

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

Conservation Law Foundation, Inc.,

Plaintiff,

v.

Shell Oil Company,
Shell Petroleum, Inc.,
Shell Trading (US) Company,
Motiva Enterprises LLC,
Triton Terminating LLC, and
Equilon Enterprises LLC d/b/a Shell Oil
Products US,

Defendants.

No. 1:17-cv-00396-WES-LDA

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFF CONSERVATION LAW FOUNDATION INC.'S
MOTION TO COMPEL AND DEFENDANTS' CROSS-MOTION FOR PROTECTIVE
ORDER GOVERNING THE PRODUCTION AND EXCHANGE OF DISCOVERY**

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INTRODUCTION

With its First Set of Requests for Production, Conservation Law Foundation, Inc. (“CLF”) propounds overbroad and largely irrelevant discovery requests that reflect a case CLF wishes to litigate, but has not actually filed. **This case is a citizen suit to enforce a stormwater permit and waste management requirements at a fuel terminal in Providence, Rhode Island (the “Terminal”).** By its nature, it involves a narrow set of issues, and the discovery necessary to address those issues is equally narrow. The core issues raised by the claims are whether the Terminal’s stormwater plans meet the common permit standards of “good engineering practices” and “best management practices” with regard to current or imminent risks from precipitation and flooding. This is not a tort case involving any claims of negligence in design or operation, or failing to act on knowledge of a risk. There is *no* element of these claims that requires an evaluation of all documents of Defendants’ corporate parents and or other Shell group¹ companies that may conceivably relate to the vast topic of climate change.

The Court has held two lengthy conferences with the parties, and the parties have engaged in months of meet and confer efforts. On the topics that are actually relevant to these claims, there is little that is actually in dispute but CLF’s motion leaves the false impression that there is. CLF’s motion does not reflect the conferring process, and misrepresents the position taken by Defendants as objecting to producing documents “that do not expressly refer to Defendants’ Terminal.” ECF No. 72 at 2. This is not correct. Defendants have repeatedly stated that they will produce documents related to the weather-risks alleged in the complaint and how those risks are assessed and addressed at the Terminal – including corporate level policies that

¹ The companies in which Shell plc directly or indirectly owns investments are separate legal entities. “Shell group” refers to Shell plc and its subsidiaries in general or to those who work for them. As indicated in the Annual Reports and similar documents of Shell plc, Shell group is used where no useful purpose is served by identifying the particular entity or entities.

apply to the Terminal and are related to the risks at issue – regardless of whether those documents “expressly refer” to the Terminal.

Equally remarkable about CLF’s motion is the fact that it does not discuss the scope of its actual claims, despite the claims being the touchstone of the relevance inquiry. Instead, CLF appears to ask the Court to *assume* the relevance of the extraordinarily broad information it seeks. The law does not permit such an assumption. CLF’s disputed discovery seeking documents on topics as far ranging as the Paris Climate Agreement, and the investment decisions and financial information of Defendants’ foreign and non-party parent companies, must be anchored in CLF’s claims – they plainly are not. This is a suit about a single fuel terminal in Providence, and whether it is in compliance with its state-issued stormwater permit and waste management obligations.² As explained below, CLF’s arguments that the vast amount of the propounded discovery can all be justified by the term “good engineering practices” is not based in the actual claims either.

Instead of demonstrating relevance based on the claims, CLF presents numerous red herrings in the form of “issues” it contends it is “entitled to...probe” through discovery. ECF No. 72 at 3. These include but are not limited to: whether Defendants have “admitted that climate change has caused increased risk of severe weather,” and whether general statements made by parent (and non-party) Shell plc in annual reports are false. *Id.* at 3, 4. There is no claim in this case that has anything to do with whether Defendants have or have not made certain admissions about climate change, nor is this case about the truth of statements by Shell plc.

² CLF’s claims have been brought under the citizen suit provisions of two federal environmental statutes: the Clean Water Act (“CWA”) for its permit claims, and the Resource Conservation and Recovery Act (“RCRA”) for its waste-related claims.

Why has CLF skipped past its claims and misrepresented the Defendants' position on what is relevant to those claims to make it appear that a dispute exists where none should? Because CLF is using this case as a strawman for something else. It has publicly stated its intention to use this case to pursue broad-based discovery requiring Defendants to "fully answer for [their] knowledge of climate change and the risks it presents." *See* Ex. 1, CLF, *Climate Change Lawsuit Against Shell Moves Forward* (Sept. 28, 2020); *see also* Ex. 2, CLF, *Pushing Shell to Reveal Climate Knowledge* (Mar. 4, 2022) ("The public deserves to know about Shell's involvement in the climate crisis," said Darrell Brown, Vice President of CLF Rhode Island."). For CLF, the true aim of this case is not about whether the Terminal is in compliance with the terms of its permits; it is the much larger issue of climate change. When looked at through this lens, CLF's requests for vast quantities of documents that have no possible relevance to CWA permit or RCRA compliance at the Terminal and its arguments about whether Defendants have "admitted" to the risks of climate change, start to make much more sense. However, these topics that CLF wishes to "probe" (as they say) through these disputed requests are simply not relevant to this citizen suit, and represent a dramatic departure from the site-specific discovery that is standard for citizen suit compliance claims. They are more germane to a tort lawsuit—and that is not this case.³ These irrelevant requests – which are in global scope, have no nexus to the claims, as drafted request thousands of non-party (and foreign) companies' files – are also not proportional to the narrow compliance claims regarding *this Terminal*. In addition to the significant time and logistical burdens of attempting to search for these documents, just four of

³ Indeed, such a case has already been filed by the State of Rhode Island. *See State of Rhode Island v. Shell Oil Products Company, LLC, et al.*, No. 19-1818 (1st Cir.) (asserting tort claims for damages based on defendants' alleged knowledge of and failure to disclose hazards related to climate change).

CLF's requests yields over 600,000 documents, and an estimated cost of \$4.8 million for just the review process alone.

For these reasons and those provided below, Defendants oppose CLF's motion to compel ("Motion") and request that this Court deny it in its entirety. This citizen suit enforcement action is not CLF's opportunity pursue its wish list of documents from Defendants about their alleged "involvement in the climate crisis." Ex. 2 at 1. As the Court correctly recognized in the January 12, 2022 discovery conference, "guardrails" are needed for discovery in this case. Defendants therefore seek a protective order limiting all discovery in this litigation to subjects relevant to the CWA and RCRA claims at issue, and implementing the below guardrails:

- **No. 1:** Discovery must be tailored to issues relating to the operation, design, maintenance, stormwater permitting or management, or waste management of the Providence Terminal; or imminent or current risks posed to the Terminal by precipitation or flooding.
- **No. 2:** Discovery requests using the terms "climate change," "greenhouse gas effect(s)" or similar terms with no limitation must be tailored so that such requests are limited to current or imminent precipitation or flooding risks to the Terminal, consistent with the scope of the CWA and RCRA claims and the Order on Defendants' Motion to Dismiss. ECF No. 55 at 2-3, 6.
- **No. 3:** All discovery is subject to the parties' agreed-upon temporal limitation of 2008 to the present (excepting subjects relevant to Cause of Action 21).

