UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. EXXONMOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, AND EXXONMOBIL PIPELINE COMPANY, Defendants.	Case No. 1:16-cv-11950-MLW

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

Plaintiff Conservation Law Foundation ("CLF") respectfully requests that this Court deny Exxon's[1] Motion to Dismiss the Amended Complaint in its entirety for the reasons that follow.

INTRODUCTION

In its renewed Motion to Dismiss, Exxon regurgitates its arguments from its prior motion, with no consideration of the Court's prior holding and the amendments that CLF made to its complaint consistent with that holding. Exxon again seeks dismissal based on a gross over-simplification and mischaracterization of its Permit[2] requirements and asks the Court to ignore CLF's considerable refinements to its original complaint. CLF's Amended Complaint focuses only on the past, present, and near-term injuries associated with Exxon's violations of the Clean Water Act ("CWA") and the Resources Conservation and Recovery Act ("RCRA") at the Terminal.

This Court's rulings on Exxon's prior motion to dismiss are contained in both an Order entered on September 13, 2017 (Doc. 29) and in the Court's reasons for decision stated during the hearing itself (Rec. of Decision (Doc. 30), Hr'g Trans. (Sept. 12, 2017), 113:2–121:23). These rulings followed an extensive hearing and provided the parties with certain guidelines relative to the Court's allowance of a portion of Exxon's initial motion to dismiss. In particular, the Court directed that the claims be narrowed to the time period for which the Permit remains effective or, where the Permit has expired and remains administratively continued indefinitely, as is the case here, that CLF limit its claims to the "near future" so as to avoid claims that are not ripe for decision. Doc. 29 at 2. The Court also determined that, while the *cause* of increased severe weather and other climatic events might be relevant to the claims CLF raises, the issue for the Court in this

[1] As used herein, "Defendants" or "Exxon" refers to ExxonMobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company, collectively.
[2] As used herein, "Permit" refers to EPA NPDES Permit No. MA0000833, as modified on Oct. 12, 2011.

case is whether the climatic changes outlined by CLF were and are occurring during the relevant time frame and whether they should have been considered and addressed by Exxon pursuant to its obligations under the Permit and applicable law. As the Court explained:

> Whether there's a foreseeable imminent risk of substantial change or material change in sea level affecting -- having the potential to affect the Everett terminal or whether there is a foreseeable increase in the intensity, severity, frequency of storms appears to me to be relevant.
> …
> And whether good professional engineering practice, as the term is used in the permit, requires consideration of foreseeable rises in sea level and the frequency and intensity of storms, does appear to me to be relevant and subject to discovery.

Doc. 30 at 115:1–13. CLF amended its complaint accordingly, yet faces a substantively identical Motion to Dismiss, combined with a stilted reading of the Court's ruling. Exxon's positions are inconsistent with the Court's findings and applicable law.

Exxon seeks to convince the Court that it need not comply with the actual terms and conditions of its Permit, in part by attempting to divert the Court's attention to materials from Exxon's aggressive challenges to the Permit during its last reissuance that were not incorporated into and did not alter the Permit's terms. The Permit's clear and stringent requirements remain in full force and are enforceable by the Court. Exxon may have taken some comfort in the outcome of its campaign, but EPA did not ultimately modify the Permit to allow the sort of uncontrolled pollution Exxon asks the Court to countenance. The Permit is clear that all of its terms are enforceable.

Exxon admits that its continuous treatment system is undersized to handle a 10-year 24-hour storm event. That system was designed at a capacity that sends large quantities of polluted water through outfall 01A, resulting in regular, substantial violations of the Permit's numeric effluent limits for that outfall. According to Exxon's own monitoring reports, it frequently and

significantly violates the Permit limits for polycyclic aromatic hydrocarbons ("PAHs"), many of which are potent carcinogens.[3]

To excuse these pollutant discharges directly into the Island End River, Exxon points the Court to the definition of "10-year 24-hour storm event" in the Permit, claiming that it "specifies the volume of water resulting from such a precipitation event as 4.6 inches of rainfall." Doc. 37 at 3–4. It is true that the Permit defines the design storm event as the 10-year 24-hour storm event, a common hydrologic statistic. However, like all statistics, it depends entirely on the data used to calculate it: precipitation records that have (and that Exxon knows have) changed significantly over the past 50 years and continue to change. In Everett and the surrounding area, the 10-year 24-hour storm is getting bigger, with more runoff to manage. Exxon points to the Permit's "*estimate*" of a 4.6 inch rainfall amount as if it were a precise definition. As described in Section III.D, *infra*, it is nothing of the sort; it was an estimate provided for reference. The evidence will show that even the estimate cited in the Permit was based on stale data and insufficient modeling for today's conditions. But the strength of the Permit is that the definition is a narrative description of the statistic, which Exxon must annually examine and integrate into its planning and management to protect the community from its toxic releases.

Similarly, Exxon urges the Court to not enforce the Permit's express requirement to comply with water quality standards ("WQS"). Like the specific numeric effluent limits that Exxon so regularly violates, the WQS incorporated into the Permit must be complied with at the monitoring

[3] Exxon's reliance on footnote 7 of Part I.A.2 of the Permit (Doc. 34-1) to claim that all of the numeric effluent limitations set forth for PAHs in the Table are somehow rendered surplusage and unenforceable is nonsensical. This claim is inconsistent with the terms of the Permit, defies canons of construction, and is entirely self-serving at the expense of the public interest. In addition, this footnote reappeared in the Permit as a result of Exxon's strong-arm campaign against the Permit at the time it was last reissued, and as a result, can only reasonably be read as a statement of EPA's exercise of its enforcement discretion.

location, not at some indeterminate downstream location. Exxon's proposed interpretation of the plain requirements of the Permit would not only render the requirement to comply with WQS a nullity, it would eviscerate the Commonwealth's WQS altogether.

In the end, it is not CLF that dislikes the Permit and seeks to collaterally attack it; it is Exxon. Despite Exxon's best efforts to attack the permit EPA initially issued, EPA did not agree to delete the numeric PAH limits for outfall 01A, did not eliminate the enforceability of WQS at the end of the pipe, and did not precisely and forever freeze the volume of the 10-year 24-hour storm. Rather, the Permit's plain terms are enforceable and Exxon must comply with them—all of them, all of the time—in order to comply with the CWA.

Exxon's motion is rife with allegations that CLF's Amended Complaint was filed in "defiance of" and in "disregard[]" for this Court's ruling on the prior motion to dismiss. Doc. 37 at 9, 21, 35. In this vein, Exxon has appended to its current Motion to Dismiss a supposed compilation of allegations from the Amended Complaint[4] that it asserts "Disregard the Law of this Case." Doc. 38-8. In this list, Exxon includes *its own* quotes, among others, describing the increasing and ongoing effects of climate change.[5] Exxon argues that many of these quotes fall outside the statute of limitations for the case and describe risks that are too speculative and distant to be considered. But the quotes are not themselves alleged violations; CLF's argument is that Exxon, a company acutely aware of changing weather patterns, rising sea levels, warming sea temperatures, and increasing severity of climate-related events—including the foreseeable risks thereof—neglected its legal obligation to protect the residents of Everett, surrounding

[4] The Exhibit identifies 136 out of 356 allegations in the Amended Complaint.
[5] To the extent CLF uses phrases such as "effects of climate change" and "climate change impacts" in this Opposition, it does so because this is the language routinely employed by Exxon, and industry more broadly, to collectively describe increased volatility and severity of weather events; CLF is not attempting to argue the underlying causes of climate change.

communities, and the environment from these risks. To this end, the majority of paragraphs in Exxon's "list" describe the body of knowledge that Exxon has and continues to willfully ignore in its operation of the Terminal and that informs CLF's claims.

