IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHARLESTON WATERKEEPER, SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,	)	
Plaintiffs,	)	C/A No. 2:20-cv-01089-DCN
v.	)	
FRONTIER LOGISTICS, L.P.,	)	
Defendant.	)	

DEFENDANT FRONTIER LOGISTICS, L.P.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Background

Frontier Logistics, L.P. ("Frontier"), a supply chain service provider, currently operates a facility at the South Carolina State Ports Authority's ("SCPA") Union Pier Terminal in Charleston, South Carolina, while it awaits construction of a new, inland facility. Frontier has been operating the facility at the Union Pier Terminal ("UPT") since May 2017. At its facility, Frontier receives by rail and then packages production pellets into 25-kilogram bags, which are stretch-hooded or stretch-wrapped onto pallets. Production pellets are the raw material for plastic goods.

Frontier is one of a number of entities that handle and distribute production pellets in the Charleston area. The production pellets that are handled at Frontier's (UPT) facility are exported overseas by third parties, where they are used to manufacture plastic goods. Frontier is not the only handler and exporter of production pellets in the Lowcountry. Indeed, an investigation by one news media outlet found that there are over 20 companies in the Charleston area handling production pellets. Dkt.#1-1, Ex. 7, Frontier letter to DHEC.

On July 19, 2019, the South Carolina Department of Health and Environmental Control ("DHEC") received an incident report of a suspected pellet spill or release on Sullivan's Island beach in Charleston County, South Carolina. Dkt.#1-1, Ex. 5, Incident Report. The caller reported that a large amount of small plastic pellets had washed ashore from an unknown source. *Id.* Some of the pellets were opaque white and uniformly shaped. Dkt.#1-1, Ex. 4, Notice. While the reporting party did not see the alleged spill and was unaware of the source of the pellets, the reporting party claimed to have recently read an article about Frontier's facility and stated that the pellets that washed ashore were similar to the ones it handled. Dkt.#1-1, Ex. 5, Incident Report. This is the sole source of information alleging Frontier had any involvement with this incident. *Id.*

Frontier learned of the incident in the afternoon of July 19 upon being contacted by SCPA. Dkt.#1-1, Ex. 7, Frontier letter to DHEC. SCPA informed Frontier that it would secure a contractor to begin cleanup at the beach, recommending that Frontier investigate and send assistance. *Id.* Before any of Frontier's personnel arrived at the beach to assist or begin its investigation, however, a DHEC representative contacted Frontier to inform it that DHEC was attributing the spill to Frontier and that it should immediately begin the cleanup process. *Id*. At that time, Frontier had no information concerning any alleged spills at its facility, which it expressed to DHEC. *Id.*

Upon receiving the fortuitous "tip" from the reporting party, DHEC contacted SCPA and conducted a site visit to Frontier's facility, where they reported observing the presence of pellets that "appeared to resemble" those found on the beach. Dkt.#1-1, Ex. 4, Notice. Although Frontier had pellet handling and cleaning procedures, it immediately audited its facility, finding no evidence of a spill, and initiated an aggressive housekeeping effort to remove all loose pellets from the facility. Dkt.#1-1, Ex. 7, Frontier letter to DHEC. Frontier also began the process of improving its housekeeping procedures and physical barriers. *Id.* DHEC conducted subsequent site visits on

July 23 and 24, noting that there were fewer loose production pellets on the floor of the facility than had been previously observed. *Id.* During those visits, DHEC and Frontier personnel discussed the utilization of netting throughout the facility to prevent pellets from potentially migrating into waterways. *Id.*

Despite the lack of information showing that the pellets had come from Frontier's facility, as a good corporate citizen of Charleston, Frontier directed its employees to immediately begin assisting in a week-long cleanup effort at Sullivan's Island that ultimately yielded approximately 18 pounds of pellets (or approximately 1/3 of a bag). *Id.* Through the cleanup effort, Frontier's employees were able to observe that many of the pellets were not white, and were different sizes, shapes, cuts, textures, colors, and ages. *Id.* None of the pellets had identifying markings. *Id.* Frontier informed DHEC of this information, noting that its UPT facility only handles white production pellets of a certain shape and size. *Id*. Subsequent testing determined that a significant number of the recovered pellets were not polyethylene, the only type plastic handled by Frontier at UPT, nor were they pellets that had been manufactured by Frontier's customers. *Id.*

Following the second site visit, DHEC issued to Frontier a "Notice of Alleged Violation/Notice of Enforcement Conference" alleging that Frontier had violated South Carolina's Pollution Control Act, S.C. Code Ann. § 48-1-90(A)(1).[1] Dkt.#1-1, Ex. 4, Notice. The enforcement conference was held on August 1, 2019. *Id*. When it received a report that pellets were observed during a beach pellet check, DHEC conducted a fourth visit to the facility on August 21, 2019. *Id.* At that time, DHEC's inspector reported: "I just got back from Frontier and all of their BMP's

[1] "It is unlawful for a person, directly or indirectly, to throw, drain, run, allow to seep, or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes, and other wastes, except in compliance with a permit issued by the department." S.C. Code Ann. § 48-1-90(A)(1).

[best management practices] are in place. We walked the dock and rail line areas and there were no signs of a spill at that time." *Id.*

After the enforcement conference, Frontier provided DHEC a written response to the allegations on August 29, 2019. Dkt.#1-1, Ex. 7, Frontier letter to DHEC. Frontier demonstrated that the pellets from the July 2019 incident were not a result of a spill by Frontier from its facility. *Id.* Recognizing, however, the importance of guarding against a potential spill in the future, Frontier notified DHEC that it had further strengthened its pellet-handling practices and procedures. *Id.* With regard to the July 2019 site visit, Frontier notified DHEC that it had made significant upgrades to the facility's pellet containment systems as part of its ongoing efforts to prevent the possibility of any pellet egress into water or surrounding areas. *Id.*

Frontier's efforts included: the addition of new vacuum cleaning equipment, installation of additional building and area barriers such as foam sealing material, industrial taping of joints, solid barriers, impermeable flexible netting reinforced by sand bags and similar measures. *Id.*; *see also*, Dkt.#12, Answer Ex. 1. Frontier also implemented new inspection protocols, which include a weekly written inspection checklist that is verified with photographic evidence by a supervisor of a different Frontier location. *Id*. In addition, as part of its active membership of Operation Clean Sweep, Frontier began developing an enhanced written pellet handling, spill prevention, and spill response plan that recognizes the special problems of temporarily operating its facility over the water. *Id*. The plan includes daily continuous cleaning, weekly inspection, and adverse weather inspection sections. *Id.*

On October 17, 2019, DHEC notified Frontier of its determination in regard to the July 2019 incident. Dkt.1-1, Ex. 8, DHEC letter to Frontier. Based on its investigation and the supplemental information provided by Frontier during and subsequent to the enforcement

conference, DHEC determined that the matter should be closed without any further action. *Id*. DHEC acknowledged and recognized Frontier's efforts in addressing the potential of spills or releases and its continued attention to facility operations and best management practices. *Id*.