Defendants further seek reimbursement of reasonable expenses incurred in opposing CLF's motion to compel and bringing their motion for a protective order, including for attorneys' fees, pursuant to Fed. R. Civ. P. 26(c)(3) and 37(a)(5).

BACKGROUND

I. CLF's Claims Allege CWA and RCRA Non-Compliance at the Providence Terminal.

CLF filed its citizen suit on August 28, 2017. ECF No. 1. It has amended its complaint three times. The currently operative Third Amended Complaint ("Complaint") was filed on October 8, 2019. ECF No. 45. Defendants' motion to dismiss the Complaint was granted in part

and denied in part on September 28, 2020. ECF No. 55. The Court granted the motion on standing grounds with respect to CLF’s allegations of future harms, such as those premised on sea level rise, and dismissed CLF’s claim alleging a violation of federal RCRA laws. *Id.* at 2.

CLF’s Complaint contains twenty-two causes of action, all arising under the citizen suit provisions of the CWA, 33 U.S.C. § 1365(a)(1), or RCRA, 42 U.S.C. §§ 6972(a)(1)(A) and (B). The claims can be organized into four general categories⁴:

STATUTE	CAUSE(S) OF ACTION	ALLEGATIONS
CWA claims	Causes of Action Nos. 1-10, 12-20. ECF No. 45 ¶¶ 274-339, 347-405.	Alleging noncompliance with the Terminal’s stormwater permit (“Permit-based claims”).
	Cause of Action No. 11. <i>Id.</i> ¶¶ 340-346.	Alleging violation of the CWA prohibition on unpermitted discharges (“CWA statutory-based claim”).
RCRA claims	Cause of Action No. 21. <i>Id.</i> ¶¶ 406-422.	Alleging waste at Terminal presents an imminent and substantial endangerment to health and the environment in violation of RCRA (“RCRA statutory endangerment claim”).
	Cause of Action No. 22. <i>Id.</i> ¶¶ 423-436.	Alleging violation of RCRA regulation requiring minimizing possibility of spills or releases of hazardous waste (“RCRA regulatory claim”).

The nineteen Permit-based claims allege violations of the terms of the Terminal’s stormwater permit, Rhode Island Pollutant Discharge Elimination System (“RIPDES”) Permit No. RI0001481. *RIPDES Permit No. RI0001481 applies only to the Providence Terminal.* Conservation Law Foundation’s Third Am. Compl. for Declaratory and Inj. Relief and Civil Penalties (“TAC”), L at 1, 6, ECF No. 45-12. The currently effective version of RIPDES Permit No. RI0001481 was issued on January 30, 2019 to Defendant Triton Terminating LLC . *Id.* at 6.

⁴ For the Court’s reference, a chart listing each claim and its elements individually is provided at Appendix A.

II. CLF's First RFPs and the Parties' Efforts to Meet and Confer.

Discovery in this case is underway. On May 28, 2021, CLF propounded its First RFPs, comprised of sixty-two requests. Motion, Ex. A, ECF No. 72-3. Per agreement, the Defendants' deadline to respond and produce documents responsive to the First RFPs was August 13, 2021.

CLF's First RFPs impose a default time-period of January 1, 2005 to the present, but some requests seek documents dated as far back as 1985. *Id.* at 3, 5-6 (RFP Nos. 1, 7.) On March 2, 2022, the parties agreed to use 2008 to the present as the default time period for the First RFPs, but this agreement excludes the 17 requests (including subparts) that specifically seek information prior to 2008. *Id.* at 5-6, 8, 11, 13 (RFP Nos. 1, 7, 12, 14, and 19.)

The subject matters covered by CLF's First RFPs are nothing short of sprawling, and the requests define "Defendants" to include all corporate parents and affiliates (which number in the thousands and include overseas companies), among numerous other non-parties. *Id.* at 3-4. Documents requested include: "all documents" related to "climate change" both "at the Terminal *and generally*," including "financial and investment" information, *id.* at 7 (RFP No. 10) (emphasis added); "all Documents *and research*" related to the "recommendation that the United States not withdraw from the Paris Agreement," *id.* at 13 (RFP No. 21) (emphasis added); "all documents" related to a list of twenty documents that include speeches and interviews by former CEOs of parent companies dating as far back as 1992 and that do not address Providence, the Terminal, or the CWA or RCRA requirements at issue in the case, *id.* at 11-12 (RFP No. 14); among other subjects that are extraordinarily broad or facially unrelated to CLF's CWA and RCRA claims. *See* Appendix B, Chart of CLF's First RFPs ("RFPs chart").

Defendants served their objections and responses to CLF's First RFPs on August 13, 2021, and produced responsive documents. Motion, Ex. B, ECF No. 72-4. Per agreement of the

parties, Defendants are producing documents on a rolling basis. To date, Defendants have produced over 19,000 pages, with the most recent production made on March 9, 2022.

Defendants anticipate making additional productions shortly.

Defendants first raised their concerns about the overbroad and irrelevant scope of CLF's First RFPs prior to the deadline to respond, on August 9, 2021, in an effort to surface and resolve these issues.⁵ The parties have since exchanged extensive correspondence⁶ and conferred by videoconference on August 20, September 27, and October 4, 2021. CLF's motion to compel on January 4, 2022 that was dismissed the next day. ECF No. 68. The Court subsequently held an informal conference with the parties on January 12 and instructed the parties to continue to confer to attempt to narrow the areas of dispute. The parties conferred on January 19. On January 26, and submitted a joint letter outlining the issues in dispute. On February 14, the parties had second informal conference with the Court. On February 24, the parties had another conference in an attempt to resolve or narrow the disputes, which was unsuccessful. CLF refiled its motion to compel on March 4, 2022 with no narrowing of the issues and making the same arguments as in the original motion. ECF No. 72.

LEGAL STANDARD

Federal Rule of Civil Procedure 26 requires that information sought in discovery be "relevant to any party's claim or defense" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); *see also In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008). Rule 26(b)(1) "vests the trial judge with broad discretion to tailor discovery narrowly." *Diaz v. Devlin*, 2018 WL 1610541, at *2 (D. Mass. Apr. 13, 2018).

⁵ Motion, Ex. C, Ltr. from Roy D. Prather to Elizabeth Petersen (Aug. 9, 2021), ECF No. 72-5.

⁶ *See* Ex. C, Ltr. from Ian Coghill to Roy D. Prather (Aug. 18, 2021); Ex. D, Ltr. from Ian Coghill to Roy D. Prather (Sept. 10, 2021); Motion, Ex. E, Ltr. from Roy D. Prather to Ian Coghill (Sept. 23, 2021), ECF No. 72-7; Ex. E, Ltr. from Roy D. Prather to Ian Coghill (Sept. 29, 2021); Ex. F, Ltr. from Ian Coghill to Roy D. Prather (Oct. 1, 2021).

