

July 28, 2020

*Via Registered Mail and Certified Mail, Return Receipt Requested*

Mike Barron  
Terminal Manager, New Haven Terminal  
500 Waterfront Street,  
New Haven, CT 06512

Gulf Oil Limited Partnership  
80 William Street, Suite 400  
Wellesley Hills, MA 02481

**RE: Notice of Intent to File Suit for Violations of the Resource Conservation and Recovery Act and Clean Water Act at the Terminal**

To Whom It May Concern:

Conservation Law Foundation (“CLF”)<sup>1</sup> hereby notifies Gulf Oil Limited Partnership (hereinafter, “Gulf”) of its intent to commence a civil action under Section 505 of the Clean Water Act (“CWA”), 33 U.S.C. § 1365 and Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), for violations of the CWA, 33 U.S.C. § 1251 *et seq.*, and RCRA, 42 U.S.C. § 6901 *et seq.*, at Gulf’s bulk storage and fuel terminal located at 500 Waterfront Street, New Haven, Connecticut (the “Terminal”). Unless Gulf adequately resolves the violations of RCRA and the CWA described herein, CLF intends to file suit against Gulf in the United States District Court for the District of Connecticut to secure appropriate relief under federal and state law for these violations.

Gulf has not designed, maintained, modified, and/or operated its Terminal to account for the numerous impacts of climate change. Gulf’s infrastructure and operational failures at the Terminal, which include failing to inform regulators of the Terminal’s specific vulnerabilities to climate change, put CLF’s members, the New Haven community, and their natural resources at great risk and violate RCRA and the CWA because they essentially guarantee flooding, unpermitted discharges, and widespread contamination.

**I. The Terminal**

Gulf, acting through officers, managers, subsidiary companies, and instrumentalities, owns or has owned and/or operates or has operated the Terminal, which consists of a “tank farm,” a pipeline, a marine terminal, buildings, and infrastructure located at 500 Waterfront Street in New

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<sup>1</sup> CLF is a 501(c)(3) nonprofit, member-supported organization dedicated to the conservation and protection of New England’s environment.

Haven, Connecticut. The Terminal is located in the Port of New Haven, in New Haven Harbor, which opens into the Long Island Sound.

The Terminal is engaged in the receipt, storage, and wholesale distribution of petroleum products. The spectrum of fuels handled by this facility consists of gasoline, fuel grade ethanol, No. 2 fuel oil, and diesel. The facility currently contains sixteen bulk storage tanks with a total bulk storage capacity of 23,089,858 gallons, however the Terminal is in the process of seeking approvals for an additional seven million gallons of storage capacity. In addition, the Terminal contains a 2,000 gallon fuel oil underground storage tank holding No. 2 fuel oil lying outside of the tank farm. The Terminal receives, stores, blends, and distributes gasoline and petroleum distillate products. Fuel products are received at the marine terminal area of the Terminal via ships or by pipeline and shipped from the Terminal via trucks.

The Terminal's bulk storage tanks are located in a single containment area surrounded by earthen or concrete dikes. An intermediate dike divides the tank farm into two sections, east and west. According to the Terminal's Stormwater Pollution Prevention Plan ("SWPPP"), stormwater in the tank farm flows by gravity into catch basins and into a holding tank, from which it is either infiltrated or pumped out. From the holding tank, it is pumped out of the containment area and into a stormwater interceptor, pumped through an oil/water separator, and then discharged to the New Haven Municipal Separate Storm Sewer System ("MS4"). According to the SWPPP, stormwater from the truck loading rack similarly flows through the interceptor and oil/water separator before discharging to the New Haven MS4.

According to Stormwater Management Plans Gulf recently filed with the City of New Haven, most stormwater from the tank farm is discharged directly into New Haven Harbor through two outfalls not identified in the SWPPP.

Gulf is a generator of hazardous waste at the Terminal and is categorized as a Small Quantity Generator of hazardous waste. It has contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste, as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and solid waste, as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), at the Terminal, which may present an imminent and substantial endangerment to health or the environment.

Based on the information currently available to CLF, the toxic and hazardous wastes and pollutants listed below, many of which are highly carcinogenic, are present at the Terminal: petroleum hydrocarbons and other constituents including but not limited to toxic chemicals, such as 1,2,4-Trimethylbenzene, Benzene, Cyclohexane, Ethylbenzene, Lead Compounds, N-Hexane, Naphthalene, Polycyclic Aromatic Compounds, Toluene, and Xylene.

In addition to current activities and storage, the soils and groundwater at the Terminal are contaminated from Gulf's past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste. Environmental remediation reports submitted by Gulf to the Connecticut Department of Energy and Environmental Protection indicate that various chemical spills have occurred on the site since at least the 1980s. The Terminal is subject to long-term remediation requirements for contamination from non-aqueous phase liquid (NAPL), VOCs (Acetone, benzene, 2-Butanone (MEK), n-Butylbenzene, sec-Butylbenzene, tert-Butylbenzene,

Chloroform, Ethanol, Ethyl benzene, Isopropylbenzene, 4-Isopropyltoluene, Methyl tert-butyl ether (MTBE), Methylene chloride, Naphthalene, n-Propylbenzene, Toluene, Tert-amyl methyl ether, Tert-Butanol / butyl alcohol, 1,2,4-Trimethylbenzene, 1,3,5-Trimethylbenzene, m,p-Xylene, o-Xylene), SVOCs (Acenaphthene, Anthracene, Benzo (b) fluoranthene, Benzo (a) anthracene, Benzo (a) pyrene, Benzo (b) fluoranthene, Benzo (g,h,i) perylene, Benzo (k) fluoranthene, Bis(2-ethylhexyl)phthalate, Di-n-butyl phthalate, Chrysene, Dibenzofuran, Di-n-butyl phthalate, Fluoranthene, Fluorene, Indeno (1,2,3-cd) pyrene, 1-Methylnaphthalene, 2-Methylnaphthalene, Pentachlorophenol, Phenanthrene, Phenol, Pyrene), petroleum hydrocarbons, and lead.<sup>2</sup>

The Federal Emergency Management Agency (“FEMA”) flood map for the area where the Terminal is located, which was last revised in July 2013, shows that the entire Terminal is within a Special Flood Hazard Area (SFHA) subject to inundation by a 1% annual chance flood (i.e., a 100-year flood or “base flood”). The Terminal is adjacent to and bordered by a VE<sup>3</sup> zone in New Haven Harbor, also referred to as a coastal high hazard area, making the terminal vulnerable to high velocity water including waves as well as wave effects 3 feet or greater. Furthermore, the FEMA base flood elevation is more than 5 feet higher than the erodible land elevation surrounding the terminal. The Terminal has been subject to storm surge inundation in the past, including during Superstorm Sandy.

## II. Climate Change and New Haven

The present flood risks at the Terminal demonstrated by the FEMA map are, and will continue to be, exacerbated by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which are, and will continue to become, worse as a result of climate change. According to the Fourth National Climate Assessment, “The frequency of dangerous coastal flooding in the Northeast would more than triple with 2 feet of sea level rise.”<sup>4</sup> Since 1900, sea level has already risen approximately one foot in the Northeast, at a rate that is three to four times higher than the global average.<sup>5</sup> From 1895 to 2011, the Northeast sustained a temperature increase of 2°F and a 10% increase in precipitation (5 inches), and from 1958 to 2016, “the number of heaviest 1% precipitation events (that is, an event that has a 1% chance of occurring in any given year) in the Northeast has increased by 55%.”<sup>6</sup> The location, elevation, and failure to operate, maintain, or design infrastructure at the Terminal to account for the impacts associated with climate change make it especially vulnerable.

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<sup>2</sup> Stantec, Site Characterization Report (July 14, 2016).

<sup>3</sup> The designation of VE corresponds to the 1% annual chance coastal floodplains that have additional hazards associated with wave action.

<sup>4</sup> Mecray, Ellen L., *et al.*, *Ch. 18: Northeast*, 713 FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATIONS IN THE UNITED STATES (2018), *available at* [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch18\\_Northeast\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch18_Northeast_Full.pdf).

<sup>5</sup> *Id.* Horton, Radley, *et al.*, *Ch. 16: Northeast*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, eds., U.S. Global Change Research Program) (2014).

<sup>6</sup> Mecray, *supra* at n.3; Radley, *supra* at n.4.

The entirety of the Port of New Haven is situated on artificial fill layered over stratified drift.<sup>7</sup> Combined with being located nearly at sea level, the Terminal is at risk from coastal flooding caused by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change.

“New Haven’s southern facing coastline and the geomorphology of Long Island Sound cause it to be particularly vulnerable to all hurricanes forecasted to track to New England. This is due to the ability of Long Island Sound to amplify hurricane surges.”<sup>8</sup> “As a coastal town, New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms. Weather-related flooding is compounded by a high rate of sea level rise of 2.5mm per year (the global mean trend is 0.5mm per year).”<sup>9</sup> “Several extreme precipitation indices are projected to increase, including the number of days with more than 1 inch of precipitation [], number of heavy precipitation days[], fraction of total precipitation accounted for by heavy precipitation [], and the maximum 1-day and 5-day precipitation [], all indicating a substantial increase of flood risk by mid-century.”<sup>10</sup>

Sea level trends along the Northeast Atlantic “have been higher than the global rate over the last several decades, capped by a recent multiyear jump in sea level beginning in 2009.”<sup>11</sup> This trend is projected to continue.<sup>12</sup> A 2019 analysis by the Connecticut Institute for Resilience and Climate Adaptation (“CIRCA”) concluded that communities in Connecticut should plan that “sea level will be 0.5 m (1ft 8 inches) higher than the [1992 level] in Long Island Sound by 2050.”<sup>13</sup> Moreover, according to a report by the Connecticut Department of Energy and Environmental Protection (“CT DEEP”), average surface temperatures in Long Island Sound have been rising—which has been connected to increased risk of frequency and magnitude of storms—with a change of almost 2 degrees between 1991 and 2015.<sup>14</sup>

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<sup>7</sup> *City of New Haven Natural Hazard Mitigation Plan Update II*, Figure 2-5, 2-12 (Apr. 2017).

<sup>8</sup> *Id.* at 5-1.

<sup>9</sup> CONNECTICUT INSTITUTE FOR CLIMATE AND ADAPTATION, *City of New Haven Commercial Industrial Toolbox Final Report 4* (Jul. 31, 2017), available at <https://circa.uconn.edu/wp-content/uploads/sites/1618/2016/03/CIT-CIRCA-Final-Report-With-JPEG-Appendices-attached.pdf>.

<sup>10</sup> Connecticut Institute for Resilience and Climate Adaptation, *Connecticut Physical Climate Science Assessment Report (PCSAR): Observed trends and projections of temperature and precipitation*, 4 (Aug. 2019), available at <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/11/CTPCSAR-Aug2019.pdf>.

<sup>11</sup> NOAA, *Global & Regional Sea Level Rise Scenarios for the U.S.*, at 9 (Jan. 2017), [https://tidesandcurrents.noaa.gov/publications/techrpt83\\_Global\\_and\\_Regional\\_SLR\\_Scenarios\\_for\\_the\\_US\\_final.pdf](https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf).

<sup>12</sup> *See id.* at vii (“Along regions of the Northeast Atlantic (Virginia coast and northward) and the western Gulf of Mexico coasts, RSL [relative sea level] rise is projected to be greater than the global average for almost all future GMSL [global mean sea level] rise scenarios.”).

<sup>13</sup> James O’Donnell, Connecticut Institute for Resilience & Climate Adaptation, *Sea Level Rise in Connecticut*, 1, 4 (Feb. 2019), available at <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/02/SeaLevelRiseConnecticut-Final-Report.pdf>.

<sup>14</sup> *2015 Long Island Sound Hypoxia Season Review*, CT DEEP (2015), available at [https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis\\_water\\_quality\\_monitoring/2015/2015SeasonReviewfinalpdf.pdf](https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis_water_quality_monitoring/2015/2015SeasonReviewfinalpdf.pdf).

The Port of New Haven, and specifically the Terminal, is directly at risk from these impacts. In fact, the Terminal has been inundated by storm surge in the past. According to the CT DEEP online mapping tool entitled Connecticut Coastal Hazards Viewer, all of the oil terminals in the Port of New Haven, including the Terminal, were inundated when Superstorm Sandy hit New Haven on October 29, 2012. The storm surge in New Haven during Sandy was measured to be 9.14 feet above normal tide levels.<sup>15</sup> Despite swamping the Terminal, the storm surge from Sandy was *less than initially anticipated* owing to a change in the storm’s trajectory.<sup>16</sup> Post-Sandy, the City of New Haven commissioned a study of the resiliency of the I-95 corridor through New Haven. The study’s authors noted that “[u]nder different storm tracking scenario, Superstorm Sandy could have caused more damage if the flooding inundation was superposed with high tides.”<sup>17</sup> In particular, the study concluded that a similar storm in the future could further increase the water level by almost three feet.

