IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, Inc.,	)	
Plaintiff,	)	
v.	)	Case 1:16-cv-11950 (MLW)
EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, and EXXONMOBIL PIPELINE COMPANY,	)	
Defendants.	)	

(CORRECTED VERSION)

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT[1]

Relying on mischaracterizations of the Permit, ExxonMobil's arguments, and its own pleadings, CLF's Opposition fails to cure any of the Amended Complaint's (the "AC") fatal deficiencies. CLF's non-climate change claims are barred by the permit shield, the collateral attack doctrine, and the jurisdictional provisions of the CWA. And because CLF ignored this Court's directive to limit its climate change claims to weather-related conditions that allegedly will impact the Terminal in the near term, the standing and RCRA defects in the original complaint remain in the AC. CLF's attempts to rewrite the Permit also continue unabated. CLF seeks to transform a *per minute* discharge requirement into a *daily* threshold, impose a numeric effluent limit that cannot be reliably measured, and invent new ways to measure Permit compliance. Each attempt is improper and contrary to law. And CLF's efforts to redefine the concept of "good engineering practices," and reliance on EPA guidance mooted by Executive Orders, fare no better. The AC should be dismissed in its entirety and with prejudice.

ARGUMENT

I. The Permit Shield and Collateral Attack Doctrine Bar Counts 1–3

A. Design Flow Conditions (Count 1)

The Permit does not support CLF's attempt to impose liability on ExxonMobil any time

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[1] Unless otherwise specified, defined terms retain their meaning from ExxonMobil's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint ("Mot."), ECF No. 42. "Opp. at __" are references to Plaintiff's Opposition to Defendants' Motion to Dismiss (ECF No. 39). "WG Decl." refers to the Declaration of Wendi Goldsmith in Support of Plaintiff's Opposition (ECF No. 40-1). ExxonMobil submits that this declaration should be struck in its entirety, as it improperly offers legal opinions on the validity of CLF's claims. A court may consider "affidavits" for purposes of the Rule 12(b)(1) analysis, but not in its Rule 12(b)(6) analysis. *Doucot* v. *IDS Scheer, Inc.*, 734 F. Supp. 2d 172, 180 (D. Mass. 2010); *Gonzalez* v. *United States*, 284 F.3d 281, 288 (1st Cir. 2002). But Rule 12(b)(1) may not be used "as a feint to get before the Court extrinsic evidence" in opposition to a Rule 12(b)(6) motion. *Pulse Creations, Inc.* v. *Vesture Grp., Inc.*, 154 F. Supp. 3d 48, 52 n.3 (S.D.N.Y. 2015). Goldsmith's declaration is devoted overwhelmingly to rebutting legal arguments made pursuant to Rule 12(b)(6). CLF tacitly concedes this when it notes that the declaration bears on "the analysis of substantial risk and good engineering practices." (Opp. at 13.) The only portions of the declaration devoted to the imminence inquiry consist entirely of legal conclusions. (*See, e.g.*, WG Decl. ¶ 8 (AC is "consistent with the Court's initial ruling.").) But an expert may not testify as to legal conclusions. *Holmes Grp., Inc.* v. *RPS Prods., Inc.*, No. 03-40146-FDS, 2010 WL 7867756, at *6 (D. Mass. June 25, 2010).

the Terminal discharges through outfall 01A—which CLF admits the "system was designed" to do. (Opp. at 2.) As CLF concedes, the Permit provides that the Terminal's "systems shall be designed" to treat the total equivalent volume of "water which would result from a 10-year 24-hour precipitation event, which volume shall be discharged through outfall 01C and outfall 01A." (Opp. at 22.) And discharge is expressly permitted through outfall 01A whenever flows to outfall 01C exceed "280 gpm."[2] CLF does not dispute that, since the Permit was issued, the volume of water encountered at the Terminal has never exceeded the capacity of its treatment system.[3] Nor has CLF alleged that the Terminal has discharged effluent through outfall 01B.[4]