Plaintiffs Charleston Waterkeeper and South Carolina Coastal Conservation League allege that they and their members have a broad range of interests in Charleston-area waters and beaches. *Id.* ¶ 13. Upon learning of the July 2019 incident, Plaintiffs began staking out a variety of locations around the Charleston Harbor that they believed were both sufficiently close to Frontier's facility and able to accumulate aquatic debris. *Id.* ¶¶ 49, 51. Plaintiffs then spent the next eight months targeting these locations for pellet hunts. *Id.* ¶ 52. Plaintiffs specifically targeted Frontier as a culprit and engaged in this activity for the purpose of justifying that preconceived notion as a matter of convenience, rather than engaging in activity to locate and discover the true source of the pellets.

Plaintiffs allege that they have collected 14,281 plastic pellets from the intentionally selected sites since they began seeking out said pellets in July of 2019. Dkt.#1, Complaint ¶¶ 49, 52. The collected pellets, which upon visual inspection are clear or opaque white, come in a variety of shapes, and range from new to weathered, allegedly "resemble" those found along a fence near Frontier's facility. *Id.* at ¶ 55. Plaintiffs also allege that approximately 10 of those some 14,281 pellets contain polyethylene, the main chemical component contained in the production pellets handled at Frontier's facility. *Id.* at ¶ 56. Based on this limited amount of information, Plaintiffs have inferred that all 14,281 pellets they have collected came from illegal discharges made solely from Frontier's facility. *Id.* at ¶¶ 2, 3.

Plaintiffs initiated this action against Frontier on March 18, 2020, seeking declaratory and injunctive relief, as well as civil penalties and attorneys' fees, under the citizen suit provisions of

the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), and the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(1). Dkt.#1, Complaint.

Standard of Review

A party may move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. Fed. R. Civ. P. Rule 12(c). Rule 12(c) motions dispose of cases in which there is no substantive dispute that warrants the litigants and the court proceeding further. *Fowler v. State Farm Mut. Auto. Ins. Co.*, 300 F.Supp.3d 751, 755-56 (D.S.C. 2018), *aff'd* 759 F. App'x 160 (4th Cir. 2019) (quotation omitted). Such a motion should be granted when accepting the facts as pleaded in the complaint, the case can be decided as a matter of law. *S & S Const., Inc. of Anderson v. Reliance Ins. Co.*, 42 F. Supp. 2d 622, 623 (D.S.C. 1998) (citing *Tollison v. B & J Machinery Co., Inc.,* 812 F.Supp. 618, 619 (D.S.C.1993)). A motion for judgment on the pleadings tests the sufficiency of a claim, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F.Supp.2d 494, 496 (D.S.C. 2005).

In evaluating a Rule 12(c) motion, the district court uses the same standard it uses when evaluating a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Mincey v. World Sav. Bank, FSB*, 614 F. Supp. 2d 610, 629 (D.S.C. 2008) (citing *Burbach Broad. Co. of Del. v. Elkins Radio Corp.,* 278 F.3d 401, 405–06 (4th Cir.2002); *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999)). The court "may consider the pleadings as well as any documents attached to the pleadings." *Id*. The key difference between a Rule 12(b)(6) motion and a Rule 12(c) motion is that on a 12(c) motion, the court is to consider the answer as well as the complaint, including in its review all pleadings, exhibits attached thereto, documents central to plaintiff's claims, and other materials in addition to the complaint if such materials are public

records or are otherwise appropriate for the taking of judicial notice. *Bradacs v. Haley*, 58 F. Supp. 3d 499, 505 (D.S.C. 2014) (quotations omitted).

To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570(2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly,* 550 U.S. at 556).

> While a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Twombly, 550 U.S. at 555 (citations and quotations omitted). This standard "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quotation omitted).

> Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to **legal conclusions**. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Second, only a complaint that states a **plausible** claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.

Id. at 678–79.

Argument

Considering the pleadings, exhibits attached thereto, and other materials that are appropriate for the taking of judicial notice, Plaintiffs have failed to: (1) establish their standing to

bring either an RCRA or a CWA claim; (2) state a claim under the RCRA; and (3) state a claim under the CWA. Plaintiffs are also prohibited from seeking relief under the RCRA and the CWA for their alleged injuries. Frontier is therefore entitled to judgment as a matter of law.

I. Plaintiffs lack standing.

Plaintiffs have failed to establish that they have standing to bring either a RCRA or a CWA claim against Frontier. To meet the constitutional minimum for standing, a plaintiff must establish three elements: (1) injury in fact; (2) traceability; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

> While each of the three prongs of standing should be analyzed distinctly, their proof often overlaps. Moreover, these requirements share a common purpose—namely, to ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff's complaint.

Friends of the Earth, Inc.. 204 F.3d at 154 (citation omitted).

The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560. To meet the traceability prong, it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. *Id*. Finally, the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury. *Id*. at 561. Plaintiffs bear the burden of establishing each element as they are the parties seeking to invoke federal jurisdiction. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002) (citing *Lujan.,* 504 U.S. at 561; *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990)). While this Court must accept as true all of Plaintiffs' general allegations, "[n]evertheless, the party invoking the jurisdiction of the court must include the necessary factual allegations in the pleading, or else the case must be dismissed for lack of

standing." *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

Plaintiffs generally allege that they have standing to bring these claims either in their own right or as representatives of their members. An organization has associational standing when (1) at least one of its members would have standing to sue in his or her own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *E.g.*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Not only have Plaintiffs failed to allege facts sufficient to establish that they have standing, they have also failed to establish that even a single member would have standing in his or her own right. Because Plaintiffs do not meet any of the requirements for standing either on their own or as representatives of their members, this Court lacks jurisdiction and Frontier is entitled to judgment as a matter of law.

a. No injury in fact that is actual or imminent.

There is no realistic threat of harm to the Plaintiffs and their members, and Plaintiffs have failed to allege as such. To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, (1979)). And while a threatened injury can satisfy this requirement, "not all threatened injuries constitute injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017). Indeed, a threatened event can be reasonably likely to occur but still be insufficiently imminent to constitute an injury-in-fact. *Id.* at 276 (quotations omitted).

"An individual's decision to deny herself aesthetic or recreational pleasures based on concern about pollution will constitute a cognizable injury ***only when the concern is premised***

upon a realistic threat." *Maine People's All. And Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 284 (1st Cir. 2006) (citing *Laidlaw,* 528 U.S. at 184; *City of Los Angeles v. Lyons,* 461 U.S. 95, 107 n. 8 (1983) (explaining that "the *reality* of the threat ..., not the plaintiff's subjective apprehensions," constitutes the cognizable injury)) (emphasis added). The Supreme Court has "repeatedly reiterated" that a threatened injury must be certainly impending to constitute an injury in fact, and that allegations of possible future injury are insufficient. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation and citations omitted). Injury premised on a "speculative chain of possibilities" does not establish that the injury is "certainly impending or is fairly traceable.' *Id.* at 414.