The Terminal stores toxic pollutants known to be harmful to humans and aquatic life in an area affected by sea level rise, increased precipitation, increased magnitude and frequency of storm events, as well as increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change. The first significant storm surge that makes landfall at the Terminal is going to flush hazardous and solid waste from the Terminal into the Harbor and the Quinnipiac and Mill Rivers and through nearby communities and ecosystems; a significant rise in sea level will put the majority of the Terminal, including soils, groundwater, and treatment works, under water. Gulf knows all this, and yet has failed to disclose required information in its possession and has not taken appropriate steps to protect the public and the environment from this certain risk.

### **III. Resource Conservation and Recovery Act (“RCRA”) Violations**

#### *1. Imminent and Substantial Endangerment*

CLF intends to include the wastes identified above in its proof of Gulf’s RCRA violations. To the extent that other hazardous and solid wastes are revealed to be present at the Terminal—a fact that Gulf is in a better position to know than CLF—Gulf is put on notice that CLF also intends to include those other wastes in its proof of Gulf’s RCRA violations.

The hazardous and solid waste at the Terminal is generated, handled, stored, treated, transported and/or disposed of at or near sea level in close proximity to major human population centers, New Haven Harbor, and the Quinnipiac and Mill Rivers in New Haven. In the face of rising sea levels and increasing major storm events, the Terminal poses an imminent and substantial risk to surrounding communities and the environment.

Gulf has not disclosed its creation of this imminent and substantial risk to the United States Environmental Protection Agency (“EPA”), state regulators, or the public as it relates to the

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<sup>15</sup> *City of New Haven Natural Hazard Mitigation Plan Update II* at 3-12.

<sup>16</sup> Hernandez, Esteban L., *Connecticut officials talk resiliency to mark Superstorm Sandy anniversary*, New Haven Register (Oct. 31, 2017), available at <https://www.nhregister.com/news/article/Connecticut-officials-talk-resiliency-to-mark-12321276.php>.

<sup>17</sup> Anagnostou, Emmanouil & Zhang, Wei, *Resiliency Analysis of Storm Surge for Interstate 95 Right-of-Way at Long Wharf / New Haven, CT*, 24 (Mar. 23, 2017).

Terminal. Gulf failed to disclose required information in its possession to the federal and state regulators and the public regarding the effects of climate change on the Terminal. Gulf's failure to disclose has contributed to the imminent and substantial endangerment to health and the environment.

## 2. *Open Dumping*

In addition to the hazardous waste discussed above, the petroleum products stored at the Terminal qualify as "solid waste" under RCRA because Gulf's failure to address the known imminent risks associated with climate change discussed above will result in release of these products when these foreseeable events occur. Gulf's inaction in the face of its own knowledge regarding the risks of climate change represents an "intent to discard" useful products because the outcome of this inaction is certain to occur.

RCRA prohibits "open dumping" which includes "facilities or practices in floodplains" that "result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources." 40 C.F.R. 257.3-1(a). The Terminal is in a 100-year floodplain as determined by the Federal Emergency Management Agency. Inundation by flood waters results in the washout and carrying away of discarded petroleum products and other contaminants. The strip drains and catch basins surrounding the truck loading area catch spilled oil products during loading and are fully open to inundation by flood waters. The Terminal has been subject to storm surge inundation in the past, including during Sandy.

Gulf has taken no steps to prevent similar flooding and pollution discharges, despite the past flooding and the increasing severity of storms and storm surge caused due to climate change impacts, in violation of RCRA's open-dumping prohibition.

## 3. *Generator Violation*

Small Quantity Generators like the Terminal are required to maintain and operate their facilities in such a way as to "minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment." 40 C.F.R. § 262.16(b)(8)(i); *see also* Connecticut Reg. § 22a-430-3(h). Gulf is violating these duties by (i) failing to disclose the known and ever-increasing risks to the Terminal from climate change discussed above, and (ii) failing to take any steps to prevent flooding at the Terminal from these risks.

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Gulf's violations of RCRA are ongoing and continuous. CLF intends to seek a civil injunction, as provided under Section 7002 of RCRA, 42 U.S.C. § 6972, ordering Gulf to make necessary disclosures, to address current and ever-increasing risks of flooding from climate-change-induced storms, and restraining Gulf from further violating RCRA. CLF also intends to seek civil penalties and an award of litigation costs, including attorney and expert witness fees, under Section 7002 of RCRA, 42 U.S.C. § 6972.

#### **IV. Clean Water Act**

Gulf operates the Terminal pursuant to the General Permit for Discharge of Stormwater Associated with Industrial Activity issued by CT DEEP (“General Permit”). A version of the General Permit was first effective on October 1, 2011 and was reissued most recently on October 1, 2019. The current General Permit is set to expire on September 30, 2021.<sup>18</sup>

The Permit requires Gulf to develop a Stormwater Pollution Prevention Plan (“SWPPP”) and sets forth the elements that are required to be included in the SWPPP, including: (i) a facility description, (ii) identification of “potential pollutant sources,” (iii) a description of the “control measures” implemented by the Terminal, and (iv) an engineer’s certification. *See* Permit § 5(c). In the section entitled “Potential Pollutant Sources,” the Permit provides that “[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may result in the discharge of pollutants during dry weather from the site.” Permit § 5(c)(2)(D).

Among other requirements the Permit states:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit § 5(b).

Gulf’s SWPPP fails to include information documenting sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change—that would impact the Terminal and surrounding communities. By failing to address these impacts of climate change, Gulf is neither maintaining nor implementing a SWPPP or BMPs that will reduce or eliminate the pollutants in the Terminal’s storm water discharges and assure compliance with the Permit, which is a violation of the Permit in itself.

#### **A. Clean Water Act Violations**

##### *1. Failure to Eliminate Non-Stormwater Discharges*

The Permit requires that Gulf eliminate all non-stormwater discharges and that Gulf’s SWPPP document the control measures it will use to eliminate the non-stormwater discharges. Permit 5(c)(2)(E); Bureau of Materials Management and Compliance Assurance Water Permitting and Enforcement Division, *Guidance Document for Preparing a Stormwater Pollution Prevention Plan*, 19 CT DEEP (Mar. 2011), available at [https://portal.ct.gov/-/media/DEEP/Permits\\_and\\_Licenses/Water\\_Discharge\\_General\\_Permits/swpppguidpdf.pdf](https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Water_Discharge_General_Permits/swpppguidpdf.pdf). Gulf’s SWPPP fails to describe or ensure implementation of BMPs that will be used to ensure that non-stormwater pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and

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<sup>18</sup> See <https://www.ct.gov/deep/cwp/view.asp?A=2721&Q=558454>.

frequency of storm events, and increased magnitude and frequency of storm surges, do not occur in the future and are eliminated. Therefore, Gulf is violating the Permit and the Clean Water Act.

## 2. *Activity Inconsistent with the Coastal Management Act and Causing Adverse Impacts to Coastal Resources*

Gulf has failed to design its Terminal to minimize the risk of oil and chemical spills at the Terminal and therefore its activities at the Terminal are inconsistent with the applicable goals and policies in the Coastal Management Act. *See* Permit § 3(b)(2). The referenced provisions state in part:

(a) The following general goals and policies are established by this chapter: . . .

(5) To consider in the planning process the potential impact of a rise in sea level, coastal flooding and erosion patterns on coastal development so as to minimize damage to and destruction of life and property and minimize the necessity of public expenditure and shoreline armoring to protect future new development from such hazards.

Conn. Gen. Stat. § 22a-92(a)(5). Connecticut has adopted a sea level change scenario of 20 inches by 2050. CT DEEP, *Notice*, (Dec. 26, 2018) available at [https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal\\_management/coastal\\_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en](https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal_management/coastal_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en).

Gulf has failed to consider the potential impact of a rise in sea level, coastal flooding, and erosion patterns on coastal development in its planning and operating process at the Terminal. Gulf has also failed to design the Terminal to minimize the risk of oil and chemical spills and has failed to minimize the risk of spillage of petroleum products and hazardous substances. Moreover, Gulf has failed to provide effective containment and cleanup facilities for accidental spills or disallowed offshore oil receiving systems that have the potential to cause catastrophic oil spills in the Long Island Sound estuary. Accordingly, Gulf's activities designing and operating the Terminal will cause adverse impacts to coastal resources as defined in section 22a-93(15) of the Connecticut General Statutes.

## 3. *Unlawful Certification*

Gulf's Permit requires that the SWPPP be signed "by a responsible corporate officer or duly authorized representative thereof." Permit § 5(c)(4). The SWPPP must also include the following certification:

I have personally examined and am familiar with the information submitted in this document and all attachments thereto, and I certify that, based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that a false statement made in the submitted information may be punishable as a criminal offense, in accordance with section 22a-6 of the General Statutes, pursuant to section 53a-157b of the General Statutes, and in accordance with any other applicable statute.



Permit § 6(d).

In addition, the Permit requires that each SWPPP contain a certification from a licensed professional engineer:

I certify that I have thoroughly and completely reviewed the Stormwater Pollution Prevention Plan prepared for this site. I further certify, based on such review and site visit by myself or my agent, and on my professional judgment, that the Stormwater Pollution Prevention Plan meets the criteria set forth in the General Permit for the Discharge of Stormwater Associated with Industrial Activity effective on October 1, 2018. I am aware that there are significant penalties for false statements in this certification, including the possibility of fine and imprisonment for knowingly making false statements.

Permit § 5(c)(7).

Gulf made the required certifications at the time of development and submission of its SWPPP but the certifications were false. *First*, Gulf made these certifications without discussing in the SWPPP or disclosing to regulators information in its possession regarding climate change driven impacts and the substantial risks of pollutant discharges associated with these impacts. *Second*, Gulf made these certifications without considering the spill prevention and control procedures that would be necessary to address the effects of climate change, sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—and the substantial risks of pollutant discharges and/or releases associated with these effects. *Third*, Gulf's SWPPP falsely stated that all stormwater discharges were pumped through the treatment system and out through an outfall to the New Haven MS4 when, in fact, most stormwater discharges from the tank farm are made directly to New Haven Harbor through two outfalls that are not identified in the SWPPP. *Fourth*, Gulf's SWPPP falsely asserted that Gulf did not need to consider additional monitoring to impaired waterbodies because all discharges were made to the New Haven MS4. *Fifth*, as described below, the SWPPP is incomplete because it fails to include information for monitoring discharges to impaired waterbodies. Accordingly, Gulf's SWPPP certification is untrue, inaccurate, and incomplete in violation of the Permit and the CWA.

4. *Failure to Identify Sources of Pollution Reasonably Expected to Affect the Quality of Stormwater Discharges*

The Permit requires that “[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may result in the discharge of pollutants during dry weather from the site. The [SWPPP] shall identify all activities and materials that may be a source of stormwater pollution at the site.” Permit § 5(c)(2)(D). Gulf has failed to identify sources of pollutants resulting from the impacts of climate change as sources of pollution reasonably expected and anticipated to affect the quality of the stormwater discharges from the Terminal, including the potential for flooding at the Terminal from storm surge despite past instances of storm surge. Gulf has failed to identify sources of pollutants resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are

becoming, worse as a result of climate change—and which are reasonably expected and anticipated by Gulf to affect the quality of the stormwater discharges from the Terminal.

5. *Failure to Describe and Implement Practices to Reduce Pollutants and Assure Permit Compliance*

The Permit requires that:

[t]he permittee must document the location and type of control measures installed and implemented at the site in accordance with “Control Measures” (Section 5(b)). The permittee shall discuss the appropriateness and priorities of control measures in the Plan and how they address identified potential sources of pollutants at the site. The Plan shall include a schedule for implementing such control measures if not already implemented.

Permit § 5(c)(2)(E). According to the Permit:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit § 5(b). The SWPPP does not refer to the potential for flooding at the Terminal from storm surge, despite past incidences of storm surge flooding referred to *supra*, and as a result does not include control measures or BMPs to minimize this potential unpermitted discharge. Gulf’s SWPPP for the Terminal does not describe or ensure implementation of BMPs that will be used to address pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are becoming, worse as a result of climate change—which are reasonably expected, and known to Gulf.

6. *Failure to Implement Measures to Manage Runoff*

The Permit requires the Terminal to “minimize the discharge of pollutants from the site” including to “divert uncontaminated run-on to avoid areas that may contribute pollutants.” Permit § 5(b)(7). Gulf’s SWPPP for the Terminal does not refer to the potential for flooding at the Terminal from storm surge or heavy precipitation, despite the multiple past incidences of flooding. Because the SWPPP for the Terminal fails to describe or ensure implementation of BMPs that will be used to address run-on to avoid areas that may contribute pollutants, despite previous flooding and the current and growing risk of further flooding from the climate change impacts discussed above, Gulf is violating the Permit and the Clean Water Act.

