

January 26, 2022

VIA ECF

Honorable William E. Smith
U.S. District Court for the District of Rhode Island
One Exchange Terrace
Federal Building and Courthouse
Providence, RI 02903

Re: *Conservation Law Foundation v. Shell Oil Products U.S. et al.*, No. 1:17-cv-00396-WES-LDA

Dear Judge Smith:

As requested during the January 12, 2022 conference in the above-referenced matter, counsel for all parties respectfully submit this joint summary of key discovery dispute issues arising out of Conservation Law Foundation's ("CLF's") First Set of Requests for Production to All Defendants served on May 28, 2021. This letter sets forth (i) the discovery issues that require the Court's assistance to resolve and (ii) the parties' proposals for a procedure moving forward. The parties have attempted in good faith to reach a joint agreement on the issues and their characterization, but where the parties have not been able to agree, the parties have indicated their respective positions.

Also, the parties held different understandings concerning what the Court asked the parties to include in this letter. CLF understood that the purpose of the letter was to provide the Court with a brief summary of the primary discovery disputes between the parties and the basis for the parties' positions. Defendants understood the Court's requested purpose of this letter to merely enumerate the discovery issues that the parties felt were ripe for adjudication with arguments to be saved for subsequent briefing. To the extent required by CLF's statements, Defendants have provided a brief summary of their positions and reserve the right to expound upon these positions during briefing.

I. SUMMARY OF DISCOVERY ISSUES

After conferring, the parties present the following discovery issues are ripe for briefing and a ruling from the Court:

A. Scope of Relevant Discovery

The parties have two disputes concerning the discoverability of documents beyond documents concerning the Terminal.

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1. **CLF’s Characterization: Whether documents concerning Shell facilities other than the Providence Terminal are discoverable, including the engineering of the facilities, impacts of severe weather at those facilities, and/or company-wide Shell engineering and climate policies applicable to those facilities.**
1. **Defendants’ Characterization: Whether documents or information concerning Defendants’ facilities unrelated to the Providence Terminal are discoverable.**

CLF asserts that several types of information about other Shell facilities are discoverable, including, for example: (i) Shell policies concerning climate-change preparedness at its facilities, (ii) Shell’s approach to evaluating the adequacy of the climate resilience at other facilities, and (iii) the impact of severe weather on other facilities. Shell has made numerous public statements concerning the centralization of policies and evaluation of climate-change preparedness at Shell facilities worldwide. These documents are relevant to various issues in this case, including whether Defendants are satisfying the permit requirement to follow “good engineering practices.” Also, if similarly situated facilities have been inundated by severe weather, that information is clearly relevant to the imminence of similar occurrences at the Providence Terminal.

Further, CLF asserts that fundamental dispute between the parties on this issue is the *relevance* of this information not proportionality. It is Defendants burden to demonstrate lack or proportionality and negotiate potential limitations. Defendants have refused to do so.

Defendants assert that this citizen suit enforcement action solely concerns whether or not the Providence Terminal is in compliance with the requirements of the Clean Water Act and the Resource Recovery and Conservation Act (“RCRA”). The vast majority of the claims allege violations of the terms of the Providence Terminal’s stormwater permit. Discovery of information about engineering to address weather risks to places other than Providence is neither relevant nor proportional to these claims about compliance at this Terminal. Defendants disagree with CLF’s characterization of a dispute over “company-wide” policies. As Defendants have repeatedly communicated to CLF, Defendants’ position is that that corporate policies related to weather preparedness practices and related engineering that apply to the Providence Terminal are discoverable, e.g., a policy that is applied to all U.S. terminals. Defendants have never objected that such policies are not discoverable.

2. **Whether documents concerning Defendants’ knowledge regarding climate change and the risks it poses to infrastructure are discoverable.**

The parties dispute whether documents concerning Defendants’ understanding and knowledge of the risks that climate change poses to infrastructure are discoverable.

CLF asserts that Shell’s long-standing study of climate change and the risks it poses to infrastructure—including any study of the risks to coastal facilities in the United States—is

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relevant to both the degree to which the risks at issue in this case are foreseeable and in determining what Defendants were required to disclose to regulators, as well as what Defendants were obligated to do at the Providence Terminal in order to satisfy good engineering practices and best management practices.

Defendants assert that CLF's extensive requests seeking to obtain information on their alleged knowledge or understanding of climate change and its risks have no relevance whatsoever to CLF's claims, which are strictly tied to alleged current or ongoing violations of the Clean Water Act or RCRA at the Providence Terminal. Climate change is an exceptionally broad issue that has been subject to public debate, scientific studies, and policy discussions for decades. What these Defendants or their corporate affiliates knew or understood with respect to climate change has no bearing on any of CLF's claims, which are overwhelmingly permit violation claims. CLF's prior briefs to this Court have argued that best management practices and good engineering are current industry standards. What Defendants historically knew or understood about climate change risks is not relevant to determining or applying such standards. Further, discovery into this broad topic of "climate change" knowledge is vastly disproportional to the needs of this case and will expand this case into issues far beyond the realm of the narrow issues for the Court to decide.

B. Time Period

The parties have two related disputes concerning the default time period for CLF's Requests.

