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 Terminaling LLC, and Equilon Enterprises LLC d/b/a Shell Oil Products US, Defendants.	No. 1:17-cv-00396-WES-LDA

DEFENDANTS' REPLY IN SUPPORT OF
CROSS-MOTION FOR PROTECTIVE ORDER
GOVERNING THE PRODUCTION AND EXCHANGE OF DISCOVERY

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INTRODUCTION

Plaintiff Conservation Law Foundation Inc.'s ("CLF") Reply in Support of its Motion to Compel and Opposition to Defendants' Cross-Motion for Protective Order ("Reply/Opposition") reinforces what the Defendants have been saying all along: CLF has no interest in pursuing the case that it has actually filed—an enforcement claim directed at the Providence Terminal. Instead, it is pursuing a much larger agenda about climate change and the activities of the Defendants' corporate parent company and affiliates. CLF, remarkably, does not even attempt to deny this in its Reply/Opposition.

In an effort to narrow the scope of the dispute before the Court, Defendants have provided CLF numerous examples of information captured by CLF's out-of-scope requests, including several that CLF agreed, before the Court, are irrelevant. Despite that, CLF has not offered to narrow any requests in its Reply/Opposition. Defendants have also repeatedly stated their willingness to provide documents relevant to stormwater and waste management at the Providence Terminal (including broader corporate policies applicable to the Terminal that address these topics). CLF has offered no explanation whatsoever as to why more is necessary.

Instead, CLF resorts to ultimately meritless arguments in an attempt to seek discovery of irrelevant information. *First*, when confronted with the fact that the sole claim involving the term "good engineering practices" (Cause of Action 2) narrowly involves the content of a single permitting document and could not possibly justify CLF's extraordinarily broad requests seeking all engineering documents for facilities anywhere owned or operated by any of the thousands of entities in the Shell group, CLF suggests the Court simply read the term "good engineering practices" into its other causes of action. This argument has no basis in the law.

Second, CLF fails to rebut Defendants' argument that CLF's discovery requests related to infrastructure in locations beyond the Providence Terminal are not relevant to CLF's CWA and RCRA claims. As Defendants have repeatedly explained—with no rebuttal from CLF—neither the basis for liability nor the relief sought relates to any locations other than Providence. Defendants submitted the declaration of James Kent Yeates that establishes each facility is unique and has its own regulatory and other risk profile characteristics. CLF makes no effort to address this, much less carry its burden to show the relevance of requests related to infrastructure beyond the Providence Terminal.

Third, CLF incorrectly argues that it need not address proportionality despite the contrary guidance from the Rule 26 Advisory Committee Notes. Rather than address the substantial evidence of the undue burden CLF's requests would impose on Defendants, CLF instead raises issues related to the search terms and never discusses this burden. And on the issue of search terms, not only does CLF misstate the status of the search terms, it also fails to acknowledge that those terms represent only a fragment of what CLF contends it is entitled to in discovery. The costs related to searching for, collecting, reviewing, and producing the global scope of documents CLF seeks would be staggering. CLF offers nothing to address this serious issue.

Fourth, Defendants made proper, specific objections explaining how Defendants' discovery is overbroad and irrelevant. It is not Defendants' obligation to rewrite CLF's discovery requests to tailor them to CLF's actual claims. That is CLF's responsibility, but one it refuses to undertake.

Fifth, CLF continues to argue—without case law support—that Defendants somehow waived their objections because CLF was apparently confused by certain conditional objections. Even accepting CLF's purported confusion and notwithstanding the parties' numerous

communications and discussions where Defendants explained their objections, a party's confusion about the application of an objection does not create grounds for waiver.

As Defendants highlighted in their opening brief, a citizen suit enforcement action is a *very narrow and limited claim. See Sanchez ex rel. D.R.-S. v. U.S.*, 671 F.3d 86, 95-96 (1st Cir. 2012) (noting limited nature of Clean Water Act citizen suit claim and rejecting plaintiffs' theory and arguments based in tort). It is not CLF's opportunity to pursue its wishlist of documents from Defendants about their alleged "involvement in the climate crisis." ECF No. 79-4, 3. The guardrails Defendants have requested are essential to the reasonable completion of discovery in this case. CLF's refusal to compromise in the face of clearly identified and substantiated relevance and proportionality concerns only emphasizes the need for the Court's intervention to set clear parameters on discovery.