Consistent with the 2000 amendments to the federal rules, courts determining relevance “focus on the direct connection between the material sought and a party’s claim or defense.” *Bucceri v. Cumberland Farms, Inc.*, 2020 WL 58428, at *5 (D. Mass. Jan. 6, 2020) (citing *In re Subpoena to Witzel*, 531 F.3d at 118). Courts analyzing relevance under Rule 26(b) have considered whether the discovery sought relates to the elements plaintiff “must prove to establish liability,” *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, 2014 WL 2965881, at *7 (D.N.J. July 1, 2014), or whether it has “bearing on an issue of material fact,” *Prusin v. Canton’s Pearls, LLC*, 2016 WL 7408840, at *2 (D. Md. Dec. 22, 2016). In addition to relevance, discovery requests must also be assessed “in light of the proportionality considerations articulated in Rule 26(b)(1).” *Id.* The proportionality of discovery correlates with the needs of the case.

“The party seeking information in discovery over an adversary’s objection has the burden of showing its relevance.” *McCormick v. Dresdale*, 2011 WL 13364595, at *1 (D.R.I. June 3, 2011) (quotation marks and citation omitted). After that showing of relevance is made, “the party opposing disclosure bears the burden of showing that the requested discovery is improper.” *Controlled Kinematics, Inc. v. Novanta Corp.*, 2019 WL 3082354, at *2 (D. Mass. July 15, 2019). A “party ... from whom discovery is sought may move for a protective order ... [and] [t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Viscito v. Nat’l Plan. Corp.*, 2020 WL 4274721, at *2 (D. Mass. July 24, 2020) (quoting *Gill Gulfstream Park Racing Assoc., Inc.*, 399 F.3d 391, 400 (1st Cir. 2005)); Fed. R. Civ. P. 26(c). The good cause standard requires a factual demonstration of potential harm. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).

If a party seeks discovery broader than what is relevant to a claim or defense, good cause is required to support the request. *In re Subpoena to Witzel*, 531 F.3d at 118. Where the proposed

discovery is outside the relevance and proportionality requirements of Rule 26(b)(1), courts “must limit the frequency or extent of discovery.” Fed. R. Civ. P. 26(b)(2)(C)(iii).⁷

ARGUMENT

By signing its First RFPs, CLF certified it met its obligation to serve requests that are consistent with Rule 26’s relevance limitation and proportional. Fed. R. Civ. P. 26(g); *see also, Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179, 187 (1st Cir. 1989) (parties have an “obligation to tailor interrogatories to suit the particular exigencies of the litigation. They ought not to be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that something helpful will turn up.”). CLF has completely disregarded this obligation.

The correct analytical framework for determining whether Defendants’ objections to the requests in dispute should be sustained is whether the information sought by the requests is relevant *to the claims and defenses* and *proportional to the needs of the case*. Fed. R. Civ. P. 26(b).⁸ CLF has not carried its burden to show either the relevance of its disputed requests to its claims (which are only mentioned in passing, and even then, mischaracterized), or that they are proportional (which is never discussed by CLF). CLF’s overbroad and irrelevant requests are at odds with the narrow nature of its compliance claims, and the federal rules’ overarching goal of a “just, speedy, and inexpensive determination” of the action. Fed. R. Civ. P. Rule 1.

⁷ The Advisory Committee Notes to the 2000 amendments to the rules explain that “[t]his otherwise redundant cross-reference (between Rule 26(b)(2)(C) and Rule 26(b)(1)) has been added to emphasize the need for active judicial use of [Rule 26(b)(2)] to control excessive discovery.” Fed. R. Civ. P. 26(b) advisory committee’s note to 2000 amendment. The First Circuit has recognized that “the purpose of the change was to involve the court more actively in regulating the breadth of sweeping or contentious discovery. *In re Subpoena to Witzel*, 531 F.3d at 118 (internal quotation omitted).

⁸ CLF has not raised or argued that its disputed requests are subject to the good cause standard for broader discovery, thus the disputed requests need not be analyzed under that standard. *In re Subpoena to Witzel*, 531 F.3d at 118 ([plaintiff] did not address the good cause requirement to support its discovery request, and good cause is not apparent on the record. Therefore, consideration of the discovery dispute in this case is limited to those matters that are relevant to a party’s claim or defense.).

I. Defendants Have Never Limited Relevant Documents To Those that “Expressly” Refer to the Terminal.

CLF’s motion prominently (and misleadingly) frames the “primary dispute” between the parties as the “relevance of documents that do not *expressly* refer to Defendants’ Terminal....” Motion 2 (emphasis added); *see also id.* at 10. This framing is a misrepresentation of the Defendants’ longstanding position. Defendants have never stated that relevant documents are only those that expressly refer the Terminal; this is unmistakable from the parties’ meet and confer correspondence.⁹

Rather, Defendants have agreed to produce documents related to the precipitation and flooding risks to the Terminal that are alleged in the Complaint (including to the extent related to climate change), including corporate policies applicable to the Terminal on those risks, and regardless of whether those documents expressly refer to the Terminal.

CLF ignores this (despite being informed of Defendants’ position numerous times), and proceeds with its strawman argument that Defendants object to producing documents from “outside the Terminal’s fence-line” (which is not true). Motion at 10. CLF then takes a kitchen sink approach to arguing it needs “outside the [] fenceline” corporate policies by: selectively invoking a quote from an irrelevant decision about CO₂ emissions from a district court in the Hague (that is currently under appeal); making baseless claims that overseas parent Shell plc dictates the operations of the Providence Terminal – this is completely incorrect; and asking the

⁹ *See e.g.*, Motion, Ex. E at 5, ECF No. 72-7 (“To provide further clarity, *we reiterate that it is not Defendants’ position that a document must explicitly state “Providence,”* for example, for it to be relevant, responsive, and produced. By way of illustration, if there are documents that pertain to all Shell terminals in the northeastern United States (which would necessarily include the Providence Terminal), those documents could, in theory, be responsive provided the documents relate to the claims in this case.) (emphasis added); Motion, Ex. C. at 2, ECF No. 72-5 (not stating that documents must refer to the Terminal, but rather, that CLF’s requests should “pertain to” the Terminal). Counsel for Defendants also stated the January 11, 2022 conference before the Court that documents applicable to the Terminal and related to the issues in the case would be produced, including applicable non-Terminal-specific corporate policies.

Court to disregard bedrock corporate law. *Id.* at 11. But in any event, those arguments serve no practical purpose because Defendants are *not* refusing to produce broadly applicable corporate policies that apply to the Terminal and relate to the weather risks alleged in the Complaint.

To correct CLF's misunderstanding, and resulting misstatements concerning how the integrity of the Providence Terminal is assessed, Defendants attach to this memorandum the Declaration of James Kent Yeates, the Lead Facility Engineer for the East Coast Equilon Enterprises LLC terminals, which includes the Providence Terminal. Ex. G, Yeates Decl. Mr. Yeates details the "Asset Integrity" processes and policies that the Terminal applies to (1) ensure compliance with permit requirements, including to the extent such requirements reflect industry standards, and (2) evaluate and address physical risks to the Terminal. *Id.* Defendants will (and have never refused to) produce documents related to these policies and processes, including those of broader applicability that are not specific to Providence. This includes the relevant portions of the Health, Security, Safety, Environment and Social Performance Control Framework ("HSSE Control Framework"), which is a high-level overarching set of mandatory goals and objectives that apply to all organizations within the Shell group.