This information is included in the Amended Complaint because it demonstrates that Exxon has for years studied the trajectories of climate changes in order to understand the real-world impacts of these increases day-by-day and year-by-year. To the extent certain quotes describe ongoing trends that will continue for years to come, these conclusions reached by industry, scientists, and governments alike demonstrate the foreseeability of these changes continuing in the near term. Despite this knowledge, Exxon has not disclosed information about associated impacts on this Terminal to regulators, nor has it adjusted the Terminal's stormwater pollution prevention plan ("SWPPP"), spill prevention control and countermeasures plan ("SPCC"), or other facility response documents to address spill prevention measures and adapt to these growing risks. Indeed, Exxon confirmed that there have been no structural changes to the facility and no associated updates to the SWPPP since the Permit became effective in 2012. *See* Doc. 30 at 30:16–31:12.

Exxon has not even attempted to comply with its ongoing duty to address certainly impending risks posed by the Terminal. Exxon's stated position in this matter is that there is nothing it need consider related to changing weather patterns, rising sea levels, and increasing severity of climate-related events, making information regarding Exxon's prior knowledge of risks highly relevant.

EPA's *Framework for Protecting Public and Private Investment in Clean Water Act Enforcement Remedies* provides useful guidance on the obligation to consider climate-related risks in the operation and management of a facility under the CWA, stating that "[i]ncreased frequency

and severity of weather events are affecting the ability of communities and regulated entities to adequately protect water resources and maintain compliance with the CWA," and as a result, "EPA will consider relevant climate risks in appropriate CWA enforcement matters." *Framework for Protecting Pub. & Priv. Inv. in CWA Enf't Remedies*, EPA, at 1-2, https://www.epa.gov/sites/production/files/2016-12/documents/frameworkforprotectingpublicandprivateinvestment.pdf (last visited Jan. 18, 2018) (hereinafter EPA *Framework*).[6]

The EPA *Framework* further provides that "[t]he obligation to maintain long-term compliance with the CWA, as well as common sense and sound engineering practices, necessitate that climate impacts be considered in CWA enforcement actions." *Id.* at 3. Accordingly,

> [i]n fashioning a remedy in an administrative or judicial enforcement action or seeking relief from a court under Section 309(b), it is both reasonable and appropriate for the Agency and the courts to take into account and address the impact of climate change on water quality and compliance. Appropriate relief in such cases may include requirements to ensure that a permittee constructs, operates, and maintains its facility in compliance with the CWA and its permit, in light of conditions as they exist now and that are likely to exist in the future as a result of climate change.

Id. at 5. In some circumstances, "EPA will require as part of the remedy that regulated entities implement resilience and adaptation measures based on the results of . . . vulnerability assessments and the expected useful life of the infrastructure in question, as needed to ensure long-term compliance with the CWA." *Id.* at 6. EPA also acknowledges that unique circumstances are present at each individual facility: "it is important for each regulated entity to assess its own vulnerability and consider a range of options that address its particular obligations and goals as well as resource challenges." *Id.* at 9.

[6] EPA specifically states that "[t]he framework applies to all sections of the Clean Water Act." *Id.* at 1 n. 1.

EPA cites its "broad authority under the CWA to assess and address climate risks to the Nation's water quality and the resilience of water quality infrastructure." *Id.* at 5. Because Exxon has failed to meet this particular obligations, it is appropriate for this Court to enforce the CWA and its regulations by "tak[ing] into account and address[ing] the impact of climate change on water quality and compliance." *Id*.

As described herein, CLF's Amended Complaint complies with both the letter and the spirit of the Court's prior ruling and Exxon's Motion to Dismiss should be denied.

LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must 'take all factual allegations as true and [] draw all reasonable inferences in favor of the plaintiff.'" *Pettengill v. Curtis,* 584 F. Supp. 2d 348, 362 (D. Mass. 2008) (quoting *Rodriguez–Ortiz v. Margo Caribe, Inc.,* 490 F.3d 92, 96 (1st Cir. 2007)); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–58 (2007); *Ashcroft v. Iqbal,* 556 U.S. 662, 677–78 (2009); *Ocasio–Hernandez v. Fortuno–Burset*, 640 F.3d 1, 10–11 (1st Cir. 2011).

In considering a motion to dismiss for lack of standing under Rule 12(b)(1), the Court "accept[s] as true all well-pleaded factual averments in the plaintiff's complaint and indulge[s] all reasonable inferences therefrom in his favor." *Katz v. Pershing, LLC*, 672 F. 3d 64, 70 (1st Cir. 2012) (quotations omitted). The Court may also consider material outside the pleadings, such as affidavits, to aid in its determination. *See Gonzalez v. United States*, 284 F.3d 281, 287–88 (1st Cir. 2002). "[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact . . . in the complaint or supporting affidavits." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987) (quotations omitted).

ARGUMENT

I. CLF has Standing to Bring Its Claims.

To establish Article III standing, a plaintiff must sufficiently plead three elements: injury in fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent." *Id.* at 560. (citations omitted). The Supreme Court held in *Clapper v. Amnesty Int'l USA* that an injury is imminent if it is "certainly impending" or, in the alternative, there is a "substantial risk" that the harm may occur. 568 U.S. 398, 414 n. 5 (2013); *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017).

At the September 12, 2017 hearing on Exxon's initial motion to dismiss, the Court found standing, reasoning that "the plaintiff has established injury in fact, causation and redressability for claims for harm that have occurred or are imminent, meaning certainly impending in the sense that there is a substantial risk that they will occur during the existence of the defendant's current permit for the Everett terminal." Doc. 30 at 118:4–9; *see also* Doc. 29 at 1–2. The Court also held, however, that "Plaintiffs do not have standing . . . for claims concerning alleged foreseeable rises in sea level and in severity and frequency of storms in the far future, such as in 2050 or 2100." Doc. 30 at 114:9–12; *see also* Doc. 29 at 2. The Court allowed CLF to amend its complaint to clarify its allegations to reflect that CLF is not litigating about climate change causes or what its impacts will be in 2050 and beyond, consistent with what CLF's counsel explained at the hearing.

Rather, CLF's claims are directed towards Exxon's ongoing failure to comply with Permit requirements, including engineered protective measures, stormwater controls and plans, and the development of spill prevention plans that will sufficiently prepare its Terminal for heavy precipitation events and other events that threaten the Boston area and the Terminal. Exxon's

failure to prevent the discharge of oil or other hazardous substances causes a certainly impending, and substantial risk of, injury to resources surrounding the Terminal and the CLF members that use and enjoy those resources.

This Court previously found on the first motion to dismiss that for each of its claims, CLF alleged injuries that are concrete and particularized.[7] CLF's Amended Complaint again sufficiently alleges such injuries and that its members reside and recreate in the affected area.[8] Further, CLF members are concerned that discharges from the Terminal contain pollutants in levels that exceed the Permit limits, and are afraid that flooding at the Terminal will cause discharges that will further pollute the Rivers and nearby communities.[9] As in *United States v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 688 (1973), these allegations satisfy the requirement that an injury be concrete and particularized. CLF also alleges injuries that are imminent for each of its claims, because the injuries are certainly impending, or there is a substantial risk that the harm may occur. *See Clapper*, 568 U.S. at 414 n. 5.

As the Court previously stated, "there must be proven a substantial risk that the alleged harm will occur during pendency of ExxonMobil's permit for the Everett terminal, which plaintiff in this case is seeking to enforce[]." Doc. 30 at 114:4–7. "The five-year term of the permit has ended, although it continues to be in effect, pending review by the EPA. . . . The EPA may revise the permit . . . or it might reissue the permit without change." *Id.* at 118:10–14. Regardless of

[7] Doc. 30 at 119:7–11 ("In this case, identified CLF members allege that they live near the affected waters, the Island End and the Mystic Rivers, running though Everett and Chelsea, among other towns, and use them for specified recreational activities, such as walking and observing wildlife.").
[8] *See, e.g.,* Doc. 34 at ¶¶ 8–10; *see also* Vidot Declaration, Doc. 21-1 at ¶¶ 2, 4-5, 7; Henderson Declaration, Doc. 21-2 at ¶¶ 2, 4, 5, 7; Bongiovanni Declaration, Doc. 21-3 at ¶¶ 2, 4, 16; Krause Declaration, Doc. 21-4 at ¶¶ 2, 4, 5, 10, 14; Reisner Declaration, Doc. 21-5 at ¶¶ 2, 4.
[9] Doc. 21-1 at ¶¶ 9-11, 12; Doc. 21-2 at ¶¶ 9–11, 13; Doc. 21-3 at ¶¶ 9–12; Doc. 21-4 at ¶¶ 7–9, 13; Doc. 21-5 at ¶¶ 6–8, 10.

whether the Permit is reissued in one year, five years, or ten years, the injuries alleged in the Amended Complaint have in fact happened and are "certainly impending."