Plaintiffs' complaint is riddled with allegations regarding the alleged environmental dangers posed by production pellets in-and-of themselves. Dkt.#1, Complaint ¶¶ 59-69. "The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181; *Friends of the Earth, Inc.*, 204 F.3d at 160-61 (same, quoting *Laidlaw*). Unlike their allegations of injuries to the environment, Plaintiffs' allegations regarding alleged injuries to themselves and their members are limited to a single paragraph in the Complaint, ¶ 13, wherein they make boilerplate allegations that their members have a broad and diverse range of interests shared by the population-at-large before reaching the legal conclusion that they "fall within the zone of interests protected by the RCRA and CWA." Plaintiffs allege that their individual members "use and enjoy Charleston waters and beaches for recreational, commercial, educational, conservation, and aesthetic purposes, including but not limited to, boating, scuba diving, swimming, fishing, and sightseeing." Dkt.#1, Complaint ¶ 13. They further allege that these interests are harmed because the pellets they have collected "are known to be harmful to wildlife and to persist in the environment." *Id*.

Certainly, the desire to use or recreate on local waters and beaches, even for purely aesthetic purposes, can be a cognizable interest for purposes of standing. *Lujan*, 504 U.S. at 562–63. "But such environmental interests cannot support an injury in fact unless they have been actually harmed or imminently will be." *Ctr. For Biological Diversity v. United States Envtl. Prot. Agency*, 937 F.3d 533, 537 (5th Cir. 2019). Because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured" so not to reduce the Article III case or controversy requirement to a meaningless formality. *Friends of the Earth, Inc.*, 204 F.3d at 154 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 734-45 ("But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.")).

Plaintiffs cannot establish standing via allegations of broad and generalized interests that cover virtually every aspect of outdoor life in a coastal community. Rather, they "must somehow differentiate [themselves] from the mass of people who may find the conduct of which [they] complain[] to be objectionable only in an abstract sense." *Friends of the Earth, Inc*, 204 F.3d at 156. "The injury in fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public." *Id.* Further, "to establish standing plaintiffs must show that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Plaintiffs have the burden of establishing such a geographic nexus, a burden they have failed to meet. "Courts cannot simply presume pollution discharged in one place will affect would-be plaintiffs everywhere." *Ctr. For Biological Diversity*, 937 F.3d at 538.

Plaintiffs may not assert an aesthetic injury simply because they sought out Frontier's facility and allegedly saw production pellets nearby. This is premised on the general rule that one

"cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. This rule applies with equal force in environmental cases. *See Mancuso v. Consol. Edison Co. of N.Y.*, 25 F.App'x 12, 13 (2d Cir. 2002) (finding no injury in fact to "aesthetic sensibilities" when a plaintiff visited an area "to obtain evidence to support [an environmental] lawsuit"). "[S]omeone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it. … But crucial to the aesthetic injury is that the aesthetic experience was actually offensive to the plaintiff." *Ctr. For Biological Diversity*, 937 F.3d at 540 (citations omitted); *see also, Friends of the Earth*, 528 U.S. at 183; *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 21 (D.C. Cir. 2011); *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F.Supp. 3d 142, 175 (D.D.C. 2016). Crucially, when Plaintiffs or their members go searching for pellets, they are not pursuing aesthetic interests that are then lessened by pollution, but rather are pursuing their interest in locating pollution. *Id*. at 541. "[Plaintiffs'] successful efforts to locate aesthetically displeasing pollution cannot serve as the basis for an aesthetic injury in fact." *Id.* at 541.

In addition to failing to establish that they will suffer an injury-in-fact to their own interests, Plaintiffs allegations are insufficient to establish associational standing because they have failed to establish that even one member would have standing in this case. A court may not accept an organization's self-description of the activities of its members and rely on statistical probability that some of those members are threatened with concrete injury. *Summers*, 555 U.S. 498. "This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that *at least one identified member* had suffered or would suffer harm." *Id.* (emphasis added). The requirement of naming the affected members has never been dispensed with in light of mere statistical

probabilities. *Id.* at 498-99. While this court must accept the allegations in the complaint as true, those allegations still must be sufficient to establish constitutional standing. Plaintiffs may not rely on broad allegations of injury to the interests of a broad group of people, without more, to establish organizational standing.

Plaintiffs allegations fail to differentiate either themselves or their members from the general public. Plaintiffs did not submit any affidavits or declarations from any of their members alleging facts that would establish individual standing, nor did they allege how the organizations themselves have allegedly been injured. Rather, they rely upon generalized interests shared by the public at large. Plaintiffs fail to set forth allegations to establish that there is a realistic threat of harm to themselves and their members. As such, this Court does not have jurisdiction and Frontier is entitled to judgment as a matter of law.

b. The pellets are not fairly traceable to Frontier's facility.

Plaintiffs have also failed to establish that their alleged injuries are causally connected to Frontier's facility. Article III demands that there be "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quotation omitted). "[T]he traceability prong focuses on *who* inflicted [Plaintiffs'] harm." *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3rd Cir. 2009) (emphasis in original). As there are numerous entities in Charleston and the surrounding area that routinely handle and distribute production pellets, Plaintiffs have failed to establish that Frontier is *a* source of their alleged injuries, much less *the* source to the exclusion of all other possibilities.

A plaintiff "need not show that a particular defendant is the only cause of their injury." *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992). However, a plaintiff must

demonstrate there are not "independent actors not before the court[ ] and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 560. "An injury sufficient to meet the causation ... element[ ] of the standing inquiry must result from the actions of the respondent, not from the actions of a third party beyond the [c]ourt's control." *Mirant Potomac River, LLC v. U.S. Envtl. Prot. Agency*, 577 F.3d 223, 226 (4th Cir. 2009) (citing *Frank Krasner Enters. Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234–35 (4th Cir. 2005)); *see also Meyer v. McMaster*, 394 F. Supp. 3d 550, 561 (D.S.C. 2019). Plaintiffs' conclusion that the collected pellets came from Frontier's UPT facility is a matter of pure speculation, as there is no evidence supporting such a claim in light of the closed DHEC investigation. Nor is there evidence outlined in the complaint that Plaintiffs conducted any investigation into the source of the pellets to the extent they derived from a source other than Frontier's UPT facility. *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