7. *Failure to Minimize the Potential for Leaks and Spills*

The Permit requires that “[t]he permittee must minimize the potential for leaks and spills.” Permit § 5(b)(9). The potential for leaks and spills is increased by previous instances of flooding and the current and growing risk of further flooding from the climate change impacts discussed

above. Because the SWPPP for the Terminal fails to describe or ensure implementation of BMPs that will be used to minimize the potential for leaks and spills resulting from the climate-change impacts discussed above, Gulf is violating the Permit and the Clean Water Act. Gulf is also violating this Permit provision by failing to ensure that the secondary containment area is impermeable, as described below.

*8. Failure to Submit Required Facts or Information to Connecticut Department of Energy and Environmental Protection*

The Permit requires that:

Within fifteen (15) days after the date a permittee becomes aware of a change in any of the information submitted pursuant to this general permit, becomes aware that any such information is inaccurate or misleading, or that any relevant information has been omitted, such permittee shall correct the inaccurate or misleading information or supply the omitted information in writing to the commissioner. Such information shall be certified in accordance with Section 6(d) of this general permit. The provisions of this subsection shall apply both while a request for registration is pending and after the commissioner has approved such request.

Permit § 6(g).

Gulf has failed to submit relevant facts and/or submitted incorrect and incomplete information regarding the risks of climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, in its SWPPP and reports to CT DEEP. Gulf has not promptly submitted such facts or information to CT DEEP, despite Gulf's knowledge of the risks of climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, dating back decades. Gulf has also failed to submit to CT DEEP the information identified in the immediately following section concerning Gulf's failures to amend or update its SWPPP. By failing to submit relevant facts and/or submitting incorrect and incomplete information, and failing to promptly submit such information upon becoming aware that it had not previously been submitted, Gulf is violating the Permit and the Clean Water Act.

*9. Failure to Amend or Update the SWPPP*

The Permit requires that the permittee amend the SWPPP under certain circumstances, including whenever:

(A) there is a change at the site which has an effect on the potential to cause pollution of the surface waters of the state;

(B) the actions required by the Plan fail to ensure or adequately protect against pollution of the surface waters of the state; or

....

(F) necessary to address any significant sources or potential sources of pollution identified as a result of any inspection or visual monitoring;

Permit § 5(c)(5).

Gulf has not amended or updated its SWPPP as required. *First*, its failure to amend or update the SWPPP to address information in its possession regarding the risks to the Terminal from climate change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, in violation of the Permit and the Clean Water Act. *Second*, Gulf failed to update its SWPPP to disclose the existence of the two outfalls direct to New Haven Harbor. *Third*, Gulf failed to update its SWPPP to address the additional monitoring requirements for discharges to impaired waterbodies. By failing to submit relevant facts and/or submitting incorrect and incomplete information, and failing to promptly submit such information upon becoming aware that it had not previously been submitted, Gulf is violating the Permit and the Clean Water Act. By failing to properly amend or update its SWPPP, Gulf is violating the Permit and the Clean Water Act.

#### *10. Failure to Identify Discharges to Impaired Waters in SWPPP*

The Permit requires Gulf to identify in its SWPPP any impaired waters to which the Terminal discharges and whether or not a Total Maximum Daily Load allocation (“TMDL”) has been established for them. Permit § 5(c)(2)(D)(i)(7). In addition, if the Terminal discharges to an impaired waterbody, the SWPPP must also document schedules and procedures for implementing impaired waters monitoring. Permit § 5(c)(2)(K). The Terminal discharges to New Haven Harbor in two ways: (i) via the City of New Haven’s Municipal Separate Storm Sewer System (“MS4”), and (ii) through the two outfalls from the tank farm not disclosed in the SWPPP. The State of Connecticut has identified New Haven Harbor as impaired for dissolved oxygen, nutrients, oil and grease, polychlorinated biphenyls (“PCBs”), and bacteria. New Haven Harbor is also included in the Connecticut State Bacteria TMDL.

Gulf’s SWPPP fails to disclose the discharge to the impaired New Haven Harbor. It states instead that because the Terminal discharges to the MS4, it is “not subject to additional monitoring requirements associated with monitoring of discharges to impaired waters.” Gulf’s failure to identify its discharges to an impaired waterbody and failure to document procedures for monitoring those discharges are a violation of the Permit and the Clean Water Act.

#### *11. Failure to Conduct Monitoring for Discharges to Impaired Waters*

If the Terminal discharges to an impaired waterbody, the Permit imposes special monitoring requirements for indicator pollutants. Permit § 5(e)(1)(D). As explained above, Gulf discharges to New Haven Harbor, which is impaired for the following pollutants for which no TMDL has been established: dissolved oxygen, nutrients, oil and grease, PCBs, and bacteria. Until 2015, the Terminal’s stormwater monitoring reports to Connecticut DEEP identified it as discharging to an impaired waterbody (New Haven Harbor) and included the additional monitoring. Stormwater monitoring reports that Gulf submitted to CT DEEP assert that Gulf is not required to conduct additional monitoring because it discharges to the “town storm drainage

(MS4).” Gulf’s failure to monitor for indicator pollutants for the impairments in New Haven Harbor is a violation of the Permit and the Clean Water Act.

#### *12. Failure to Identify Outfalls in SWPPP*

The Permit requires that Gulf identify all stormwater outfalls in its SWPPP. *See, e.g.*, Permit § 5(c)(2)(D)(i); *id.* § 5(e)(2). Gulf’s SWPPP for the Terminal identifies only one outfall which flows through an oil/water separator before discharging to the New Haven MS4. Gulf’s SWPPP fails to identify the two outfalls that discharge directly from the tank farm to New Haven Harbor, bypassing the Terminal’s treatment system. Gulf’s failure to identify these outfalls is a violation of the Permit and the Clean Water Act.

#### *13. Failure to Monitor Discharges from All Outfalls*

The Permit requires that Gulf perform monitoring of discharges for all outfalls unless outfalls are sufficiently similar to be representative. Permit § 5(e). If Gulf takes the representative outfall exemption, it is required to describe the basis for the exemption in the SWPPP. *Id.* Of the three outfalls at the Terminal, Gulf has only conducted monitoring from the outfall that discharges to the New Haven MS4. Gulf’s failure to monitor the other two outfalls is a violation of the Permit and the Clean Water Act.

#### *14. Illegal Infiltration of Stormwater*

As an industrial facility, the Terminal is categorized as a “Land Use . . . with Potential for Higher Pollutants Loads.” *See* Permit App. C. The Permit does not allow Gulf to infiltrate stormwater into the ground unless it is (i) expressly allowed by CT DEEP, and (ii) the stormwater undergoes “appropriate pretreatment” before infiltration. *Id.* The Permit similarly restricts stormwater infiltration at sites where the soil or groundwater is contaminated, such as the Terminal. Gulf’s SWPPP states that some of the stormwater in tank farm is infiltrated into the ground. On information and belief, CLF asserts that Gulf has not received permission to infiltrate from CT DEEP and it does not pretreat the stormwater before infiltration. Gulf’s infiltration of stormwater from the tank farm is a violation of the Permit and the Clean Water Act.

#### *15. Failure to Maintain An Impervious Containment Area*

The Permit requires that the Terminal’s tank farm have an “impermeable secondary containment area” capable of holding either 100% or 110% of the volume of the largest tank or 10% of the total volume of all tanks.” Permit § 5(b)(9)(A)(i)(2). Gulf’s SWPPP states that stormwater infiltrates into the ground and that Gulf has not confirmed that the ground of the secondary containment area is impermeable. In fact, the SWPPP states that it “does not certify that a release of petroleum products would not migrate to a navigable water body or adjoining shoreline.” Gulf’s failure to ensure that the secondary containment area is impermeable is a violation of the Permit and the Clean Water Act.

V. OTHER CLAIMS

The violations of federal law alleged herein also support pendant state law claims sounding in tort, including, but not necessarily limited to, negligence and public and private nuisance. Gulf is specifically put on notice that CLF intends to pursue such claims as warranted.

VI. CONCLUSION

During the notice period, CLF is willing to discuss effective remedies for the violations noticed in this letter that may avoid the necessity of litigation. If Gulf wishes to pursue such discussions, please contact CLF within the next 20 days so that negotiations may be completed before the end of the notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the notice period.

Sincerely,



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July 28, 2020

*Via Registered Mail and Certified Mail, Return Receipt Requested*

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Complex Manager, New Haven Terminal  
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New Haven, CT 06512

Shell Petroleum, Inc.  
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Houston, TX 77002

Shell Oil Company  
150 N. Dairy Ashford  
Houston, TX 77079

Shell Trading (US) Co  
1000 Main, 12<sup>th</sup> Floor  
Houston, TX 77002

Equilon Enterprises LLC d/b/a Shell Oil  
Products US  
150 N. Dairy Ashford  
Houston, TX 77079

Motiva Enterprises LLC  
One Allen Center  
500 Dallas St, 9<sup>th</sup> Floor  
Houston, TX 77002

**RE: Notice of Intent to File Suit for Violations of the Resource Conservation and Recovery Act and Clean Water Act at the Terminal**

To Whom It May Concern:

Conservation Law Foundation (“CLF”)<sup>1</sup> hereby notifies Shell Oil Company, Equilon Enterprises LLC d/b/a Shell Oil Products US, Shell Petroleum, Inc., Shell Trading (US) Company, and Motiva Enterprises LLC (hereinafter, “Shell”) of its intent to commence a civil action under Section 505 of the Clean Water Act (“CWA”), 33 U.S.C. § 1365 and Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), for violations of the CWA, 33 U.S.C. § 1251 *et seq.*, and RCRA, 42 U.S.C. § 6901 *et seq.*, at Shell’s bulk storage and fuel terminal located at 481 East Shore Parkway, New Haven, Connecticut (the “Terminal”).<sup>2</sup>

<sup>1</sup> CLF is a 501(c)(3) nonprofit, member-supported organization dedicated to the conservation and protection of New England’s environment.

<sup>2</sup> The terminal was formerly owned and operated by Motiva Enterprises, LLC, between 2000 and 2017. Motiva was formed in 1998 as a joint venture between Shell Oil Company, Texaco Inc. and Saudi Arabian Oil Company. *See* Saudi-Texaco Joint Venture, THE NEW YORK TIMES (Jan. 3, 1989), <https://www.nytimes.com/1989/01/03/business/saudi-texaco-joint-venture.html>. In 2002, Shell Oil



Unless Shell adequately resolves the violations of RCRA and the CWA described herein, CLF intends to file suit against Shell in the United States District Court for the District of Connecticut to secure appropriate relief under federal and state law for these violations.

Shell has not designed, maintained, modified, and/or operated its Terminal to account for the numerous impacts of climate change despite devoting years of study to the topic and creating “scenarios” demonstrating the harmful effects of greenhouse gases and the necessity of mitigating the harm by both curbing emissions and simultaneously preparing infrastructure for those impacts that have already become inevitable. Shell’s infrastructure and operational failures at the Terminal, which include failing to inform regulators of the Terminal’s specific vulnerabilities to climate change, put CLF’s members, the New Haven community, and their natural resources at great risk and violate RCRA and the CWA because they essentially guarantee flooding, unpermitted discharges, and widespread contamination.

## **I. The Terminal**

Shell, acting through officers, managers, subsidiary companies, and instrumentalities, owns or has owned and/or operates or has operated the Terminal, which consists of “tank farms,” a pipeline, a marine terminal, buildings, and infrastructure located at 481 East Shore Parkway in New Haven, Connecticut. The Terminal is located in the Port of New Haven, on New Haven Harbor, which opens into the Long Island Sound.

The Terminal is engaged in the receipt, storage, and distribution of petroleum products. The spectrum of fuels handled by this facility consists of motor gasoline, fuel grade ethanol, fuel oil, jet fuel, fuel additives, and diesel. The facility contains thirty-nine bulk storage tanks with a total bulk storage capacity of approximately 76,328,498 gallons. The Terminal receives, stores, blends, and distributes gasoline and petroleum distillate products. Fuel products are received at the marine terminal area of the Terminal via ships and shipped from the Terminal via trucks. Some products are also shipped by pipeline.

The Terminal’s bulk storage tanks are located in three “Containment Areas,” which lie below the surrounding ground level and have rammed earth berms at certain locations around the periphery of the Containment Areas. The containment berms do not surround the entirety of the Containment Areas and have openings in several places. Stormwater from the Terminal flows through a series of catch-basins and pumps into a set of two retention basins. The stormwater from the basins is then manually pumped into the New Haven Municipal Separate Storm Sewer System

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Company took over Texaco’s interest in Motiva. 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>. In 2017, Motiva was dissolved and Saudi Refining, Inc. maintained control over the Northeastern region of the U.S., including ownership of the New Haven Terminal. See Shell Global, *Shell Announces the Completion of Transaction to Separate Motiva Assets* (May 1, 2017), <https://www.shell.com/media/news-and-media-releases/2017/completion-transaction-to-separate-motiva-assets.html>. Per the dissolution agreement, references to Shell herein include any predecessors, successors, parents, subsidiaries, affiliates, and divisions of Shell, including Motiva Enterprises LLC.