As discussed at the status conference on Defendants' forthcoming motion to compel, CLF has not identified the factual bases for its claims that the Providence Terminal has violated the CWA or RCRA. Those facts require answers only to very clear-cut questions: What is it that CLF believes is wrong at the Terminal? How does CLF believe the Terminal has failed to meet the terms of its CWA permit and RCRA? It is only on *those* issues that CLF should be entitled to discovery. This case is not CLF's opportunity to use discovery as a weapon to conduct an expedition into the documents not just of the owners or operators of the facility in question but also, as currently phrased, of the larger corporate family of companies on an expansive set of issues that have no bearing on the very limited set of questions before the Court. CLF has failed to establish a basis for the overly broad discovery sought in its motion, and the motion should be denied. Defendants' requested guardrails should be adopted to prevent further attempts by CLF

to obtain discovery regarding matters that are irrelevant to its claims and not proportional to the needs of the case.

ARGUMENT

I. CLF Improperly Seeks to Expand the Scope of Discovery Beyond its Claims.

CLF has failed to meet its burden to show that its discovery sought is "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. Pro. 26(b)(1). Having failed to explain the relevance of its requests in its motion to compel, CLF makes an after-the-fact attempt in its Reply/Opposition to cure that deficiency, all but acknowledging that it failed to establish relevance in the first instance. This attempt lands far wide of the mark because CLF still has not established the relevance of its overly broad discovery requests.

A. CLF Fails to Rebut that its Actual Claims Require Narrow Discovery.

CLF makes no effort to rebut Defendants' argument that CLF's "good engineering practices" and "disclosure" claims are narrow and do not require the expansive discovery sought here. Instead, in an astonishing expansion of its initial argument regarding documents related to good engineering practices, CLF now appears to argue that all its causes of action should be read conjunctively. ECF No. 83, 7. This effectively means that CLF is asking the Court to read "good engineering practices" language into causes of action where that language does not even appear. CLF cites no case law in support of this argument and Defendants have found none in any jurisdiction where a party has even attempted to make such an argument. CLF even argues that *different statutory causes of action* should be read together to justify its discovery. *See* ECF No. 83, 9-10 (arguing that "good engineering practices" language in Count 2 under the CWA should be read together with the *RCRA claim* at Count 22). These unsupported arguments should be rejected.

Similarly, CLF fails to respond to Defendants' well supported position that CLF's "disclosure" claims (Causes of Action 6 and 9) are simple compliance questions that can be determined by looking within the four corners of the Terminal's stormwater permit application or at the specific operations of the Terminal itself. *See* ECF No. 79, 22-24. CLF offers no basis for seeking global discovery into the engineering of Defendants' infrastructure in other locations outside Providence or of non-party companies' infrastructure in the U.S. and beyond. Defendants provided Appendix A to its cross-motion for protective order to facilitate reviewing the elements of CLF's claims—the most fundamental step in the analysis to determine relevance. ECF No. 79-1. CLF does not address the elements of its claims as outlined in the appendix and provides the Court with nothing to resolve the mismatch between its requested discovery and those elements. *See* ECF No. 83, 7 n. 5. Causes of Action 6 and 9 have nothing to do with anywhere or anything beyond the Providence Terminal and its particular permit, and CLF's failure to prove otherwise cannot be ignored.

B. CLF Fails to Explain How Documents Unrelated to the Providence Terminal are Relevant to its Narrow Claims.

The Reply/Opposition again argues that documents unrelated to the Providence Terminal are relevant to CLF's claims about the Providence Terminal, but it does not discuss the key facts raised by Defendants that prove otherwise. For instance, CLF does not meaningfully respond to the facts provided in the Yeates Declaration clarifying the role of the Health, Security, Safety, Environment and Social Performance Control Framework ("HSSE Control Framework") and the site-specific nature of engineering. *See* ECF No. 79-9. The information provided by Mr. Yeates makes clear that decisions regarding the stormwater management practices at the Providence Terminal are not dictated by a general framework (or parent companies). *Id.* ¶¶ 20-24. Yet CLF's Reply/Opposition continues to assert that information regarding other infrastructure

outside the Providence Terminal (with no geographical limitation) falls within the scope of information relevant to CLF's claims. CLF also ignores Mr. Yeates' explanation that there is no specific standard applied to all infrastructure other than the non-prescriptive, broad goals in the HSSE Control Framework (which are documents that Defendants have already agreed to produce). Instead, CLF continues to push its misguided position that "[w]hatever standard the Defendants apply to their facilities is relevant to determining both the good engineering practices standard, including what Defendants view as standard good engineering practices, and whether the Terminal complies with those standards." ECF No. 83, 8. Defendants have repeatedly explained that CLF's assumption that there is some overarching set of engineering practices for all infrastructure is incorrect—such universal practices do not exist. The scope of discovery should not be shaped by baseless speculation, and discovery requests should be adjusted consistent with the information a party learns throughout a litigation. At no time has CLF tried to do so.