As an overarching framework, and contrary to the unsupported arguments of CLF, the HSSE Control Framework *does not* "set[]...engineering standards" for the Terminal, nor does it task a centralized team (*i.e.*, a "Metocean" team) to assess the "climate preparedness" of all infrastructure. Motion 2, 10, ECF No. 72; Yeates Decl. ¶¶ 12, 21. This is unsurprising given the large and extraordinarily diverse assets of the thousands of companies within the Shell group operating around the world (from refineries and drilling platforms to wind farms and subsea equipment). Yeates Decl. ¶¶ 5-8.

Instead, the HSSE Control Framework sets out broad goals, but they are not prescriptive. *Id.* ¶ 24. It provides a high level framework as to the identification of risks and the level to which such risks should be managed (e.g., to meet applicable regulations), but it does not prescribe *how* such risks should be managed. *Id.* Each company is responsible for its own interpretation and application of the HSSE Control Framework to be fit for purpose for their businesses and local conditions, including regulatory requirements. *Id.*

To provide a simple example, with respect to waste management, the HSSE Control Framework states that waste should be disposed of in compliance with local requirements. *Id.* ¶ 25. It does not prescribe *how* a facility must dispose of waste – those decisions are left to individual sites to determine as appropriate (e.g., one locality may require incineration for a particular waste, while another may mandate a different practice). *Id.* As a second example, as to stormwater management and tank inspection requirements, there is nothing in the HSSE Control Framework that specifically addresses these. *Id.* ¶ 26. Instead, they fall under various overarching topics, including, “identifying safety critical equipment” or “setting inspection intervals” or “verifying technical integrity” or “establish regular inspection intervals.” *Id.*

The assessment of physical risks to the Providence Terminal, and how those risks are addressed, follow the same approach. *Id.* ¶¶ 31-25. Mr. Yeates and others with responsibilities for the Terminal assess these risks using Asset Integrity processes, decide if a particular engineering or operational control is needed, and implement these decisions. *Id.* As Mr. Yeates explains, engineering and operational controls for precipitation and flooding risks are necessarily site-specific. *Id.* Even among three East Coast terminals – Long Island, New Haven, and Providence – stormwater management practices differ due to different site conditions, and regulatory requirements. *Id.* ¶ 27. Sensibly, these types of decisions are not dictated by a general

framework (or parent companies) as CLF theorizes without basis in its motion. *Id.* Defendants have agreed to produce these documents and are continuing to collect and review them consistent with the parties' agreement for rolling productions.¹⁰

Finally, Mr. Yeates also corrects CLF's misunderstanding of the Metocean team. The Metocean team does not have the responsibility to "evaluate [the] climate preparedness" of the Providence Terminal, as CLF postulates. Motion 2, 12, ECF No. 72. CLF cites the submission of Shell plc to the Carbon Disclosure Project in support of this conclusion, but mischaracterizes that document. The document in fact says that the Metocean team has done a "screening" of certain existing and new assets – not that it has assessed all assets. Motion, Ex. D at 8, ECF No. 72-6. And importantly, the document states that work of the Metocean team is done at the asset level and that it is the asset managers who develop response plans. *Id.* at 8. The Metocean team has not been asked to, nor otherwise undertaken, an evaluation of the Providence Terminal. The request for "all documents" related to the work of the Metocean team is not relevant and as discussed below, not proportional to the needs of this case.

Defendants have agreed to produce documents related to current or imminent precipitation and flooding risks to Providence and how those risks are addressed at the Terminal, including applicable corporate policies and engineering documents, and including to the extent such risks may be discussed in the context of climate change, and regardless of whether such documents expressly refer to the Terminal. This is more than sufficient for the issues presented by CLF's claims.

¹⁰ As the Court observed during the February 14, 2022 conference, facts regarding the workings of corporate policies can often be most efficiently discovered during a deposition. Defendants would provide an appropriate witness to testify to these topics.

Where Defendants do object, and as discussed in the sections that follow, are the many requests by CLF that seek documents that on their face have *no* relationship to the Terminal, weather-related risks to Providence and the CWA and RCRA claims in this case.

II. Document Requests That Have No Relationship to the Providence Terminal or CLF’s CWA & RCRA Compliance Claims are Not Relevant.

A. Discovery Requests About Infrastructure in Locations Other Than Providence and Subjects Unrelated to CLF’s CWA & RCRA Claims is Irrelevant.

All of CLF’s claims seek to enforce the CWA and RCRA and relate only to Providence and the Terminal located there. CLF itself has argued at length to the Court that its CWA and RCRA enforcement action is about whether the “plain language” of the Terminal’s stormwater permit has been complied with, and that it “seeks a ruling from this Court addressing *the specific circumstances* present at the Terminal.” ECF No. 55, 47-1 (emphasis added). Indeed, at the hearing on January 12, 2022, counsel for CLF argued that multi-district litigation for its various pending suits is not appropriate, in part because the cases involve *site-specific* circumstances.

These prior statements by CLF about the site-specific nature of its claims were correct and they should be required to adhere to them here. By its terms the RIPDES stormwater permit at issue in eighteen of CLF’s claims applies only the Providence Terminal. TAC, Ex. L at 6, 26, ECF No. 45-12 (2019 RIPDES Permit, specifying that permit authorizes discharges from Providence Terminal). CLF’s other CWA statutory-based claim alleging an unpermitted discharge on its face relates only to the Terminal as well. *See* App. A. Similarly, the RCRA statutory endangerment and regulatory claims are Terminal-specific. *Id.* Neither the liability nor relief in this case relates to any locations beyond Providence.

Remarkably, CLF’s motion mentions its claims only in passing. But the claims in this case are the legal touchstone for determining the scope of relevance. Fed. R. Civ. P. 26(b).

Raritan Baykeeper, Inc. v. NL Industries, Inc. considered the relevance of discovery into topics beyond the scope of the claims in a CWA and RCRA citizen suit, and is instructive here. 2014 WL 2965881, (D.N.J. July 1, 2014). The *Raritan Baykeeper* citizen suit claimed violations related to contaminated river sediments, and violations at an on-site location adjacent to the river that was alleged to be the source of the river contamination. *Id.* at *1. The court stayed the latter claims related to the on-site sources. *Id.* The plaintiff then propounded requests relating to the stayed on-site source claims, arguing the information was relevant to the un-stayed claims. *Id.* at *2-3. The court analyzed the disputed requests in light of the needs of the un-stayed claim and held that the plaintiff’s disputed requests had “no relevance to any element of the claim that *Raritan must prove* for the un-stayed claim in this action.” *Id.* at *7 (emphasis added).

As the court correctly did in *Raritan Baykeeper*, this Court should likewise assess what discovery the actual claims in this case require. And like the out of scope discovery in *Raritan Baykeeper*, none of the information CLF seeks here about other locations is relevant to any element of its CWA and RCRA claims, which are *solely questions of compliance at the Terminal in Providence*.¹¹ See App. A (listing elements of each claim, none of which turn on information about other locations). CLF’s motion to compel conspicuously avoids the language of its causes of action – which are indisputably facility-specific compliance claims – and instead characterizes them as far more broad than they actually are, and as supposedly requiring discovery that extends far beyond Providence. *Compare id. with* App. B at RFP No. 10 and 25.