(“MS4”). The stormwater from the tank farm is not treated before it is pumped into the retention basins. Stormwater from the truck loading rack flows through an oil/water separator before it is pumped into the retention basins. The stormwater from the retention basins is not treated before it is pumped to the New Haven MS4. The stormwater flows from the New Haven MS4 directly into New Haven Harbor.

Shell is a generator of hazardous waste at the Terminal and is categorized as a Large Quantity Generator of hazardous waste. It has contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste, as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and solid waste, as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), at the Terminal, which may present an imminent and substantial endangerment to health or the environment.

Based on the information currently available to CLF, the toxic and hazardous wastes and pollutants listed below, many of which are highly carcinogenic, are present at the Terminal: petroleum hydrocarbons, 1,2,4-trimethylbenzene, anthracene, benzene, benzo(G,H,I)perylene, cumene, cyclohexane, ethylbenzene, lead compounds, n-Hexane, naphthalene, polycyclic aromatic compounds, styrene, toluene, and xylene (Mixed Isomers). In addition, the Terminal is subject to the risk management plan (“RMP”) requirements of Clean Air Act Section 112(r) because it holds approximately 790,000 pounds of butane for use in a “butane blending system” where butane is blended with gasoline—well in excess of the 10,000 pound RMP threshold.

In addition to current activities and storage, the soils and groundwater at the Terminal are contaminated from Shell’s past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste. Environmental remediation reports submitted by Shell to the Connecticut Department of Energy and Environmental Protection (“CT DEEP”) indicate that various chemical spills have occurred on the site since at least the 1970s. The Terminal is subject to long-term remediation requirements for contamination from benzene, lead, copper, arsenic, zinc, phenanthrene, benzo(a)anthracene, benzo(b)fluoranthene, benzo(a)pyrene, and benzo(k)fluoranthene.

The Federal Emergency Management Agency (“FEMA”) flood map for the area where the Terminal is located, which was last revised in July 2013, shows that the entire Terminal is within a Special Flood Hazard Area (SFHA) subject to inundation by a 1% annual chance flood (i.e., a 100-year flood or “base flood”).

## **II. Climate Change and New Haven**

The present flood risks at the Terminal demonstrated by the FEMA map are, and will continue to be, exacerbated by sea level rise, increased precipitation, increased magnitude and frequency of storm events, as well as increased magnitude and frequency of storm surges—all of which are, and will continue to become, worse as a result of climate change. According to the Fourth National Climate Assessment: “The frequency of dangerous coastal flooding in the

Northeast would more than triple with 2 feet of sea level rise.”<sup>3</sup> Since 1900, sea level has already risen approximately one foot in the Northeast, at a rate that is three to four times higher than the global average.<sup>4</sup> From 1895 to 2011, the Northeast sustained a temperature increase of 2°F and a 10% increase in precipitation (5 inches), and from 1958 to 2016, “the number of heaviest 1% precipitation events (that is, an event that has a 1% chance of occurring in any given year) in the Northeast has increased by 55%.”<sup>5</sup> The location, elevation, and failure to operate, maintain, or design infrastructure at the Terminal to account for the impacts associated with climate change make it especially vulnerable.

The entirety of the Port of New Haven is situated on artificial fill layered over stratified drift.<sup>6</sup> Combined with being located nearly at sea level, the Terminal is at risk from coastal flooding caused by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change.

“New Haven’s southern facing coastline and the geomorphology of Long Island Sound cause it to be particularly vulnerable to all hurricanes forecasted to track to New England. This is due to the ability of Long Island Sound to amplify hurricane surges.”<sup>7</sup> “As a coastal town, New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms. Weather-related flooding is compounded by a high rate of sea level rise of 2.5mm per year (the global mean trend is 0.5mm per year).”<sup>8</sup> “Several extreme precipitation indices are projected to increase, including the number of days with more than 1 inch of precipitation [], number of heavy precipitation days[], fraction of total precipitation accounted for by heavy precipitation [], and the maximum 1-day and 5-day precipitation [], all indicating a substantial increase of flood risk by mid-century.”<sup>9</sup>

Sea level trends along the Northeast Atlantic “have been higher than the global rate over the last several decades, capped by a recent multiyear jump in sea level beginning in 2009.”<sup>10</sup> This

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<sup>3</sup> Mecray, Ellen L., *et al.*, *Ch. 18: Northeast*, 713 FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATIONS IN THE UNITED STATES (2018), *available at* [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch18\\_Northeast\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch18_Northeast_Full.pdf).

<sup>4</sup> *Id.*; Horton, Radley, *et al.*, *Ch. 16: Northeast*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, eds., U.S. Global Change Research Program) (2014).

<sup>5</sup> Mecray, *supra* at n.3; Radley, *supra* at n.4.

<sup>6</sup> *City of New Haven Natural Hazard Mitigation Plan Update II*, Figure 2-5, 2-12 (Apr. 2017).

<sup>7</sup> *Id.* at 5-1.

<sup>8</sup> CONNECTICUT INSTITUTE FOR CLIMATE AND ADAPTATION, *City of New Haven Commercial Industrial Toolbox Final Report 4* (Jul. 31, 2017), *available at* <https://circa.uconn.edu/wp-content/uploads/sites/1618/2016/03/CIT-CIRCA-Final-Report-With-JPEG-Appendices-attached.pdf>.

<sup>9</sup> Connecticut Institute for Resilience and Climate Adaptation, *Connecticut Physical Climate Science Assessment Report (PCSAR): Observed trends and projections of temperature and precipitation*, 4 (Aug. 2019), *available at* <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/11/CTPCSAR-Aug2019.pdf>.

<sup>10</sup> NOAA, *Global & Regional Sea Level Rise Scenarios for the U.S.*, at 9 (Jan. 2017), [https://tidesandcurrents.noaa.gov/publications/techrpt83\\_Global\\_and\\_Regional\\_SLR\\_Scenarios\\_for\\_the\\_US\\_final.pdf](https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf).

trend is projected to continue.<sup>11</sup> A 2019 analysis by the Connecticut Institute for Resilience and Climate Adaptation (“CIRCA”) concluded that communities in Connecticut should plan that “sea level will be 0.5 m (1ft 8 inches) higher than the [1992 level] in Long Island Sound by 2050.”<sup>12</sup> Moreover, according to a report by CT DEEP, average surface temperatures in Long Island Sound have been rising—which has been connected to increased risk of frequency and magnitude of storms—with a change of almost 2 degrees between 1991 and 2015.<sup>13</sup>

The Port of New Haven, and specifically the Terminal, is directly at risk from these impacts. In fact, the Terminal has been inundated by storm surge in the past. According to the CT DEEP online mapping tool entitled Connecticut Coastal Hazards Viewer, all of the oil terminals in the Port of New Haven, including the Terminal, were inundated when Superstorm Sandy hit New Haven on October 29, 2012. The storm surge in New Haven during Sandy was measured to be 9.14 feet above normal tide levels.<sup>14</sup> Despite swamping the Terminal, the storm surge from Sandy was *less than initially anticipated* owing to a change in the storm’s trajectory.<sup>15</sup> Post-Sandy, the City of New Haven commissioned a study of the resiliency of the I-95 corridor through New Haven. The study’s authors noted that “[u]nder different storm tracking scenario, Superstorm Sandy could have caused more damage if the flooding inundation was superposed with high tides.”<sup>16</sup> In particular, the study concluded that a similar storm in the future could further increase the water level by almost three feet.<sup>17</sup>

As the world’s fifth largest company by revenue and second largest oil and gas company,<sup>18</sup> Shell has played a major role in causing anthropogenic climate change that is resulting in a greater frequency of storm surges, extreme weather events, and rising sea levels. Shell has been aware of this since at least 1986, when it circulated an internal document acknowledging that with “fossil fuel combustion being the major source of CO2 in the atmosphere, a forward looking approach by the energy industry is clearly desirable.”<sup>19</sup> Just three years later, in 1989, Shell announced the company’s decision to account for sea level rise in the construction of a natural-gas production

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<sup>11</sup> *See id.* at vii (“Along regions of the Northeast Atlantic (Virginia coast and northward) and the western Gulf of Mexico coasts, RSL [relative sea level] rise is projected to be greater than the global average for almost all future GMSL [global mean sea level] rise scenarios.”).

<sup>12</sup> James O’Donnell, Connecticut Institute for Resilience & Climate Adaptation, *Sea Level Rise in Connecticut*, 1, 4 (Feb. 2019), available at <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/02/SeaLevelRiseConnecticut-Final-Report.pdf>.

<sup>13</sup> *2015 Long Island Sound Hypoxia Season Review*, CT DEEP (2015), available at [https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis\\_water\\_quality/monitoring/2015/2015SeasonReviewfinalpdf.pdf](https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis_water_quality/monitoring/2015/2015SeasonReviewfinalpdf.pdf).

<sup>14</sup> *City of New Haven Natural Hazard Mitigation Plan Update II* at 3-12.

<sup>15</sup> Hernandez, Esteban L., *Connecticut officials talk resiliency to mark Superstorm Sandy anniversary*, New Haven Register (Oct. 31, 2017), available at <https://www.nhregister.com/news/article/Connecticut-officials-talk-resiliency-to-mark-12321276.php>.

<sup>16</sup> Anagnostou, Emmanouil & Zhang, Wei, *Resiliency Analysis of Storm Surge for Interstate 95 Right-of-Way at Long Wharf / New Haven, CT*, 24 (Mar. 23, 2017).

<sup>17</sup> *Id.* at 25–28.

<sup>18</sup> *Global 500: Royal Dutch Shell*, FORTUNE (2016); Lauren Gensler, *The World’s Largest Oil and Gas Companies 2017: Exxon Reigns Supreme, While Chevron Slips*, FORBES (May 24, 2017).

<sup>19</sup> Shell Internationale Petroleum, *The Greenhouse Effect* (1986).

platform in the North Sea.<sup>20</sup> In 1991, Shell published the educational film, “Climate of Concern,” cautioning against the risks of climate change.<sup>21</sup>

For over 40 years, Shell has developed “scenarios” in order to “make crucial choices in uncertain times and tackle tough energy and environmental issues.”<sup>22</sup> Since the 1990s, Shell has been contributing these “scenarios” to other organizations, including the Intergovernmental Panel on Climate Change.<sup>23</sup> Shell was also an early member of the Global Climate Coalition (“GCC”), but withdrew its membership in April 1998 when the GCC began lobbying against establishing legally binding targets and timetables in the Kyoto Protocol.<sup>24</sup> Shell has continued to publicly reiterate its support for international agreements, such as the Kyoto Protocol<sup>25</sup> and the Paris Climate Agreement.<sup>26</sup>

In August 2005, Shell’s Mars Platform suffered damages during Hurricane Katrina, not coming back online until May 2006.<sup>27</sup> The storm forced Shell to begin “preparing for hurricanes in the Gulf of Mexico.”<sup>28</sup> In the company’s 2016 Sustainability Report, Shell stated that “[t]he effects of climate change mean that government, business and local communities are adapting their infrastructure to the changing environment. At Shell, we are taking steps at our facilities around the world to ensure that they are resilient to climate change. This reduces the vulnerability of our facilities and infrastructure to potential extreme variability in weather conditions.”<sup>29</sup>

The Terminal stores toxic pollutants known to be harmful to humans and aquatic life in an area affected by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change. The first significant storm surge that makes landfall at the Terminal is going to flush hazardous and solid waste from the Terminal into the Harbor and the Quinnipiac and Mill Rivers and through nearby communities and ecosystems; a significant rise in sea level will put the majority of the Terminal, including soils, groundwater, and treatment works, under water. Shell knows all this, and yet has failed to disclose required information in its possession and has not taken appropriate steps to protect the public and the environment from this certain risk.

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<sup>20</sup> *Greenhouse Effect: Shell Anticipates A Sea Change*, THE N.Y. TIMES (1989).

<sup>21</sup> Damian Carrington and Jelmer Mommers, ‘Shell knew’: oil giant’s 1991 film warned of climate change danger, THE GUARDIAN (Feb. 28, 2017).

<sup>22</sup> *Shell Earlier Scenarios* (2017).

<sup>23</sup> Peter Knight, *The Shell Report: Profits and Principles – does there have to be a choice?* (1998).

<sup>24</sup> *Id.* According to Shell, “[t]he main disagreement centered on the Kyoto protocol which aims to cut overall greenhouse gas emissions by 5% by the year 2012. The GCC is actively campaigning against legally binding targets and timetables as well as ratification by the US government. The Shell view is that prudent precautionary measures are called for.” *Id.*

<sup>25</sup> Chris Noon, *Shell CEO Targets Washington Over Kyoto*, FORBES (Dec. 5, 2006).

