).....9, 16, 22
Brossman Sales, Inc. v. Broderick,
808 F. Supp. 1209 (E.D. Pa. 1992).....23
Campagna v. Mass Department of Envrtl Protection,
334 F.3d 150 (1st Cir. 2003).....9
Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.,
633 F.3d 20 (1st Cir. 2011).....26, 27
Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013).....4, 5, 6
Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC,
80 F. Supp. 3d 1180 (E.D. Wash. 2015).....13
Connectu, LLC v. Zuckerberg,
522 F.3d 82 (1st Cir. 2008).....25
Crigler v. Richardson's,
2010 WL 2265675 (M.D. Tenn. June 3, 2010).....24
Davies v. Nat'l Co-op. Refinery Assoc.,
963 F. Supp. 990 (D. Kan. 1997).....29
Ed Peters Jewelry Co. v. C & J Jewelry Co.,
124 F. 3d 252 (1st Cir. 1997).....8
Ellis v. Gallatin Steel Co.,
390 F.3d 461 (6th Cir. 2004).....27
Envirowatch, Inc. v. Fukino,
2007 WL 1933132 (D. Haw. June 28, 2007).....25
Friends of Sakonnet v. Dutra,
738 F. Supp. 623 (D.R.I. 1990).....23
Global NAPs, Inc. v. Verizon New England, Inc.,
706 F.3d 8 (1st Cir. 2013).....14
Goldfarb v. Mayor & City of Baltimore,
791 F.3d 500 (4th Cir. 2015).....11
Gwaltney of Smithfield, Ltd. v. Chespeake Bay Found.,
484 U.S. 49 (1987).....23, 24
Hinds Invs., L.P. v. Angioli,
654 F.3d 846 (9th Cir. 2011).....13
Hoxsie Real Estate Trust v. Exxon Educ. Found.,
81 F. Supp. 2d 359 (D.R.I. 2013).....12, 18
Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,
263 F. Supp. 2d 796 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005).....10, 13

Katz v. Pershing, LLC,
672 F.3d 64 (1st Cir. 2012).....3, 6
Marrero Hernandez v. Esso Standard Oil Co.,
597 F. Supp. 2d 272 (D.P.R. 2009).....12
Me. People's Alliance v. Mallinckrodt,
471 F.3d 277 (1st Cir. 2006).....2, 3, 5, 14
O'Shea v. Littleton,
414 U.S. 488 (1974).....4, 5
Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.,
215 F.3d 195 (1st Cir. 2000).....28
Pintando v. Miami-Dade Housing Agency,
501 F.3d 1241 (11th Cir. 2007).....24
Pub. Interest Research Group, Inc. v. Carter-Wallace, Inc.,
684 F. Supp. 115 (D.N.J. 1988).....24
Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996).....26
Redondo Waste Sys., Inc. v. Lopez-Freytes,
659 F.3d 136 (1st Cir. 2011).....9
Rockwell Int'l Corp. v. United States,
549 U.S. 457 (2007).....24
Roman Catholic Bishop of Springfield v. City of Springfield,
724 F.3d 78 (1st Cir. 2013).....6
Sanchez v. Pereira-Castillo,
590 F.3d 31 (1st Cir. 2009).....21
Sepúlveda-Villarini v. Dep't of Educ. of P.R.,
628 F.3d 25 (1st Cir. 2010).....21
Sierra Club v. Chesapeake Operating, LLC,
248 F. Supp. 3d 1194 (W.D. Okla. 2017).....27
Spokeo Inc. v. Robins,
136 S. Ct. 1540 (2016).....3
United States v. CDMG Realty Co.,
96 F.3d 706, 714 (3d Cir.1996).....11
U. S. v. Davis,
261 F.3d 1 (1st Cir. 2001).....9
United States v. Outboard Marine Corp.,
549 F. Supp. 1036 (N.D. Ill. 1982).....20
United States v. Price,
523 F.Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).....11, 12
United States v. Zenon-Encarnacion,
387 F.3d 60 (1st Cir. 2004).....17
Upper Blackstone Water Pollution Abatement Dist. v. EPA,
690 F.3d 9 (1st Cir. 2012).....17
Vaqueria Tres Manjitas, Inc. v. Irizarry,
587 F.3d 464 (1st Cir. 2009).....26
Waste Servs. of Decatur, LLC v. Decatur Cnty.,
2019 WL 1435836 (W.D. Tenn. Mar. 29, 2019).....26

Whitmore v. Arkansas,
495 U.S. 149 158 (1990) 6

STATE COURT CASES

H.J. Baker & Bro. Inc. v. Orgonics, Inc.,
554 A.2d 196 (R.I. 1989) 9

FEDERAL STATUTORY AUTHORITIES

33 U.S.C. § 1251(b) 27
33 U.S.C. § 1319(b) 20
33 U.S.C. § 1319(d) 23
42 U.S.C. § 6903(27) 13
42 U.S.C. § 6972(a)(1)(B) 7, 10, 12
42 U.S.C. § 9601(29) 12
CWA § 309(b) 20
CWA § 309(d) 23
RCRA § 7002(a)(1)(B) ..... passim

FEDERAL RULES AND REGULATIONS

40 C.F.R. § 262.16(b)(8)(i) 14
40 C.F.R. § 262.251 14
51 Fed. Reg. 10 (Mar. 24, 1986) 15

STATE RULES AND REGULATIONS

250-RICR-140-10-1.1 15
250-RICR-140-10-1.5(A)(32) 15

OTHER MATERIAL

EPA, *Framework for Protecting Public and Private Investment in Clean Water Enforcement Remedies https*://www.epa.gov/sites/production/files/2016-12/documents/frameworkforprotectingpublicandprivateinvestment.pdf. 20, 21
EPA, *Water Enforcement Policy, Guidance and Publications,* https://www.epa.gov/enforcement/water-enforcement-policyguidance-and-publications 20
Nat'l Hurricane Ctr., *Tropical Cyclone Report – Hurricane Irene,* https://www.nhc.noaa.gov/data/tcr/AL092011_Irene.pdf 5
Nat'l Hurricane Ctr., *Tropical Cyclone Report – Hurricane Sandy,* https://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf 5
Oxford Living English Dictionary https://en.oxforddictionaries.com/definition/process 8

INTRODUCTION

Unable to rebut Defendants' core arguments requiring dismissal of Causes of Action 1-7, 9, 10, 21, and 22 (the "Adaptation Claims") of the Third Amended Complaint ("TAC") (ECF No. 45) and dismissal of all claims against Defendant Motiva Enterprises, LLC ("Motiva")[1], Conservation Law Foundation Inc. ("CLF") instead resorts to mischaracterizing the law, repeatedly invoking events like Superstorm Sandy and Hurricane Harvey at distant facilities that have no bearing on the likelihood of severe weather in Providence or how the Providence Terminal is operated, and asking the Court to construe its allegations in "the light most favorable" to CLF to find allegations that do not exist.

These attempts at misdirection cannot distract from the following key failures of the TAC:

- to demonstrate standing by alleging facts showing CLF's alleged injury is "certainly impending" or is at a "substantial risk" of occurring;
- to state a claim under the Resource Conservation and Recovery Act ("RCRA") by pleading facts alleging Defendants engaged in the *acts* of "handling, storage, treatment, transportation, or disposal" of "waste" that may present an "imminent and substantial endangerment";
- to identify any long-term planning requirements in the Terminal's Rhode Island Pollutant Discharge Elimination System ("RIPDES") permit that would cover the decades-long horizon of the Adaptation Claims;
- to identify any obligation to manage inundation from sea level rise or storm surge as "stormwater";
- to plead facts upon which the Court can infer Clean Water Act ("CWA") permit violations or a RCRA regulatory violation; and

[1] As stated in Defendants' motion to dismiss, ECF. No. 46, Defendant Motiva Enterprises LLC moves to dismiss all causes of action, and Defendants Shell Oil Products US, Shell Oil Company, Shell Petroleum Inc., Shell Trading (US) Company, Triton Terminaling LLC, and Equilon Enterprises LLC move to dismiss Causes of Action 1-7, 9, 10, 21, and 22 in their entirety, and Causes of Action 13-15 to the extent that they are based on allegations concerning Outfall 003A.