In Counts 1 through 5, CLF alleges Permit violations relating to unpermitted discharges, including discharges in excess of the Permit's numeric effluent limits into the Mystic and Island Ends Rivers, as well as the half-moon pond, that violate State WQS, that cause visible oil sheen, and that are inconsistent with the operational requirements of the Terminal. These discharges from the Terminal have already injured CLF members living, working, or recreating in the areas surrounding the Terminal, and these discharges and associated injuries are ongoing. The Court previously recognized CLF's standing to bring these claims. Doc. 30 at 118:4–9.

CLF's Amended Complaint again sufficiently alleges that Exxon's unlawful discharges into the Island End and Mystic Rivers, *see, e.g.,* Doc. 34 at ¶ 87, harm CLF's members' use and enjoyment of the Island End and Mystic Rivers, as well as the ecosystems themselves. *See id.* at ¶ 9; *see also* Doc. 21-1 at ¶¶ 7, 9–11; Doc. 21-2 at ¶¶ 4–7, 9–11; Doc. 21-3 at ¶¶ 7, 9–11; Doc. 21-4 at ¶¶ 4–5, 7–10, 14–16; Doc. 21-5 at ¶¶ 4, 6–8. Environmental plaintiffs establish an injury in fact when they prove that they used the affected area and are persons for whom the aesthetic and recreational values of the area are lessened by the challenged activity. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183. This Court should again find standing as to these claims.

Counts 6 through 14 of the Amended Complaint concern present and ongoing violations of the Permit, specifically, the requirements that Exxon disclose information to regulators, and develop, implement, and maintain an adequate SWPPP and SPCC. Currently, Exxon has not disclosed relevant information, and has not developed nor implemented a SPCC or SWPPP that conforms with the requirements of its Permit to reduce or prevent the discharge of pollutants, to implement best management practices, and to identify all sources of pollution reasonably expected

to affect the quality of stormwater discharges, among other things as set forth in the Amended Complaint.[10] "Just one storm has the capacity to cause great damage." Doc. 34 at ¶ 173 (quoting Ken Cohen, *With Hurricanes, No Matter the Season We'll be Prepared*, ENERGY FACTOR BY EXXONMOBIL (June 19, 2014)). Because Exxon is unprepared to prevent discharges and releases from its Terminal, catastrophic events similar to those occurring throughout the country, *see* Doc. 34 § III.C, could devastate an entire community and the resources upon which it relies. This is exactly what the CWA and RCRA seek to prevent.

Exxon contends that the Amended Complaint's allegations are premised on distant and speculative impacts and that CLF has "concede[d] that its alleged impacts will not occur (if at all) for several decades or more." Doc. 37 at 1. However, by a fair reading, the Amended Complaint does not present distant and speculative impacts. *See* Goldsmith Declaration (attached hereto as Exhibit A) at 6–7, 9–11, 13–14, 16–20, 23–24. CLF quotes researchers and scientists who discuss the trends and ongoing manifestations of climate change and indicate that trends are continuing and effects are aggregating. *See id.* at 13, 17–18.

As described in the Amended Complaint, flooding and precipitation events are occurring at an increasing rate throughout the Northeast, including in the Boston area. These events are exacerbated by influences such as storms and storm surges, sea level rise, and increasing sea surface temperatures, which are each in turn impacted by climate change.[11] The Terminal's location makes it particularly vulnerable to flooding, as well as pollutant discharges and releases caused by flooding, thereby placing those areas surrounding the Terminal at a greater risk of harm.

[10] Inadequate stormwater pollution and spill prevention practices are evidenced in part by the discharges and spills referenced in Counts 1 through 5 of the Amended Complaint.

[11] These events and influences make up the factors identified in the Amended Complaint as causing and/or contributing to the substantial risk of pollutant discharge and/or releases from the Terminal. *See* Doc. 34 § III.B.

The frequency and severity of flooding and precipitation events in the Boston area places CLF members living, working, or recreating near the Terminal at an imminent risk of injury from discharges and releases from the Terminal because Exxon has failed to take necessary action to address and adapt to climate-related impacts.

Coastal infrastructure is already being damaged by sea level rise and heavy downpours. *See* Doc. 34 ¶ 130. Infrastructure failures create a substantial risk of discharges and releases of pollutants, such as the July 2010 severe rainfall event that resulted in a discharge of pollutants from the Terminal into the Island End River. *Id.* ¶ 142. The Permit requires the use of good engineering practices and the implementation of spill prevention and control measures to guard against the very risks that are now present at the Terminal because of Exxon's failure to comply with the Permit's terms. The Amended Complaint sufficiently alleges that flooding and precipitation events, paired with Exxon's failure to comply with its Permit terms that would prevent a discharge or release of pollutants at the Terminal resulting from these events, creates an injury that is "certainly impending."

The injuries alleged in the Amended Complaint have no relation to the year 2050 or 2100. Although Exxon points to allegations referring to the years 2050 and 2100 and attempts to mischaracterize the statements as referring to injuries that will not occur until those dates, Doc. 37 at 21, the paragraphs in the Amended Complaint referencing such dates are actually referring to injuries and impacts that are currently happening and that will continue to get increasingly worse through those dates.[12] *See* Goldsmith Decl. at 13, 17-18 ("[W]hen CLF or its experts cite reports

[12] *See, e.g.,* Doc. 34 at ¶ 183 ("[I]t is *virtually certain* that global means sea level rise *will continue beyond 2100* . . . .") (second emphasis added); *id.* ¶ 185 ("Other researchers have found that cumulative emissions through the year 2015 have already committed global sea level rise to 1.6 meters (range of 0 to 3.7 meters) and that *cumulative emissions through 2050*, under the IPCC

which have a scope to provide forecasts (including projected ranges of potential variation due to statistical interpretation or varied human responses), it does not mean that referenced climate-related impacts do not occur until some specified date. It merely indicates the intended time scale the forecasting exercise was designed to represent."). Further allegations related to climate change remain in the Amended Complaint because they are relevant to the analysis of substantial risk and good engineering practices, among other things. *See* Doc. 30 at 115:1–6; *id.* at 115:9–13*;* Goldsmith Decl. at 17; *see also id.* at 6–7, 9–11, 13–14, 16–20, 23–24.

The Court previously held that CLF's claims are fairly traceable to Exxon's violations of RCRA and the CWA, and that CLF's claims are redressable. Doc. 30 at 120:1–4. This remains true for the claims asserted in the Amended Complaint.

As the Court recognized, *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.* held that a plaintiff can establish a substantial likelihood that the defendant caused his harm by showing that the defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit; (2) into a waterway in which the plaintiff has an interest that is or may be adversely affected by the pollutant; and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiff. 913 F.2d 64, 72 (3d Cir. 1990). The requirement that the plaintiff's injury be fairly traceable to the defendant's conduct does not mean that the plaintiff must show "to a scientific certainty that the defendant's effluent and defendant's effluent alone caused the precise harm suffered by the plaintiffs." *Id.* Here, CLF alleges that Exxon discharges pollutants that are harmful to humans and aquatic life in areas where CLF members walk, drive, bike, and would otherwise swim, and that these discharges have caused the alleged injuries to CLF

Fifth Assessment intermediate emissions pathway, commit Boston to sea level rise of 2.8 meters.") (emphasis added).

members.[13] It is not relevant whether or not any other person has contributed to the pollution in these areas.