<sup>26</sup> Samantha Raphelson, *Energy Companies Urge Trump to Remain in Paris Climate Agreement*, NPR (May 18, 2017).

<sup>27</sup> Shell, *The Shell Sustainability Report: Meeting the Energy Challenge* (2006).

<sup>28</sup> *Id.*

<sup>29</sup> Royal Dutch Shell plc., *Sustainability Report* (2016).

### **III. Resource Conservation and Recovery Act (“RCRA”) Violations**

#### *1. Imminent and Substantial Endangerment*

The hazardous and solid waste at the Terminal is generated, handled, stored, treated, transported and/or disposed of at or near sea level in close proximity to major human population centers, New Haven Harbor, and the Quinnipiac and Mill Rivers in New Haven. In the face of rising sea levels and increasing major storm events, the Terminal poses an imminent and substantial risk to surrounding communities and the environment.

Shell has not disclosed its creation of this imminent and substantial risk to the United States Environmental Protection Agency (“EPA”), state regulators, or the public as it relates to the Terminal. Shell failed to disclose required information in its possession to the federal and state regulators and the public regarding the effects of climate change on the Terminal. Shell’s failure to disclose has contributed to the imminent and substantial endangerment to health and the environment.

#### *2. Open Dumping*

In addition to the hazardous wastes discussed above, the petroleum products stored at the Terminal qualify as “solid waste” under RCRA because Shell’s failure to address the known imminent risks associated with climate-change, discussed above, will result in release of these products when these foreseeable events occur. Shell’s inaction in the face of its own knowledge regarding the risks of climate change represents an “intent to discard” useful products because the outcome of this inaction is certain to occur.

RCRA prohibits “open dumping” which includes “facilities or practices in floodplains” that “result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.” 40 C.F.R. 257.3-1(a). The Terminal is in a 100-year floodplain as determined by the Federal Emergency Management Agency. Inundation by flood waters results in the washout and carrying away of discarded petroleum products and other contaminants. The perimeter trough and catch basin surrounding the truck loading area catch spilled oil products during loading and are fully open to inundation by flood waters. The Terminal has been subject to storm surge inundation in the past causing the discharge of pollutants from the site. For example, the Terminal reported that precipitation and flooding from Hurricane Irene had caused it to discharge substantial pollutant loads to New Haven Harbor.

Shell has taken no steps to prevent similar flooding and pollution discharges, despite the past flooding and the increasing severity of storms and storm surge caused by climate change, in violation of RCRA’s open-dumping prohibition.

#### *3. Generator Violation*

Large Quantity Generators like the Terminal are required to maintain and operate their facilities in such a way as to “minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.” 40 C.F.R. § 262.251; *see also*

Connecticut Reg. § 22a-430-3(h). Shell is violating these duties by (i) failing to disclose the known and ever-increasing risks to the Terminal from climate change discussed above, and (ii) failing to take any steps to prevent flooding at the Terminal from these risks.

\* \* \* \* \*

Shell’s violations of RCRA are ongoing and continuous. CLF intends to seek a civil injunction, as provided under Section 7002 of RCRA, 42 U.S.C. § 6972, ordering Shell to make necessary disclosures, to address current and ever-increasing risks of flooding from climate-change-induced storms, and restraining Shell from further violating RCRA. CLF also intends to seek civil penalties and an award of litigation costs, including attorney and expert witness fees, under Section 7002 of RCRA, 42 U.S.C. § 6972.

#### **IV. Clean Water Act**

Shell operates the Terminal pursuant to the General Permit for Discharge of Stormwater Associated with Industrial Activity issued by CT DEEP (“General Permit”). A version of the General Permit was first effective on October 1, 2011 and was reissued most recently on October 1, 2019. The current General Permit is set to expire on September 30, 2021. *See* <https://www.ct.gov/deep/cwp/view.asp?A=2721&Q=558454>.

The Permit requires Shell to develop a Stormwater Pollution Prevention Plan (“SWPPP”) and sets forth the elements that are required to be included in the SWPPP, including: (i) a facility description, (ii) identification of “potential pollutant sources,” (iii) a description of the “control measures” implemented by the Terminal, and (iv) an engineer’s certification. *See* Permit § 5(c). In the section entitled “Potential Pollutant Sources,” the Permit provides that “[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may result in the discharge of pollutants during dry weather from the site.” Permit § 5(c)(2)(D).

Among other requirements the Permit states:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit § 5(b).

Shell’s SWPPP fails to include information documenting sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change—that would impact the Terminal and surrounding communities. By failing to address these foreseeable impacts of climate change, Shell is not maintaining and implementing a SWPPP and BMPs that will reduce or eliminate the pollutants in the Terminal’s storm water discharges and assure compliance with the Permit, which is a violation of the Permit in itself.

## A. Clean Water Act Violations

### 1. Failure to Eliminate Non-Stormwater Discharges

The Permit requires that Shell eliminate all non-stormwater discharges and that Shell's SWPPP document the control measures it will use to eliminate the non-stormwater discharges. Permit 5(c)(2)(E); Bureau of Materials Management and Compliance Assurance Water Permitting and Enforcement Division, *Guidance Document for Preparing a Stormwater Pollution Prevention Plan*, 19 CT DEEP (Mar. 2011), available at [https://portal.ct.gov/-/media/DEEP/Permits\\_and\\_Licenses/Water\\_Discharge\\_General\\_Permits/swpppguidpdf.pdf](https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Water_Discharge_General_Permits/swpppguidpdf.pdf). Shell's SWPPP fails to describe or ensure implementation of BMPs that will be used to ensure that non-stormwater pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges, do not occur in the future and are eliminated. Therefore, Shell is violating the Permit and the Clean Water Act.

### 2. Activity Inconsistent with the Coastal Management Act and Causing Adverse Impacts to Coastal Resources

Shell has failed to design its Terminal to minimize the risk of oil and chemical spills at the Terminal and therefore its activities at the Terminal are inconsistent with the applicable goals and policies in the Coastal Management Act. *See* Permit Sect. 3(b)(2). The referenced provisions state in part:

(a) The following general goals and policies are established by this chapter: . . .

(5) To consider in the planning process the potential impact of a rise in sea level, coastal flooding and erosion patterns on coastal development so as to minimize damage to and destruction of life and property and minimize the necessity of public expenditure and shoreline armoring to protect future new development from such hazards.

Conn. Gen. Stat. § 22a-92(a)(5). Connecticut has adopted a sea level change scenario of 20 inches by 2050. CT DEEP, *Notice*, (Dec. 26, 2018) available at [https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal\\_management/coastal\\_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en](https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal_management/coastal_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en). Shell has failed to consider the potential impact of a rise in sea level, coastal flooding, and erosion patterns on coastal development in its planning and operating process at the Terminal. Shell has also failed to design the Terminal to minimize the risk of spillage of petroleum products and hazardous substances. Moreover, Shell has failed to provide effective containment and cleanup facilities for accidental spills or disallowed offshore oil receiving systems that have the potential to cause catastrophic oil spills in the Long Island Sound estuary. Accordingly, Shell's activities designing and operating the Terminal will cause adverse impacts to coastal resources as defined in section 22a-93(15) of the Connecticut General Statutes.



### 3. *Unlawful Certification*

Shell's Permit requires that the SWPPP be signed "by a responsible corporate officer or duly authorized representative thereof." Permit at 5(c)(4). The SWPPP must also include the following certification:

"I have personally examined and am familiar with the information submitted in this document and all attachments thereto, and I certify that, based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that a false statement made in the submitted information may be punishable as a criminal offense, in accordance with section 22a-6 of the General Statutes, pursuant to section 53a-157b of the General Statutes, and in accordance with any other applicable statute."

Permit 6(d).

In addition, the Permit requires that each SWPPP contain a certification from a licensed professional engineer:

"I certify that I have thoroughly and completely reviewed the Stormwater Pollution Prevention Plan prepared for this site. I further certify, based on such review and site visit by myself or my agent, and on my professional judgment, that the Stormwater Pollution Prevention Plan meets the criteria set forth in the General Permit for the Discharge of Stormwater Associated with Industrial Activity effective on October 1, 2018. I am aware that there are significant penalties for false statements in this certification, including the possibility of fine and imprisonment for knowingly making false statements."

Permit 5(c)(7).

Shell made the required certifications at the time of development and submission of its SWPPP but without discussing in the SWPPP or disclosing to regulators information in its possession regarding climate change driven impacts and the substantial risks of pollutant discharges associated with these impacts. Shell made these certifications without considering the spill prevention and control procedures that would be necessary to address the foreseeable effects of climate change—sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—and the substantial risks of pollutant discharges and/or releases associated with these effects. Accordingly, Shell's SWPPP certification is untrue, inaccurate, and incomplete in violation of the Permit and the CWA.

### 4. *Failure to Identify Sources of Pollution Reasonably Expected to Affect the Quality of Stormwater Discharges*

The Permit requires that "[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may result in the discharge of pollutants during dry weather from the site. The [SWPPP] shall identify

all activities and materials that may be a source of stormwater pollution at the site.” Permit 5(c)(2)(D). Shell has failed to identify sources of pollutants resulting from the impacts of climate change as sources of pollution reasonably expected and anticipated by Shell to affect the quality of the stormwater discharges from the Terminal, including the potential for flooding at the Terminal from storm surge despite multiple past instances of storm surge. Shell has failed to identify sources of pollutants resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are becoming, worse as a result of climate change—and which are reasonably expected and anticipated to affect the quality of the stormwater discharges from the Terminal.

#### 5. *Failure to Describe and Implement Practices to Reduce Pollutants and Assure Permit Compliance*

The Permit requires that:

[t]he permittee must document the location and type of control measures installed and implemented at the site in accordance with “Control Measures” (Section 5(b)). The permittee shall discuss the appropriateness and priorities of control measures in the [SWPPP] and how they address identified potential sources of pollutants at the site. The [SWPPP] shall include a schedule for implementing such control measures if not already implemented.

Permit 5(c)(2)(E). According to the Permit:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit 5(b). The SWPPP does not refer to the potential for flooding at the Terminal from storm surge, despite the multiple past incidences of storm surge flooding referred to *supra*, and as a result does not include control measures or BMPs to minimize this potential unpermitted discharge. Shell’s SWPPP for the Terminal does not describe or ensure implementation of BMPs that will be used to address pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are becoming, worse as a result of climate change—which are reasonably expected, and known to Shell.

#### 6. *Failure to Implement Measures to Manage Runoff*

The Permit requires the Terminal it to “minimize the discharge of pollutants from the site” including to “divert uncontaminated run-on to avoid areas that may contribute pollutants.” Permit § 5(b)(7). Shell’s SWPPP for the Terminal does not refer to the potential for flooding at the Terminal from storm surge or heavy precipitation, despite the multiple past incidences of flooding. Because the SWPPP for the Terminal fails to describe or ensure implementation of BMPs that will

be used to address run-on to avoid areas that may contribute pollutants despite previous flooding and the current and growing risk of further flooding from the climate change impacts discussed above, Shell is violating the Permit and the Clean Water Act.

*7. Failure to Minimize the Potential for Leaks and Spills*

The Permit requires that “[t]he permittee must minimize the potential for leaks and spills.” Permit 5(b)(9). The potential for leaks and spills is increased by previous instances of flooding and the current and growing risk of further flooding from the climate change impacts discussed above. Because the SWPPP for the Terminal fails to describe or ensure implementation of BMPs that will be used to minimize the potential for leaks and spills resulting from the climate-change impacts discussed above, Shell is violating the Permit and the Clean Water Act.

*8. Failure to Submit Required Facts or Information to Connecticut Department of Energy and Environmental Protection*

The Permit requires that:

Within fifteen (15) days after the date a permittee becomes aware of a change in any of the information submitted pursuant to this general permit, becomes aware that any such information is inaccurate or misleading, or that any relevant information has been omitted, such permittee shall correct the inaccurate or misleading information or supply the omitted information in writing to the commissioner. Such information shall be certified in accordance with Section 6(d) of this general permit. The provisions of this subsection shall apply both while a request for registration is pending and after the commissioner has approved such request.

Permit 6(g).

Shell has failed to submit relevant facts and/or submitted incorrect and incomplete information regarding the risks of climate-change, discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors in its SWPPP and reports to CT DEEP. Shell has not promptly submitted such facts or information to CT DEEP, despite Shell’s knowledge of the risks of climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, dating back decades. By failing to submit relevant facts and/or submitting incorrect and incomplete information and failing to promptly submit such information upon becoming aware that it had not previously been submitted, Shell is violating the Permit and the Clean Water Act.