- to plead a basis for jurisdiction over Motiva after its relinquishment of all ownership and operational responsibility for the Terminal.[2]

ARGUMENT

I. CLF Has Not Shown It Suffers from An Imminent Injury

CLF's opposition evades Defendants' central argument challenging CLF's standing to bring its Adaptation Claims: the TAC does not demonstrate an injury-in-fact that is "certainly impending" or is at a "substantial risk" of occurring. *See* Defs.' Mem. at 15-16, ECF No. 46-1. CLF instead espouses a number of alternate standards that it claims satisfy Article III's imminence requirement that are all based on mischaracterizations of the law—its members' "proximity" to the Terminal, the occurrence of a so-called "past wrong," and the allegation that severe weather "trends are continuing." The law of standing is clear: CLF must demonstrate that the risk of injury to its members is of a magnitude that is "substantial" or "certainly impending." CLF has not met its burden to satisfy this requirement.

A. CLF Has Failed To Allege Facts Demonstrating Its Alleged Injury Is "Certainly Impending" Or At A "Substantial Risk" Of Occurring

CLF misstates the law of this circuit in claiming that "[a] plaintiff can show a substantial probability of harm by demonstrating proximity to the source of risk RCRA seeks to minimize." Opp. at 7, ECF No. 47-1 (citing *Me. People's Alliance v. Mallinckrodt*, 471 F.3d 277, 283-84 (1st Cir. 2006)). This proposition is nowhere in the Court of Appeals' *Mallinckrodt* decision. The statements of CLF's members regarding their proximity to the Terminal are irrelevant to the core argument raised by Defendants; the probability of an event such as a hurricane or flooding coming to fruition does not turn on nearness to an alleged source of pollution.

[2] For the reasons stated *infra* and in Defendants' Memorandum (ECF No. 46-1), all claims against Motiva should be dismissed.

Mallinckrodt actually states that "neither a bald assertion of [] harm nor a purely subjective fear that an environmental hazard may have been created is enough to ground standing. Rather, an individual's decision to deny herself aesthetic or recreational pleasures based on concern about pollution will constitute a cognizable injury *only when the concern is premised upon a realistic threat*." *Id*. at 284 (emphasis added).[3] The affidavits of CLF's members ultimately establish only a subjective fear of injury. *See* Opp. Ex. A ¶¶ 8, 13, ECF No. 47-2 (describing "concern[]" about possibility of releases or discharges from Terminal); Opp. Ex. B ¶¶ 9, 14, ECF No. 47-3 (same); Opp. Ex. C ¶¶ 12, 15, ECF No. 47-4 (same); Opp. Ex. D ¶¶ 13, 15, 19, ECF No. 47-5 (same); Opp. Ex. E ¶¶ 7, 10, 13, ECF No. 47-6 (same). The affidavits also do not speak to whether the injury they fear is imminent—the central argument raised by Defendants.

Even if the Court credits CLF's members' "concern," the Adaptation Claims are not premised on a "realistic threat," *i.e*., an "actual or imminent, not speculative" threat. *Katz v.*

[3] Although not raised in Defendants' opening brief, CLF's opposition and the affidavits of its members call into question whether CLF's Adaptation Claims satisfy the requirement for a "concrete and particularized" injury in fact. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016). In light of the Court's "independent obligation to determine whether subject-matter jurisdiction exists," Defendants address the issue here. *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514 (2006). Not one of the five affidavits submitted by CLF states that any CLF member has decided to "deny herself aesthetic or recreational pleasures," *Mallinckrodt*, 471 F.3d at 284, due to concern about a deluge of petroleum or other substances the from the Terminal resulting from the severe precipitation and flooding described in Section IV of the TAC. *See generally* Opp. Exs. A-E, ECF Nos. 47-2 – 47-6. The isolated statements in the affidavits Mr. Riley and Mr. Kilguss that they do not eat the fish they catch or swim in the area due to general water quality concerns or the Parks Department decision not to install a fish cleaning station do not provide standing for CLF's Adaptation Claims. Opp. Ex. D ¶¶ 11-12, ECF No. 47-5,, Opp. Ex. E. ¶¶ 8, 14, ECF No. 47-6; *see also Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) ("The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts."). No CLF member contends they refrain from activities due to fear of the effects of the severe precipitation and flooding from *the Terminal*, described in Section IV.A. of the TAC which are the basis of the Adaptation Claims. Rather, *all* affirmatively state that they regularly engage in rowing, boating, fishing, and other recreational activities on or near the Providence River. *See* Opp. Ex. A ¶ 6, ECF No. 47-2; Opp. Ex. B ¶ 7, ECF No. 47-3; Opp. Ex. C ¶¶ 4, 9, 10, 11, ECF No. 47-4; Opp. Ex. D ¶ 6, ECF No. 47-5; Opp. Ex. E ¶¶ 6, 8, ECF No. 47-6. This is in stark contrast to the affidavits found to support standing in *Mallinckrodt*, where the defendant was alleged to have contaminated a river with mercury and the plaintiffs refrained from certain activities in response to fear of mercury exposure. *See Mallinckrodt*, 471 F.3d at 284 (describing testimony of members of plaintiff's organization "that they have modified their behavior due to fear of mercury contamination. Although eager to do so, none of them will eat fish or shellfish from the river nor recreate on or near it").

Pershing, LLC, 672 F.3d 64, 79 (1st Cir. 2012). Defendants' opening brief addressed how the phenomena identified in Section IV.A. of the TAC (collectively, "severe precipitation and flooding") (and the sources cited therein) that CLF alleges contribute to its risk of injury[4] (1) contain no information regarding the likelihood that the phenomena will occur, (2) estimate risk to be at very low levels (*e.g.*, between 0.2% and 4%), (3) rely on irrelevant models of hypothetical impacts that do not speak to risk of injury (*e.g.*, modeling depicting the *aggregate* impact of *100,000* storms at *maximum* levels of wind and rain), or (4) describe remote scenarios occurring at the end of the century. *See* Defs.' Mem. at 15-16, ECF No. 46-1. In sum, the TAC offered nothing establishing the existence of a "certainly impending" or "substantial risk" of injury as required under the law.

CLF's opposition does not show the existence of an "imminent" threat under either the "certainly impending" or "substantial risk" standard, despite conceding these standards apply. *See* Opp. at 12, ECF No. 47-1 (citing *Clapper*, 568 U.S. at 414 n.5). It instead asks the Court to find its claimed injury is imminent because the "trends are continuing and effects are aggregating" and similarly that precipitation and flooding are happening at an "increasing rate." *Id.* at 13-14. Even accepting arguendo that trends are "continuing" or occurring at an "increasing rate," this sleight of hand tells the Court nothing at all about the magnitude of risk, much less establishes that the risk is "substantial" or presents a "certainly impending" injury. CLF identifies no case where an "increased rate" of factors allegedly contributing to an injury has been deemed to meet standing's imminence requirement.

Also unavailing is CLF's invocation of a "sheen" referenced in an April 2010 Rhode Island Department of Environmental Management ("RIDEM") report. *Id.* at 15. CLF cites the

[4] CLF acknowledges that these phenomena "make up the factors identified in the [TAC] as causing and/or contributing to the substantial risk of pollutant discharge and/or releases from the Terminal." Opp. at 13 n.13, ECF No. 47-1.

sheen as "'evidence bearing on whether there is a real and immediate threat of repeated injury.'" *Id*. at 14 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). However, the next sentence in *O'Shea* states, "the prospect of future injury *rests on the likelihood* that respondents will *again* be. . . ." injured. *O'Shea*, 414 U.S. at 496 (emphasis added). The Court concluded standing was lacking because the claimed injury was premised on contingent events and therefore there was "uncertainty about whether the alleged injury will be likely to occur. . . ." *Id*. at 498.[5] Thus, contrary to CLF's suggestion, *O'Shea* is consistent with *Clapper* and *Mallinckrodt* in requiring a plaintiff to show the likelihood of a future injury is not uncertain, but rather "substantial" or "certainly impending."[6] *Mallinckrodt*, 471 F.3d at 283-84 ("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."); *Clapper*, 568 U.S. at 414 n.5. As described above, and in Defendants' opening brief, CLF has failed to make this showing here.[7]

Finally, CLF cannot evade the imminence requirement by merely stating a risk exists "today." Opp. at 14 n.14, ECF No. 47-1. Some level of risk is always present. An injury is always possible. The law of standing requires more—that CLF show the risk is of a magnitude that it poses an imminent injury. *See Clapper*, 568 U.S. at 409 ("'[a]llegations of *possible* future

[5] The Supreme Court also stated in *O'Shea* that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, *if unaccompanied by any continuing, present adverse effects*." 414 U.S. at 495-96 (emphasis added). As described above, the affidavits submitted by CLF's members do not indicate continuing or present injuries (*i.e*., refrain from aesthetic or recreational activities) out of concern about Terminal discharges from the alleged severe precipitation and flooding underlying the Adaptation Claims. *See supra* at n.1.