These requests reaching locations far beyond Providence plainly seek irrelevant information. For example, there is no claim in this case that requires information about a facility

¹¹ Importantly, just as NL Industries produced on-site documents related to impacts on the river sediments at issue, Defendants here likewise are not objecting to producing requested information regarding engineering, design, weather-risk studies etc. to the extent the information has application to Providence.

on the west coast that faces wildfire or drought conditions. But from day one, CLF has been insistent it is entitled to exactly those documents and has not moved an inch from that position since. CLF cites to no caselaw allowing such broad discovery in a citizen suit enforcement action (and Defendants are aware of none), and the claims themselves certainly do not support such a dramatic departure from site-specific discovery that is standard for citizen suit claims.

Relatedly, subsumed under CLF's argument that it is entitled to discovery into other facilities are a number of requests that do not even remotely relate to the subject matters of these CWA and RCRA claims. These include broad-based requests for documents about "investment and financial decisions" and "discussions with trade industry groups," Motion, Ex. A at 13, ECF No. 72 (citing RFP. No. 10). CLF does not even attempt to tie these requests to any claim, and they must be identified—and rejected — for what they are: an impermissible fishing expedition.

B. Discovery into Locations and Subjects Unrelated to Providence is Not Necessary for the Court to Interpret the Permit Term "Good Engineering Practices."

To the extent CLF does invoke a claim to justify this unprecedented citizen suit discovery, CLF argues it is entitled to discovery of documents about facilities located all around the world largely based on single phrase – "good engineering practices" – which occurs in a single cause of action in Complaint: Claim No. 2. CLF contends the permit term "good engineering practices," opens the door to limitless discovery on the theory that actions taken at other facilities are probative of whether "good engineering practices" have been satisfied at the Providence Terminal. *See* Ex. C at 3, Coghill Ltr. (Aug. 18, 2021).

The starting point of the relevance inquiry is Claim No. 2 itself. *In re Subpoena to Witzel*, 531 F.3d at 118. CLF characterizes it, and the term "good engineering practices" as broadly applying to the design and operation of the Terminal. *See* Motion 11-12. But the actual

claim is both far narrower, and more specific. Claim No. 2 alleges a violation of the permit requirement that Terminal's "[*Stormwater Pollution Prevention Plan (SWPPP)*] shall be prepared in accordance with good engineering practices." TAC ¶ 288, ECF No. 45 (emphasis added). This is a claim about the SWPPP and what is written in it; *it is not a claim about whether or not the entire Terminal is designed and operated to a "good engineering practices" standard*. Focusing on the claim reveals a significant disconnect between what discovery Claim No. 2 actually requires and the far broader discovery that CLF seeks. *Begin*, 2015 WL 13714688, at *1 ("[t]here is a disconnect between the... allegations made by Plaintiff in Count VII and his description of those allegations in opposing the requested protective order."). Deciding Claim No. 2 will require two steps: first, determining what "good engineering practices" are for stormwater pollution prevention at *this* terminal given its specific circumstances, and second, determining whether the Terminal's SWPPP reflects those practices.

These are the types of questions the Court routinely receives expert testimony on to decide. In fact, CLF appears to agree with this (at least outside of this case). CLF argued in a nearly identical citizen suit pending in the U.S. District Court for Massachusetts against ExxonMobil that "good engineering practices" is a professional standard of care and that "expert testimony will provide the court with answers as to what a prudent engineer would use." *See Ex. Conservation Law Foundation, Inc. v. Exxonmobil Oil Corp. et al.*, 2020 WL 5511915, *45 (1st Cir. 2020) (Br. of Appellant). CLF further cited to an EPA federal register notice listing organizations that provide such engineering industry standards, *e.g.*, American National Standards Institute, American Society for Testing and Materials, American Society of Civil Engineers, etc. *Id.* (citing 67 Fed. Reg. 47042, 47058 (July 17, 2002)).

Expert testimony regarding “what a prudent engineer would do” is standard expert opinion evidence of an industry norm, and “common fare in civil litigation.” *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 79 (1st Cir. 2006). Such testimony is informed by the expert’s experience and qualifications, and importantly, is opinion evidence on what are *common practices or norms* in the industry. See e.g., *Barletta Heavy Div., Inc. v. Travelers Ins. Co.*, 2013 WL 5797612, at *9 (D. Mass. Oct. 25, 2013) (industry standards are “common practices” in industry). CLF offers no explanation for why discovery in this case should follow a radically different course that is not grounded in the actual claims and would needlessly expand discovery in this case *by several orders of magnitude*.

Second, CLF’s argument that Claim No. 2 requires discovery into refineries, pipelines, offshore platforms (and a host of other infrastructure that are not even terminals) located anywhere completely disregards that the question of whether the SWPPP meets “good engineering practices” is still a question *that is specific to Providence*. The permit and any standards it incorporates only apply to the Terminal. See TAC, Ex. L at 6, 26, ECF No. 45-12. Assuming that CLF does not believe that weather risks are similar everywhere, good engineering practices regarding weather risks to a different asset type or a different location (e.g., a tropical climate or on an offshore platform in the Gulf of Mexico) will not give the Court useful information about what good engineering practices are for weather risks at an onshore fuel terminal located in Providence, Rhode Island.

CLF’s argument that “discrepancies between actions taken at other Shell facilities and those taken at the Terminal is clearly relevant” for determining whether Defendants have violated the “good engineering practices” standard at the Terminal is illogical. As a hypothetical example, if Defendants have done nothing to address flooding or stormwater risks at another

coastal terminal, would CLF then concede that under the “good engineering practices” standard nothing should be done to address flooding or stormwater at the Providence terminal? Surely not. As EPA, and even CLF has recognized (again, outside of this case) a SWPPP must reflect site specific considerations. CLF’s insistence that it needs to probe engineering “discrepancies” among facilities is another red herring – there are inherently “discrepancies” because professional engineers will come to different judgments about what is necessary for a given site.

Likewise, CLF’s desire to probe “discrepancies” between engineering decisions by the Metocean team and what is done at Providence is misplaced. As explained in Mr. Yeates’ declaration, the responsibility and decision-making for ensuring the integrity of the asset rests with the asset itself. Ex. G. The Metocean team is part of the Projects and Technologies line of business; it is not part of the Providence Terminal asset integrity team. Motion, Ex. D at 1-2, ECF. No. 72-6. It is a group that provides support to assets and is available to companies within the Shell group of companies (or outside the Shell-group) should they wish to utilize those services on a contractual basis. The Metocean team has not undertaken any work for or done an assessment of the Providence Terminal in any respect. Ex. G. This is because there has never been a need to – the Providence terminal has experienced many storms since it was built in 1907 and water related risks are well-managed. *Id.* Thus, CLF’s RFP No. 17 for “all documents” concerning the work of the Metocean team will not yield any documents about the engineering practices applicable to the Providence Terminal.