*9. Failure to Amend or Update the SWPPP*

The Permit requires that the permittee amend the SWPPP under certain circumstances, including whenever:

(A) there is a change at the site which has an effect on the potential to cause pollution of the surface waters of the state;

(B) the actions required by the Plan fail to ensure or adequately protect against pollution of the surface waters of the state; or

....

(F) necessary to address any significant sources or potential sources of pollution identified as a result of any inspection or visual monitoring;

Permit 5(c)(5). Shell has not amended or updated its SWPPP based on information in its possession regarding the risks to the Terminal from climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, in violation of the Permit and the Clean Water Act. By failing to properly amend or update its SWPPP, Shell is violating the Permit and the Clean Water Act.

#### *10. Failure to Identify Discharges to Impaired Waters in SWPPP*

The Permit requires Shell to identify in its SWPPP any impaired waters to which the Terminal discharges and whether or not a Total Maximum Daily Load allocation (“TMDL”) has been established for them. Permit § 5(c)(2)(D)(i)(7). In addition, if the Terminal discharges to an impaired waterbody, the SWPPP must also document schedules and procedures for implementing impaired waters monitoring. Permit § 5(c)(2)(K). The Terminal discharges to New Haven Harbor via the City of New Haven’s Municipal Separate Storm Sewer System (“MS4”). Shell’s discharges enter the New Haven MS4 and discharge into New Haven Harbor south of the Terminal. The State of Connecticut has identified New Haven Harbor as impaired for dissolved oxygen, nutrients, oil and grease, polychlorinated biphenyls (“PCBs”), and bacteria. New Haven Harbor is included in the Connecticut State Bacteria TMDL.

Shell’s SWPPP fails to disclose the discharge to the impaired New Haven Harbor. It states instead that because the Terminal discharges to the MS4, it is “not subject to additional monitoring requirements associated with monitoring of discharges to impaired waters.” Shell’s failure to identify its discharges to an impaired waterbody and failure to document procedures for monitoring those discharges are a violation of the Permit and the Clean Water Act.

#### *11. Failure to Conduct Monitoring for Discharges to Impaired Waters*

If the Terminal discharges to an impaired waterbody, the Permit imposes special monitoring requirements for indicator pollutants. Permit § 5(e)(1)(D). As explained above, Shell discharges to New Haven Harbor, which is impaired for the following pollutants for which no TMDL has been established: dissolved oxygen, nutrients, oil and grease, PCBs, and bacteria. Until 2015, the Terminal’s stormwater monitoring reports to Connecticut DEEP identified it as discharging to an impaired waterbody (New Haven Harbor) and included the additional monitoring. Beginning in 2015, Shell stopped stating that it discharged to an impaired waterbody and stopped monitoring for indicator pollutants, stating in its SWPPP that “[a]s the site's discharges are to an MS4, the site is not subject to additional monitoring requirements associated with monitoring of discharges to impaired waters.” Shell’s failure to monitor for indicator pollutants for the impairments in New Haven Harbor is a violation of the Permit and the Clean Water Act.

**V. OTHER CLAIMS**

The violations of federal law alleged herein also support pendant state law claims sounding in tort, including, but not necessarily limited to, negligence and public and private nuisance. Shell is specifically put on notice that CLF intends to pursue such claims as warranted.

**VI. CONCLUSION**

During the notice period, CLF is willing to discuss effective remedies for the violations noticed in this letter that may avoid the necessity of litigation. If Shell wishes to pursue such discussions, please contact CLF within the next 20 days so that negotiations may be completed before the end of the notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the notice period.

Sincerely,



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**July 28, 2020**

*Via Registered Mail and Certified Mail, Return Receipt Requested*

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**RE: Notice of Intent to File Suit for Violations of the Resource Conservation and Recovery Act and Clean Water Act at the New Haven Terminals**

To Whom It May Concern:

Conservation Law Foundation (“CLF”)<sup>1</sup> hereby notifies Magellan Midstream Partners, L.P., Buckeye PT Terminals, LP,<sup>2</sup> and Buckeye PT Terminals GP LLC<sup>3</sup> (hereinafter, “Magellan”) of its intent to commence a civil action under Section 505 of the Clean Water Act (“CWA”), 33 U.S.C. § 1365 and Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), for violations of the CWA, 33 U.S.C. § 1251 *et seq.*, and RCRA, 42 U.S.C. § 6901 *et seq.*, at Magellan’s bulk storage and fuel terminals located at 134 Forbes Ave (“Forbes Ave Terminal”); 280 Waterfront St (“Waterfront Street Terminal”); and 85 East St (“East Street Terminal”), New Haven, Connecticut (collectively the “Terminals”).<sup>4</sup> Unless Magellan adequately resolves the violations of RCRA and the CWA described herein, CLF intends

<sup>1</sup> CLF is a 501(c)(3) nonprofit, member-supported organization dedicated to the conservation and protection of New England’s environment.

<sup>2</sup> Name changed from Magellan Terminals Holdings, L.P. on May 28, 2020.

<sup>3</sup> Name changed from Magellan NGL, LLC on Mar. 20, 2020.

<sup>4</sup> Explanation of sale to Buckeye.

to file suit against Magellan in the United States District Court for the District of Connecticut to secure appropriate relief under federal and state law for these violations.

Magellan has not designed, maintained, modified, and/or operated its Terminals to account for the numerous impacts of climate change. Magellan's infrastructure and operational failures at each of the Terminals, which include failing to inform regulators of the Terminals' specific vulnerabilities to climate change, put CLF's members, the New Haven community, and their natural resources at great risk and violate RCRA and the CWA because they essentially guarantee flooding, unpermitted discharges, and widespread contamination.

## **I. The Terminals**

Magellan, acting through officers, managers, subsidiary companies, and instrumentalities, owns or has owned and/or operates or has operated the Terminals, which consist of "tank farms," pipelines, marine terminals, buildings, and infrastructure located in the Port of New Haven in New Haven, Connecticut, which opens into the Long Island Sound.

The Federal Emergency Management Agency ("FEMA") flood map for the area where the Terminals are located, which was last revised in July 2013, shows that the entirety of each Terminal is within a Special Flood Hazard Area (SFHA) subject to inundation by a 1% annual chance flood (i.e., a 100-year flood or "base flood"). The Terminals are adjacent to and bordered by a VE<sup>5</sup> zone in New Haven Harbor, also referred to as a coastal high hazard area, making the terminal vulnerable to high velocity water including waves as well as wave effects 3 feet or greater. The Terminal has been subject to storm surge inundation in the past, including during Superstorm Sandy.

### **A. 134 Forbes Avenue**

The Forbes Ave Terminal is engaged in the receipt, storage, and distribution of petroleum products. The spectrum of fuels handled by this facility consists of gasoline, ethanol, and distillate. The facility contains fifteen bulk storage tanks with a total bulk storage capacity of approximately 28,895,664, as well as eight smaller storage tanks containing approximately 35,978 gallons of additives, miscellaneous petroleum products, and fire suppression materials. Fuel products are typically transferred to and from the Forbes Ave Terminal by four underground pipelines connected to Magellan's East Street Terminal, although it has the capability of transferring product from its vessel dock and tank farm to four other terminals. The Forbes Ave Terminal can also receive and distribute product via the Buckeye Pipeline.

The Forbes Ave Terminal's bulk storage tanks are located in a "containment area" surrounded by dikes made of earth and topped with crushed stone. The floor of the containment area is made of compacted earthen materials. The containment dikes do not surround the entirety of the containment area and have openings in several places. Stormwater from the containment area is directed by overland flow to a series of catch basins and then visually inspected for oil

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<sup>5</sup> The designation of VE corresponds to the 1% annual chance coastal floodplains that have additional hazards associated with storm waves.



sheen through manually operated lift stations. The stormwater is then directed to an oil/water separator, which then discharges into New Haven Harbor. Stormwater from the truck loading rack flows through a bermed concrete pad equipped with ten catch basins that collect the stormwater and/or released product and direct it to an oil/water separator.

Both the tank farm and the truck loading rack are included in the same drainage area, where stormwater that is not directed by overland flow to the stormwater collection system is either evaporated or infiltrated into unpaved surfaces. The Forbes Avenue SWPPP does not certify the imperviousness of the tank farm secondary containment system and notes that previous investigations suggested the tank farm was not sufficiently impervious to contain a product release.

Magellan is categorized as a Small Quantity Generator of hazardous waste at the Forbes Ave Terminal. Magellan has contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste, as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and solid waste, as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), at the Forbes Ave Terminal, which may present an imminent and substantial endangerment to health or the environment.

Based on the information currently available to CLF, the toxic and hazardous wastes and pollutants listed below, many of which are highly carcinogenic, are present at the Forbes Ave Terminal as follows: waste oil, waste water soluble oil, waste chemical liquids, waste chemical solid, ignitable waste, corrosive waste, lead, mercury, benzene; lead-contaminated soils generated by excavation of soils during site upgrades or other structural construction projects.<sup>6</sup>

In addition to current activities and storage, the soils and groundwater at the Forbes Ave Terminal are contaminated from Magellan's and others' past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste. The Forbes Ave Terminal site has been used as a fuel terminal since the 1920s and the soil is contaminated with petroleum products and lead, presumably from leaded gasoline spills and/or from re-painting the storage tanks.<sup>7</sup> At least as of 2011, soil at the Terminal showed greater than 5 milligrams of lead per liter of soil.<sup>8</sup>

## **B. 280 Waterfront Street**

The Waterfront Street Terminal is engaged in the receipt, storage, and distribution of petroleum products. The spectrum of fuels handled by this facility consists of gasoline and distillate. The facility contains fourteen bulk storage tanks with a total bulk storage capacity of approximately 6,281,700, as well as eight smaller storage tanks containing approximately 74,925 gallons of other products, including diesel and gasoline additives, heating oil, skimmed oil, conductivity additive, foam storage, and foam concentrate. Fuel products are typically received at the Terminal's vessel dock by marine vessel or by pipeline and then transferred to the storage tanks. Products are generally distributed via the Waterfront Street Terminal's truck loading racks or the Buckeye Pipeline. The Waterfront Street Terminal also has the capability of transferring

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<sup>6</sup> Bates 2266, 2012 Forbes Avenue Hazardous Waste Contingency Plan

<sup>7</sup> Bates 2302-03, 2016 RCRA Inspection Report Large Quantity Generator

<sup>8</sup> Bates 2246

product from its vessel dock and tank farm to four other terminals and can receive and distribute product via the Buckeye Pipeline.

The Waterfront Street Terminal's bulk storage tanks are located in one drainage area with six intermediate containment areas, which have containment dikes constructed of reinforced concrete or earth with a crushed stone surface around the periphery of the containment areas. The containment dikes do not surround the entirety of the containment areas and have openings in several places. Stormwater that accumulates within the tank farm is discharged through manually operated release valves after being inspected for signs of oil sheen; stormwater collected near the bulk storage tanks is generally treated in an oil/water separator before being discharged to the Waterfront Street Terminal's lagoon system. Stormwater from the truck loading racks and truck pump-back area is directed towards perimeter trough drains which direct the stormwater or released product to an oil/water separator. Stormwater from the Waterfront Street Terminal's vessel dock runs off directly into New Haven Harbor.

Stormwater from the tank farm and truck loading racks evaporates, infiltrates into unpaved surfaces, or is directed via overland flow to the stormwater collection system. The Waterfront Street SWPPP does not certify the imperviousness of the tank farm secondary containment system and notes that previous investigations suggested the tank farm was not sufficiently impervious to contain a product release.

Magellan is categorized as a Small Quantity Generator of hazardous waste at the Terminal. Magellan has contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste, as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and solid waste, as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), at the Waterfront Street Terminal, which may present an imminent and substantial endangerment to health or the environment.

Based on the information currently available to CLF, the toxic and hazardous wastes and pollutants listed below, many of which are highly carcinogenic, are present at the Waterfront Street Terminal as follows: waste oil, waste water soluble oil, waste chemical liquids, waste chemical solid, ignitable waste, lead, benzene. In addition to current activities and storage, the soils and groundwater at the Waterfront Street Terminal are contaminated from Magellan's and others' past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste.

### **C. 85 East Street**

The East Street Terminal is engaged in the receipt, storage, and distribution of petroleum products. The spectrum of fuels handled by this facility consists of liquid asphalt and petroleum distillate. The facility contains seventeen bulk storage tanks with a total bulk storage capacity of approximately 53,828,790, as well as seven smaller storage tanks containing approximately 22,419 gallons of other products, including diesel additive, conductivity additive, and other additives, heat oil plus, oily waste, No. 2 fuel oil, and foam concentrate. Fuel products are typically received at the East Street Terminal by marine vessel at the vessel dock or by truck and then transferred to the storage tanks via product piping. Products are generally distributed via the East Street Terminal's

truck loading racks or by transfer line, but product can also be loaded at the East Street Terminal's vessel dock. The East Street Terminal transfers product to other locations via product pipelines owned and operated by Buckeye Pipeline, Inc., as well as via a transfer line for storage at, and then distribution from, a terminal at 265 Welton Street in Hamden Connecticut.