In any event, Plaintiffs allege that the pellets are fairly traceable to Frontier because they "resemble" those found near Frontier's facility and a small sample are allegedly made of primarily the same chemical composition as those handled at the facility. Dkt.#1, Complaint ¶¶ 55, 56. Whether a court can infer a causal link between a source of pollution and at least some portion of a petitioner's injury is a fact-specific inquiry that turns on many factors, including the size of the waterway, the proximity of the source and the injury, forces like water currents, and whether discharges will evaporate or become diluted. *Ctr. for Biological Diversity*, 937 F.3d at 545. Plaintiffs have failed to allege sufficient facts to establish such a causal link between the production pellets handled at Frontier's facility and the pellets they have allegedly found throughout the Charleston region. Further, Plaintiffs specifically selected some of their sampling sites based on

their proximity to Frontier, seeking to attribute traceability merely by proximity. However, Plaintiffs still have failed to provide evidence that collected pellets originated from Frontier. Dkt.#1, Complaint ¶ 51. All while ignoring the fact that there are numerous other entities in the Charleston area that handle and transport production pellets. Dkt.#12, Answer ¶ 56. Plaintiffs do not allege that they sought out any of these other entities to determine if they are the sources of the pellets that have been found. Rather, Plaintiffs just assume that because they have collected plastic pellets in Charleston County at-large and because 10 of the 14,281 pellets collected allegedly have the same general composition as those handled by Frontier, the pellets must have come from Frontier. Such an assumption is not premised on any factual allegations, and is insufficient to meet Plaintiffs' burden of establishing that the collected pellets originated from Frontier's facility. *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 188 (4th Cir. 2018) ("[N]o matter how rare or unique the injury, a plaintiff still must carry the burden of demonstrating each element of standing.").

c. Plaintiffs' alleged injuries will not be redressed by judicial relief.

Plaintiffs have also failed to meet the third element of standing: "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (quoting *Simon*, 426 U.S. at 41-42). A plaintiff seeking injunctive relief shows redressability by "alleg[ing] a continuing violation or the imminence of a future violation" of the statute at issue. *Friends of the Earth, Inc.*, 204 F.3d at 162–63 (4th Cir. 2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998); *see also Laidlaw,* 528 U.S. 187-88 (noting that *Steel Co.* held that private plaintiffs may not sue to assess penalties for wholly past violations)). The redressability requirement ensures that the plaintiff would personally benefit in a tangible way from the court's intervention. *Friends of the Earth, Inc.*, 204 F.3d at 162. Further, where alleged injuries are not fairly traceable to a defendant's challenged actions, the court cannot

say that granting the relief a plaintiff seeks will prevent plaintiff's future injuries. *Lujan*, 504 U.S. at 571.

Plaintiffs have failed to meet the redressability standard as: (1) there is no ongoing or impending violation, and (2) no benefit can come from this Court's intervention. Plaintiffs aver that relief will remedy their alleged injuries "by increasing the likelihood, if not ensuring, that Frontier will cease its pollutant discharges and eliminate the endangerment to the environment." Dkt.#1 at ¶14. However, Plaintiffs alleged injuries will not be redressed by judicial relief because there is no ongoing violation, nor is there a threat of an imminent future violation. *Steel Co.,* 523 U.S. 83.

Following the July 2019 incident, Frontier strengthened its policies and procedures to further ensure containment of the production pellets it handles. Dkt.#1-1, Ex. 7, Frontier response letter. These steps were taken despite Frontier having no evidence that a spill into the waterway had ever occurred at its facility or that it was the source of the July 2019 incident. Moreover, DHEC completed an investigation into the source of the alleged spill that was inconclusive and did not result in a finding of violation against Frontier. Throughout that investigation period, DHEC was updated on Frontier's strengthened protocols at the facility, as previously outlined. In that regard, DHEC's decision to close the enforcement action against Frontier was an implicit finding that Frontier's upgraded procedures were appropriate to ensure pellet containment and prevent egress into local waterways.

Plaintiffs waited seven months after the last incident was reported to DHEC to file their claim. By that time, and months before that, Frontier had upgraded its pellet containment mechanisms and implemented new cleaning procedures sufficient to satisfy DHEC. Those efforts that were neither prompted by Plaintiffs' suit nor were the result of state inaction. Given these

unique facts, Plaintiffs lack standing. *Ailor v. City of Maynardville, Tennessee*, 368 F.3d 587, 599 (6th Cir. 2004).

Plaintiffs bear the burden of establishing that they have standing to bring their claims in this court. However, Plaintiffs have failed to establish even one of the elements necessary to carry that burden. Therefore, Plaintiffs do not have standing in this matter and this Court does not have jurisdiction. Plaintiffs' claims should be dismissed as a matter of law.

II. Plaintiffs have failed to state a claim under RCRA.

Frontier is entitled to judgment as a matter of law because Plaintiffs have failed to allege sufficient facts to establish that judicial action is necessary to remedy any "imminent and substantial threat to health or the environment" stemming from the pellets handled at Frontier's facility. The purpose of RCRA is to reduce the generation of hazardous waste and to minimize present and future threats therefrom. In enacting RCRA, Congress declared:

> it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of **so as to minimize the present and future threat to human health and the environment**.

42 U.S.C.A. § 6902(b) (emphasis added).

> Congress' 'overriding concern' in enacting RCRA was to establish the framework for a national system to insure the safe management of hazardous waste." Congress also expressed concern over "the 'rising tide' in scrap, discarded, and waste materials" and "the need to reduce the amount of waste and unsalvageable materials and to provide for **proper and economical solid waste disposal practices**."

Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1040–41 (9th Cir. 2004) (quoting *Am. Mining Cong. v. U.S. EPA,* 824 F.2d 1177, 1179 (D.C. Cir. 1987)) (emphasis in original). While RCRA contains a citizen suit provision, the collection and disposal of solid wastes continue to be primarily

the function of State, regional, and local agencies. *Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403, 407 (4th Cir. 2018) (citing 42 U.S.C. § 6901(a)(4)).

RCRA provides that a person may pursue an endangerment suit under the RCRA to prevent imminent and substantial endangerment to health or the environment stemming from a solid or hazardous waste. A person may commence a civil action

> against any person … including [1] any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, [2] who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of **any solid or hazardous waste** [3] which **may present an imminent and substantial endangerment** to health or the environment[.]

42 U.S.C.A. § 6972(a)(1)(B) (emphasis added). In such an endangerment suit, a plaintiff must establish all three elements set forth in the statute. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1100 (9th Cir. 2017) (quoting 42 U.S.C. § 6972(a)(1)(B)).

Furthermore, Plaintiffs are not presumptively entitled to injunctive relief even if they could clear RCRA's statutory hurdles. *LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 943 (7th Cir. 2019) (2019). Despite Plaintiffs' characterization, RCRA is not a "cleanup" statute that would enable the Court to order Frontier to perform and pay for any and all facility upgrades that Plaintiffs desire. *Id.* at 949 (citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996)). Nor is RCRA's citizen suit provision directed at providing compensation for past clean-up efforts. *Meghrig*, 516 U.S. at 484. Under RCRA, the district court may restrain the handling of solid waste that presents an imminent and substantial danger or order actions that may be *necessary to eliminate that danger*. *LAJIM, LLC*, 917 F.3d at 949. It does not, however, require a court-ordered cleanup where the court has not found such action necessary to prevent harm to the public or the environment. *Id*. "[N]othing

in the language [of the RCRA] *mandates* injunctive relief; 'shall' pertains only to the grant of jurisdiction and not to the relief the district court may order." *Id.* at 943.