In sum, Defendants have agreed, reasonably, to produce documents that are relevant to CLF’s claims concerning CWA and RCRA compliance about the Providence Terminal, including policies of general applicability, and regardless of whether the documents “expressly refer” to the Terminal. CLF ignores this, and further seeks discovery that is completely

untethered to any claim, including extensive discovery into locations and subjects that have nothing to do with the issues raised by CLF's CWA and RCRA claims. Accordingly, Defendants seek the following limitation to exclude this irrelevant discovery from the case.

- **GUARDRAIL NO. 1:** Discovery must be tailored to issues relating to the operation, design, maintenance, stormwater permitting, or waste management of the Providence Terminal; or imminent or current risks posed to the Terminal by precipitation or flooding.

III. CLF's Requests For Documents Generally Related to "Climate Change" and with No Applicability to the Providence Terminal Seek Information Irrelevant to CLF's CWA and RCRA Claims.

CLF's insistence on maintaining requests that are irrelevant to its claims is easily illustrated by CLF third argument asking the Court to overrule Defendants' objections to its use of "climate change" and similar terms. Motion 16. This is one among many surprising arguments that appear in CLF's motion because CLF has already acknowledged — before the Court — that "climate change" encompasses a wide range of subjects that are irrelevant to these claims, such as air emissions.

On January 11, 2022, the parties appeared before the Court at the first of two informal discovery conferences. At that conference, counsel for Defendants explained that CLF's use of the term "climate change" with no qualifiers or other limitations is problematic because it sweeps in a significant set of irrelevant documents — most notably related to air emissions such as CO₂. Air emissions have nothing to do with this case. Counsel for CLF heard this, and *agreed* that CLF did not need documents about air emissions. This simple, common sense point has been made to CLF multiple times, and Defendants have asked CLF to tailor the language of its requests (as it is obligated under the rules) to avoid this problem.¹²

¹² See Ex. E (Defendants explaining that "climate change" also includes topics such as food security and desertification, which are also irrelevant to this case, and proposing that "that the parties confer to explore establishing a precise definition [of "climate change"] relevant and proportional to the specific claims in this case.")

Yet, here the parties are, months later, and CLF is making *the exact same* request.¹³ Further, CLF does so while failing to address how the enormous subject of “climate change” —, which includes its causes and far-term effects the Court dismissed on standing grounds — is relevant to its claims.¹⁴ Motion 16. The reason for this failure is obvious, CLF’s claims, no matter how generously construed, are *only about imminent precipitation and flooding risks*. See Compl. § I.V.a; Mem. and Order 6, ECF No. 55. CLF’s requests for documents that touch on the wide range of topics related to varying facets of “climate change” are plainly overbroad and seek irrelevant information.

CLF “ought not to be permitted to use broadswords where scalpels will suffice.” *Mack*, 871 F.2d at 187 (1st Cir. 1989). The Court should sustain Defendants’ objections to “climate change” and similar terms when used without appropriate tailoring to the claims, particularly in light of CLF’s concession that its claims do not require discovery into all the subjects “climate change” encompasses. See Motion, Ex. B at 7-8, 13-14, ECF No. 72-4 (RFP Nos. 10, 11, 23-25). To remedy the overbroad and irrelevant reach of CLF’s general requests about “climate change” or similar broad subjects, Defendants propose to the Court the following guardrail:

- **GUARDRAIL NO. 2:** Discovery requests using the terms “climate change,” “greenhouse gas effect(s)” or similar terms with no limitation must be tailored so that such requests are limited to current or imminent precipitation or flooding risks to the Terminal, consistent with the scope of the CWA and RCRA claims and the Order on Defendants’ Motion to Dismiss. Mem. and Order 2-3, 6, ECF No. 55.

IV. CLF’s Contention That It Must Discover Defendants’ “Knowledge” About Climate Change To Prove Its Case is Wrong.

¹³ To be clear, CLF’s “climate change” document requests are phrased as broadly as possible. Request No. 10 seeks “All Documents related to Defendants addressing or adapting to climate change...” with no substantive limitation.

¹⁴ CLF musters one argument in support, unrelated to its claims – that Defendants’ objections to “climate change” and similar terms are “unsupportable” because Defendants are “intimately familiar with these terms” due to the fact they have been used by Defendants before. Defendants’ familiarity with these terms has nothing to do with their objections.

CLF's arguments about the need for information about Defendants "knowledge" of climate change improperly seek to expand the scope of a citizen suit claim. The Court should not permit CLF to write a "knowledge" element into its claims that does not exist.

CLF has now said repeatedly it believes it is "entitled to probe what Shell knew about climate change risks and when Shell knew it." *See* Ex. F at 2, Coghill Ltr. (Oct. 1, 2021). In its motion, CLF states that Defendants' "knowledge of climate change" is relevant for three reasons: (1) these documents "are relevant to the severity and imminence of risks at the Terminal[,]"; (2) these documents "are relevant to determining what Defendants were required to disclose to regulators"; and (3) these documents are relevant to CLF's request for civil penalties. Motion 15, ECF No. 72. These three arguments are easily dispatched. First, CLF itself limits the scope of what is needed regarding imminence and severity of risks to those "*at the Terminal.*"¹⁵ Defendants do not object to producing information about current and imminent precipitation and flooding risks (including to the extent exacerbated by climate change) at the Terminal.

CLF's second argument for why it should be allowed to pursue "knowledge" discovery is based on its so-called "disclosure" claims. *See* Ex. F, Coghill Ltr. (Oct. 1, 2021). Although these claims are never identified by CLF, the first of these is Claim No. 9, alleging a violation of the Part II(1)7 of the permit, which states:

Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, they shall promptly submit such facts or information.

TAC, Ex. L at 16, ECF No. 45-12 (2019 Permit, Part II(1)7). CLF strains credibility in asserting that the "investment and spending decisions" of Defendants (and their parents

¹⁵ CLF, again, does not tie this argument to any specific claim(s).

and affiliates), or climate change impacts at distant locations are required “relevant facts” to be included in a Rhode Island stormwater permit application. But even if that is accepted for the sake of argument, whether such facts were omitted can be determined by looking within the four corners of the application. Ex. F at 2, Coghill Ltr. (Oct. 1, 2021). Like CLF’s other claims, this is a straightforward question of compliance. If CLF wants to engage in exploratory discovery unrelated to Providence or the Terminal there “in the vague hope that something helpful will turn up” — that is prohibited under the federal rules. *Mack*, 871 F.2d at 187.

CLF’s second so-called “disclosure” claim is Claim No. 6. That claim alleges a violation of Part I.C.4 of the permit, which requires the permittee to:

[A]mend the SWPPP whenever there is a change in design, construction, operation, or maintenance, which has a significant effect of [sic] the potential for the discharge of pollutants to the waters of the State; a release of reportable quantities of hazardous substances and oil; or if the SWPPP proves to be ineffective in achieving the general objectives of controlling pollutants in storm water discharges associated with industrial activity.