The East Street Terminal's bulk storage tanks are located in five containment areas, which lie below the surrounding ground level and have containment dikes made of earth with a crushed stone surface at certain locations around the periphery of the containment areas. The containment dikes do not surround the entirety of the containment areas and have openings in several places. The floor of the containment areas are made of compacted earthen materials and the East Street SWPPP does not certify the imperviousness of the tank farm secondary containment system and notes that previous investigations suggested the tank farm was not sufficiently impervious to contain a product release. Stormwater from the tank farm either accumulates within the diked areas and discharges to New Haven Harbor through manually operated release valves after being inspected for signs of oil sheen, or, in the case of one drainage area, evaporates or infiltrates into the ground. Stormwater at the truck loading rack, where biodiesel and other distillates are blended, is directed to catch basins and strip drains within a bermed concrete pad and then directed to two oil/water separators.

Magellan is categorized as a Small Quantity Generator of hazardous waste at the East Street Terminal. Magellan has contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste, as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and solid waste, as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), at the East Street Terminal, which may present an imminent and substantial endangerment to health or the environment.

Based on the information currently available to CLF, the toxic and hazardous wastes and pollutants listed below, many of which are highly carcinogenic, are present at the East Street Terminal as follows: ignitable waste, lead, benzene, methyl ethyl ketone, the following spent nonhalogenated solvents: toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine, benzene, 2-ethoxyethanol, and 2-nitropropane; all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above nonhalogenated solvents or those listed in F001, F003, or F004 (40 C.F.R. § 261.31), and still bottoms from the recovery of these spent solvents and spent solvent mixtures. In addition to current activities and storage, the soils and groundwater at the East Street Terminal are contaminated from Magellan's and others' past, present, and ongoing handling, storage, treatment, transportation, or disposal of hazardous and solid waste.

## **II. Climate Change and New Haven**

The present flood risks at the Terminals demonstrated by the FEMA map are, and will continue to be, exacerbated by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which are, and will continue to become, worse as a result of climate change. According to the Fourth National Climate Assessment, “The frequency of dangerous coastal flooding in the Northeast

would more than triple with 2 feet of sea level rise.”<sup>9</sup> Since 1900, sea level has already risen approximately one foot in the Northeast, at a rate that is three to four times higher than the global average.<sup>10</sup> From 1895 to 2011, the Northeast sustained a temperature increase of 2°F and a 10% increase in precipitation (5 inches), and from 1958 to 2016, “the number of heaviest 1% precipitation events (that is, an event that has a 1% chance of occurring in any given year) in the Northeast has increased by 55%.”<sup>11</sup> The location, elevation, and failure to operate, maintain, or design infrastructure at the Terminal to account for the impacts associated with climate change make it especially vulnerable.

The entirety of the Port of New Haven is situated on artificial fill layered over stratified drift.<sup>12</sup> Combined with being located nearly at sea level, the Terminals are at risk from coastal flooding caused by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change.

“New Haven’s southern facing coastline and the geomorphology of Long Island Sound cause it to be particularly vulnerable to all hurricanes forecasted to track to New England. This is due to the ability of Long Island Sound to amplify hurricane surges.”<sup>13</sup> “As a coastal town, New Haven experiences frequent flooding due to heavy rainfall and increasingly severe hurricanes and winter storms. Weather-related flooding is compounded by a high rate of sea level rise of 2.5mm per year (the global mean trend is 0.5mm per year).”<sup>14</sup> “Several extreme precipitation indices are projected to increase, including the number of days with more than 1 inch of precipitation [], number of heavy precipitation days[], fraction of total precipitation accounted for by heavy precipitation [], and the maximum 1-day and 5-day precipitation [], all indicating a substantial increase of flood risk by mid-century.”<sup>15</sup>

Sea level trends along the Northeast Atlantic “have been higher than the global rate over the last several decades, capped by a recent multiyear jump in sea level beginning in 2009.”<sup>16</sup> This

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<sup>9</sup> Mecray, Ellen L., *et al.*, *Ch. 18: Northeast*, 713 FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATIONS IN THE UNITED STATES (2018), *available at* [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch18\\_Northeast\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch18_Northeast_Full.pdf).

<sup>10</sup> *Id.*; Horton, Radley, *et al.*, *Ch. 16: Northeast*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, eds., U.S. Global Change Research Program) (2014).

<sup>11</sup> Mecray, *supra* at n.3; Radley, *supra* at n.4.

<sup>12</sup> *City of New Haven Natural Hazard Mitigation Plan Update II*, Figure 2-5, 2-12 (Apr. 2017).

<sup>13</sup> *Id.* at 5-1.

<sup>14</sup> CONNECTICUT INSTITUTE FOR CLIMATE AND ADAPTATION, *City of New Haven Commercial Industrial Toolbox Final Report 4* (Jul. 31, 2017), *available at* <https://circa.uconn.edu/wp-content/uploads/sites/1618/2016/03/CIT-CIRCA-Final-Report-With-JPEG-Appendices-attached.pdf>.

<sup>15</sup> Connecticut Institute for Resilience and Climate Adaptation, *Connecticut Physical Climate Science Assessment Report (PCSAR): Observed trends and projections of temperature and precipitation*, 4 (Aug. 2019), *available at* <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/11/CTPCSAR-Aug2019.pdf>.

<sup>16</sup> NOAA, *Global & Regional Sea Level Rise Scenarios for the U.S.*, at 9 (Jan. 2017), [https://tidesandcurrents.noaa.gov/publications/techrpt83\\_Global\\_and\\_Regional\\_SLR\\_Scenarios\\_for\\_the\\_US\\_final.pdf](https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf).

trend is projected to continue.<sup>17</sup> A 2019 analysis by the Connecticut Institute for Resilience and Climate Adaptation (“CIRCA”) concluded that communities in Connecticut should plan that “sea level will be 0.5 m (1ft 8 inches) higher than the [1992 level] in Long Island Sound by 2050.”<sup>18</sup> Moreover, according to a report by the Connecticut Department of Energy and Environmental Protection (“CT DEEP”), average surface temperatures in Long Island Sound have been rising—which has been connected to increased risk of frequency and magnitude of storms—with a change of almost 2 degrees between 1991 and 2015.<sup>19</sup>

The Port of New Haven, and specifically all three Terminals, is directly at risk from these impacts. In fact, the Terminals have been inundated by storm surge in the past. According to the CT DEEP online mapping tool entitled Connecticut Coastal Hazards Viewer, all of the oil terminals in the Port of New Haven, including Magellan’s three Terminals, were inundated when Superstorm Sandy hit New Haven on October 29, 2012. The storm surge in New Haven during Sandy was measured to be 9.14 feet above normal tide levels.<sup>20</sup> Despite swamping the Terminals, the storm surge from Sandy was *less than initially anticipated* owing to a change in the storm’s trajectory.<sup>21</sup> Post-Sandy, the City of New Haven commissioned a study of the resiliency of the I-95 corridor through New Haven. The study’s authors noted that “[u]nder different storm tracking scenario, Superstorm Sandy could have caused more damage if the flooding inundation was superposed with high tides.”<sup>22</sup> In particular, the study concluded that a similar storm in the future could increase the water level by almost three feet.<sup>23</sup>

Each Terminal stores toxic pollutants known to be harmful to humans and aquatic life in an area affected by sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change. The first significant storm surge that makes landfall at the Terminals is going to flush hazardous and solid waste from the Terminals into the Harbor and the Quinnipiac and Mill Rivers and through nearby communities and ecosystems; a significant rise in sea level will put the majority of each of the Terminals, including soils, groundwater, and treatment works, under water. Magellan knows all this, and yet has failed to disclose required information in its possession and has not taken appropriate steps to protect the public and the environment from this certain risk.

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<sup>17</sup> *See id.* at vii (“Along regions of the Northeast Atlantic (Virginia coast and northward) and the western Gulf of Mexico coasts, RSL [relative sea level] rise is projected to be greater than the global average for almost all future GMSL [global mean sea level] rise scenarios.”).

<sup>18</sup> James O’Donnell, Connecticut Institute for Resilience & Climate Adaptation, *Sea Level Rise in Connecticut*, 1, 4 (Feb. 2019), available at <https://circa.uconn.edu/wp-content/uploads/sites/1618/2019/02/SeaLevelRiseConnecticut-Final-Report.pdf>.

<sup>19</sup> *2015 Long Island Sound Hypoxia Season Review*, CT DEEP (2015), available at [https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis\\_water\\_quality/monitoring/2015/2015SeasonReviewfinalpdf.pdf](https://portal.ct.gov/DEEP/Water/LIS-Monitoring/-/media/DEEP/water/lis_water_quality/monitoring/2015/2015SeasonReviewfinalpdf.pdf).

<sup>20</sup> *City of New Haven Natural Hazard Mitigation Plan Update II* at 3-12.

<sup>21</sup> Hernandez, Esteban L., *Connecticut officials talk resiliency to mark Superstorm Sandy anniversary*, New Haven Register (Oct. 31, 2017), available at <https://www.nhregister.com/news/article/Connecticut-officials-talk-resiliency-to-mark-12321276.php>.

<sup>22</sup> Anagnostou, Emmanouil & Zhang, Wei, *Resiliency Analysis of Storm Surge for Interstate 95 Right-of-Way at Long Wharf / New Haven, CT*, 24 (Mar. 23, 2017).

<sup>23</sup> *Id.* at 25–28.

### **III. Resource Conservation and Recovery Act (“RCRA”) Violations—All Terminals**

#### *1. Imminent and Substantial Endangerment*

The hazardous and solid waste at the Terminals is generated, handled, stored, treated, transported and/or disposed of at or near sea level in close proximity to major human population centers, New Haven Harbor, and the Quinnipiac and Mill Rivers in New Haven. In the face of rising sea levels and increasing major storm events, the Terminal poses an imminent and substantial risk to surrounding communities and the environment.

Magellan has not disclosed its creation of this imminent and substantial risk to the United States Environmental Protection Agency (“EPA”), state regulators, or the public as it relates to each of the Terminals. Magellan failed to disclose required information in its possession to the federal and state regulators and the public regarding the effects of climate change on each Terminal. Magellan’s failure to disclose has contributed to the imminent and substantial endangerment to health and the environment.

#### *2. Open Dumping*

In addition to the hazardous waste discussed above, the petroleum products stored at each Terminal qualify as “solid waste” under RCRA because Magellan’s failure to address the known imminent risks associated with the climate-change impacts discussed above will result in release of these products when these foreseeable events occur. Magellan’s inaction in the face of its own knowledge regarding the risks of climate change represents an “intent to discard” useful products because the outcome of this inaction is certain to occur.

RCRA prohibits “open dumping” which includes “facilities or practices in floodplains” that “result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.” 40 C.F.R. 257.3-1(a). All three Terminals are in a 100-year floodplain as determined by the Federal Emergency Management Agency. Inundation by flood waters results in the washout and carrying away of discarded petroleum products and other contaminants. The perimeter trough and catch basins surrounding the truck loading area catch spilled oil products during loading and are fully open to inundation by flood waters. The Terminal has been subject to storm surge inundation in the past causing the discharge of pollutants from the site.

Magellan has taken no steps to prevent similar flooding and pollution discharges, despite the past flooding and the increasing severity of storms and storm surge caused due to climate change impacts, in violation of RCRA’s open-dumping prohibition.

#### *3. Generator Violation*

Small Quantity Generators like the East Street Terminal are required to maintain and operate their facilities in such a way as to “minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.” 40 C.F.R. § 262.251; *see also* Connecticut Reg. § 22a-430-3(h). Magellan is violating these duties by (i)

failing to disclose the known and ever-increasing risks to the Terminal from climate change discussed above, and (ii) failing to take any steps to prevent flooding at the Terminal from these risks.

\* \* \* \* \*

Magellan’s violations of RCRA at each Terminal are ongoing and continuous. CLF intends to seek a civil injunction, as provided under Section 7002 of RCRA, 42 U.S.C. § 6972, ordering Magellan to make necessary disclosures, to address current and ever-increasing risks of flooding from climate-change-induced storms, and restraining Magellan from further violating RCRA. CLF also intends to seek civil penalties and an award of litigation costs, including attorney and expert witness fees, under Section 7002 of RCRA, 42 U.S.C. § 6972.

#### **IV. Clean Water Act**

Magellan operates the Terminals pursuant to the General Permit for Discharge of Stormwater Associated with Industrial Activity issued by CT DEEP (“General Permit”). A version of the General Permit was first effective on October 1, 2011 and was reissued most recently on October 1, 2019. The current General Permit is set to expire on September 30, 2021. *See* <https://www.ct.gov/deep/cwp/view.asp?A=2721&Q=558454>.