Plaintiffs' RCRA claims fail as a matter of law because they have failed to allege facts sufficient to support each of the statutory elements. This is because: (1) Frontier does not store, transport, or dispose of any solid or hazardous waste at its facility, (2) there is no risk of harm from the operations of Frontier's facility, and (3) the pellets handled at the facility do not present an imminent and substantial danger to health or the environment. Furthermore, no injunctive relief is necessary because Frontier is engaging in ongoing and effective pellet containment efforts under the State's supervision.[2] Frontier is entitled to judgment as a matter of law on Plaintiffs' RCRA claims.

a. The pellets handled at Frontier's facility are not solid waste.

Plaintiffs have failed to state a claim upon which relief can be granted under RCRA because Frontier does not handle, store, treat, transport, or dispose of any solid waste or hazardous material. 42 U.S.C. § 6972(a)(1)(B). Plaintiffs have not alleged that the pellets handled at Frontier's facility are hazardous material. Dkt.#1, Complaint. Therefore, the "crux of the case turns on the issue of whether [the pellets are] 'solid waste' within the meaning of the RCRA." *Safe Air for Everyone*, 373 F.3d at 1041. RCRA defines solid waste as:

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. …

42 U.S.C.A. § 6903(27). Plaintiffs have alleged that the pellets it has collected fall within the statutory definition of solid waste as "other discarded material." Dkt.#1, Complaint ¶ 73. Because

[2] Furthermore, Frontier's operations at UPT—the subject of the claims—will cease by the end of the year anyway because these operations are being relocated to a new facility currently under construction and off the water.

plaintiffs assert no other basis for their claim that Frontier's pellets are "solid waste," the Court need look no further than determining whether they are "discarded material." *Garrison v. New Fashion Pork LLP*, No. 18-CV-3073-CJW-MAR, 2020 WL 1811373, at *5 (N.D. Iowa Jan. 9, 2020).

Pellets handled at Frontier's facility do not meet the statutory definition of solid waste generally, and discarded material specifically, because they have not been discarded, nor have they been used for their intended purpose. Prior courts have found that the statutory definition of solid waste is ambiguous, necessitating reference to the traditional canons of construction and relevant legislative history. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013); s*ee also, No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2nd Cir. 2001) (defining "discard" according to its ordinary and natural reading); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1308 (2d Cir. 1993) (noting that "'solid waste' plainly means one thing in one part of the RCRA and something entirely different in another part of the same statute."); *Midshore Riverkeeper Conservancy, Inc. v. Franzoni*, __ F.Supp.3d. __, 2019 WL 6895597, at *7 (D. Md. Dec. 17, 2019) (referencing RCRA's legislative history); *Krause v. City of Omaha*, No. 8:15CV197, 2015 WL 5008657, at * (D. Ne. Aug. 19, 2015) (looking to legislative history to "provide guidance.").

Quoting from the relevant legislative history, the court in *Ecological Rights* concluded that the RCRA was intended to regulate "waste by-products of the nation's manufacturing processes," as well as manufactured products

> themselves once they have served their intended purposes, and are no longer wanted by the consumer. For these reasons, the term discarded materials is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse, trash, garbage and sludge.

Id. (quoting H.R. Rep. No. 94-1491(I), at 2). The key to whether a manufactured product is a solid waste is whether that product has served its intended purpose and is no longer wanted by the consumer. *Id.* at 515. As such, wood preservative escaping from utility poles is not a solid waste for purposes of RCRA because it is neither a manufacturing waste by-product nor a material that the consumer no longer wants and has disposed of or thrown away. *Id.* at 515 (quotation omitted); *see also*, *No Spray Coal., Inc.*, 252 F.3d at 150 ("[M]aterial is not discarded until after it has served its intended purpose."); *Krause*, 2015 WL 5008657, at * 3 (road salt is not "discarded under the RCRA" because it was not a manufacturing by-product or material that the consumer no longer wanted); *Hendrian v. Safely-Kleen Sys., Inc.,* No. 08-14371, 2014 WL 117315, at *9 (E.D. Mich. Jan. 13, 2014) (concluding that "under the RCRA, a material or product is not classified as 'waste' until *after* it is discarded by the end-user.") (emphasis in original).

Similarly, the pellets that are handled at Frontier's facility have yet to serve their intended use and purpose. Much like the PCP-based wood preservative that escapes from treated utility poles through normal wear and tear is not automatically an RCRA "solid waste," *Ecological Rights Found.*, 713 F.3d at 515, the pellets handled at Frontier's facility are not automatically solid waste as defined by the statute. Notably, Plaintiffs have not alleged that the pellets handled at Frontier's facility are manufacturing waste by-products, nor have they alleged that the pellets have served their intended purpose and are material that a consumer has discarded. Dkt.#1, Complaint *generally*. As Plaintiffs allege, Frontier provides supply chain management services to the plastics industry, receiving plastic pellets that have yet to be used at the facility, packaging them into 25 kilogram bags, and then transferring them to the appropriate transporter for shipment overseas, where they are delivered to the end-user for use in the manufacture of plastic goods. Dkt.#1, Complaint ¶ 15; Dkt.#12, Answer ¶ 15. These production pellets are not the final product for

consumers but are instead a manufacturing component that does not serve their intended purpose until such time as they are manufactured into plastic goods. Dkt.#12, Answer ¶ 15.

The pellets handled by Frontier have left its facility long before they reach the consumer to serve their intended purpose. They are neither "waste by-products of the nation's manufacturing processes" nor discarded materials that have served their intended purpose. As such, they are not solid waste as defined by the statute, and Frontier does not store, transport, or dispose of any solid waste for purpose of an RCRA claim. Plaintiffs' RCRA claims thus fail as a matter of law.

b. The pellets do not present an imminent and substantial danger to human health or the environment.

Frontier is also entitled to judgment as a matter of law because the pellets handled at its facility do not pose an imminent and substantial danger to health or the environment, and there is no need for the requested relief. The third element of a RCRA citizen suit requires that Plaintiffs establish the pellets handled at Frontier's facility may present a harm that is both imminent and substantial. 42 U.S.C. § 6972(a)(1)(B). The RCRA citizen suit provision is directed at a specific harm - § 6972(a)(1)(B) permits a private party to bring suit only upon an allegation that the contaminated site presently poses an "imminent and substantial endangerment to health or the environment[.]" *Meghrig*, 516 U.S. at 488 (quoting 42 U.S.C. § 6972(a)(1)(B)). The risk of harm sought to be abated cannot be "remote in time, completely speculative in nature, or *de minimis* in degree." *Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1144 (M.D. Fla. 2020) (quoting *Little Hocking Water Ass'n v. E.I. Du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 967 (S.D. Ohio 2015) (citation omitted)). The mere presence of contamination alone is not enough to constitute an imminent and substantial endangerment. *Miller*, 424 F. Supp. 3d at 1146–47 (quotation omitted). Importantly, "RCRA does not impose strict liability on polluters; instead, it requires a showing that hazardous waste presents a current threat of harm to health or the environment." *Leister v.*

Black & Decker (U.S.), Inc., 117 F.3d 1414, 1997 WL 378046 *3 (4th Cir. 1997) (internal quotations omitted). And showing contamination levels at or over state cleanup standards—on its own—is insufficient to support an endangerment claim. *Id.* at 1149.

i. There is no risk of harm.