Instead, CLF alleges violations of a phantom 403,200 gallons per *day* requirement found nowhere in the Permit. (Opp. at 18 (citing AC Ex. E).) Contrary to its prior protestations,[5] CLF now acknowledges that Count 1 is based on the nonsensical theory that outfall 01A may not discharge a single drop until outfall 01C has discharged at maximum capacity all day long. (WG Decl. ¶ 17.) The text of the Permit plainly refutes CLF's theory, and CLF's reliance on generalized EPA statements about "improv[ing] effluent quality" does nothing to change this requirement. (Opp. at 18 (citing AC Ex. A, Response to Comments at 1–2).) The Permit fails entirely to support CLF's assertion that discharging stormwater through outfall 01A must be avoided, and to do so, the Terminal must store discharge that exceeds outfall 01C's maximum capacity in a tank that is designed for extreme weather events. (WG Decl. ¶ 17.) CLF's attempt to rewrite the Permit's design flow conditions constitutes an impermissible collateral attack on

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2 *See* AC Ex. A, Permit at 10–11.

3 AC Ex. E at 1. While CLF claims that, on "several occasions," the Terminal discharged through outfall 01A without making any discharges through outfall 01C, its own evidence confirms that all of these incidents occurred in early January 2012, when the new treatment system for 01C was either not yet operational or just starting up. *Id.* Because CLF does not allege this situation ever recurred after the new treatment system became fully operational, CLF fails to allege an ongoing violation. *See Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1092–94 (1st Cir. 1986).

4 AC Ex. A, Response to Comments at 3; Toal Ex. 3 at 8–11.

5 Sept. 12, 2017 Hr'g Tr. 105:21-23.

the Permit, and is also barred by the permit shield. (Mot. at 9.)

B. Numeric Effluent Limits (Count 2)

Contrary to CLF's accusations, ExxonMobil has never argued that the Permit authorizes "uncontrolled pollution." (Opp. at 2.) Quite the opposite, ExxonMobil asserts that the Permit expressly imposes clear limits: "Compliance/non-compliance" for "discharges at outfall 01A shall be 10 µg/L for individual PAHs."[6] In fact, CLF concedes that the Permit's 10 µg/L compliance limit restricts EPA's enforcement, (Opp. at 3 n.3, 19), but inexplicably insists that CWA citizen suits are unaffected. (Opp. at 19.) Not so. "[P]rivate citizens are given a more limited enforcement role" than EPA under the CWA. *Paolino* v. *JF Realty, LLC*, 710 F.3d 31, 35 (1st Cir. 2013); *see also Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60–61 (1987). And not a single authority supports CLF's theory that citizens may enforce more stringent effluent limits than EPA. *See Karr* v. *Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) (describing EPA's authority to "negotiate" agreements with permit holders that bind and restrict citizen suits). By asserting that the Permit's compliance limit is irrelevant to a CWA compliance determination, it is CLF—not ExxonMobil—that seeks to render the terms of the Permit "meaningless." (Opp. at 19.)

In its Opposition, CLF fails to address ExxonMobil's argument that the 0.031 µg/L limit CLF seeks to enforce cannot be reliably measured for PAHs. (Mot. at 15 nn.37–38.) Such "Minimum Level[s]" of quantification are clearly defined in the Permit.[7] And EPA's NPDES Permit Program Instructions explain that, if testing results are "below the minimum level(s) specified in [a] permit," they may be reported as "0."[8] CLF points to a handful of reported

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6 AC Ex. A, Permit at 4 n.7.

7 *Id.* at 2, 10.

8 *See* EPA, *NPDES Permit Program Instructions for the Discharge Monitoring Report Forms (DMRs) Report Year 2009* ch. 1, at 5 (2009), *available at* https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1003N3V.txt.