- 1. CLF's Characterization: Whether the time period for relevant discovery for the majority of CLF's Requests is January 1, 2005 to present (as CLF asserts) or January 1, 2011 to present (as Defendants assert).**
- 1. Defendants' Characterization: Whether the time period for relevant discovery for the majority of CLF's Requests is January 1, 2008 to present (as CLF previously proposed) or January 1, 2011 to present (as Defendants assert).**

The Default Time Period defined for the majority of CLF's Requests is January 1, 2005 to the present. The parties dispute the appropriate beginning date for the relevant time period for CLF's claims.

CLF asserts that its 2005 designation is appropriate because it encompasses the time period for Defendants' Clean Water Act permit in effect at the time the case was filed (2011 permit), as well as the immediately preceding permit (2005 permit). CLF asserts that Defendants' knowledge and actions during the prior permit, and Defendants' statements to Rhode Island Department of Environmental Management during the 2005 permit and the application for the 2011 permit, are relevant for evaluating the state of Defendants' knowledge and experience at the start of the current permit term. In an effort to avoid the expense and time of motion practice, CLF previously offered to agree to a time period of January 1, 2008 to

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present. Defendants rejected that offer and made no counter-proposal. CLF cannot be bound to an offer of compromise that was rejected by Defendants.

Defendants first bring to the Court's attention that while conferring, CLF proposed an applicable time period of January 1, 2008 to present. Defendants rejected this proposal, maintaining that January 1, 2011 to present is more than sufficient to provide CLF with the discovery it needs for this case. For CLF's Requests pertaining to alleged violations of the Providence Terminal's Rhode Island Pollution Discharge Elimination System permit, Defendants believe January 1, 2011 to present (over 10 years of discovery) is more than sufficient. In light of the five year statute of limitations, Defendants' proposal would provide discovery of five years preceding the accrual of the first alleged violation. For CLF's remaining Requests, where CLF seeks information earlier than 2005, Defendants object to the time period.

2. Whether Defendants have preserved their objections to the time period(s) stated in CLF's Requests

The parties dispute whether Defendants have waived objections to the relevant time period by failing to raise them in their Responses to a number of Plaintiff's requests.

CLF asserts that Defendants' objections to the time period were waived for being insufficiently specific, conditional, and inappropriately expanded to cover Requests to which Defendants did not originally object.

Defendants reject CLF's characterization of Defendants' objections and their sequence. Defendants have repeatedly maintained their objections to the time period of CLF's Requests.

C. Delayed Productions

The parties dispute whether Defendants have complied with their agreement to produce documents on a rolling basis.

CLF asserts that while certain discovery disputes remain as described above, Defendants have unreasonably delayed running searches for and producing responsive documents that are not in dispute. CLF has only received two rolling productions and Shell has not completed running initial searches on electronically stored documents. CLF anticipates asking the Court to impose a schedule for Defendants, search, review, and production of responsive documents.

Defendants are unable to discern the issue CLF is raising for the Court to adjudicate here. Defendants have produced and are continuing to produce documents responsive to CLF's Requests that are not currently in dispute. There remains a number of issues the parties must resolve related to document production beyond the pending discovery disputes, including the finalization of search terms for electronically stored information. The fact that Defendants' have made two rolling productions does not relate to a dispute requiring a decision from the Court.

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CLF also asserts that, in addition to the issues described above, resolution of the parties' discovery dispute will also require the Court to resolve additional subsidiary issues including, among others, (i) the propriety of general objections, (ii) questions of waiver of objections (e.g., whether Defendants' objections to specific Requests were sufficiently specific to preserve the objection), and (iii) miscellaneous individual disputes that have been discussed among the parties.

Defendants understand the Court's requested letter to be a succinct list of overarching discovery disputes that are ripe for the Court's resolution. Defendants do not agree that the Court requested the parties to present the issues in the aforementioned paragraph for the Court's resolution at this time. Particularly with respect to the second and third issues, CLF hardly provides enough of a description of what "questions of waiver" and "miscellaneous individual disputes" are even ripe for adjudication.

The parties will continue to discuss and negotiate other discovery issues in an effort to resolve those issues without the Court's assistance.

II. PROPOSALS FOR PROCESS MOVING FORWARD

A. CLF's Proposal

CLF believes that briefing of a motion to compel in the context of specific discovery requests is the most efficient and appropriate way to resolve the discovery issues outlined above. CLF proposes initial and responsive briefing limited to 30 pages and a reply of no more than 15 pages.

B. Defendants' Proposal

Defendants believe that further briefing on the issues, as Defendants have articulated them, in sections I.A. and I.B. for the Court's resolution is the next logical and most expeditious step in resolving key discovery disputes. Defendants propose accomplishing this through cross-motions from the parties: a motion to compel by CLF followed by a combined opposition and cross-motion for protective order by Defendants; a combined opposition and reply by CLF; and a reply by Defendants. Defendants agree with CLF's proposal of the respective page lengths for the briefs.

III. CONCLUSION

The parties thank the Court for its consideration of these discovery issues and look forward to further discussion during our next conference.

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Respectfully submitted,

/s/ Ian Coghill

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