Further, each of the claims asserted in CLF's Amended Complaint are redressable. *See* Goldsmith Decl. at 25. As the Court previously found, "[i]f CLF succeeds in proving that the permit is not – that particular requirements of the permit are not being performed, the court can order that they be performed." Doc. 30 at 120:23–121:1. "Similarly, if CLF succeeds in proving that good professional practices are required by the permit and include certain conduct that the defendant has not and is not engaging in, the court could order it to meet those standards." *Id.* at 121:6–9.

For these reasons, CLF has standing to bring each Count in its Amended Complaint.

II. CLF Properly Alleged Imminent and Substantial Endangerment under RCRA.

Exxon argues that CLF has failed to allege a RCRA claim, Doc. 37 at 24; however, as described above, the risks to CLF members of exposure to discharges and/or releases from the Terminal resulting from Exxon's failure to address and adapt to climate-related impacts are imminent and substantial.

RCRA "allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists." *Me. People's Alliance v. Mallinckrodt, Inc.,* 471 F. 3d 277, 279 (1st Cir. 2006). "This is expansive language, which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (citations and quotation omitted); *see also*

[13] *See* Doc. 21-1 at ¶¶ 9–11; Doc. 21-2 at ¶¶ 9–11; Doc. 21-3 at ¶¶ 9–11; Doc. 21-4 at ¶¶ 7–9; Doc. 21-5 at ¶¶ 6–8*; see also* Doc. 30 at 120:19–22.

Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004) ("[T]he plaintiffs need only demonstrate that the waste disposed of 'may present' an imminent and substantial threat.").

"Imminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately." *Mallinckrodt*, 471 F.3d at 288; *see also Dague*, 935 F.2d at 1356 ("A finding of imminency does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: An imminent hazard may be declared at any point in a chain of events which may ultimately result in harm to the public.") (quotations and citations omitted). The requirement that an endangerment be substantial "does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that excess deaths will occur, or that a water supply will be contaminated to a specific degree) . . . . Rather, an endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken." *United States v. Union Corp.*, 259 F. Supp. 2d 356, 400 (E.D. Pa. 2003) (citations and quotations omitted).

"[T]he term 'endangerment' means a threatened or potential harm, and does not require proof of actual harm." *Parker*, 386 F.3d at 1015. As summarized by the First Circuit, "the combination of the word 'may' with the word 'endanger,' both of which are probabilistic, leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)(1)(B) so long as the threat is near-term and involves potentially serious harm." *Mallinckrodt*, 471 F.3d at 296. Plaintiff has met these requisites here.

Exxon's effort to cast climate-related impacts as "remote" or "speculative" is belied by established science, as described in the Amended Complaint. *See* Doc. 34 at ¶¶ 111–205. The

threat CLF and its members have identified "is present *now,* although the impact of the threat may not be felt until later." *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). Indeed, Exxon admits that "[g]iven the Terminal's location, […] a release at the Terminal would likely have catastrophic effects on both human life and the environment." Doc. 34-4 at 5.

It is the cumulative impact of Exxon's CWA violations alleged in Counts 1 through 14 and Exxon's disregard of known risks impacting its Terminal that creates a risk of imminent and substantial endangerment to human health and the environment under RCRA, as CLF has alleged in Count 15 of its Amended Complaint. CLF has sufficiently alleged that the endangerment (i.e., injury) to human health and the environment caused by Exxon's acts and omissions is imminent and substantial and can be abated by an order from this Court.

III. Neither the Permit Shield nor the Collateral Attack Doctrine Bar CLF's Claims.

As Exxon admits, a citizen suit may properly target "a permittee that 'discharges pollutants in excess of the levels specified in the permit,' or otherwise fails to comply with the permit's conditions." Doc. 37 at 10 (citation omitted). "[I]f a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will 'shield' its holder from CWA liability." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., MD*, 268 F.3d 255, 266 (4th Cir. 2001). However, the mere existence of a permit does not shield a discharger from all liability under the CWA. As the Fourth Circuit recently made clear, *Piney Run* "expressly held that a permit shields 'its holder from liability . . . as long as . . . the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements.'" *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 142 (4th Cir. 2017) (quoting *Piney Run*, 268 F.3d at 259) (emphasis added).

The Amended Complaint specifies the exact Permit condition(s) CLF is enforcing and alleges violations of those conditions. "[I]f 'the language [of a permit] is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Fola Coal*, 845 F.3d at 139 (quoting *Piney Run*, 268 F.3d at 270) (quotations omitted). Exxon's self-serving attempts to complicate or even read out the plain language of the Permit do not change the fact that it is in violation of the Permit, and thus cannot avail itself of the permit shield defense.

Further, contrary to Exxon's assertion that CLF's suit is an "attempt to reinterpret the Permit to impose more stringent conditions," Doc. 37 at 10, CLF brought this suit to remedy ongoing violations of the CWA and RCRA. CLF is not challenging the terms of Exxon's Permit, it is enforcing those terms. Doc. 30 at 118:9-10. Thus, Exxon's argument that CLF's claims represent a collateral attack on the Permit—and are therefore untimely—is equally inapposite.[14]

A. CLF is Properly Enforcing the Permit's Operating Conditions.

The Permit contains operational requirements that define circumstances under which Exxon may discharge through each of its three outfalls—outfall 01A, outfall 01B, and outfall 01C:

> [t]he continuous treatment system shall be designed, constructed, maintained, and operated to treat the volume of storm water, groundwater, and other associated wastewaters up to and including 280 gpm through outfall 01C . . . . All wet weather and dry weather discharges less than or equal to the design capacity of the continuous treatment system [280 gpm] shall be treated through the continuous treatment system and discharged at outfall 01C.

Doc. 34-1, Permit at 10–11. Outfall 01C is the preferred outfall for all wet and dry weather discharges because the continuous treatment system provides a higher level of treatment than

[14] *Defs. of Conewango Creek* v. *Echo Developers, LLC.*, No. CIV.A. 06-242 E, 2007 WL 3023927 (W.D. Pa. Oct. 12, 2007); *Palumbo* v. *Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993); and *United States v. South Union Co.*, 630 F.3d 17 (1st Cir. 2010), addressed facial challenges to valid permits and authorizations issued under the CWA and RCRA. In contrast, CLF's allegations do not challenge the issuance of the Permit or its conditions, but rather seek to enforce its terms.

discharges at outfall 01A receive. Contrary to the express terms of the Permit, Exxon frequently discharges at outfall 01A when outfall 01C has not yet reached capacity, *see* Doc. 34-5, and on at least several occasions, Exxon has discharged at outfall 01A when there has been no discharge at outfall 01C at all, *see id.*

These operational requirements do not mean that "as a practical matter, Outfall 01A could never be used," Doc. 37 at 12; rather, use of outfall 01C's capacity must be maximized *before* outfall 01A is utilized, consistent with EPA's intent that the redesigned treatment system "improve effluent quality under all flow conditions." Doc. 34-1, Response to Comments at 1–2.

Exxon's failure to comply with the Permit's operating conditions for its wastewater treatment system is an ongoing violation of the CWA and particularly concerning because the vast majority of its numeric effluent limit violations are occurring at outfall 01A. Exxon's arguments, which are counter to the Permit's terms, as well as the intent of the CWA, do not support dismissal, but rather underscore the need for discovery, including release of continuous flow monitoring data solely in Exxon's possession.

B. CLF is Properly Enforcing the Permit's Numeric Effluent Limits.

With respect to the numeric effluent limit violations alleged in the Amended Complaint, Exxon contends that CLF "uses the wrong effluent limit," Doc. 37 at 12, and asks this Court to disregard *almost an entire page* of its Permit and look only at one sentence found in a footnote. Section I.A.2 of the Permit states that "the permittee is authorized to discharge . . . effluent from Serial Number Outfall 01A to the culvert at the Island End River" and, in the same paragraph, that "[s]uch discharge shall: 1) be limited and monitored by the permittee as specified below" Doc. 34-1, Permit at 3. Directly below that paragraph is a chart listing twenty-nine "Effluent Characteristic[s]" with corresponding "Discharge Limitation[s]" and "Monitoring Requirements."