discharges that fall "below" 10 µg/L to show that ExxonMobil is capable of measuring lower PAH levels. (Opp. at 19–20.) But that is entirely beside the point since none of these discharges are as low as the limit CLF seeks to enforce.[9] The 0.031µg/L standard is a Water Quality Based Effluent Limit ("WQBEL") that EPA is required to include in the Permit, whether or not it can be reliably measured.[10] Where, as here, a WQBEL falls below the minimum effluent levels EPA has determined can be reliably measured, it is standard practice for EPA to retain the WQBEL in a permit and modify it via footnote to accord with the µg/L to which the permittee is bound.[11] (*See* Toal Ex. 2 at 10 ("A compliance/non-compliance level of 10 µg/L was established for individual PAHs since 0.031 µg/L was below the minimum analytical detection level available at the time.").) The Permit's express compliance limit cannot be disregarded, nor can the legal effect of the permit shield, merely because a citizen seeks to challenge whether the Permit is "sufficiently strict." *See S. Appalachian Mountain Stewards* v. *A&G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014).[12]

C. State Water Quality Standards (Count 3)

CLF disingenuously asserts that State Water Quality Standards ("WQS") must be evaluated at the end of the pipe because that "is the only way to measure or test" Permit compliance. (Opp. at 21.) But the cases on which CLF relies belie this claim. As explained in *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9 (1st Cir. 2012)—where CLF was a party—federal "effluent limitations" regulate "individual discharges of pollution," while WQS "specify the amounts of pollutants that may be present in these water bodies." *Id.* at

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[9] *See* Toal Ex. 3 at 1–7. The AC presumably did not point to EPA's ECHO database reports for these discharges because they clearly show that the Terminal is in compliance with the Permit.

[10] 40 C.F.R. § 122.44(d)(1); Toal Ex. 2, Statement of Basis at 10.

[11] *See* EPA, *Technical Support Document for Water Quality-Based Toxics Control* 111 (1991), https://www3.epa.gov/npdes/pubs/owm0264.pdf; EPA, *NPDES Permit Writers' Manual* ch. 8, at 13 (2010), https://www3.epa.gov/npdes/pubs/pwm_2010.pdf.

[12] CLF's claim is also barred by the collateral attack doctrine. CLF had the opportunity to raise any concerns it had about compliance limits when the draft permit was available for public comment. But CLF failed to do so.

14. WQS claims are thus evaluated by measuring "surface water quality standards of the receiving waters." 314 C.M.R. § 4.03(1)(a). CLF cites no authority to the contrary. Nor does it contest EPA's unequivocal statement that Massachusetts WQS "apply to the receiving water and not directly to the outfall."[13] The Terminal has complied with the Permit's explicit numeric effluent limits. Any attempt to enforce WQS is thus barred by the permit shield.[14]

II. This Court Lacks Jurisdiction Over Wholly Past Violations (Counts 2 and 4) and Cannot Adjudicate Claims to Which No Factual Allegations Attach (Count 5)

CLF must allege an "ongoing violation" as a jurisdictional prerequisite for a CWA citizen suit. *See Gwaltney*, 484 U.S. at 59. It has not done so. Significantly, in failing to defend its allegations concerning TSS, CLF tacitly concedes that the TSS discharge on which it attempts to rely was a permitted discharge. (Mot. at 18.) CLF relies instead on PAH discharges, all of which fall below 10 µg/L, to argue that "ongoing violations" are present. (Opp. at 19, 31–32.) But, as observed above, discharges below 10 µg/L comply with the Permit. Count 2 must be dismissed.

Count 4 also fails as a matter of law because CLF points to a single oil sheen incident attributable to ExxonMobil as purported evidence of an ongoing violation. (Opp. at 32.) But "one exceedance does not constitute an ongoing violation." *Allen Cty. Citizens for Env't, Inc.* v. *BP Oil Co.*, 762 F. Supp. 733, 742 (N.D. Ohio 1991), *aff'd*, 996 F.2d 1451 (6th Cir. 1992). CLF's attempted reliance on *NRDC, Inc.* v. *Texaco Refining & Marketing., Inc.*, 2 F.3d 493, 496

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[13] Toal Ex. 5. CLF's reliance on *Ohio Valley Environmental Coalition* v. *Fola Coal Co., LLC*, 845 F.3d 133 (4th Cir. 2017), is misplaced. The Permit at issue there contained "narrative" WQS, not a "numerical" effluent standard, such as the one at issue here. *See id.* at 143–44.