Similarly, CLF offers no argument responsive to the information Mr. Yeates provided that the Metocean team has never done, or been requested to do, any evaluation of the Providence Terminal. As Mr. Yeates explained, there is no relationship between Metocean and the Terminal. ECF No. 79-9, ¶¶ 14-15. Faced with that, CLF now posits that it needs the Metocean team's "climate change projections" because they are part of the Shell group's "longstanding and ongoing study of climate change" – but notably, not citing any actual claim in its Complaint. ECF No. 83, 9 (citing requests seeking reports shared with industry trade groups, submissions to the Climate Disclosure Project, and a 40 year old video about climate change). None of these documents have anything to do with the Providence Terminal, its stormwater permit, the CWA, or RCRA, and there is no claim in this case that turns on Defendants' so-called

"longstanding and ongoing study of climate change." Further, as CLF knows, the Terminal did not even come into the Equilon/Triton portfolio until 2017 and was an existing asset, not one that any Shell-related entity built. To the extent that the Metocean team has done any work related to climate change or other assets, that is not relevant to how this Terminal was built or its permits, so to ask Defendants to retrieve "all documents" relating to Metocean violates both the relevance and proportionality requirements of Rule 26. Further, in large part, the underlying climate change documents referenced by CLF are publicly available and CLF *already has access to them*. If CLF thinks they are relevant or wishes to use them in the litigation for cross examination or impeachment or however else it chooses, it is certainly at liberty to attempt to do so; they do not need "all documents related to" them.

CLF should not be permitted to use this case as a tool—here, more like a weapon—for acquiring an expansive set of documents that are not relevant to its claims. Simply because CLF argues otherwise, based on passages from documents it misconstrues and/or misapprehends, does not make it so and should not be a reason for discovery of any documents related to Metocean or other general climate change related documents as they are irrelevant to the very limited nature of CLF's claims.

II. CLF Has Not Properly Considered Proportionality In Crafting Its Discovery Requests.

A party propounding discovery has an affirmative duty under Rule 26 to consider proportionality. *See* Fed. R. Civ. P. 26 Advisory Committee Notes, 2015 Amendment. CLF claims it considered proportionality when propounding its discovery requests, but CLF's motion to compel wholly failed to explain how CLF did so. Instead, CLF selectively quotes the 2015 Advisory Committee Notes to argue that it has no such obligation. ECF No. 83, 4. The text CLF cites is excerpted and omits the preceding sentences that make clear CLF's obligation: "The

present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of *the parties to consider these factors in making discovery requests, responses, or objections.*" *Id.* (emphasis added). Contrary to CLF's characterization, CLF had an initial duty to serve proportional discovery. CLF violated this obligation.

Additionally, CLF offers no substantive response to the factual information provided by the Williams Declaration that establishes the burden to Defendants to comply with even a fraction of CLF's overly broad requests. *See* ECF No. 79-10. Instead, CLF mischaracterizes the parties' discussions involving search terms to dismiss the overwhelming costs highlighted by Mr. Williams. In support of its cross-motion, Defendants conducted searches using the terms originally proposed by CLF because those terms represent the full scope of information CLF argues it is entitled to receive according to its document requests. The narrower search terms that Defendants have agreed to run at this stage constitute a subset of CLF's requests—those specifically related to the Providence Terminal, since the parties agree that these are relevant. The parties agreed to move forward with these limited search terms to facilitate document collection, review, and production while the parties address their overall dispute regarding the appropriate scope of discovery. If CLF can impose its much broader demand for documents unmoored from any particular geographic location or claim in this case, then that will require the broader searches identified by Mr. Williams in his declaration. CLF cannot on one hand dismiss the nearly $5 million in costs associated with just six of sixty-two document requests as irrelevant because Defendants have not agreed to those requests and on the other hand argue that Defendants' proposed search terms are insufficient for the requests.

III. Despite Numerous Opportunities, CLF Improperly Refuses to Narrow the Scope of its Requests to Relevant Information.

Defendants have repeatedly explained to CLF why and how its discovery requests are not proportional to the needs of the case or relevant to its claims, yet CLF's Reply/Opposition doubles down on their refusal to narrow or otherwise tailor its requests to the actual claims. CLF selectively quotes a portion of Defendants' objections to argue that they are boilerplate and "unhelpful to inform CLF and this Court as to what Defendants find relevant or how CLF's requests for 'irrelevant' information burden Defendants." *See* ECF No. 83, 3. However, Defendants' responses and the correspondence exchanged between the parties belies this characterization and illustrates why Defendants' requested guardrails are necessary.