[6] CLF's reliance on the 2010 "sheen" as evidence of a threat of repeated injury is belied by the lack of allegations of discharges or releases from storms in the intervening eight years. This period included Hurricane Irene's storm surge of 4.65 feet and 1.98 inches of precipitation in Providence and Superstorm Sandy's storm surge of 6.20 feet and 1.45 inches of precipitation in Providence. *See* Nat'l Hurricane Ctr., *Tropical Cyclone Report – Hurricane Irene* at 22-23 (Dec. 14, 2011), https://www.nhc.noaa.gov/data/tcr/AL092011_Irene.pdf; Nat'l Hurricane Ctr., *Tropical Cyclone Report – Hurricane Sandy* at 61, 81 (Feb. 12, 2013), https://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf. Further, CLF's affidavits do not indicate its members were injured by the alleged 2010 sheen.

[7] CLF's claim that "coastal infrastructure has already been damaged" refers to a generalized statement in the TAC. It is not specific to Providence. *See* TAC ¶ 141, ECF No. 45.

injury' are not sufficient."') (quoting *Whitmore v. Arkansas*, 495 U.S. 149 158 (1990)) (emphasis added). CLF has failed to carry that burden and its Adaptation Claims should be dismissed on this ground alone.

B. Standing Cannot Be Premised On A Speculative Chain of Possibilities

CLF dismisses the lengthy chain of events needed for its alleged injury to occur that is discussed in Defendants' memorandum by claiming that an alleged 2010 discharge violation somehow evinces substantial harm will occur in the future. *See* Defs.' Mem. at 16-17, ECF No. 46-1. CLF ignores the multiple instances of major storms that have occurred since that time with no corresponding discharge or release. *See supra* at n.5. As described above, CLF has failed to show that the risk of severe precipitation and flooding that will trigger its alleged injury is even likely. Thus the first step in CLF's chain of causation is speculative. Uncertainty as to whether a necessary link in the causation chain will even occur is fatal to standing's imminence and traceability requirements. *Clapper*, 568 U.S at 410-14; *see also Katz*, 672 F.3d at 80 ("Standing is not an 'ingenious academic exercise in the conceivable."') (citation omitted).

II. CLF's Members' Affidavits Confirm The Adaptation Claims Are Not Ripe

CLF does not dispute that it must satisfy both the fitness and hardship prongs of the ripeness test. Because CLF's Adaptation Claims rest on events that may not occur at all, they are not fit for judicial resolution. *See* Defs.' Mem. at 18-19, ECF No. 46-1. Further, CLF's affidavits only confirm that its members will suffer no "direct or immediate dilemma" if the Court withholds judgment on CLF's speculative claims. *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 90 (1st Cir. 2013). CLF's members regularly row, boat, fish, and otherwise engage in recreational activities in the area. Opp. Ex. A ¶ 6, ECF No. 47-2; Opp. Ex. B ¶ 7, ECF No. 47-3; Opp Ex. C ¶¶ 4, 9, 10, 11, ECF No. 47-4; Opp. Ex. D ¶ 6, ECF No. 47-5; Opp. Ex. E ¶¶ 6, 8, ECF No. 47-6.

III. CLF Has Failed To Identify Actions Or Wastes Necessary To Sustain The RCRA Endangerment Claim

The core of CLF's RCRA claim is that Defendants are liable because of a failure to act. CLF now strains to turn its allegations of inaction into acts and saleable products into waste in an effort to salvage its RCRA imminent and substantial endangerment claim. CLF argues that "failing to act" is a "process" and by allegedly failing to act Defendants are somehow "generating" waste. CLF also argues the petroleum and other products sold at the Terminal are within the scope of this waste statute. Both arguments lack any legal basis and border on nonsensical.

Significantly, CLF's opposition cites to no allegations in the TAC identifying any Defendant's "handling, storage, treatment, transportation, or disposal" of "waste" that it alleges is causing an "imminent and substantial endangerment." There are no such allegations in the TAC. These allegations are absent from CLF's complaint because CLF is fundamentally not alleging a RCRA claim. It is alleging a "failure to adapt" that is fundamentally at odds with RCRA's statutory focus on affirmative waste management *activities*. Accordingly, the Court should dismiss CLF's RCRA claim.

A. Mere "Generation" Of Waste Is Not Sufficient To Sustain An Imminent And Substantial Endangerment

CLF makes much ado about Defendants' "generation" of waste, *see* Opp. at 21-26, ECF No. 47-1, but being a generator of waste only puts Defendants within the class of potentially liable parties under RCRA § 7002(a)(1)(B). *See* 42 U.S.C. § 6972(a)(1)(B). Nearly every commercial and industrial facility generates some solid waste. Alleging mere generation of waste at a facility does not state a claim under RCRA's imminent and substantial endangerment provision, even if that facility sits near sea level. If it did, under CLF's logic, nearly every

building subject to flooding along the Providence River would be liable for creating an imminent and substantial endangerment under the statute.

CLF's argument that Defendants' alleged failure to act should be deemed "generation of waste" lacks any legal basis and should be rejected out of hand. CLF contends that because the definition of "hazardous waste generation" includes "the process of producing hazardous waste," it follows that Defendants' so-called "process of failing to act" equates to the "process of producing hazardous waste." Opp. at 26, ECF No. 47-1. CLF's argument collapses under the plain meaning of its words. Inaction involves no "process." A "process" is, by definition, "a series of *actions* or steps." Oxford Living English Dictionary, https://en.oxforddictionaries.com/definition/process (emphasis added). CLF's post-hoc attempt to transform its allegations of a failure to act into the "process" of waste generation must be rejected.

B. CLF's Baseless Successor Liability Theory Does Not Rescue the RCRA Claim

CLF's opposition continues to problematically fail to distinguish between the various entities that have been named as defendants and makes the sweeping conclusion (without any legal or factual support) that "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." Opp. at 24, ECF No. 47-1. This attempt to impose successor liability on Defendants for the Terminal's entire history runs contrary to both federal and state law.

As an initial matter, CLF does not allege any facts in the TAC that even suggest Defendants are liable to as successors to the Terminal's past owners. Moreover, the buyer of a corporation's assets does not assume the selling corporation's liabilities. *See Ed Peters Jewelry*

Co. v. C & J Jewelry Co., 124 F. 3d 252, 266 (1st Cir. 1997); *H.J. Baker & Bro. Inc. v. Orgonics, Inc.*, 554 A.2d 196, 205 (R.I. 1989).[8] Nothing in the TAC supports the argument that any Defendant assumed liabilities relating to the operations at the Terminal going back to 1907, an argument rendered all the more perplexing given that the prior owners and operators that CLF referenced continue to exist to this day. *See Davis*, 261 F.3d at 54 (affirming district court's refusal to impose successor liability where selling corporation "continued as a financially viable business following the sale…."); *see* Ex. A (Del. Div. of Corp. records of active status for Equilon Enterprises, Motiva Enterprises, Texaco Inc., and Saudi Refining, Inc.). Lacking any basis in law or fact, or even an allegation in the TAC, the Court should reject CLF's argument that Defendants have liability as successors in interest.