[14] CLF's WQS claim also fails because the portions of the Mystic and/or Island End Rivers at issue (the "Rivers") have not been impaired by PAHs since before the Permit term. (Mot. at 17.) CLF inaccurately claims that—because some PAHs are also listed as Petroleum Hydrocarbons ("PHs") in an unrelated federal document—the Rivers are impaired for PAHs. (Opp. at 21.) But the Mass. DEP reports on which the AC relies treat PAHs and PHs separately. *See, e.g.*, Mass. DEP, *Massachusetts Year 2014 Integrated List of Waters* at 135, 154 (Dec. 2015), http://www.mass.gov/eea/docs/dep/water/resources /07v5/14list2.pdf (listing "Millers River" as impaired by both PAHs and PHs while identifying the relevant portions of the Rivers as impaired only by PHs).

(3d Cir. 1993), fails because that case involved 365 violations of the numeric effluent limit.[15]

Finally, CLF does nothing to defend its conclusory allegations of unspecified discharges into the half-moon shaped pond. (Opp. at 34.) Instead, CLF offers the bald assertion that the AC's allegations "are more than adequate to meet the pleading standard," and then proceeds to argue that it may assert a claim it has not pled. (*Id.*) While CLF purports to allege "point source discharges through groundwater," it fails to cite a single paragraph in the AC that contains any such factual allegation. (*Id.* at 33.) Count 5 should be dismissed.

III. CLF Continues to Lack Standing for Its Climate Change Claims (Counts 6–15)

This Court ruled that "the scope" of the climate change claims CLF alleged in its original complaint was "too broad" to confer standing on CLF. (Sept. 12, 2017 Hr'g Tr. 113:15-18.) And despite CLF's representation to the Court that it would "cabin[]" its claims to a period commensurate with the term of the Permit (*id.* 110:20-25), it has not done so. Instead, the AC retains allegations concerning distant theoretical climate change risks, including potential impacts projected in 2050 and 2100. (Opp. at 12.)

Having opted to retain these pleadings in disregard of the Court's instructions, CLF may not excuse them as nonessential.[16] The defect inherent in the AC—its myriad references to distant hypothetical climate change impacts—is not salvaged by the Opposition, which is replete with generalized references to "damage[]" to "coastal infrastructure," and to hypotheses that CLF's members will suffer from "catastrophic events similar to those occurring throughout the country." (Opp. at 11, 12.) Simply put, such vague generalities do not satisfy the "certainly

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[15] CLF's attempt to impute all discharges by Sprague Energy to ExxonMobil is defeated by the very Fact Sheet on which it relies. (Opp. at 32 n.25.) As CLF admits, ExxonMobil is responsible only for Sprague's "storm water" discharges, and discharges "into ExxonMobil's storm water collection system." (*Id.*) But nothing in the list of incident reports on which Count 4 exclusively relies suggests that the Sprague incidents involved stormwater, as opposed to oil in the "[c]ontainment [a]rea" and "[a]sphalt" on the dock. *See* AC Ex. K.

[16] Nor may it find sanctuary in its attempts to justify the AC's sprawling scope by contending that it *also* attempts to allege present and ongoing violations. *See* Opp. at 10–11.

impending" risks pleading standard applicable to climate change claims. *See Clapper* v. *Amnesty Int'l*, 568 U.S. 398, 409, 414 & n.5 (2013). These allegations do not remotely suggest that, absent immediate action by ExxonMobil, a severe weather event will cause the Terminal's outfalls and emergency spill responses to fail.[17]

The closest the Opposition comes to identifying a site-specific, near-term risk is its reference to a 2010 discharge and a recent storm surge in Boston. (Opp. at 11–12; WG Decl. ¶ 7.) But the 2010 incident occurred before EPA issued the Terminal's Permit, and before the current wastewater treatment system became operational.[18] The January 4, 2018 storm is no more persuasive because CLF does not, and cannot, allege that this record-setting storm surge caused the Terminal to make any unpermitted discharges or otherwise fail to comply with the Permit conditions. (WG Decl. ¶ 7.) Thus, CLF once again fails to allege facts suggesting that climate change presents an imminent risk of harm to its members.