Id. Sixteen of the twenty-nine effluent characteristics are for PAHs. *Id.* The "Group I" and "Group II" PAHs have a "Discharge Limitation" of "0.031 µg/L." *Id.* This is the limit "CLF purports to enforce for Outfall 01A," Doc. 37 at 13, because this is the limit clearly specified in the Permit for these compounds.

Exxon's contention that "the Permit unambiguously sets a different limit for discharges through Outfall 01A," Doc. 37 at 13—in one sentence in a footnote—would require the Court to improperly read the numeric effluent limits out of the Permit. *See Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1206 (9th Cir. 2013) ("'[A] court must give effect to every word or term' in an NPDES permit 'and reject none as meaningless or surplusage.'") (citations omitted). The reading of the Permit that gives effect to both the numeric effluent limits and the footnote at issue is that Exxon must comply with the numeric effluent limits, but EPA, in exercising its enforcement discretion, agreed that it would deem Exxon to be out of compliance for enforcement purposes only if it exceeds a 10 µg/L threshold. The fact that EPA established its own compliance threshold does not in any way bar CLF's citizen suit enforcing the Permit's express effluent limits.

Exxon attempts to distract the Court with accusations that CLF seeks to replace the permitted limits with limits that "EPA deems below the concentrations which can reliably be measured" and that are "impossible to implement." Doc. 37 at 15. However, Exxon's own Discharge Monitoring Reports disprove this argument. For example, in the last reporting period, which concluded in December 2017, Exxon reported the following values in its Discharge Monitoring Report: Benzo(a)pyrene 0.069 µg/L; Benzo(b)fluoranthene 0.12 µg/L; Chrysene 0.389 µg/L; Fluoranthene 0.932 µg/L; and Pyrene 1.16 µg/L. These values, which notably constitute additional violations of the Permit's numeric effluent limits, clearly demonstrate that Exxon is

capable of measuring—and in fact is measuring—for PAHs *well* below EPA's internal enforcement guidance level.

CLF properly alleges violations of the Permit's numeric effluent limits, and enforcement is not barred by either the permit shield or the collateral attack doctrine.

C. CLF is Properly Enforcing the Permit's Required Compliance with WQS.

Exxon also argues that it is protected by the permit shield defense because CLF has misapplied the State WQS. Doc 37 at 15. Again, the permit shield defense is not available to Exxon, because it has violated—and CLF is enforcing—the conditions of Exxon's Permit requiring that "[s]uch discharge shall: . . . not cause a violation of the State Water Quality Standards of the receiving water," Doc. 34-1, Permit at 3, 5, 6; that "[t]he discharges either individually or in combination shall not cause or contribute to a violation of State Water Quality Standards of the receiving waters," *id.* at 9; that "[t]he discharge shall not contain materials in concentrations or combinations which are hazardous or toxic to human health, aquatic life of the receiving surface waters or which would impair the uses designated by its classification," *id*.; and that "[t]he permittee shall not discharge any pollutant or combination of pollutants in toxic amounts," *id*. at 11. *See Fola Coal*, 845 F.3d at 143 ("*Piney Run* held, as we do today, that a permit holder must comply with all the terms of its permit to be shielded from liability. The terms of Fola's permit required it to comply with water quality standards. If Fola did not do so, it may not invoke the permit shield.").

Exxon argues that EPA determined that "the effluent limits established in the Permit are 'sufficient to ensure compliance with . . . water-quality based standards established pursuant to any State law or regulation.'" Doc. 37 at 17 (citation omitted). CLF is not disputing that; indeed, CWA regulations require that NPDES permits contain any requirements necessary to achieve WQS through limitations on pollutants or pollutant parameters that would cause or contribute to a

violation of State WQS. *See* 40 C.F.R. § 122.44(d). The Permit conditions requiring Exxon to comply with WQS, not discharge pollutants in toxic amounts, and not impair the designated uses of the receiving water are each distinct and enforceable conditions of the Permit, separate from the numeric effluent limits. *See Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) ("state water quality standards generally supplement these effluent limitations, so that where one or more point source dischargers, otherwise compliant with federal conditions, are nonetheless causing a violation of State water quality standards, they may be further regulated to alleviate the water quality violation.") (citing 33 U.S.C. § 1311(b)(1)(C)). Exxon's assertion that WQS can only be measured at a location removed from the Terminal would render the requirement to comply with WQS meaningless. If, as the Permit requires, a facility must comply with WQS, the sampling of actual releases from the facility is the only way to measure or test such compliance.

Finally, contrary to Exxon's assertion that the receiving water is not impaired for PAHs, Doc. 37 at 17, CLF's Amended Complaint clearly alleges that throughout the entire time period covered by this enforcement action, the relevant segment of the Mystic River—which includes the Island End River—was listed as impaired for "Petroleum Hydrocarbons." Doc. 34 at ¶¶ 57–59. The term "Petroleum Hydrocarbons" includes PAHs.[15] Exxon not only regularly discharges at levels that violate WQS applicable to PAHs, but also contributes to the long-standing and well-documented petroleum hydrocarbon impairment in the Island End and Mystic Rivers. These are clear violations of the Permit that are subject to the Court's jurisdiction.

[15] *See Toxicological Profile for Total Petroleum Hydrocarbons (TPH)*, U.S. Dep't of Health & Human Servs., Pub. Health Serv., Agency for Toxic Substances and Disease Registry at App. D, Table D-1 (Sept. 1999), https://www.atsdr.cdc.gov/toxprofiles/tp123.pdf (containing a list of hundreds of petroleum hydrocarbons, including the PAHs associated with the Terminal).

D. CLF is Properly Enforcing the Permit's Conditions Requiring Exxon to Disclose, Consider, and Address Climate-Related Impacts.

Exxon has long known of the threats posed by precipitation and flooding, which are exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures, *see* Doc. 34 at ¶¶ 111–205, 218–233, and has long been well-aware of the present impacts and risks of climate change, *see id.* Exxon's current stated position on climate change is: "[t]he risk of climate change is clear and the risk warrants action." *Id.* ¶ 116. Yet Exxon has made no effort to consider or address such risk with respect to the Terminal.

CLF's claims related to Exxon's failure to disclose, consider, and address climate-related impacts on the Terminal are not barred by either the permit shield defense or the collateral attack doctrine. Each claim in Counts 6 through 14 specifies the precise Permit conditions that Exxon has violated and CLF is enforcing. *See id.* ¶¶ 264–342. The Permit and CWA regulations require Exxon to develop, implement, and update its facility plans to account for identified potential pollution sources and associated risks, and prepare its plans in accordance with good engineering practices. These requirements obligate Exxon to consider and address climate-related impacts.

Exxon's arguments regarding the definition of a 10-year 24-hour precipitation event are similarly unavailing. The Permit provides that

> [t]he collection, storage and treatment systems shall be designed, constructed, maintained and operated to treat the total equivalent volume of storm water, groundwater, hydrostatic test water, boiler condensate, fire testing water, truck wash water, effluent pond water and continuous treatment system filter backwash water which would result from a 10-year 24-hour precipitation event, which volume shall be discharged through outfall 01C and outfall 01A.

Doc. 34-1, Permit at 11. The Permit further provides that the "'*10-year 24-hour precipitation event*' shall mean a rainfall event with a probable recurrence interval of once in ten years." *Id.* at 2. The Permit then states that "[t]he 10-year 24-hour rainfall in Boston is *estimated* at 4.6 inches."

Id. (emphasis added, citation omitted). The Permit clearly does not, as Exxon claims, "explicitly define[]" the 10-year 24-hour precipitation event as 4.6 inches of rainfall. Doc. 37 at 26.