CLF's arguments regarding Request for Production No. 6 provide a good example. It seeks: "[a]ll Documents related to corporate control of any activities at the Terminal, including policies governing Defendants' corporate interactions with each other and any parents or subsidiaries." ECF No. 72-4, 8. CLF quotes Defendants' relevance objections, characterizes them as "boilerplate," and omits the further explanation that the request is irrelevant because it seeks "policies wholly unrelated to the activities at issue in the case." ECF No. 72-4, 8 (objection to Request No. 6). Defendants later repeatedly explained the lack of relevance by letter and through meet and confer.[1] *See* ECF No. 72-7, 6. Defendants similarly substantiated their relevance objections to all other requests at issue by specifically identifying the irrelevant information sought by CLF. *Id.* As another example, CLF's Request No. 7 seeks "All contracts

[1] Defendants' September 6, 2021 letter to CLF specifically states, "the request is overbroad because within its breadth are policies governing Defendants' corporate interactions with each other and any parents or subsidiaries. A reasonable interpretation of this request would include within its scope parents and subsidiaries that have no ownership or operational nexus to the Terminal. It would include "corporate interactions," such as routine shareholder meetings and other financial interactions, that have no relevance whatsoever to this litigation." ECF No. 72-7, 6.

and related Documents… related to environmental monitoring, sampling, analysis, and/or assessment at the Terminal from 1985 to present." ECF No. 72-4, 9 (Request No. 7). In response, Defendants raised the relevance and proportionality objections that CLF argues are boilerplate and unhelpful. As before, Defendants followed the objections by specifically identifying why the request was irrelevant and not proportional to the needs of the case:

> "Documents dating back to 1985 are irrelevant to Plaintiff's claims, which concern only alleged current violations of the CWA and RCRA, or ongoing violations limited to a five-year period. Also irrelevant are any documents related to environmental monitoring, sampling, analysis, and/or assessment at the Providence Terminal that do not involve compliance with the Terminal's RIPDES permit or its management of waste."

Id. CLF's requests repeatedly seek information far outside the scope of its actual claims. That Defendants appropriately and repeatedly raised the same relevance objection does not make the objection improper or boilerplate. It reflects CLF's consistent and unreasonable failure to propound discovery that is relevant to its claims. Moreover, Defendants specifically identified why the overly broad requests sought irrelevant information. Based on these explanations and the numerous correspondence and conferences with counsel, CLF had ample information showing how it could narrow its requests to seek only information relevant to its claims, yet it refuses to do so.

Rather than attempt to narrow its discovery requests, CLF instead complains to the Court that Defendants did not propose specific revisions to CLF's requests. *See e.g.*, ECF 83, 3. *It is not the job of Defendants to write CLF's discovery.* It is the propounding party's obligation to narrow its discovery requests to the appropriate scope. *See Rhode Island Res. Recovery Corp. v. Travelers Cas. and Surety Co. of America*, No. 10-294s, 2011 WL 13364630, at *1 (D.R.I. Apr. 8, 2011) (denying motion to compel in part due to propounding party's failure to properly narrow its requests upon objection). In *Travelers*, the plaintiff served discovery requests that the

defendants objected to as overbroad. *Id.* Despite recognizing that several requests were overbroad, the plaintiff moved to compel responses to the requests as written. *Id.* Magistrate Judge Almond partially denied the motion due to the overbroad requests, specifically noting that despite counsel's concession that certain requests were overbroad,

> Plaintiff's Motion does not propose any such "reasonable restrictions," defends the requests as drafted and seeks an order requiring Defendant to "respond fully" to the requests as drafted. Plaintiff essentially is asking the Court to rewrite its requests for it when Plaintiff apparently made no effort at the outset (or prior to the hearing on this Motion) to tailor its discovery requests . . . .

Id.