There are no facts in the pleadings to establish that the pellets handled at Frontier's facility may present a risk of harm to health or the environment. Courts interpreting this language "have emphasized the preeminence of the word 'may' in defining the degree of risk needed to support the RCRA's liability standard." *Me People's Alliance*, 471 F.3d at 288. Plaintiffs' failure to allege facts sufficient to make an evidentiary link between the pellets that are handled at Frontier's facility and the pellets it has collected from Charleston waters and beaches precludes a finding that Frontier's pellets "may present an imminent and substantial endangerment, as required under RCRA's liability standard." *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 777-78 (10th Cir. 2009). This standard requires a plaintiff to account for alternative sources for the allegedly harmful materials in order to establish that the defendant is one of those sources. *Id.* at 779. In *Tyson Foods*, the court determined that Oklahoma had failed to link the materials and activities from Tyson's facility and the bacteria found in the state's waterways because it was undisputed that there were alternate sources of the bacteria. *Id.* The state's failure to account for these alternate sources "clearly left the district court with doubt about the potential ameliorating effects" of an injunction. *Id.* at 778 (citing *Burlington N. v. Santa Fe Ry. Co.*, 505 F.3d 1013, 1021 (10th Cir. 2007)).

It is undisputed that plastic production pellets exist in great numbers throughout the United States and are handled by a number of different sources along the Eastern Coast, in South Carolina, and the Charleston area. Despite this, Plaintiffs have failed to account for any of these alternate

sources in their allegations. This failure is fatal to Plaintiffs' RCRA claims. *Tyson Foods*, 565 F.3d at 779. Because the Plaintiffs have failed to account for alternate sources of the collected pellets, they fail to allege facts sufficient to establish that Frontier is a source of those pellets and that the pellets handled at Frontier's facility may present a threat under the RCRA's liability standard.

ii. There is no imminent threat of injury.

Plaintiffs have failed to allege facts sufficient to establish that the pellets at Frontier's facility constitute an imminent threat. The timing provision of an RCRA endangerment claim requires that there be an immediate threat to health or the environment:

> The meaning of this timing restriction is plain: An endangerment can only be "imminent" if it "threaten[s] to occur immediately," Webster's New International Dictionary of English Language 1245 (2d ed.1934), and the reference to waste which "may present" imminent harm quite clearly excludes waste that no longer presents such a danger.

Meghrig, 516 U.S. at 485-86. While the imminence standard does not require an existing harm, the *threat* of harm must be present and ongoing. *Albany Bank & Trust Co.,* 310 F.3d at 972; *Meghrig,* 516 U.S. at 485–86. A plaintiff must allege that the threat is present now or in the foreseeable future. *Miller*, 424 F.Supp. 3d at 1144 (quoting *Meghrig*, 516 U.S. at 486). Through the plain language of the statute, "Congress signified 'a reasonable prospect of future harm is adequate to engage the gears of [an endangerment claim] so long as the threat is near-term and involves potentially serious harm.'" *Id.* (quoting *Me. People's Alliance*, 471 F.3d at 296); *see also, Crandall v. City & City of Denver, Co.*, 594 F.3d 1231, 1237-38 (10th Cir. 2010) (stating "the focus should [be] on the risk that harm would occur in the future, not on whether harm had occurred or was imminent" in the past); *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009) (emphasizing that there is no endangerment unless the present or imminent situation can be shown to present a risk of harm). The endangerment analysis should "focus on the

current and future state of the [facility] and surrounding area, not as the [facility] existed at some point in the past." *Miller*, 424 F.Supp. 3d at 1145.

Plaintiffs have failed to allege facts sufficient to establish that the pellets handled at Frontier's facility present an ongoing threat of harm to health or the environment. RCRA's language is clear that a remedy is not available for wholly past violations, and thus, a plaintiff must allege that the defendant's RCRA violation "is current and ongoing." *Garrison v. New Fashion Pork LLP*, No. 18-CV-3073-CJW-MAR, 2020 WL 1811373, at *4 (N.D. Iowa Jan. 9, 2020) (quoting *307 Campostella, LLC v. Mullane*, 143 F. Supp. 3d 407, 413 (E.D. Va. 2015)). The purpose of RCRA's notice provision is to give the alleged violator an opportunity to bring itself into complete compliance with the Act, and thus likewise render unnecessary a citizen suit. *See, e.g. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 60 (1987) (concluding the same as to the CWA). To read the notice provision otherwise would render it gratuitous, as no other purpose is served by providing an alleged violator notice of an impending lawsuit. *Id.*

As discussed more fully in Section III, *infra*, Plaintiffs have failed to allege sufficient facts to establish that the pellets they have collected came from Frontier's facility. Plaintiffs collected the pellets throughout Charleston County over a seven-month period. Dkt.#1, ¶¶ 49, 52. Despite publicly available information indicating that there could be up to twenty other entities that handle or distribute production pellets in the Charleston area, dkt.#1-1, Ex. 7, Plaintiffs have not sought any information about these entities' operations, and they have not stalked those facilities in their quest to obtain evidence of alleged pellet releases. Plaintiffs only allegations linking these pellets to Frontier's facility are limited to their belief that the pellets "resemble" those handled by Frontier along with their alleged chemical testing of 10 of some 14,281 pellets. Dkt.#1, ¶¶ 49, 52, 56.

Nor have Plaintiffs alleged sufficient facts to establish that there is a present and ongoing risk of harm. Immediately following receipt of notice of the July 2019 incident, an incident Frontier unequivocally denies responsibility for, Frontier assisted in a week-long beach cleanup effort. Dkt.#1-1, Ex. 7, Frontier letter to DHEC. It also began an expansive review of its pellet containment systems, operations, and procedures. Dkt.#1-1, Ex. 7, Frontier letter to DHEC; Dkt.#12-1, Ex. 1. Frontier is utilizing best management practices and participates in the industry-led Operation Clean Sweep, an organization aimed at bringing pellet loss in the United States down to zero. Dkt.#1-1, Ex. 7, Frontier letter to DHEC. Importantly, Plaintiffs do not allege that DHEC has received any incident reports concerning potential pellet spills or releases since shortly after the July 2019 incident. And neither DHEC nor the EPA have notified Frontier of any concerns regarding its pellet handling practices.

iii. There is no substantial danger necessitating action.