Exxon's suggestion that the volume of water resulting from a 10-year 24-hour precipitation event is limited to a static numeric figure is contrary to both the Permit's express language and the reality of such weather events, which, as CLF has demonstrated, continue to increase in volume, occurrence, and severity. It is, however, consistent with Exxon's broader approach to impacts of climatic changes at the Terminal, whereby Exxon treats the Permit and its obligations flowing therefrom as stagnant. Exxon contemplates a scenario in which the SWPPP, SPCC, and other facility response documents require no affirmative obligation on the part of Exxon as owner/operator once the Permit is in place. This position is untenable—standards such as good engineering practices require acknowledgement that environmental conditions change over time, and relevant precautions must be updated accordingly. Exxon bears the burden of compliance with *all* permit conditions from the date of final adoption forward, regardless of any informal assurances from regulators that may have occurred.[16]

Finally, the fact that terms and phrases in Exxon's Permit such as "good engineering practices" and "identify sources of pollutants" are "not unique to the Terminal's Permit" and "appear in near-identical form in other publicly available permits" does not affect their enforceability. *See* Doc. 34-1, NPDES Part II Standard Conditions at 2 ("The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the

[16] *See Fola Coal*, 845 F.3d at 145 ("Further, even if Fola had offered evidence that WVDEP made such assurances when it issued Fola's renewal permit in 2009, that would not foreclose the Coalition from bringing this lawsuit. For Congress enacted the citizen suit provision of the Clean Water Act to address situations, like the one at hand, in which the traditional enforcement agency declines to act. An agency's informal assurance that it will not pursue enforcement cannot preclude a citizen's suit to do so.") (citations omitted).

[CWA] and is grounds for enforcement action").[17] The Permit also provides that "[t]he permittee shall comply with the terms of its SWPPP." Doc. 34-1, Permit at 13. Exxon's hyperbole—arguing that a ruling in CLF's favor in this case would mean that "all NPDES permits and SPCCs impose this requirement, notwithstanding that neither Congress nor EPA ever intended such a result"—misses the point.[18] CLF has brought *this* enforcement action against *this* Defendant to cure violations of *this* Permit at *this* Terminal. The fact that other facilities' permits may contain similar requirements does not in any way affect CLF's ability to pursue this action.

E. Dismissal Based on the Permit Shield Defense or Collateral Attack Doctrine Would be Premature at this Stage in the Litigation.

CLF has more than met the initial pleading standard and has complied with the Court's mandate to amend the complaint. Each of CLF's claims is entitled to further factual investigation through discovery, and any permit shield defense should be considered by the Court based on a fully-developed record. *See CLF v. Pease Dev. Auth*., No. 16-CV-493-SM, 2017 WL 4310997, at *17 (D.N.H. Sept. 26, 2017) (rejecting motion to dismiss on the basis of permit shield defense where "[t]he parties' arguments regarding the defense raise questions well beyond the factual allegations in CLF's complaint, and draw support from extrinsic evidence not properly before the court at this early stage of the litigation").

[17] CLF disagrees with Exxon's dismissive characterization of its legal obligations, but in any case, a similar argument regarding citizen suit enforceability of the term "Best Technology Available" in a Permit condition was rejected in *Hudson Riverkeeper Fund, Inc. v. Orange & Rockland Utils., Inc*. 835 F.Supp. 160, 164-165 (S.D.N.Y. 1993). (defendant argued plaintiff's attempt to enforce allegedly vague permit condition was "actually a collateral attack on the terms of the permit, not an enforcement claim" but court "conclude[d] as a matter of law that [the condition] is not so vague or ambiguous as to be useless, lacking in meaning, or unenforceable. Best Technology Available, under the statute, is something which exists, and can be ascertained as fact.").

[18] Moreover, the simple presence of this language in Exxon's Permit (and apparently many other permits) belies its claims. Usage in this Permit, many other permits, and in applicable regulations appears to underscore EPA's very intent to obtain compliance with this obligation. Why else would EPA include such language?

IV. Exxon's Arguments About Deference to EPA are Unpersuasive.

Exxon devotes significant effort to set up the straw proposition that EPA's failure to expressly mention climate change in the Permit conditions or various manuals and guidance documents constitutes an affirmative determination that climate-related impacts cannot be considered in determining compliance with the Permit. Doc. 37 at 29–31. Exxon further states, without any actual support, that this lack of any affirmative statement by EPA is entitled to deference by the Court.[19] On the contrary, EPA has made it clear that climate-related impacts can and should be considered in determining Permit compliance, *see* EPA *Framework*, *supra* at 5-6, and CLF's claims based on climate-related impacts fall squarely within the scope of enforceable conditions in the Permit.

First, EPA has not commenced any enforcement action that would preclude CLF's suit. Inaction by government authorities in the face of violations is the *sine qua non* of CWA and RCRA citizen suits. Under the CWA, a citizen may commence suit only when enforcement agencies fail to commence and diligently prosecute enforcement prior to the filing of a duly noticed citizen suit complaint in a federal district court. *See* 33 U.S.C. § 1365(a), (b)(2); *Atl. States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991). Citizen plaintiffs cannot be estopped from maintaining a suit because of an alleged waiver or inaction by government officials. *S.P.I.R.G. v. Anchor Thread Co.,* CIV. No. 84-320 (GEB), 1984 U.S. Dist. LEXIS 23153, at *12–14 (D.N.J. Oct. 1, 1984).

[19] Exxon's reliance on *Molosky v. Washington Mutual, Inc.*, 664 F.3d 109, 118 (6th Cir. 2011), is misplaced. In *Molosky*, the court afforded deference to HUD's definition of the term "settlement services" in the context of a class action where the scope of what was covered under the term was at issue in the case. *See id.* No defined term is at issue here.

Second, as mentioned by Exxon, EPA's Permit Writers' Manual, adopted in 2010 before the Permit was issued, expressly "requires consideration of climate change." Doc. 37 at 30. While Exxon seeks to limit the scope of the Manual to "thermal effluent variances and patterning upstream flow of a discharge," *id.,* the Manual's mandate to consider climate change in characterizing receiving water upstream flow is directly applicable to the Terminal. In seeking to avoid the Permit's condition requiring compliance with water quality standards, Exxon argues that compliance only need be determined for the "discharges, once released and diluted by the receiving water." Doc. 37 at 16. But climate change must be considered, consistent with the Manual, to understand the flow conditions in the Island End River. Exxon misses the point of the climate change reference in the Manual. The reference to "receiving water upstream flow" in the Manual is *an example* of a "receiving water critical condition" where climate change must be taken into account. Other such conditions include "tidal flux and temperature" which are just as affected by climate change. *Id.* at 30, n. 70.

Lastly, the Court should reject Exxon's argument that EPA's failure to make statements about climate change in various documents is entitled to deference. *Id.* at 30. EPA's failure to make a statement indicates only silence. ("In these circumstances, where Customs' conspicuous silence raises the question of whether there is an official 'agenc[y] construction' of the relevant statute, we decline to sua sponte extend *Chevron* deference."); *San Luis & Delta-Mendota Water Authority v. Salazar*, 666 F. Supp. 2d 1137, 1156–57 (E.D. Ca. 2009) ("The agency's silence cannot be afforded deference.") (citing *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 366 (2007)). Even where an agency with express authority was a party in the litigation (which is not the case here), the Federal Circuit in *Texport* did not defer to the agency's silence but rather reached the merits of the disputed legal interpretation and ruled on the matter. *Texport*, 185 F.3d

at 1294–95. The Court should do the same here. CLF's claims based on climate-related impacts fall squarely within the mandatory Permit conditions and are enforceable under the CWA. *See* EPA *Framework*, *supra* 5-6. They are subject to Court review through presentation of fact and opinion testimony.

Exxon's argument that the Court should dismiss CLF's claims regarding climate-related impacts based on "fair warning" limits should also be rejected. CLF's claims are entirely founded on the plain language of the Permit conditions, not new, retroactive interpretations of regulations as in the cases cited by Exxon.[20] Doc. 37 at 28. The Permit's mandate that Exxon must use "good engineering practices" establishes a duty of care based on information known to reasonable engineers during the applicable timeframe and requires annual certifications under penalty of perjury that this standard, among other Permit requirements, is met. Exxon itself acknowledged in 2012 that this standard required consideration of "severe precipitation event[s]" and "severe flooding," Doc. 34-10 at 30–31, and has acknowledged that the 2010 EPA Permit Writers' Manual expressly includes consideration of climate change for "receiving water critical conditions," including "patterning upstream flow," Doc. 37 at 30 n. 70.