CLF also insists that the Court should overlook its failure to allege facts supporting the elements of its RCRA claim as to each Defendant simply because the TAC "identified" the Defendants and somehow "connected" them to the alleged endangerment at the Terminal. Opp. at 24-25 n.25, ECF No. 47-1. However, CLF must do more than simply identify an entity and allege a vague "connection." CLF must allege facts supporting "each material element necessary to sustain recovery under some actionable legal theory" in order to survive a motion to dismiss. *Campagna v. Mass Dept. of Envrtl Protection*, 334 F.3d 150, 155 (1st Cir. 2003). Without this showing, the TAC falls well short of the plausibility standard of *Iqbal*. *See Redondo Waste Sys., Inc. v. Lopez-Freytes*, 659 F.3d 136, 140 (1st Cir. 2011) (finding complaint "fails the plausibility test spectacularly" where plaintiff attempts to impose liability on several parties but "no

[8] The only relevant exception to this rule is the "mere continuation" test that provides five factors courts traditionally consider to evaluate whether to impose successor liability after an asset sale: (1) the divesting corporation's transfer of assets; (2) payment by the buyer of less than fair market value for the assets; (3) continuation by the buyer of the divesting corporation's business; (4) a common officer of the buyer and divesting corporations who was instrumental in the transfer; and (5) inability of the divesting corporation to pay its debts after the assets transfer. *U.S. v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001). CLF has provided no facts showing that the "mere continuation" exception applies.

defendant [is] specifically linked to actionable conduct. . . ."). CLF's bald allegations, which do not point to any activities conducted by any particular named Defendant fail to save the RCRA claim.

C. Saleable Petroleum And Other Products Are Not "Waste"

Faced with the fact that RCRA liability is limited to waste, CLF abandons common sense by arguing that the products sold at the Terminal should be deemed waste. CLF asks the Court to make the extraordinary "inference" that Defendants' alleged "failure to act to prevent releases of products" demonstrates an "intent to discard" the products, and thus the products are waste. Opp. at 26-28, ECF No. 47-1. There is no dispute that the petroleum and other products in the tanks are sold; this is the Terminal's primary purpose. *See* TAC ¶¶ 46, 49-50, ECF No. 45. These allegations support only one "inference"—the intent is to sell the products in the tanks, not discard them.

Further, CLF's theory that products indisputably for sale should be deemed waste on the basis of the seller's alleged knowledge that severe weather may strike would again expand the reach of RCRA § 7002(a)(1)(B) beyond recognition. Nearly every seller of a product situated on the river in Providence, or any other body of water, would be subject to RCRA citizen suits. The Court should decline to use CLF's flawed logic to drastically expand RCRA's reach.

D. CLF Remains Unable To Identify Any "Handling, Storage, Treatment, Transportation, Or Disposal" Of "Waste" That Is Presenting An Imminent And Substantial Endangerment

CLF's opposition ignores that RCRA's imminent and substantial endangerment provision is conjunctive: CLF must allege that a defendant has engaged in the "handling, storage, treatment, transportation, or disposal of . . . waste" *and* that activity presents an "imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B); *see also Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 847 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005)

("The term 'which' in the statutory phrase 'which may present an imminent and substantial endangerment to health or the environment' in RCRA § 7002(a)(1)(B) requires Plaintiffs' . . . to establish that the drum removal and/or petroleum release presented the 'imminent and substantial endangerment.' No such showing was made.").

CLF's opposition sets forth the definitions of "storage," "handling," and "treatment," and then simply asks the Court to accept, without any reference to the TAC, that Defendants "meet[] all of these tests." Opp. at 29, ECF No. 47-1. There are no specific facts alleged in the TAC regarding any handling, transportation, or treatment of waste, just formulaic paraphrasing of the elements of the RCRA claim that is insufficient as a matter of law. *See* Defs.' Mem. at 24, ECF No. 46-1. The only specific allegations regarding storage referenced in the TAC is the storage of products, not waste. Moreover, such allegations are not enough to state a claim under § 7002(a)(1)(B). As explained in Defendants' memorandum, CLF has not alleged any facts to support its claim that these alleged "storage" "handling" and "treatment" activities are causing an imminent and substantial endangerment. Defs.' Mem. at 30-32, ECF No. 46-1. CLF's reliance on *Goldfarb v. Mayor & City of Baltimore*, 791 F.3d 500, 514-15 (4th Cir. 2015), *see* Opp. at 30, ECF No. 47-1, is misplaced. There the court found the allegations of leaks, spills, excavating and mixing of contamination could cause an endangerment.[9] CLF's TAC is devoid of any allegations that such activities are causing an endangerment here.

CLF's argument that Defendants have engaged in "disposal" through inaction fares no better. CLF relies on the holding in *United States v. Price*, 523 F.Supp. 1055, 1071 (D.N.J.), *aff'd*, 688 F.2d 204 (3d Cir. 1982), that "disposal" may result from "passive inaction" because the definition of "disposal" includes "leaking." Opp. at 30-31, ECF No. 47-1. However, CLF

[9] The Court should disregard the new allegations injected by CLF in its opposition that are not contained in the TAC. *See* Opp. at 25, ECF No. 47-1 (referencing "grading, construction, and demolition" and "excavation.")

ignores that the Third Circuit later specifically rejected the basis for this conclusion in *Price*. *See United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir.1996) ("We think there is a strong argument, however, that in the context of this definition [of disposal], "leaking" and "spilling" should be read to require *affirmative human action*.") (emphasis added).[10] The other cases cited by CLF are inapposite because they concern whether migration of contaminants constitutes an imminent and substantial endangerment, not the scope of the definition of "disposal." *See Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359, 367 (D.R.I. 2013); *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 287 (D.P.R. 2009).

Finally, CLF's argument that it has adequately alleged "disposal" of waste falters because it ignores that "disposal" is preceded by the words "*past or present*" in the statute. 42 U.S.C. § 6972(a)(1)(B) (emphasis added). CLF's opposition states that severe precipitation and flooding "*will result*" in "discharging, spilling, and/or leaking," *i.e.*, the disposal has not happened yet. Opp. at 30, ECF No. 47-1 (emphasis added). It is clear from the statutory text of § 7002(a)(1)(B) that the possibility of *future* disposal is not actionable under that provision.

E. CLF Has Not Alleged Defendants "Contributed To" An "Imminent And Substantial Endangerment"

CLF's argument that it has alleged an imminent and substantial endangerment is notable for what it does not say. CLF does not identify in its opposition (or the TAC) any "handling," "storage," "treatment," "transportation," or "disposal" of "waste" that it contends is causing an imminent and substantial endangerment. Rather, CLF argues it is Defendants' "lack of preparedness" that presents the alleged endangerment. Opp. at 31, ECF No. 47-1. As explained above, CLF must allege the Defendants' past or present "handling, storage, treatment, transportation, or disposal" of "waste" is presenting the endangerment. "Lack of preparedness"

[10] Although *CMDG* addressed CERCLA liability, the Court was interpreting the RCRA definition of "disposal," which is incorporated by reference into CERCLA. *See* 42 U.S.C. § 9601(29).

does not fit within the definition of any of these enumerated activities. *See* Opp. at 29-30, ECF No. 47-1 (defining terms).[11]

CLF fails to meaningfully distinguish the weight of case law holding "contributing to" under RCRA requires active conduct. These holdings were based on a plain language reading of statute, and these cases are not, as CLF claims, limited to "passive conduct and migration." Opp. at 33 n.31; *see generally* Defs.' Mem. at 22-23, ECF No. 46-1 (discussing cases). For example, in *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, it was not migration of contaminants, but rather the defendant's alleged "studied indifference" to contamination that was found insufficient to impose RCRA liability. 263 F. Supp. 2d at 845-46. CLF's failure to adapt theory is closely analogous—essentially alleging Defendants are indifferent to the alleged risk of severe precipitation and flooding—and likewise insufficient under RCRA.