TAC, Ex. L at 16, ECF No. 45-12 (2019 Permit, Part I.C.4). There is (again) a significant disconnect between the text of Claim No. 6 as plead, and CLF’s characterization of its claims as requiring discovery into the engineering of not just the named Defendants’ infrastructure in other locations, but also of non-party companies located elsewhere, including outside of the U.S. The permit requirement CLF alleges has been violated in Claim No. 6 is triggered by three specific events: (1) a change in design, construction, operation, or maintenance of *the Terminal*; (2) a release at *the Terminal*; or (3) when the SWPPP *proves to be* ineffective at controlling pollutants in stormwater discharges at *the Terminal*. All of these events relate only to the Terminal. Claim No. 6 simply has nothing to do with anywhere beyond the Terminal. *See Begin v. Lawn Beauticians, Inc.*, 2015 WL 13714688, at *1 (D.R.I. May 19, 2015) (finding discovery requests

irrelevant to claim and issuing protective order, noting “[t]here is a disconnect between the... allegations made by Plaintiff in Count VII and his description of those allegations in opposing the requested protective order.”).

CLF’s third argument regarding civil penalties fares no better. CLF contends that the “egregiousness of Defendants’ conduct” is relevant to its request for civil penalties, and therefore it is entitled to discovery about Defendants’ knowledge about climate change, even if unrelated to the Providence terminal. Motion 15, ECF No. 72. CLF cites no authority that supports this statement. CLF does cite 33 U.S.C. § 1319(d), though that provision does not support this argument either. Section 1319(d) describes factors taken into account in determining civil penalties, which includes “the seriousness of *the violation*.” 33 U.S.C. § 1319(d). Nowhere is a defendant’s conduct or “knowledge” mentioned in §1319(d).¹⁶

It is not surprising that knowledge is not an enumerated factor in § 1319(d), because there is no knowledge element in any citizen suit cause of action. CLF’s claims are up-or-down questions of compliance — is the Terminal in violation of its stormwater permit and RCRA or not? What Defendants may have known about climate change and when does not the affect the answer to those questions.¹⁷ Put another way, if Defendants lacked certain knowledge about climate change risks, that fact would not insulate them from liability here.¹⁸

¹⁶ This discovery is not appropriate for impeachment purposes either. *See* Mot. at 14, ECF No. 72. *See In re Bextra & Celebrex Mktg. Sales Practices. & Prod. Liab. Litig.*, 249 F.R.D. 8, 12 (D. Mass.2008) (in balancing benefits and burdens of discovery, information sought only for impeachment purposes is not given substantial weight relative to burdens associated with production).

¹⁷ CLF’s argument also implies a negligence framework with a standard of care applies to its CWA and RCRA claims. *See* Ex. F at 2, Coghill Ltr. (Oct. 1, 2021) (asserting “the depth of Shell’s knowledge and how long Shell failed to act on that knowledge is relevant to [] Shell’s liability under several of CLF’s claims.”). This argument has no support in the text of claims themselves, *see* App. A (claims chart) or causes of action, 33 U.S.C. § 1365(a)(1).

¹⁸ Notably, knowledge *is* an element of the criminal enforcement provisions of the CWA and RCRA. *See* 33 U.S.C. § 1319(c)(1)(A) (criminal enforcement for “knowing” and “negligent” violations of the CWA); 42 U.S.C. § 6928(d) (criminal enforcement for “knowing” violations of RCRA). Congress knew how to incorporate knowledge elements into the CWA and RCRA provisions it reserved for government enforcement, and chose not to for the statutes’ citizen suit causes of action.

Many of CLF's most attenuated requests are based on a vague assertion it is entitled to discovery about Defendants' "knowledge of climate change." These include— just to name a few-- requests about Defendants' financial and investment information, interactions with trade groups, articles written and speeches given as far back as the 1980s, documents related to the Paris Agreement, documents related to the creation of pages on the global Shell plc website and documents related to the U.N. Intergovernmental Plan on Climate Change. *See* Motion, Ex. A at 8, 13, ECF No. 72-3 (RFP Nos. 12, 16, 21, 24). Nowhere in CLF's motion does it substantiate why this information is needed based on the claims, and cannot casually import a knowledge element into a civil citizen suit with no basis in the statute. CLF should not be permitted to probe irrelevant subjects under the guise of requiring "knowledge about climate change."

V. CLF's Claims Concern Current Violations; Discovery Going Back Decades Is Outside the Scope of Rule 26(b)(1).

Even under the most liberal construction of Rule 26(a)(1), CLF's discovery seeking documents as far back as 37 years for a suit seeking to enforce only current or ongoing alleged violations of the CWA and RCRA runs afoul of the relevance and proportionality requirements of the rule. Fed. R. Civ. P. 26(a)(1); *Dumas v. O'Reilly Auto Stores, Inc.*, 2017 WL 2573956, at *4 (M.D. La. June 13, 2017) (reducing timeframe for discovery in employment discrimination action of all complaints made to defendant from six to three years as more proportional to claim).

All of CLF's CWA claims either stem from alleged ongoing violations of the Terminal's stormwater permits or the CWA. Its RCRA claims are similarly predicated on alleged current violations or present imminent risks. TAC ¶¶ 406-436, ECF No. 45. This is consistent with well-established law that the citizen suit provisions of the CWA and RCRA are strictly limited to enforcement of current or ongoing violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-64 (1987); *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me.*,

LLC, 339 F.3d 23, 33-34 (1st Cir. 2003) (“[O]nly citizen suits alleging that defendants are in violation of the Clean Water Act at the time suit is brought are cognizable.” (emphasis in original)). In addition, the statute of limitations for “citizen actions seeking the enforcement of civil penalties” is five years for the CWA and RCRA. *Id.* at 426 (compiling cases). The five-year statute of limitations also applies to equitable claims seeking injunctive relief under the CWA. *Sierra Club, Inc. v. Granite Shore Power LLC*, 2019 WL 8407255, at *8-11 (D.N.H. Sept. 13, 2019) (applying the concurrent remedy doctrine to CWA claims).¹⁹

The parties have agreed to a default time period of 2008 to present, but numerous requests are not subject to the default period and seek information as far back as 1985. Motion, Ex. A at __.5-6 (RFPs No. 1,7) There is no possible relevance of information from the 1980s or even the 1990s to CLF’s permit-based claims, CWA statutory-based claim, or RCRA regulatory claim, which all allege current or ongoing noncompliance.²⁰ Accordingly, Defendants seek the following limitation on discovery:

- **GUARDRAIL NO. 3:** All discovery is subject to the parties’ agreed-upon temporal limitation of 2008 to the present (excepting subjects relevant to Claim 21).

¹⁹ CLF specifically discusses RFP Nos. 1 and 7, both of which seek information dating back to 1985. With respect to RFP No. 1, CLF does not demonstrate how document retention policies from 1985 are relevant to its claims. While a document retention policy from 1985 does indeed inform what documents were being retained in 1985, CLF does not provide any argument for why documents from 1985 or knowing what documents Defendants would have had in 1985 has any bearing on what documents CLF needs to prove its claims. Similarly, with RFP No. 7, documents concerning environmental monitoring, sampling, or analysis from 1985 have no bearing on whether Defendants are currently in compliance with their RIPDES permit or whether the conditions at the Terminal present an “imminent or substantial endangerment.”