These conditions directly relate to compliance with Permit conditions governing the Terminal SWPPP. Doc. 34-1, Permit at 13–14. Furthermore, regardless of EPA's statements and

[20] Exxon's citation to *Wisconsin Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013) ("*Flambeau Mining*") is a red herring. Plaintiffs in *Flambeau Mining* attacked the validity of the permit held by defendant, a permit with which defendant was in full and complete compliance 727 F.3d at 705, 711. The *Flambeau* court, noted that "if a [NPDES] permit holder discharges pollutants *precisely in accordance with the terms of its permit*, the permit will 'shield' its holder from CWA liability," *id*. at 706 (emphasis added), and held that "where the permitting authority issues a facially valid NPDES permit and the permit holder lacks notice of the permit's (potential) invalidity, we hold that the permit shield applies" *id.* at 711. The factual and legal analysis employed by the *Flambeau* court are inapplicable here. CLF is not attacking the validity of Exxon's Permit, it is enforcing the Permit's terms and conditions.

actions or CLF's arguments, as discussed in Section III.D, *supra*, Exxon has been aware of climate change risks for decades, has acknowledged that action is required to address those risks on numerous occasions, and has engineered facilities other than the Terminal to address those risks. Exxon is under an express duty to disclose this information to EPA, and to act on information in its possession to implement, amend, and update its SWPPP. Doc. 34-1, NDPES Part II Standard Conditions at 9 ("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 Regional Administrator, it shall promptly submit such facts or information."); *id*. at 4 ("The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment."); Doc. 34-1, Permit at 14 ("The permittee shall amend and update the SWPPP within 30 days for any changes at the facility affecting the SWPPP.").

The good engineering standard is consistent with the statutory scheme of the CWA, which places rigorous demands on dischargers to achieve higher and higher levels of pollution abatement.[21] The Amended Complaint sufficiently alleges that Exxon has failed to use good engineering practices at the Terminal, in part because it has not designed or adapted the Terminal or its wastewater treatment system to address precipitation and/or flooding, which is exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures. Doc. 34 at ¶¶

[21] *See Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 123–24 (D.C. Cir. 1987) ("[T]he [CWA] regulatory scheme is structured around a series of increasingly stringent technology-based standards . . . . Thus, the most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing . . . This policy is expressed as a statutory mandate, not simply as a goal . . . . the nature of the statutory scheme . . . pushes all dischargers to achieve ever-increasing efficiencies and improvements in pollution control.").

88–90. The Amended Complaint contains numerous allegations of Exxon's inadequate infrastructure design, *id.* ¶ 14, as well as statements setting forth the well-known risks associated with inadequate infrastructure, *id.* ¶¶ 137–140, and statements from engineers, including those at Exxon, confirming that good engineering practices account for these risks when designing and/or updating facilities. *Id.* ¶¶ 218-227.[22] Exxon is not using good engineering practices, as evidenced by the Terminal's past failures when faced with severe rainfall. *See id.* ¶ 142.

At this stage of the litigation, these allegations are sufficient to survive Exxon's Motion to Dismiss; CLF need not propose an alternate design to the Terminal, and discovery will be needed to uncover further specifics as to the Terminal's inadequacies and how those must be remedied to protect CLF members from further injury.

V. The Terminal's SPCC is an Enforceable BMP and Permit Condition.

CWA regulations provide, in relevant part, that "each NPDES permit shall include" "[b]est management practices (BMPs) to control or abate the discharge of pollutants" when "[a]uthorized under section 402(p)[23] of the CWA for the control of storm water discharges" and "[t]he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA." 40 C.F.R. § 122.44(k).

---

[22] Exxon argues that engineers only take climate change-related impacts into account when designing facilities with intended lifespans "far in excess of the five-year term applicable to NPDES permits. . . ." Doc. 37 at 31–32. No honest argument can be made that Exxon constructed its Terminal with an intention to only operate it for five years and had no intention of operating beyond the term of a single permit; one only has to look at Exxon's application to extend the Permit to conclude that is not a serious argument.

[23] Section 402(p) exempts certain discharges comprised entirely of stormwater from the requirement to obtain an NPDES permit, *see* 33 U.S.C. § 1342(p)(1); however, the exemption does not apply to discharges associated with industrial activities, and the statute specifically requires that "[p]ermits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311," *id.* § 1342(p)(2)–(3). Thus, discharges associated with industrial activities, including discharges from the Terminal, are subject to the regulation requiring permits to include BMPs to control or abate the discharge of pollutants. *See* 40 C.F.R. § 122.44(k).

Accordingly, the Permit requires that "[t]he SWPPP shall include [BMPs] for on-site activities that will minimize the discharge of pollutants in storm water to waters of the United States." Doc. 34-1, Permit at 13. The Permit lists specific elements that the SWPPP must contain, including "[a] description of all storm water controls, both structural and non-structural. BMPs must include . . . **spill prevention and response procedures."** *Id.* (emphasis added). Exxon's SWPPP contains a section describing spill prevention and response BMPs, which states that "[d]etails regarding spill prevention and response are provided in the Everett Terminal's [SPCC] Plan and Facility Response Plan (FRP)." SWPPP for ExxonMobil Oil Corporation Everett Terminal at 21 (Oct. 2013), https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d280a51809&fromSearch=true.

Exxon itself has elected to incorporate its SPCC as a condition of its Permit and rely on its SPCC and Facility Response Plan as the spill prevention and response BMPs required by its Permit. Exxon cannot both use its SPCC to attempt to meet the Permit requirement that it implement spill prevention and response procedures and claim that its SPCC bears no relation to the Permit. The SPCC is an enforceable condition of Exxon's Permit, and CLF's claims related to the SPCC are properly brought under the CWA.

VI. CLF has Sufficiently Alleged Ongoing Violations of the CWA.

"The most natural reading of 'to be in violation' [under 33 U.S.C. § 1365(a)] is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. "The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be '*alleged* to be in violation.'"

Id. at 64; *see also SURCCO v. PRASA*, 157 F. Supp. 2d 160, 164–65 (D.P.R. 2001), *on reconsideration* (July 26, 2001) ("Mere allegations of violation are sufficient to establish an ongoing harm since the 'good faith' pleading requirements are sufficient to protect Defendants from frivolous allegations.") (citing *Gwaltney*, 484 U.S. 49).

"[P]laintiffs can establish that violations are continuous or intermittent either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Nat. Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 501 (3d Cir. 1993) (citations and quotations omitted). "A continuing likelihood of intermittent or sporadic violations exists until there is no real likelihood of repetition," and "a real likelihood of repetition remains so long as a discharger has failed to take remedial measures that clearly eliminate the causes of the violations." *Id.* (citations and quotations omitted).[24]

CLF has sufficiently alleged past, current, and ongoing violations of the CWA at the Terminal. With respect to Exxon's violations of the Permit's numeric effluent limits, CLF's Amended Complaint alleges that "[t]hese violations are ongoing and continuous, and barring a change at the Terminal and full compliance with the Permit and the Clean Water Act, these violations will continue indefinitely." Doc. 34 at ¶ 248. As discussed herein, the alleged violations of the Permit's applicable PAH limits have continued after CLF's complaint was filed. There is no

[24] *See also P.R. Campers' Ass'n. v. P.R. Aqueduct & Sewer Auth.*, 219 F. Supp. 2d 201, 216–17 (D.P.R. 2002) (finding that plaintiff met both requirements for alleging an ongoing violation—although it only had to meet one—where plaintiff alleged exceedances of permitted numeric effluent limits after complaint was filed, and "recurrence of intermittent or sporadic violations" at defendant's plant was "not an impossibility").

evidence that Exxon has taken any remedial measures that would clearly eliminate the causes of these violations, thus there is a continuing likelihood of intermittent or sporadic violations.