CLF's argument that Defendants are contributing to an endangerment because they "ha[ve] control over" hazardous waste at the Terminal, Opp. at 29, ECF No. 47-1 (citing *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1229 (E.D. Wash. 2015)), ignores that control only creates RCRA liability where the defendant directed the specific *activities* of "handling," "storage," "treatment," "transportation," or "disposal" of waste. *See Cow Palace*, 80 F. Supp. at 1230 (defendant's direction of third party's *disposal activities* constituted sufficient control for RCRA liability); *see also Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 850-51 (9th Cir. 2011) (defendant lacked sufficient control to be liable under RCRA where it did not direct *disposal* of waste). CLF's TAC fails to allege any facts showing any Defendant's specific direction of the aforementioned activities.

[11] CLF's repeated references to the Terminal's NDPES permit and alleged discharges covered by the permit to suggest the existence of an imminent and substantial endangerment under RCRA are legally irrelevant. *See e.g.*, Opp. at 36, 38, ECF No. 47-1. Discharges subject to an NDPES permit are excluded from definition of solid waste under RCRA. *See* 42 U.S.C. § 6903(27). CLF has not alleged any releases of solid waste in the TAC.

CLF also cannot rely on the broad injunctive relief available under RCRA to imply that a failure to act creates liability. In fact, *Mallinckrodt* cautions against this "conflat[ion of] the [] court's finding of liability with its choice of remedy." 471 F.3d at 283. The breadth of the Court's injunctive powers in no way excuses CLF from its obligation to plead actionable conduct under RCRA.

Finally, CLF has not alleged an endangerment under RCRA that is "imminent." CLF acknowledges that the First Circuit requires the threat of harm to be "near-term." Opp. at 32, ECF No. 47-1 (quoting *Mallinckrodt*, 471 F.3d at 288). As discussed above, there are no allegations in the TAC that the alleged threat of harm is "near-term." *See supra* § I.A.

IV. CLF Has Not Pled A RCRA Regulatory Violation

CLF's opposition makes multiple concessions that are fatal to its RCRA regulatory count at Claim 22.

First, CLF has conceded its federal RCRA regulatory claims. The opposition offers no response to Defendants' argument that CLF has failed to allege violations of 40 C.F.R. §§ 262.16(b)(8)(i) or 262.251. *Compare* Defs.' Mem. at 35-37, ECF No. 46-1 *with* Opp. at 35-37, ECF No. 47-1. In failing to respond CLF has waived these claims and they should be dismissed. *Global NAPs, Inc. v. Verizon New England, Inc.*, 706 F.3d 8, 16 (1st Cir. 2013) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Second, CLF concedes that, to the extent its claim is based on the tanks and products within them, it is premised on the possibility that the fuels in the tanks will become wastes *in the future*. Opp. at 35-36, ECF No. 47-1 (explaining claim is not "addressed to the fuel at the time it is stored in the tanks," and that compounds will become waste "once" they are discarded). As explained in detail in Defendants' opening brief and in the foregoing section, RCRA applies to

the management of existing waste, not products that *may* become waste in the future. *See supra* § III.C; Defs.' Mem. at 27-29, ECF No. 46-1. It bears noting that CLF is alone in subscribing to this novel view of RCRA; to date, CLF has not identified a single case that supports it. That is not surprising because CLF's expansive interpretation renders much of RCRA's scheme meaningless, including the preparedness regulations at issue here at 250-RICR-140-10-1.1. More specifically, the agency indicated its clear intent to exclude areas on-site that do not treat, store, or dispose of hazardous waste from the definition of "facility," and therefore, the scope of the regulation. *See* Defs.' Mem. at 36–37, ECF No. 46-1 (quoting 51 Fed. Reg. 10,146, 10,164 (Mar. 24, 1986)). If, as CLF contends, areas holding saleable products (such as tanks, the marine transfer area, and ethanol railcars) that are indisputably not wastes, are subject to the regulation – the definition of "facility" loses all meaning. *See* 250-RICR-140-10-1.5(A)(32) (definition of "facility" limited to contiguous areas on the land "used for treating, storing or disposing of hazardous waste or used oil."). The Court should reject CLF's invitation to disregard the clear text of the regulation (and a substantial body of RCRA case law) to bring non-wastes within the scope of RCRA.

CLF's final concession is an implicit one – the opposition conspicuously fails to identify any non-conclusory allegations in the TAC regarding the Defendants' alleged management of hazardous waste, including with regard to the so-called "legacy contamination." As explained in Defendants' brief, the TAC contains no facts alleging how, if at all, Defendants have handled, stored, treated, transported, or disposed of the waste alleged to have contaminated soil and/or groundwater at the Terminal, *see* Defs.' Mem. at 33 n.22, ECF No. 46-1. CLF's opposition does not argue otherwise. Indeed, there are no specific allegations regarding any accumulation of hazardous wastes at the Terminal. In the absence of any supporting factual allegations, CLF's

RCRA regulatory violation must be dismissed. *Iqbal*, 556 U.S. at 678 (complaint must plead adequate factual material to support a reasonable inference that defendant is liable).

V. CLF's CWA Adaptation Claims Seek To Impose Novel Legal Obligations On Defendants And Are Insufficiently Pled

A. CLF'S CWA Adaptation Claims Attempt To Hold Defendants To Requirements Not Found In The Terminal's Permit

CLF engages in misdirection and relies on questionable authority to resist the conclusion that the CWA Adaptation Claims are an attempt to read nonexistent requirements into the Terminal's permit. These claims seek to hold Defendants liable for conditions that may only exist well past the life of the Terminal's RIPDES permit and outside any obligation Defendants might have under that permit to manage stormwater. To the extent that CLF's claims seek to hold Defendants' liable on these bases, the CWA Adaptation Claims must be dismissed.

1. The Terminal's Permit Does Not Impose Obligations Beyond Its 5-Year Term

CLF has provided the Court with no legal basis to conclude that Defendants have an obligation to address or consider risks of severe precipitation and flooding long beyond the conceivable life of the Terminal's Permit. Instead, CLF engaged with arguments that Defendants have not made: "that the NPDES program's five-year permit term forecloses any obligation [they have] to consider climate-related impacts on the Terminal," Opp. at 37, ECF No. 47-1, and that the Terminal's permit should be read to include a *force majeure* or act of God exemption.[12] *Id.* at 39 n.34. CLF chose to address these straw men rather than explain to the

[12] In this portion of its memorandum, CLF also refers to injuries being "certainly impending," a term germane to Article III standing, but not interpretation of the CWA or the Terminal's permit. Opp. at 38, ECF No. 47-1.

Court why Defendants should be held liable for failures to consider conditions that may only come to pass by the end of the century.[13]

While CLF is correct that the Terminal was not "constructed . . . with an intention to only operate it for five years," it does not follow that an NPDES permit imposes requirements that are intended to reach decades into the future. *Id.* at 38. Congress instead chose to address changes to conditions over time by requiring periodic, 5-year renewals of a facility's permit. *See* Defs.' Mem. at 38, ECF No. 46-1. These renewals afford the permitting authority the opportunity to "reevaluat[e] . . . the relevant factors," and, as needed, "tighten[] . . . discharge conditions." *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 22 (1st Cir. 2012). Under this process, the permit terms cited by CLF in the CWA Adaptation Claims—including the requirement oft-referenced by CLF to use "good engineering practices" in preparing the SWPPP—will be reevaluated and potentially revised by RIDEM and subject to public comment. CLF cannot hold Defendants liable for conditions that will occur decades from now because the Terminal's permit does not address them; the CWA contemplates that a future permit will if needed.

CLF's cherry-picked example of a permit being administratively extended for thirteen years provides no basis for the Court to disregard how Congress structured the NPDES program. Opp. at 38, ECF No. 47-1 (citing *United States v. Zenon-Encarnacion*, 387 F.3d 60, 63-64 (1st Cir. 2004)). CLF cites no legal authority to support this argument, nor does it suggest that the Terminal has such a history of delays in renewing its permit that there could conceivably be any justification to read the RIPDES Permit to impose obligations to address conditions that may only occur more than fifty years from now. To the contrary, the record indicates that RIDEM

[13] Each of the CWA Adaptation Claims seek to hold Defendants liable for failing to address the "factors discussed in Section IV.A," which include, among other things, sea level rise scenarios for 2070 and 2100. *E.g.*, TAC ¶¶ 219, 229, ECF No. 45.

has been relatively prompt in renewing the Terminal's permit. The Terminal's 2011 Permit became effective just over a year after the previous permit had expired, and permit renewal issued by RIDEM this year went into effect less than three years after the 2011 Permit expired. *See* TAC, Exs. A and L, ECF Nos. 45-1 and 45-12.