IV. CLF Fails to Plead a RCRA Violation (Count 15)

The same defects that negate CLF's standing also warrant dismissal of its RCRA claim, which fails to plead "an imminent and substantial endangerment," 42 U.S.C. § 6972(a)(1)(B). An endangerment can only be "'imminent' if it 'threaten[s] to occur immediately.'" *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 485–86 (1996); *see also Me. People's All.* v. *Mallinckrodt, Inc.*, 471 F.3d 277, 279 n.1 (1st Cir. 2006). Rather than allege facts rendering a release of solid or hazardous waste imminent, CLF quotes a statement ExxonMobil made in a FOIA response regarding the potential impact of a catastrophic release caused by "terrorism." (Opp. at 16.) This statement has no bearing on the imminence of any hazardous waste release resulting from a

[17] CLF's SPCC argument also fails. CLF argues that the Court should regard the SPCC as a condition of the Permit based on a reference to "spill prevention and response procedures" in the SWPPP. (Opp. at 30.) But reference to this language in the Permit does not create a private cause of action concerning alleged SPCC-related violations. Claims concerning SPCCs bear no relation to NPDES permits and fall outside the province of the CWA's citizen suit provision. (Mot. at 33).

[18] On July 10, 2010, outfall 01A had a reported discharge of 142 mg/L of TSS. *See* AC Ex. F at 6.

severe weather event.

Shifting strategies, CLF also offers a completely new RCRA theory. It now argues that the claim arises from "the cumulative impact of Exxon's CWA violations alleged in Counts 1 through 14." (Opp. at 16.) Given this clarification, CLF's RCRA claim should be dismissed for the independent reason that it fails to allege endangerment arising out of the treatment, storage, or disposal of "solid or hazardous waste." *See* 42 U.S.C. § 6972(a)(1)(B). Industrial discharges that are subject to NPDES permits are expressly exempted from RCRA's definition of "waste" in order "to prevent duplicative regulation under RCRA and the [CWA]." *Water Keeper All.* v. *U.S. Dep't of Def.*, 152 F. Supp. 2d 163, 169 (D.P.R. 2001); *see also* 42 U.S.C. § 6903(27).

V. CLF's CWA Climate Change Claims Fail (Counts 6–14)

CLF's climate change claims rely on its unsupported theory that the Terminal's obligations under the CWA are, irrespective of the Permit's express conditions, continuously changing throughout the limited term of the Permit. (Opp. at 3, 5.) These claims are barred.

First, CLF's climate change claims flout the permit shield and the collateral attack doctrine. CLF objects that the Permit's definition of a 10-year, 24-hour storm event ("Storm Event")—*i.e.*, the 4.6 inch standard that appears in the "Definitions" section of the Permit[19]—is "based on stale data." (Opp. at 3.) But an enforcement action may not be brought simply because CLF wants to enforce a more stringent standard than the one that appears in the Permit. *See A&G Coal Corp.*, 758 F.3d at 564; *Defs. of Conewango Creek v. Echo Developers, LLC*, No. CIV.A. 06-242 E, 2007 WL 3023927, at *8–9 (W.D. Pa. Oct. 12, 2007).[20] Nor may CLF plausibly claim that ExxonMobil "forever" seeks to freeze the volume of a Storm Event at 4.6

[19] AC Ex. A, Permit at 2.

[20] CLF improperly asserts that this case is inapposite. But there, as here, the plaintiff sought to disguise its claim as an enforcement action, asserting "that it [wa]s not questioning the issuance of the permit, but rather [defendant's] failure to comply with terms and/or conditions of the permit." *See id*. at *9.

inches. (Opp. at 4, 23.) To the contrary, ExxonMobil properly treats the Permit's conditions as fixed until renewal. *See Massachusetts* v. *Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995) ("CWA cannot function effectively unless citizens are given fair notice of their obligations.").