²⁰ Defendants have not objected to CLF’s proposed discovery timeframe with respect to Claim No. 22, the RCRA statutory endangerment claim. That is because that claim concerns alleged historic soil contamination at the facility, and older documents that may characterize the nature or extent of the alleged soil contamination may be relevant.

VI. CLF’s Disputed Requests Are Not Proportional to the Needs of the Case.

A. Discovery Unrelated to the Providence Terminal Is Not Proportional.

Rule 26’s proportionality mandate overwhelmingly favors excluding CLF’s proposed discovery into the subjects of weather risks and related engineering at potentially thousands of facilities.²¹ As described in the attached declaration of Clyde Williams, CLF’s request present substantial logistical and cost undue burdens. Ex. H. Estimated costs for reviewing documents for just four of CLF’s requests are over \$4.85 million. *Id.*

VII. CLF’s Overbroad Discovery Requests (RFP Nos. 4, 6, 7, 22, & 31)

RFP No. 4 (Management Structure of Terminal): This RFP requests documents “sufficient to show” the managerial structure at the Terminal. Defendants objected to the “sufficient to show” language as vague and ambiguous for it provides no guidelines for when “sufficient to show” would be considered satisfied. Defendants’ response providing a limitation to provide only documents implicated by CLF’s CWA and RCRA claims is an articulation of that objection. This limitation narrows the overbroad request by ensuring that Defendants are not overburdened by producing documents concerning irrelevant positions, like a Human Resource Manager. Defendants understood there was no dispute on this issue because during the meet and confer held September 27, 2021, the parties agreed to take an iterative approach whereby Defendants would provide documents “sufficient to show” the managerial structure.

RFP No. 6 (Corporate Control of Terminal Activities): By requesting *all* documents relating to corporate control, “including policies governing Defendants’ corporate interactions with each other and any parents or subsidiaries,” including non-parties, RFP No. 6 is egregiously

²¹ It is important to note that CLF has defined “Defendant” to include parents, subsidiaries, affiliates, and numerous other non-parties. This fact, combined with CLF’s overbroad requests that do not related to the claims, or even the Terminal, has the effect of essentially demanding the files of 1300+ companies about subjects that do not even relate to this case. This is an abuse of the discovery process and should not be permitted.

overbroad and calls for an unduly large and burdensome volume of documents. Defendants' objection calls for a limitation of this request to just those documents that are relevant to CLF's CWA and RCRA claims. CLF's corporate liability arguments for why *all* documents responsive to this request are relevant are contrary to well-established principles of corporate law. CLF believes these documents are "highly relevant to the issue of liability," stating that because "each organization is responsible for its own environmental compliance and, to an as yet undetermined degree, that of its subsidiaries[,] therefore, each Defendant is liable for Defendants' failures at the Terminal." Motion 18-19, ECF No. 72. With this argument, supported by a citation to a district court case from The Hague, CLF seeks to single-handedly overthrow the "general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation...is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). This principle is not a "nicet[y] of state corporate law," as CLF flippantly contends, but rather a bedrock tenet of corporate jurisprudence. Defendants' objections are reasonable and have been explicitly expressed to CLF. Motion, Ex. E at 6, ECF No. 72-7.

RFP No. 7 (Environmental Monitoring, Sampling, Analysis, and Assessment): The CWA and RCRA only deal with water and waste. *See* 33 U.S.C. § 1365(a)(1); 42 U.S.C. § 6972(a)(1)(A). Those statutes do not involve air emissions, for example, and yet, CLF's request for *all* environmental monitoring, sampling, analysis, and/or assessment documents incorporates an enormous category of air emissions and other irrelevant documents.

RFP No. 22 (Physical Infrastructure at the Terminal): CLF's arguments about this RFP also misrepresent Defendants' position. Defendants' primary objection with this RFP is that its scope is vastly overbroad since it encompasses many documents that are not relevant to CLF's CWA and RCRA claims. Defendants did provide CLF with an explanation of their objection,

along with examples: “For example, CLF’s request as written would encompass wholly unrelated physical changes at the Terminal like replacing the heating and air conditioning system in the Terminal’s offices.” Motion, Ex. E, at 4, ECF No. 72-7. Defendants provided that explanation on September 23, 2021, and again during the February 14, 2022 conference.

RFP No. 31 (Communications with Rhode Island or Providence): RFP No. 31 also suffers from overbreadth concerns by requesting *all* communications with the State of Rhode Island or City of Providence “regarding the Terminal.” Defendants object to this RFP No. 31 because responsive documents would include, for example, those regarding Clean Air Act Title V permit correspondence and other irrelevant correspondence that have no probative value to CLF’s CWA and RCRA claims.

VIII. Defendants’ Objections Are Proper.

Defendants’ objections are not “generic” and thus are consistent with Local Rule 34(b). Objections are improperly generic when they are “boilerplate” objections not “stated with specificity.” Fed. R. Civ. P. 34(b). CLF points to Defendants’ General Objections, but ignores that each response is accompanied by a full and complete set of objections. CLF’s argument is meritless. Even if any such objections lack the necessary specificity (which they do not), waiver is an inappropriate remedy. Defendants have consistently raised these objections through discovery correspondence, and discussions with CLF and the court, which began even before formal responses to the Requests were provided. *See* Motion, Ex. C, Aug. 9, 2021 letter from R. Prather to E. Peterson. CLF’s argument that the conditional nature of the response left CLF “guessing” as to whether documents were produced or withheld is disingenuous. Defendants conditionally responded to each Request, yet CLF only takes issue with certain Responses that

mention the search terms.²² There is nothing inherently inappropriate about a conditional response as long as it is clear which portion of the Request is being objected to, and which part is being answered. *Enargy Power (Shenzhen) Co. Ltd. V. Xiaolong Wang*, 2014 WL 4687542 *4 (D. Ma. September 17, 2014).

IX. Status of Defendants' Rolling Productions.

CLF's First Requests seek an enormous volume of documents that span across all of the named Defendants and by their terms include non-parties. Notwithstanding the staggering magnitude of implicated documents, for a host of requests, Defendants have agreed to produce documents subject to their objections. Since the First Requests were served on May 28, 2021, Defendants have provided three productions, including most recently on March 9, 2022, containing over 19,000 pages.²³ Review of documents is ongoing. To the extent additional responsive documents have not yet been produced, there are three primary reasons for this: (1) the parties had not come to an agreement on the default relevant time period for responsive documents until March 2, 2022; (2) CLF has not attempted to propose any revised, targeted discovery requests; and (3) the parties had not, and still have not, agreed on applicable search terms.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny CLF's motion to compel and grant Defendants' cross-motion for protective order.

²² Indeed, CLF does not even take issue with all Responses that mention the search terms. *See, e.g.*, Resp. 23.

²³ Defendants served its third production on March 9, 2021, after CLF filed its Motion to Compel.

Dated: April 1, 2022

Respectfully submitted,

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