The oral ruling denying the motion to dismiss in *ExxonMobil* similarly provides no basis to conclude that the term of the Terminal's permit cabins its obligation to consider the risks of severe precipitation and flooding. That court's determination that ExxonMobil was obligated "to consider foreseeable severe weather events" concerned the terms of ExxonMobil's NPDES permit, not the CWA's statutory limit on permit terms. TAC, Ex. G at 132:21-22, ECF No. 47-8 ("*the permit* requires Exxon to consider …." (emphasis added)). *ExxonMobil* in no way addressed the *time period* over which Shell must consider weather impacts—be they foreseeable or otherwise. The CWA provides the answer to that question: Shell must only consider weather impacts that may occur over the reasonable life of its permit, not phenomena that may occur decades from now.

2. The Definition Of "Stormwater" Limits The Scope Of CLF's Claims

CLF has also failed to address in its brief how the definition of "stormwater"—and the duty to manage it under the RIPDES permit—covers wastewater caused by precipitation, as opposed to inundation caused by sea level rise and storm surge. CLF instead devotes a substantial discussion to what portions of the Terminal are "point sources" that are subject to regulation under the CWA. Opp. at 41-42, ECF No. 47-1. CLF identifies these components and their potential to convey pollutants to warn the Court not to adopt Defendants' position that

"discharges related to inundation are not subject to regulation" under the CWA. *Id.* at 43. CLF has again tried to rebut an argument that Defendants have not made. [14]

CLF's First through Sixth Counts seek to enforce portions of the RIPDES Permit that address stormwater. These permit provisions, such as the requirement to use "good engineering practices" and develop Best Management Practices ("BMPs"), concern Defendants' obligation to manage "storm water discharges associated with industrial activity," as opposed to all possible types of discharges that might be regulated by the CWA. *E.g.*, Am. Compl. Ex. A at Permit Condition I.C.1, ECF No. 11-1. Thus, the definition of "stormwater" dictates the scope of the permit provisions under which CLF seeks to hold Defendants liable. Whether certain portions of the Terminal fall within the definition of a "point source" is irrelevant.

CLF's First through Sixth Counts thus fail to state claims to the extent that they seek to hold Defendants liable for failing to address conditions that fall outside the definition of stormwater because they are not caused by precipitation. CLF does not contest those portions of Defendants' Memorandum demonstrating that the definition of stormwater—and Defendant's obligations under its permit to manage it—does not encompass sea level rise and storm surge. Defs. Mem. at 39-42, ECF No. 46-1. Yet the TAC alleges that Defendants violated the RIPDES Permit by failing to account for "the factors discussed in Section IV.A," which include these two phenomena. *See, e.g.*, TAC ¶ 281, ECF No. 45. How the U.S. Environmental Protection Agency ("EPA") and RIDEM have defined stormwater precludes holding Defendants liable for any alleged failure to consider storm surge and sea level rise under the permit conditions on which CLF based its first six counts.

[14] CLF's citation to portions of the *ExxonMobil* transcript describing a permittee's obligation to proactively address changing circumstances similarly does not respond to an argument Defendants have made. Opp. at 42-43, ECF No. 47-1. This contention is not germane to what types of water flowing across or through the Terminal may be regulated as "stormwater" under the Terminal's permit.

3. CLF Relies On An Inapplicable, Outdated EPA Document To Expand Defendants' Obligations Beyond What The Terminal's Permit Requires

CLF attempts to argue that Defendants' obligations under the NPDES permit are unbounded by time or the definition of stormwater by extensively citing to an EPA document that is no longer valid and does not apply to the permit obligations CLF seeks to enforce. Although CLF characterizes the document, *Framework for Protecting Public and Private Investment in Clean Water Enforcement Remedies* ("*Framework*"), as "guidance," it is undated and appears nowhere in EPA's repository of CWA enforcement guidance.[15] *See* EPA, *Water Enforcement Policy, Guidance and Publications,* https://www.epa.gov/enforcement/water-enforcement-policyguidance-and-publications (last updated Nov. 1, 2019). The document also does not appear to reflect current government policy; two of the executive orders underpinning the *Framework* have been revoked in 2017. *See Framework* at 8 (discussing executive orders); Exec. Order No. 13783 § 3(i) (Mar. 28, 2017) (revoking Exec. Order No. 13653); Exec. Order No. 13807 § 6 (Aug. 15, 2017) (revoking Exec. Order No. 13690).

CLF further overlooks how the *Framework* in no way purports to define obligations under the RIPDES Permit that CLF claims to be enforcing. The *Framework* concerns only how EPA will exercise its discretion to seek "appropriate relief" using its authority under Section 309(b) of the CWA in cases where a violation has already been found. *Framework* at 5 (citing 33 U.S.C. § 1319(b)). Courts have recognized that this discretion sweeps more broadly than strictly requiring compliance. *See, e.g.*, *United States v. Outboard Marine Corp.*, 549 F. Supp. 1036, 1043-44 (N.D. Ill. 1982) (breadth of Section 309(b) permits injunctive relief to remedy environmental conditions). The *Framework* also contains no discussion of how to assess

[15] Based on the URL for the pdf of the *Framework*, EPA appears to have posted it online in December 2016. *See Framework,https*://www.epa.gov/sites/production/files/2016-12/documents/frameworkforprotectingpublicand privateinvestment.pdf.

whether Defendants or other entities are complying with their permits. The *Framework* simply presumes a violation already occurred, something that CLF has the burden to establish in this action.

B. The Amended Complaint Does Not Contain Allegations Sufficient To Infer Plausible Violations Of The Terminal's Permit

CLF's opposition doubles down on the defects in its pleading of the CWA Adaptation Claims rather than direct the Court to non-conclusory allegations that might support these claims. CLF calls out two aspects of the TAC, neither of which shows that CLF has stated "a plausible, not a merely conceivable, case for relief."[16] *Sepúlveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 29 (1st Cir. 2010) (Souter, J.). The TAC's failure to state plausible violations of the Terminal's permit requires dismissal of the CWA Adaptation claims.

First, CLF asserts that "[e]ach claim describes the basis for the alleged violation," Opp. at 47, ECF No. 47-1, but that basis consists solely of conclusory statements. CLF simply cites its conclusory assertions that Defendants have failed—in a way that is not specified—to "consider" or otherwise address "the factors discussed in Section IV.A" of the TAC. *E.g.*, TAC ¶ 287, ECF No. 45 ("Shell has failed to identify sources of pollution resulting from the factors discussed in Section IV.A. . . ."). Conclusory statements like these cannot be credited in assessing the sufficiency of CLF's pleadings. *See A.G. ex rel Maddox v. Elsevier, Inc.,* 732 F.3d 77, 80 (1st Cir. 2013) (declining to credit "conclusory statement [] presented as an ipse dixit, unadorned by any factual assertions that might lend it plausibility."); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (conclusory allegations are '"not entitled to the presumption of truth'")

[16] Defendants have not tried "to hold CLF to a higher pleading standard than is required." Opp. at 47, ECF No. 47-1. Defendants ask the Court to evaluate CLF's allegations consistent with the decisions of the U.S. Supreme Court and the First Circuit. CLF cites no authority to support its contention that it is being held to a higher standard than mandated by law.

(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)); *see also* Defs.' Mem. at 19-20, 43-44, 47-48, ECF No. 46-1.

Second, CLF relies on allegations that have no bearing on whether Defendants' activities complied with the RIPDES Permit. CLF's memorandum highlights how Section IV.A of the TAC lays out a variety of flooding and precipitation risks relating to climate change, and Shell's alleged general awareness that some of these risks may exist. Opp. at 47, ECF No. 47-1 (citing TAC ¶¶ 126-246, ECF No. 45). These allegations, however, do not permit the Court to infer anything about whether Defendants prepared the SWPPP or operated the Terminal consistent with the terms of the RIPDES permit.[17] CLF's decision to highlight these portions of the TAC, which are unrelated to Terminal operations, demonstrates how this suit is about advancing CLF's agenda, not enforcing the CWA.