The Permit requires Magellan to develop a Stormwater Pollution Prevention Plan (“SWPPP”) for each Terminal and sets forth the elements that are required to be included in the SWPPP, including: (i) a facility description, (ii) identification of “potential pollutant sources,” (iii) a description of the “control measures” implemented by each Terminal, and (iv) an engineer’s certification. *See* Permit § 5(c). In the section entitled “Potential Pollutant Sources,” the Permit provides that “[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may result in the discharge of pollutants during dry weather from the site.” Permit § 5(c)(2)(D).

Among other requirements the Permit states:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit § 5(b).

Each of the Terminal’s SWPPPs fails to include information documenting sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—all of which will become, and are becoming, worse as a result of climate change—that would impact the Terminals and surrounding communities. By failing to address these impacts of climate change, Magellan is not maintaining and implementing SWPPPs and BMPs that will reduce or eliminate the pollutants in the Terminals’ storm water discharges and assure compliance with the Permit, which is a violation of the Permit in itself.

## A. Clean Water Act Violations—All Terminals

### 1. Failure to Eliminate Non-Stormwater Discharges

The Permit requires that Magellan eliminate all non-stormwater discharges and that Magellan's SWPPPs document the control measures it will use to eliminate the non-stormwater discharges. Permit 5(c)(2)(E); Bureau of Materials Management and Compliance Assurance Water Permitting and Enforcement Division, *Guidance Document for Preparing a Stormwater Pollution Prevention Plan*, 19 CT DEEP (Mar. 2011), available at [https://portal.ct.gov/-/media/DEEP/Permits\\_and\\_Licenses/Water\\_Discharge\\_General\\_Permits/swpppguidpdf.pdf](https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Water_Discharge_General_Permits/swpppguidpdf.pdf). Magellan's SWPPPs fail to describe or ensure implementation of BMPs that will be used to ensure that non-stormwater pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, as well as increased magnitude and frequency of storm surges, do not occur in the future and are eliminated. Therefore, Magellan is violating the Permit and the Clean Water Act with respect to each Terminal.

### 2. Activity Inconsistent with the Coastal Management Act and Causing Adverse Impacts to Coastal Resources

Magellan has failed to design, maintain, and operate each of its Terminals to minimize the risk of oil and chemical spills at the Terminals and therefore its activities at each Terminal are inconsistent with the applicable goals and policies in the Coastal Management Act. See Permit Sect. 3(b)(2). The referenced provisions state in part:

(a) The following general goals and policies are established by this chapter: . . .

(5) To consider in the planning process the potential impact of a rise in sea level, coastal flooding and erosion patterns on coastal development so as to minimize damage to and destruction of life and property and minimize the necessity of public expenditure and shoreline armoring to protect future new development from such hazards.

Conn. Gen. Stat. § 22a-92(a)(5). Connecticut has adopted a sea level change scenario of 20 inches by 2050. CT DEEP, *Notice*, (Dec. 26, 2018) available at [https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal\\_management/coastal\\_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en](https://portal.ct.gov/-/media/DEEP/coastal-resources/coastal_management/coastal_hazards/SeaLevelChangeDEEPStatement12262018pdf.pdf?la=en). Magellan has failed to consider the potential impact of a rise in sea level, coastal flooding, and erosion patterns on coastal development in its planning and operating process at each Terminal. Magellan has also failed to design each of the Terminals to minimize the risk of oil and chemical spills and has failed to minimize the risk of spillage of petroleum products and hazardous substances. Moreover, at each Terminal Magellan has failed to provide effective containment and cleanup facilities for accidental spills or disallowed offshore oil receiving systems that have the potential to cause catastrophic oil spills in the Long Island Sound estuary. Accordingly, Magellan's activities designing and operating each of the Terminals will cause adverse impacts to coastal resources as defined in section 22a-93(15) of the Connecticut General Statutes.



### 3. *Unlawful Certification*

Magellan's Permit requires that each SWPPP be signed "by a responsible corporate officer or duly authorized representative thereof." Permit at 5(c)(4). Each SWPPP must also include the following certification:

"I have personally examined and am familiar with the information submitted in this document and all attachments thereto, and I certify that, based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that a false statement made in the submitted information may be punishable as a criminal offense, in accordance with section 22a-6 of the General Statutes, pursuant to section 53a-157b of the General Statutes, and in accordance with any other applicable statute."

Permit 6(d).

In addition, the Permit requires that each SWPPP contain a certification from a licensed professional engineer:

"I certify that I have thoroughly and completely reviewed the Stormwater Pollution Prevention Plan prepared for this site. I further certify, based on such review and site visit by myself or my agent, and on my professional judgment, that the Stormwater Pollution Prevention Plan meets the criteria set forth in the General Permit for the Discharge of Stormwater Associated with Industrial Activity effective on October 1, 2018. I am aware that there are significant penalties for false statements in this certification, including the possibility of fine and imprisonment for knowingly making false statements."

Permit 5(c)(7).

Magellan made the required certifications at the time of development and submission of its SWPPPs for each Terminal but without discussing in the SWPPPs or disclosing to regulators information in its possession regarding climate change driven impacts and the substantial risks of pollutant discharges at the Terminals associated with these impacts. Magellan made these certifications without considering the spill prevention and control procedures that would be necessary to address the effects of climate change—sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surges—and the substantial risks of pollutant discharges and/or releases at the Terminals associated with these effects. Accordingly, the SWPPP certification in each of Magellan's SWPPPs is untrue, inaccurate, and incomplete in violation of the Permit and the CWA.

### 4. *Failure to Identify Sources of Pollution Reasonably Expected to Affect the Quality of Stormwater Discharges*

The Permit requires that "[t]he [SWPPP] shall map and describe the potential sources of pollutants that may reasonably be expected to affect stormwater quality at the site or that may

result in the discharge of pollutants during dry weather from the site. The [SWPPP] shall identify all activities and materials that may be a source of stormwater pollution at the site.” Permit 5(c)(2)(D). Magellan has failed to identify sources of pollutants resulting from the impacts of climate change as sources of pollution reasonably expected and anticipated by Magellan to affect the quality of the stormwater discharges from each Terminal, including the potential for flooding at each Terminal from storm surge—despite past instances of storm surge flooding. Magellan has failed to identify sources of pollutants resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are becoming, worse as a result of climate change—and which are reasonably expected and anticipated by Magellan to affect the quality of the stormwater discharges from each of its Terminals.

#### *5. Failure to Describe and Implement Practices to Reduce Pollutants and Assure Permit Compliance*

The Permit requires that:

[t]he permittee must document the location and type of control measures installed and implemented at the site in accordance with “Control Measures” (Section 5(b)). The permittee shall discuss the appropriateness and priorities of control measures in the Plan and how they address identified potential sources of pollutants at the site. The Plan shall include a schedule for implementing such control measures if not already implemented.

Permit 5(c)(2)(E). According to the Permit:

Control Measures are required Best Management Practices (BMP) that the permittee must implement to minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.

Permit 5(b). Magellan’s SWPPPs for each of its Terminals does not refer to the potential for flooding at each Terminal from storm surge, despite the past incidences of storm surge flooding referred to *supra*, and as a result does not include control measures or BMPs to minimize this potential unpermitted discharge. Magellan’s SWPPP for each of the Terminals does not describe or ensure implementation of BMPs that will be used to address pollutant discharges resulting from sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge—all of which will become, and are becoming, worse as a result of climate change—which are reasonably expected, and known to Magellan.

#### *6. Failure to Implement Measures to Manage Runoff*

The Permit requires all permitted Terminals to “minimize the discharge of pollutants from the site” including to “divert uncontaminated run-on to avoid areas that may contribute pollutants.” Permit § 5(b)(7). Magellan’s SWPPPs for the Terminals do not refer to the potential for flooding at each Terminal from storm surge or heavy precipitation, despite the multiple past incidences of

flooding. Because none of the SWPPPs for the Terminals describe or ensure implementation of BMPs that will be used to address run-on to avoid areas that may contribute pollutants, despite previous flooding and the current and growing risk of further flooding from the climate change impacts discussed above, Magellan is violating the Permit and the Clean Water Act at each Terminal.

*7. Failure to Minimize the Potential for Leaks and Spills*

The Permit requires that “[t]he permittee must minimize the potential for leaks and spills.” Permit 5(b)(9). The potential for leaks and spills is increased by previous instances of flooding and the current and growing risk of further flooding from the climate change impacts discussed above. Because each SWPPP for the Terminals fails to describe or ensure implementation of BMPs that will be used to minimize the potential for leaks and spills resulting from the climate-change impacts discussed above, Magellan is violating the Permit and the Clean Water Act at each Terminal.

*8. Failure to Submit Required Facts or Information to Connecticut Department of Energy and Environmental Protection*

The Permit requires that:

Within fifteen (15) days after the date a permittee becomes aware of a change in any of the information submitted pursuant to this general permit, becomes aware that any such information is inaccurate or misleading, or that any relevant information has been omitted, such permittee shall correct the inaccurate or misleading information or supply the omitted information in writing to the commissioner. Such information shall be certified in accordance with Section 6(d) of this general permit. The provisions of this subsection shall apply both while a request for registration is pending and after the commissioner has approved such request.

Permit 6(g).

Magellan has failed to submit relevant facts and/or submitted incorrect and incomplete information regarding the risks of climate-change discussed above, and the substantial risks of pollutant discharges and/or releases at its three Terminals associated with these factors, in its SWPPPs and reports to CT DEEP. Magellan has not promptly submitted such facts or information to CT DEEP, despite Magellan’s knowledge of the risks of climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, dating back decades. By failing to submit relevant facts and/or submitting incorrect and incomplete information, and failing to promptly submit such information upon becoming aware that it had not previously been submitted, Magellan is violating the Permit and the Clean Water Act at each Terminal.

*9. Failure to Amend or Update the SWPPP*

The Permit requires that the permittee amend the SWPPP under certain circumstances, including whenever:

(A) there is a change at the site which has an effect on the potential to cause pollution of the surface waters of the state;

(B) the actions required by the Plan fail to ensure or adequately protect against pollution of the surface waters of the state; or

....

(F) necessary to address any significant sources or potential sources of pollution identified as a result of any inspection or visual monitoring;

Permit 5(c)(5). Magellan has not amended or updated any of its SWPPPs based on information in its possession regarding the risks to the Terminals from climate-change discussed above, and the substantial risks of pollutant discharges and/or releases associated with these factors, in violation of the Permit and the Clean Water Act. By failing to properly amend or update its SWPPP, Magellan is violating the Permit and the Clean Water Act at each Terminal.

#### *10. Illegal Infiltration of Stormwater*

As an industrial facility, the Terminals are categorized as a “Land Use . . . with Potential for Higher Pollutants Loads.” See Permit App. C. The Permit does not allow Magellan’s Terminals to infiltrate stormwater into the ground unless they are (i) expressly allowed by CT DEEP, and (ii) the stormwater undergoes “appropriate pretreatment” before infiltration. *Id.* The Permit similarly restricts stormwater infiltration at sites where the soil or groundwater is contaminated, such as at the Terminals. Each of Magellan’s three SWPPPs state that at least some of the stormwater from the tank farms is infiltrated into the ground. On information and belief, CLF asserts that Magellan has not received permission to infiltrate from CT DEEP at any of its Terminals and none of the Terminals pretreat the stormwater before infiltration. Magellan’s infiltration of stormwater from the tank farms is a violation of the Permit and the Clean Water Act at each Terminal.

#### *11. Failure to Maintain an Impervious Containment Area*

The Permit requires that a Terminal’s tank farm have an “impermeable secondary containment area” capable of holding either 100% or 110% of the volume of the largest tank or 10% of the total volume of all tanks. 5(b)(9)(A)(i)(2). Magellan’s SWPPPs states that at least some stormwater infiltrates into the ground at each Terminal and that Magellan has not confirmed that the ground of the secondary containment area is impermeable. In fact, each SWPPP states it does not certify the imperviousness of the tank farm secondary containment system and notes that previous investigations have suggested the tank farms are not sufficiently impervious to contain a product release. Magellan’s failure to ensure that the secondary containment area is impermeable at each of its Terminals constitutes three separate violations of the Permit and the Clean Water Act at each Terminal.

**V. OTHER CLAIMS**

The violations of federal law alleged herein also support pendant state law claims sounding in tort, including, but not necessarily limited to, negligence and public and private nuisance. Magellan is specifically put on notice that CLF intends to pursue such claims to the fullest extent permitted by law.

**VI. CONCLUSION**

During the notice period, CLF is willing to discuss effective remedies for the violations noticed in this letter that may avoid the necessity of litigation. If Magellan wishes to pursue such discussions, please contact CLF within the next 20 days so that negotiations may be completed before the end of the notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the notice period.

Sincerely,



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