Here, CLF has approached this discovery dispute just like the plaintiff in *Travelers*. Despite acknowledging during meet and confers—and in conferences with the Court—that certain requests as written sought information irrelevant to its claims and receiving explanations regarding the others, CLF has responded only by digging in its heels. CLF's unreasonable refusal to narrow or tailor any of its discovery requests and its insistence on standing on irrelevant and overbroad requests as drafted should not be rewarded. Like in *Travelers*, other courts regularly reject a propounding parties' discovery requests where they have made no efforts to narrow them. *See, e.g.*, *Sanchez Ritchie v. Energy*, No. 10CV1513-CAB(KSC), 2015 WL 12914435, at *3 (S.D. Cal. Mar. 30, 2015) ("Particularly when a party stands on an overly broad request and does not make a reasonable attempt to narrow it or to explain the need for such a broad range of documents and/or information, the Court will not 'rewrite a party's discovery request to obtain the optimum result for that party. That is counsel's job.'") (citation omitted).[2]

[2] *See also, Robinson v. PPG Indus., Inc.*, No: 19-04033, 2021 WL 4497222, at *5 (C.D. Cal. July 23, 2021) ("The Court will not rewrite Plaintiff's discovery requests to cure their breadth problem where . . . Plaintiff has not offered reasonable narrowing of the requests in his briefing"); *Annex Books, Inc. v. City of Indianapolis*, No. 1:03-cv-00918, 2011 WL 13305341, at * 3 (S.D. Ind. Feb. 18, 2011) ("A more narrowly tailored request . . . might be acceptable,

IV. CLF's Remaining Arguments Regarding Defendants' Objections Have No Merit.

CLF's Reply/Opposition provides no basis for overruling Defendants' objections or deeming them waived. CLF argues that the Court should overrule Defendants' objections to terms such as "climate change" and "greenhouse gases" because those objections are "not about overbreadth or relevance." ECF No. 83, 11. Again, CLF ignores the full text of Defendants' objections that specifically identify that the requests using those terms are overbroad, irrelevant, and not proportional because they include an expansive set of documents unrelated to the Providence Terminal or CLF's claims in this case. ECF No. 72-4, 12-13, 24-26. Defendants additionally objected that the terms were vague and ambiguous because they were undefined. *Id.* CLF's reading of the objections is particularly curious given the many instances where Defendants explained to CLF why the use of such terms in the referenced requests was not relevant to the claims (in correspondence and during meet and confer). *See, e.g.*, ECF 72-7, 3. Further, as discussed above, Defendants need not propose a narrower version of CLF's overbroad and irrelevant requests.

Similarly, none of Defendants' objections were inadequate. CLF references objections to five specific requests (Nos. 4, 6, 7, 22, and 31) to argue that CLF does not understand "what Defendants believe to be relevant . . . ."[3] ECF No. 83, 12-13. CLF uses this purported lack of understanding to claim that it was prevented from evaluating the objection. *Id.* Again, the numerous communications between the parties regarding these objections fully describe the

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but this is not what the Defendant requested, and the Court will not in this instance rewrite Defendant's discovery requests, which it had an opportunity to narrow when drafted and during the Local Rule 37.1 resolution efforts.")

[3] CLF's repeated argument that Defendants' offering only one example of irrelevant information sought by a specific request somehow obviated any need for CLF to propose any amended language beggars belief. *See* ECF No. 83, 13. CLF had ample explanations and examples to explore narrowing its overbroad requests. Instead, it has remained intractable.

bases and nature of Defendants' relevance objections. CLF's characterization is disproven by the correspondence exchanged between the parties. CLF has never proposed to narrow its requests to attempt to agree on relevance.

Additionally, CLF's argument that Defendants have waived their objections has no basis in the law. Case law is clear that waiver is only appropriate "if the responding party fails to make a timely objection, or fails to state the reason for an objection . . . ." *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991). Because Defendants have stated their objections and provided reasons for those objections, none of Defendants' objections has been waived. Moreover, CLF cites to no case law to support its theory that a conditional objection was somehow waived, particularly where the parties agreed on how search terms would be used. CLF's statement that its confusion regarding the extent or effect of the asserted objections renders them waived has no merit.

Lastly, CLF continues to express concern with the delay in productions while ignoring that Defendants have produced thousands of pages of documents that do not relate to the very discovery issues in dispute. As Mr. Williams' declaration illustrated, the costs that would be incurred responding to CLF's requests as currently written would be astronomical. ECF No. 79-10, ¶ 14. To date, Defendants have produced over 19,000 pages of documents to CLF containing information related to the Providence Terminal. Defendants again note that they have already agreed to provide documents relevant to stormwater and waste management at the Providence Terminal (including broader corporate policies applicable to the Terminal that address these topics). CLF's refusal to consider any narrowing of its requests has forced Defendants to delay moving forward with production until the Court can provide the much-needed guardrails requested in Defendants' cross-motion.

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.

Dated: April 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, the foregoing Reply in Support of Defendants' Cross-Motion for Protective Order was filed through the Court's electronic filing system ("ECF"), through which the document is available for viewing and downloading from the ECF system, and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Roy D. Prather III
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