C. Motiva's Transfer Of The Terminal And Its Permit Precludes Jurisdiction Under The CWA's Citizen Suit Provision

CLF seeks to preserve the Court's jurisdiction over its claims against Motiva by attempting to characterize the transfer of the Terminal to Triton Terminaling, LLC as a mere "name change." Opp. at 48, ECF No. 47-1. CLF ignores how Motiva "transfer[ed] … ownership and operational responsibilities to Triton," a distinct corporate entity (with no common ownership), and based on this transaction, obtained a permit transfer from RIDEM. Defs.' Mot. To Dismiss, Ex. 2, ECF No. 20-3. CLF has even acknowledged that Motiva no longer operates the Terminal. *See* TAC ¶ 26, ECF No. 45.

CLF's observation that certain Terminal personnel appeared not to have changed since the transfer does not alter the conclusion that Motiva no longer owns or controls the Terminal.

[17] The only portions of Section IV.A highlighted in CLF's memorandum that even arguably address the Terminal are stated as bald conclusions consistent with Defendants' liability, not factual allegations. *See* TAC ¶¶ 118, 230, 237.

Facilities are not required to fire and replace all of their employees after being conveyed from one corporate entity to another. Moreover, CLF itself acknowledges that these people ceased to be employees of Motiva after the transfer. *See* Opp. at 49, ECF No. 47-1 (observing that the contact individual's "affiliation has been changed from Motiva to Shell."). CLF's assertion that the "actor" responsible for complying with the Terminal's permit "remains the same" has no basis. *Id.* at 50.

Motiva's relinquishment of operational control and ownership makes clear that the Court lacks jurisdiction over it. Even when alleged violations of the CWA begin under a prior owner and continue into the present, the prior owner cannot "be in violation" of the CWA.[18] *See Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 632-33 (D.R.I. 1990); *Brossman Sales, Inc. v. Broderick*, 808 F. Supp. 1209, 1214 (E.D. Pa. 1992). A person cannot "be in violation" if it has "relinquished [control] of the source of the alleged violation and no longer ha[s] the control to abate it." *Brossman*, 808 F. Supp. at 1214. The case law also provides no indication that—as CLF suggests—some unspecified "connection" between a former and current operator provides a basis for federal courts to assert jurisdiction over the former. Having ceded its "ownership and operational responsibilities," Defs.' Mot. To Dismiss, Ex. 2, ECF No. 20-3, Motiva no longer has control over the Terminal and cannot be the subject of this citizen suit.[19]

[18] The lack of subject matter jurisdiction over a citizen suit brought against Motiva does not mean that the company has been "absolved from liability" under the CWA. Opp. at 51, ECF No. 47-1. Motiva remains potentially subject to actions for civil penalties brought by EPA alleging past noncompliance with the CWA. *See Gwaltney of Smithfield, Ltd. v. Chespeake Bay Found.*, 484 U.S. 49, 58 (1987) (discussing actions under CWA § 309(d), 33 U.S.C. § 1319(d)).

[19] Permitting citizen suits against Motiva and similarly situated prior owners would undermine the purpose of the CWA's requirement to provide notice prior to instituting a citizen suit. Motiva relinquished its interests in the Terminal prior to CLF transmitting its notice letters. Opp. at 48, ECF No. 47-1. As a consequence, the notice letter could not have prompted Motiva to address the alleged violations identified in the notice letter and avoid the need for a citizen suit.

VI. CLF Alleges No Ongoing Violations from One of the Terminal's Outfalls

The Court lacks jurisdiction over CLF's claims against the Terminal's Outfall 003A because the TAC facially cannot satisfy the requirements of the CWA's citizen suit provision. The CWA's grant of jurisdiction in citizen suits demands that CLF "*allege* a state of either continuous or intermittent violation" in order to assert claims against Outfall 003A. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987) (emphasis added). CLF's own pleading incorporates by reference the Terminal's 2019 RIPDES Permit, which both superseded the Terminal's prior permit and relieved Outfall 003A of the requirements that are the basis for Causes of Action 13-15.[20] *In other words, CLF's own pleading effectively admits that there is no potential for future violations from this outfall*. As such, claims concerning Outfall 003A are wholly past and the Court lacks jurisdiction over them. *See id.*; *Pub. Interest Research Group, Inc. v. Carter-Wallace, Inc.*, 684 F. Supp. 115, 121 (D.N.J. 1988) (citizen suit cannot be brought to enforce expired permit terms that lack "counterparts in the discharger's present permit").

CLF provides no support for its position that the Court should ignore the current, operative complaint in order to assess whether jurisdiction exists. The Supreme Court has recognized that a voluntarily amended complaint—not a prior pleading—governs a court's assessment of its subject matter jurisdiction in a variety of contexts; this rule is not limited, as CLF suggests, to the circumstances presented in *Connectu, LLC v. Zuckerberg*, 522 F.3d 82 (1st Cir. 2008). *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction" (collecting cases)); *Pintando v. Miami-Dade*

[20] TAC ¶ 71, ECF No. 45; TAC, Ex. L at 7-11, ECF No. 45-12 (effluent limits and monitoring requirements in 2019 RIPDES Permit containing no requirements for outfall 003A); *id.* at 29 ("monitoring at Outfall 003 will be eliminated from" the permit).

Housing Agency, 501 F.3d 1241, 1244 (11th Cir. 2007) (*per curiam*) (dismissing action based on amended complaint that no longer pleaded federal claims).

Neither of the cases cited in CLF's brief suggests that the CWA creates an exception to this rule. *See* Opp. at 52 n.47, ECF No. 47-1. In fact, *Crigler v. Richardson*'s determination that the court lacked jurisdiction over wholly past violations relied principally on an analysis of a third amended complaint. 2010 WL 2265675, at *7 (M.D. Tenn. June 3, 2010) ("There is . . . nothing in the Third Amended Complaint to indicate that these defendants were engaging in violations of the Clean Water Act after the 2006 incident"). The other case on which CLF relies—involving the 60-day notice requirement in RCRA's citizen suit provision—concerned an issue of timing for *initiating* suit rather than which set of allegations a court must use in order to assess its jurisdiction. *Envirowatch, Inc. v. Fukino*, 2007 WL 1933132, at *4 (D. Haw. June 28, 2007).

VII. The Doctrines Of Abstention And Primary Jurisdiction Should Be Applied In This Case

A. CLF Seeks Rulings That Will Impact the Development of State Policies, Warranting Abstention

CLF attempts to avoid dismissal of the CWA and RCRA Regulatory Adaptation Claims on abstention grounds by miscasting these claims as a run-of-the-mill enforcement action and selectively reading First Circuit precedent. CLF seeks rulings from the Court on a subject—how to manage changes to stormwater discharges resulting from climate change and how to harden port fuel terminals—before Rhode Island agencies have completed processes intended to address this same topic. Abstaining from these claims will ensure that expert state agencies—rather than a federal court—have the first word on how to address these important policy and technical issues that directly affect Rhode Island's citizens and economy.