Second, the climate change claims are also barred for the independent reason that CLF still fails to plausibly allege a defect in design, infrastructure, or operation that violates good engineering practices ("GEP"). The Opposition states that the AC contains "numerous allegations of Exxon's inadequate infrastructure design," but cites nothing more than a single conclusory assertion concerning "undersized pipes and inadequate storage" to buttress this point. (Opp. at 29 (citing AC ¶¶ 12,14).) That the AC contains numerous invocations of the *phrase* "inadequate infrastructure design" (AC ¶¶ 14, 111, 141, 150, 163, 175, 200), and criticizes pipe size and storage capacity absent any identified and plausible link between these purported inadequacies and GEP, does not render the AC's claims concerning design defects cognizable. (*See* WG Decl. ¶ 10 (no present indication that Terminal lacks implementation of GEP).)

Even CLF's supposed expert in GEP fails to identify a single concrete engineering defect at the Terminal. (WG Decl. ¶¶ 2, 12, 16.) And because it cannot, CLF fails to allege that the Terminal is not equipped to handle a Storm Event. Indeed, CLF does not claim that stormwater flows have exceeded the capacity of the outfalls designed to handle a Storm Event (01A and 01C) under the Permit—even during the recent "highest documented tidal elevation in Boston," which occurred on January 4, 2018. (WG Decl. ¶ 7.) At no time under this Permit has the outfall designed to be used "only in extreme weather events" (01B) ever discharged any stormwater.[21] The sole storm-related release on which CLF relies is from 2010—predating the Permit and upgrades to the Terminal's storage and treatment system. (Opp. at 12; AC ¶ 142.)

[21] AC Ex. A, Permit at 11, Response to Comments at 3; Toal Ex. 3 at 8–11.

The lack of any storm-related releases since then confirms that the facility employs GEP.[22]

Third, in lieu of factual allegations, CLF relies heavily on EPA guidance issued after CLF commenced this suit. (Opp. at 5–6, 25, 27.) But that guidance "is not a rule or final agency action; nor does [it] establish any binding legal obligations on EPA."[23] It is not included in EPA's current listing of CWA enforcement guidance documents,[24] and the two climate change-related Executive Orders motivating this guidance have been revoked.[25] In any event, the guidance merely indicates that EPA may take account of climate change "[i]n fashioning a remedy" in an enforcement action," *i.e.*, after permit violations have already been identified.[26] And while the guidance captures EPA's recognition that potential long-term, albeit "uncertain[]," climate change impacts may uniquely affect different regions across the country,[27] it is untethered to specific permits or conditions.[28]

CONCLUSION

Neither the CWA nor RCRA require the holders of EPA-issued NPDES permits, SWPPPs, and SPCCs to continuously reinterpret their permits to mitigate any and all hypothetical risks posed by climate change. These statutes were never intended to provide citizens *carte blanche* to end run EPA's regulatory authority. For the reasons set forth above and in ExxonMobil's opening brief, the AC should be dismissed in its entirety and with prejudice.

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22 In its Opposition, CLF also does not—and cannot—contend that any of the other CWA violations it alleges (Counts 1–5), even if true, would be attributable to climate change impacts.

23 EPA, *Framework for Protecting Public and Private Investment in CWA Enforcement Remedies* 10 (Dec. 2016) ("*Framework*"), *available at* https://19january2017snapshot.epa.gov/enforcement/framework-document-protecting-public-and-private-investment-clean-water-act-enforcement_.html.

24 *See* EPA, *Water Enforcement Policy, Guidance and Publications*, https://www.epa.gov/enforcement/water-enforcement-policy-guidance-and-publications (last updated Feb. 16, 2017).

25 *Compare Framework* at 8, *with* Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,469 (Aug. 15, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 28, 2017).

26 *See* Framework at 5 (quoting 33 U.S.C. § 1319(b)) (distinguishing between "compliance orders" and "ask[ing] a court for 'appropriate relief,'" and advocating consideration of climate change only in the latter case); *see also* 33 U.S.C. § 1319(a)(1), (b) (defining "compliance orders" and "appropriate relief").

27 *See id.* at 1–2.

28 *See id.* at 1, 3–4.

Dated: February 5, 2018

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CERTIFICATE OF SERVICE

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), this motion was filed through the ECF system on February 5, 2018 and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
Deborah E. Barnard