Plaintiffs have failed to allege that the pellets handled at Frontier's facility pose a substantial danger necessitating action. To establish an endangerment claim, Plaintiffs alleged threat of harm must be "serious" and "there must be some necessity for the action." *Tilot Oil, LLC v. BP Prod. N. Am., Inc.*, 907 F. Supp. 2d 955, 963–64 (E.D. Wis. 2012) (quoting *Price v. U.S. Navy,* 39 F.3d 1011, 1019 (9th Cir. 1994)); *see also Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2d Cir. 2009); *Burlington N.,* 505 F.3d at 1021 (recognizing substantial endangerment where "there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken."); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 399 F.3d 248, 259 (3d Cir. 2005) (equating "substantial" with "serious," as well as adopting same standard in *Burlington N.*); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004)

(the imminent endangerment must be "substantial"; in other words, it must be "serious.") (citation omitted).

The complaint in this matter does not allege sufficient facts to show that the pellets handled at Frontier's facility pose a substantial or serious threat to health or the environment. As an initial matter, there is no substantial threat given the relatively small quantity of pellets that Plaintiffs have collected in comparison to the amount of pellets regularly handled in the Charleston area. In addition, the allegations that some of the pellets collected by Plaintiffs "resemble" those found outside of Frontier's property, and that they are allegedly composed of polyethylene, do not establish that the collected pellets originated from Frontier's facility, or that the pellets that Frontier handles pose a substantial threat. Dkt.#1, Complaint at ¶ 55. Plaintiffs make a blanket assertion that, because they have found a small quantity of plastic pellets in Charleston's waters, Frontier's pellets automatically present an imminent and substantial endangerment. *Id.* at ¶ 76. The mere fact that Plaintiffs have collected pellets from Charleston's waters does not support a reasonable inference that the collected pellets are solely attributable to Frontier, or that the pellets handled at Frontier's facility constitute an imminent and substantial endangerment. *Simsbury-Avon Pres. Soc'y, LLC*, 575 F.3d at 214.

Even a generous reading of the complaint reveals that Plaintiffs have failed to sufficiently allege an imminent and substantial endangerment. Plaintiffs have not alleged that either the pellets at Frontier's facility or the pellets that they have collected pose a substantial risk to human health, Dkt.#1, Complaint at ¶ 59. Rather, they allege that plastics have been demonstrated to cause a variety of effects in animals and that pellets "endanger vital ecosystems and the organisms that rely on them for survival." *Id.* at ¶¶ 59, 70. A mere allegation of an endangerment is insufficient to state a claim under the RCRA. Plaintiffs further allege that "many animals, including species of

birds, fish, and marine turtles, have been reported to ingest plastic pellets" which have "been demonstrated to cause a variety of lethal and non-lethal effects in animals." *Id.* at ¶ 77. This is the closest Plaintiffs come to alleging an endangerment. This allegation, premised on a "report[]," not evidence, that animals have ingested plastic pellets, and the idea that if an animal ingests enough pellets it will be injured, is insufficient to support a RCRA endangerment claim, especially without further allegations as to the amount of pellets in Charleston's waters, the number of animals that may be impacted, or the amount that must be ingested in order to cause an imminent and substantial endangerment.

Not only have Plaintiffs failed to sufficiently allege that the harms caused by plastic pellets are substantial, they have failed to allege that any relief is necessary to prevent these harms. Where there are ongoing, effective remediation efforts, overseen by the state under threat of enforcement action, any threat of harm is "minor and no remedy is necessary beyond that already occurring." *Tilot Oil, LLC*, 907 F. Supp. 2d at 964–67.

> The current state of remediation and lack of evidence as to that remediation being so insufficient as to perpetuate a possible imminent and substantial endangerment (even assuming there is one in the first place) indicate again that *further* remedial directives from this court are not necessary.

Id. at 968. While ongoing remediation is not dispositive, the court may consider it. *Miller*, 424 F. Supp. 3d at 1151. A court may properly deny an injunction where the parallel plan is adequate to the task. *Liebhart v. SPX Corp.*, 917 F.3d 952, 963 (7th Cir. 2019) (citing *LAJIM, LLC*, 917 F.3d at 941–50 ("[T]he district court correctly held that it has discretion to award injunctive relief under the RCRA and is not required to order relief after a finding of liability," particularly in light of ongoing relief supervised by a state environmental agency.); *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 139–40 (3rd Cir. 2013)). "Although the Court will not consider its

effectiveness, the remediation's undisputed facts militate against any remedy." *Miller*, 424 F.Supp.3d at 1151. The *Miller* court reasoned that the State's environmental agency, which had been monitoring the site and directing cleanup for over a year and was satisfied with the site's cleanup, "is far better positioned to oversee remediation" than itself. *Id.*

RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. *Meghrig*, 516 U.S at 483. Rather, RCRA is concerned with preventing present and future threats, and remedies are limited to mandatory or prohibitory injunctions. *Id.* at 484. The Supreme Court emphasized in *Meghrig* that, in interpreting RCRA, courts must take Congress at its word and "be chary of reading additional remedies into a statute that, like RCRA, expressly provides for a particular remedy." *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694 (7th Cir. 1999) (quotations and citations omitted). Congress deliberately limited RCRA's remedies to injunctive relief—more specifically, injunctive relief obtained before the property is cleaned up, while the danger to health or the environment is "imminent and substantial." *Id.* (quoting 42 U.S.C. § 6972(a)(1)(B)).

Plaintiffs have failed to allege facts sufficient to establish that the production pellets handled at Frontier's facility are solid waste that may pose such an imminent and substantial threat to health or the environment, nor have they alleged facts sufficient to establish that judicial relief is necessary. Therefore, Frontier is entitled to judgment on Plaintiffs' RCRA claims as a matter of law.

III. Plaintiffs have failed to state claims under the CWA.

The central purpose of the CWA's citizen suit provision is to permit citizens to abate pollution when the government cannot or will not command compliance. *Gwaltney*, 484 U.S. at 62; *see also, Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 646 (4th

Cir. 2018). The citizen suit provision is "meant to supplement rather than to supplant governmental action." *Ailor v. City of Maynardville, Tennessee*, 368 F.3d 587, 598 (6th Cir. 2004). The legislative history of the Act reinforces this view of the role of the citizen suit, as the Senate Report noted that **"[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,"** and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* (quoting S.Rep. No. 92–414, p. 64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973)) (emphasis in original). This is not the case in this matter.