CLF misreads *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20 (1st Cir. 2011), to create a general bar to abstaining in CWA and RCRA citizen suits. *Chico* cautions against deferring to state enforcement proceedings that do not qualify for RCRA's "diligent prosecution" bar because Congress "[had] carefully delineat[ed] … the situations in which … enforcement efforts will foreclose review of a citizen suit in federal court." *Id.* at 31. The court did not hold that citizen suit provisions cabin district courts' ability to abstain in deference to state *policymaking* processes. To the contrary, *Chico* recognizes that abstention is appropriate when a plaintiff asks the "district court [to] become the regulatory decision-making center." *Id.* at 30 (internal quotations omitted) (quoting *Vaqueria Tres Manjitas, Inc. v. Irizarry*, 587 F.3d 464, 473 (1st Cir. 2009)); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (*Burford* counsels in favor of abstention in order to "retain[] local control over 'difficult questions of state law bearing on policy problems of substantial public import' …." (citation omitted)).[21]

The CWA and RCRA regulatory Adaptation claims will require the Court—before any state agency has a chance to do so—provide direction for how a coastal fuel terminal in Rhode Island must address potential effects of climate change, not simply "enforce the Permit as written."[22] Opp. at 56, ECF No. 47-1. The Court will have to interpret and delineate the scope of regulatory obligations and programs that are currently under evaluation by RIDEM to

[21] CLF relies on an unreported district court case to suggest that its compliance with RCRA's pre-suit notice requirement bars this court from abstaining under *Burford*. Opp. at 53, ECF No. 47-1 (quoting *Waste Servs. of Decatur, LLC v. Decatur Cnty.*, 2019 WL 1435836, at *4 (W.D. Tenn. Mar. 29, 2019)). Adopting this position would require the Court to disregard the Supreme Court's instruction that a court's duty to exercise statutorily-conferred jurisdiction "is not … absolute." *Quackenbush* 517 U.S. at 716. *Burford* explicitly recognized that federal courts have *discretion* to decline to exercise jurisdiction where doing so would interfere with state policymaking. *See id.* at 727.

[22] CLF attempts to assure the Court that hearing this case will not interfere with Rhode Island's adaptation and resiliency efforts because "RIDEM presumably considered its resilience framework and state goals when approving Shell's Permit renewal application" earlier this year. Opp. at 55, ECF No. 47-1. This assertion relies on an assertion that is not supported by record. The Statement of Basis explaining how RIDEM drafted the Terminal's new permit contains no indication that RIDEM considered its resiliency policy during the development of the 2019 RIPDES Permit. TAC at 26-35, ECF No. 45-12.

determine how best to manage changes to stormwater discharges that may result from climate change.[23] *See* Defs.' Mem. at 55-56, ECF No. 46-1. The CWA counsels that addressing these important water quality questions is committed to state policymakers, not federal courts. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution …."). CLF does not simply ask the court to apply state regulations that are "substantially identical to" federal rules, *Chico*, 633 F.3d at 33; it asks the Court to wade into the state's active policymaking process with respect to how to manage stormwater pollution and the resiliency of infrastructure to account for the impacts of climate change.[24]

Unlike in *Chico* "careful management of the case" will not prevent conflict with Rhode Island's regulatory efforts. *Id.* at 32. A decision concerning the extent to which climate change must be considered under the Terminal's permit will affect not only Defendants, but also numerous other facilities holding permits containing language similar to that in the RIPDES Permit. *See, e.g.*, RIDEM, *Multi-Sector General Permit – Storm Water Discharge Associated with Industrial Activity, No. RIR500000*, at Condition V.A. (Aug. 15, 2013) (requiring development of Storm Water Management Plans "in accordance with good engineering practices. . . ."). These facilities will alter their operations to conform to the Court's decision in order to reduce their risk of exposure to enforcement actions. Without the benefit of RIDEM evaluating available data and revising design standards required by state water quality plans, *see*

[23] As explained in Section IV.A *supra*, these claims also seek to impose novel obligations that are not required by the Terminal's permit.

[24] Courts abstaining from hearing citizen suits have not done so, as CLF suggests, solely because a party sought collateral review of a state permit. *See* Opp. at 56, ECF No. 47-1. Rather, they have abstained to prevent interference with states' "efforts to establish a coherent policy with respect to" environmental issues on which they have been delegated authority under federal law. *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1203 (W.D. Okla. 2017) (finding Oklahoma's regulation of underground injection wells warranted abstention in RCRA citizen suit); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 480 (6th Cir. 2004) ("'federal review … would be disruptive to Kentucky's efforts to establish a coherent policy' with respect to"' its implementation of the CAA).

Defs.' Mem. at 55-56, ECF No. 46-1, these operational changes may frustrate the regulatory framework RIDEM ultimately puts in place.

Any decision requiring Defendants to implement measures or modify Terminal infrastructure will also necessarily impact the State's ongoing coastal resilience. The very operational changes that facilities will make in response to rulings in this case will be made without the benefit of a coordinated planning effort designed to account for overall port resiliency and broader economic considerations that the state intends to address in its adaptation and resiliency strategies. *Id.* at 56-57.

B. Primary Jurisdiction Applies To CLF's RCRA Endangerment Claim

CLF continues to downplay the profound breadth of the technical issues implicated by its RCRA § 7003(c)(1)(B) endangerment claim and disputes the applicability of primary jurisdiction by arguing that the doctrine is not appropriate in the context of a RCRA citizen suit. CLF's position relies on its ignoring the passage of the Resilient Rhode Island Act of 2014 and that statute's charge to RIDEM to account for the potential impacts of climate change. Looking to the factors for evaluating primary jurisdiction set forth by the First Circuit most recently in *Pejepspcot*, each factor weighs in favor of its applicability here for the following reasons which CLF failed to rebut. *See Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co*., 215 F.3d 195, 205 (1st Cir. 2000).[25]

First, RIDEM has been delegated authority under RCRA to take action to protect human health and the environment and is tasked with evaluating potential risks associated with climate-related severe precipitation and flooding. Second, as repeatedly illustrated through the various sources discussed in CLF's Amended Complaint (*see* TAC ¶¶ 135-236, ECF No. 45), the

[25] These factors are: "(1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." (citation omitted).

climate-related issues identified by CLF require the analysis of complex, evolving, and highly technical data regarding climate-related storm risks with which RIDEM is already engaging. Lastly, deference to RIDEM on this issue will avoid the possibility of the Court entering an order that conflicts with RIDEM's own determination regarding how remediation standards should be applied to address the coastal areas of the state that CLF has alleged may be at greater risk of severe precipitation and flooding.

Additionally, CLF's opposition fails to address RIDEM's current involvement with the historic contamination alleged by CLF to be the source of an imminent and substantial endangerment (*i.e.,* the AOCs). As noted in Defendants' memorandum, RIDEM is already overseeing the remediation of the AOCs and has approved the applicable RAP. Defs.' Mem. at 58, ECF No. 47-1. CLF's allegations regarding dangers posed by soil and groundwater contamination directly relate to RIDEM's core function of protecting health and the environment and the steps it is taking to do so. Courts have found this type of agency involvement constitutes a basis for applying primary jurisdiction in the context of a RCRA citizen suit. *See, e.g., Davies v. Nat'l Co-op. Refinery Assoc.*, 963 F. Supp. 990, 997-98 (D. Kan. 1997) (applying primary jurisdiction where state agency has been actively involved in investigation and remediation of site). CLF does not deny the above facts regarding RIDEM's authority nor does it challenge or take issue with the nature or level of RIDEM's ongoing oversight of actions directed to contamination at the facility. At bottom, the injunctive relief sought by CLF rests within the scope of RIDEM's authority and deference to RIDEM on the issues implicated by CLF's RCRA claim is appropriate here.

CONCLUSION

For the foregoing reasons, and those stated in Defendants' motion to dismiss and accompanying memorandum, the Court should dismiss (i) all causes of action against Defendant

Motiva, (ii) Causes of Action 1-7, 9, 10, 21, and 22 against all Defendants; and (iii) and Causes of Action 13-15 to the extent that they are based on allegations concerning Outfall 003A.

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Respectfully submitted,

/s/ Bina Reddy

Robert D. Fine (RI Bar # 2447)
Chace, Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903
(401) 453-6400
Fax (401) 453-6411
rfine@crfllp.com

John S. Guttmann (admitted *pro hac vice*)
Beveridge & Diamond, P.C.
1350 I Street, NW, Suite 700
Washington, DC 20005
(202) 789-6020
Fax (202) 789-6190
jguttmann@bdlaw.com

Bina Reddy (admitted *pro hac vice*)
Beveridge & Diamond, P.C.
400 W. 15th Street, Suite 1410
Austin, TX 78701
(512) 391-8045
Fax (512) 391-8099
breddy@bdlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, the foregoing Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Third Amended Complaint by Shell Oil Products US, Shell Oil Company, Shell Petroleum Inc., Shell Trading (US) Company, Motiva Enterprises LLC, Triton Terminaling LLC, and Equilon Enterprises LLC was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Bina Reddy
Bina Reddy