CLF has also sufficiently alleged ongoing violations with respect to Exxon's violation of the Permit's prohibition on visible oil sheen, foam, or floating solids. Even assuming that three out of the four incidents are not attributable to Exxon[25] as Exxon claims, *see* Doc. 37 at 19, at least one incident *has* been specifically attributed to Exxon. That incident occurred in October 2015, and there is no evidence that Exxon has taken any remedial measures that would clearly eliminate the cause of this violation. Moreover, the soils and groundwater at the Terminal are heavily contaminated with oil and grease,[26] and heavy precipitation events and storm surges will continue to mobilize these contaminants off-site and into the Island End and Mystic Rivers, causing a continuing likelihood of intermittent or sporadic violations.[27]

VII. CLF has Properly Alleged that the Half-Moon Pond is a Water of the United States and Exxon's Discharges of Pollutants into It are Point Source Discharges.

The half-moon pond is a remnant of the Island End River that was impounded by Exxon's predecessors long before the enactment of the Clean Water Act, and both was and is a water of the

[25] CLF does not concede that Exxon is not responsible for all four of the incidents referenced. The "Source" of the 2011 incident is listed as "Unknown," but the "Location" is listed as "52 Beacham St.," which is the address of Exxon's Everett Terminal. Furthermore, while Sprague Energy is a separate corporate entity, Exxon's Permit Fact Sheet confirms that "ExxonMobil is responsible for storm water and any other discharges from Sprague Energy into ExxonMobil's storm water collection system." Doc. 34-1, Fact Sheet at 8.

[26] *See* Doc. 34-1, Fact Sheet at 11–12 (stating that on-site groundwater is "generally contaminated" and that "Contaminated groundwater infiltration into the collection system contributes a constant flow of oil to the treatment works. . . . ExxonMobil has taken no action to date to mitigate the resulting infiltration of contaminated groundwater into the storm drains and ultimate discharge to Island End River.").

[27] The Supreme Court has held that evidence of past violations, like those identified in the complaint, can help prove a continuing violation as well as establish the likelihood of future violations. *Gwaltney*, 484 U.S. at 58–59.

United States.[28] Exxon's reliance on *Village of Oconomowoc Lake* v. *Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994), is misplaced, because in that case discharges from an artificial pond went to groundwater, *id*. at 966, while here CLF alleges point source discharges through groundwater[29] and over the ground to the half-moon pond.

The "touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped," *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994). "Whether a discharge occurred from a point source is a question of fact," and an "entire facility or industrial plant may be a point source." *Williams Pipe Line*, 964 F. Supp. at 1318-19. The "concept of a point source was designed to…embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Dague*, 935 F.2d at 1354–55 (quoting *United States v. Earth Sciences, Inc*., 599 F.2d 368, 373 (10th Cir. 1979)). Decisions from jurisdictions across the country have made clear that the term "point source" extends well beyond pipes, culverts and stormwater collection and disposal

[28] *See* CLF's demonstrative, submitted to the Court at the Sept. 12, 2017 Motion Hr'g as Ex. B, at 32-35 (containing imagery of the historical extent of the Island End River), Doc. 30 at 32:5-7.

[29] Federal decisions from across the country have held that the CWA covers discharges to surface waters via hydrologically connected groundwater. *See, e.g.*, *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 8, 2011) ("[G]roundwater is subject to the CWA provided an impact on federal waters."); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (referring to EPA's interpretation and stating "there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to" the CWA); *Northwest Envtl. Def. Ctr. v. Grabhorn, Inc.,* No. CV-08-548-ST, 2009 WL 3672895, *11 (D. Or. Oct. 30, 2009) ("In light of the EPA's regulatory pronouncements . . . CWA covers discharges to navigable surface waters via hydrologically connected groundwater."); *Hernandez v. Esso Std. Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater.").

systems to include any discrete conveyance traceable to a single discharger, including, for example, piles of materials or debris, equipment, vehicles, overflowing sumps, eroded channels, and paved surfaces.[30] CLF should be allowed to prove, on summary judgment or at trial, that Exxon's discharges to the pond are jurisdictional. The allegations in the Amended Complaint are more than adequate to meet the pleading standard at this stage of the litigation.

VIII. CLF's Amended Complaint Should Not be Dismissed with Prejudice.

There is no support for Exxon's argument that CLF's Amended Complaint should be dismissed with prejudice. The case cited by Exxon, *Rife v. One W. Bank, F.S.B*., in support of its argument that "granting CLF yet another opportunity to amend would be futile," Doc. 37 at 33, is unpersuasive. In *Rife*, plaintiff's "claim was filed outside the applicable 5-year statute of limitations" and plaintiff "could not avail himself of any tolling mechanism, equitable or otherwise." 873 F.3d 17, 19 (1st Cir. 2017). No such jurisdictional bar to CLF's claims exists here. Nor is CLF seeking to further amend its complaint. CLF's Amended Complaint is properly before the Court.

Exxon's reliance on *Aponte-Torres v. Univ. of Puerto Rico* is similarly misplaced, where the First Circuit upheld the District Court's decision that plaintiffs "had been 'afforded discovery precisely to supplement their allegations and [had] failed to adequately do so'; thus, the court found

[30] *See, e.g., Dague,* 935 F.2d at 1354–55 (leachate seeping from defendant's landfill into groundwater which surfaces in nearby off-site wetland and then passes through off-site culvert that is not owned or controlled by defendant is a point source discharge); *Parker*, 386 F.3d at 1009 (holding that "debris and construction equipment qualifies as a point source under the CWA"); *Earth Sciences*, 599 F.2d at 374 (sump pit used to collect leachate solution that overflowed due to excessive collection of rainwater constitutes a point source); *see also* EPA, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (1990) ("[P]oint source discharges of storm water result from structures which increase the imperviousness of the ground which acts to collect runoff, with runoff being conveyed along the resulting drainage or grading patterns.").

'no reason [to] expend scarce judicial resources' in a situation in which the plaintiffs had 'already twice failed to state a claim.'" 445 F.3d 50, 54 (1st Cir. 2006). CLF has not yet had any opportunity to conduct discovery in this case, and this Court should deny Exxon's Motion to Dismiss and afford CLF that opportunity. Ironically, Exxon's attempts to cherry-pick various pieces of information that purportedly "tell a very different story about the Terminal's compliance with the CWA than CLF depicts," Doc 37. at 34, actually demonstrate the necessity of developing a complete factual record in this case through the discovery process.

Finally, the serious—and completely unfounded—accusation levied by Exxon that CLF has violated its duty of candor to the Court, *id.*, is shocking and offensive. The case cited by Exxon, *In re Stallworth*, involved an attorney who repeatedly and intentionally lied and misrepresented facts to the Court. No. 11-19919-WCH, 2012 WL 404952, at *7 (Bankr. D. Mass. Feb. 8, 2012). CLF fails to see how opposing parties disagreeing about the meaning and significance of Exxon's selected tidbits of information taken out of context, especially at this early stage of litigation before a factual record has even been fully developed, could in any way be equated with the behavior in *Stallworth.* Again, if anything, Exxon's argument sharply illustrates the need for discovery and further factual development in this case.

CONCLUSION

For all the foregoing reasons, Exxon's Motion to Dismiss should be denied.

ORAL ARGUMENT REQUEST

CLF respectfully requests oral argument on Exxon's Motion to Dismiss.

Respectfully submitted,

CONSERVATION LAW FOUNDATION, INC.

By its attorneys:

/s/ Zachary K. Griefen
Zachary K. Griefen, Esq., BBO# 665521
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
zgriefen@clf.org

/s/ Heather A. Murray
Heather A. Murray, Esq., BBO# 696356
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1716
hmurray@clf.org

/s/ Christopher M. Kilian
Christopher M. Kilian, Esq.*
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4015
ckilian@clf.org

/s/ Allan Kanner
Allan Kanner*
Elizabeth B. Petersen*
Allison S. Brouk*
Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
(504) 524-5777
a.kanner@kanner-law.com
e.petersen@kanner-law.com
a.brouk@kanner-law.com

*Admitted Pro Hac Vice