Frontier is entitled to judgment as a matter of law because the citizen suit provision requires that a plaintiff sufficiently allege a continuing and ongoing violation of the Act in order for the court to exercise jurisdiction. Per the CWA's citizen suit provision, "any citizen may commence a civil action against any person who is *alleged to be in violation* of (A) an effluent standard or limitation under the CWA or (B) an order issued by the Administrator or a State with respect to such standard or limitation." 33 U.S.C.A. § 1365(a)(1) (emphasis added). The most natural reading of the "to be in violation" language is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. *Gwaltney*, 484 U.S. at 57. Because the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past, citizens may only bring suit for ongoing violations. *Id.*

The CWA's ongoing violation requirement applies to Plaintiffs' requests for declaratory and injunctive relief, as well as their request for civil penalties. "[C]itizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Id.* at 59. Likewise, the CWA authorizes citizens to seek injunctive relief only

to abate a "continuous or intermittent" violation. *Upstate Forever*, 887 F.3d at 646 (quoting *Gwaltney*, 484 U.S. at 64; see also, *Friends of the Earth III*, 629 F.3d at 402 ("We have instructed that a citizen plaintiff can prove an ongoing violation ... by proving violations that continue on or after the date the complaint is filed.") (citation omitted)). Conversely, when a violation of the CWA is "wholly past," the federal courts do not have jurisdiction to entertain a citizen suit, even if the past discharge violated the CWA[3]. *Id.* (citing *Gwaltney*, 484 U.S. at 64).

Plaintiffs have failed to allege facts sufficient to establish that Frontier is either currently violating or likely to violate the CWA. Citizen-plaintiffs establish an ongoing violation either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*,

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[3] The prospective nature of the citizen suit provision is borne out in its legislative history:

> Members of Congress frequently characterized the citizen suit provisions as "abatement" provisions or as injunctive measures. See, *e.g.,* Water Pollution Control Legislation, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 1st Sess., pt. 1, p. 114 (1971) (staff analysis of S. 523) ("Any person may sue a polluter to abate a violation ..."); *id.,* pt. 2, at 707 (Sen. Eagleton) ("Citizen suits ... are brought for the purpose of abating pollution"); H.R.Rep. No. 92–911, p. 407 (1972) H.R.Rep. No. 92–911, p. 407 (1972), Leg.Hist. 876 (additional views of Reps. Abzug and Rangel) ("[C]itizens may institute suits against polluters for the purpose of halting that pollution"); 118 Cong.Rec. 33693 (1972), 1 Leg. Hist. 163 (Sen. Muskie) ("Citizen suits can be brought to enforce against both continuous and intermittent violations"); *id.,* at 33717, 1 Leg. Hist. 221 (Sen. Bayh) ("These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws").

Gwaltney, 484 U.S. at 61. Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. *Id.* at 60–61.

844 F.2d 170, 171–72 (4th Cir. 1988). A violation occurring prior to the date the complaint was filed, whether occurring before or after the date of the 60–day notice, does not satisfy this burden. *Allen Cty. Citizens for the Env't, Inc. v. BP Oil Co.*, 762 F. Supp. 733, 743 (N.D. Ohio 1991), *aff'd sub nom. Allen Cty. Citizens for Env't, Inc. v. BP Oil Co.*, 966 F.2d 1451 (6th Cir. 1992). Further, Justice Scalia's concurrence in *Gwaltney* strongly indicates that the causes of the violation, not the lingering effects, should be used to determine whether there is an ongoing violation:

> When a company has violated an effluent standard or limitation, it remains, for purposes of [§ 1365(a)] , "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate *the cause of the violation*.

Day, LLC v. Plantation Pipe Line Co., 315 F. Supp. 3d 1219, 1239 (N.D. Ala. 2018) (quoting *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring)) (emphasis in *Day*).

A cursory review of the parties' pleadings reveals that Plaintiffs have not sufficiently alleged ongoing violations. Moreover, even if a violation could be attributed to Frontier, which it cannot, Frontier has taken all necessary actions to ensure ongoing compliance with the Act. In determining whether violations are ongoing, the district court may consider

> whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on *whether the risk of defendant's continued violation had been completely eradicated* when citizen-plaintiffs filed suit.

Adams v. Teck Cominco Alaska, Inc., 414 F. Supp. 2d 925, 936 (D. Alaska 2006) (quoting *Sierra Club*, 853 F.2d at 671 (quotation and citation omitted) (emphasis in original)). As the Supreme Court discussed in *Gwaltney*, the purpose of providing 60 days' notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act, and thus likewise render unnecessary a citizen suit. *Gwaltney*, 484 U.S. at 60.

Plaintiffs may not simply make unsupported accusations of prior violations by Frontier and argue that the trier of fact should be allowed to speculate as to whether there are continuing violations. *Allen Cty. Citizens for the Env't, Inc.*, 762 F.Supp. at 745. Plaintiffs have cited to one event that occurred prior to the filing of the complaint in its effort to establish that Frontier is violating the CWA. Not only is the Plaintiffs' claim that Frontier was responsible for this event incorrect, even if the event were attributable to Frontier the occurrence of this one event is insufficient to establish that Frontier is committing ongoing CWA violations. Rather, at this stage of the proceedings, Plaintiffs must come forward with some evidence of a violation *after* they filed their 60-day notice and the complaint. *Id.* at 743. Frontier is not committing any such violations, nor are Plaintiffs capable of proving that the alleged pellets they continue to locate in the Charleston region are the result of an ongoing violation, rather than a singular incident prior to the filing of the complaint. As such, not only have Plaintiffs failed to allege sufficient facts to establish that Frontier is responsible for any prior CWA violations, they have also failed to allege facts sufficient to show that Frontier is committing ongoing and continuous violations. For this reason, Frontier is entitled to judgment as a matter of law on all of Plaintiffs' claims arising under the CWA.

IV. Plaintiffs cannot bring both a RCRA claim and a CWA claim.

Plaintiffs cannot bring simultaneous claims alleging that the pellets at Frontier's facilities are both solid waste for purposes of the RCRA and discharges under the CWA. The RCRA definition of solid waste "does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33." 42 U.S.C.A. § 6903(27). This definition states unambiguously that all point source discharges subject to regulation under section 402 of the

CWA, regardless of whether there is a permit in place, cannot be considered solid waste under RCRA. *Little Hocking Water Ass'n, Inc.,* 91 F. Supp. 3d at 959; *see also*, *Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1421-22 (7th Cir. 1990) (if the material discharged is subject to the CWA's permit requirements, then it is not regulable under the RCRA). "[R]egardless of the content of the discharge and whether every substance released in the discharge is regulated under Section 402 of the CWA, such discharges in their entirety are not solid waste under RCRA if they are subject to the CWA NPDES permit scheme." *Id.* at 59-60. Therefore, in the event that either one of Plaintiffs' causes of action is viable (which they aren't), Plaintiffs' should be required to elect a cause of action under either the CWA or RCRA, not both, and the non-elected cause of action must be dismissed.

Conclusion

For the reasons set forth above, Frontier respectfully requests that its motion for judgment on the pleadings be granted because Plaintiffs have failed to allege sufficient facts to (1) show that they have standing, (2) state a claim under the RCRA, and (3) state a claim under the CWA.

[SIGNATURE PAGE FOLLOWS]

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