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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

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INTRODUCTION

The United States Environmental Protection Agency ("EPA") seeks to quash a subpoena served by ExxonMobil Corporation that commands the appearance of Ms. Thelma Murphy, an EPA employee, for testimony at a hearing scheduled for May 14, 2019. ExxonMobil apparently believes Ms. Murphy has knowledge based on her employment at EPA that will support its motion for stay pursuant to the doctrine of primary jurisdiction. Because neither the United States nor any of its agencies are parties to this case, Ms. Murphy must obtain EPA approval to testify at the hearing. EPA—pursuant to validly promulgated regulations that prohibit such testimony unless EPA determines the testimony would clearly be in the interests of EPA—denied the necessary authorization to allow Ms. Murphy to testify at the hearing on May 14, 2019.

Based on that instruction, even if Ms. Murphy appears on May 14, EPA regulations direct her to respectfully decline to testify. 40 C.F.R. § 2.404(b). Under longstanding Supreme Court law, this Court does not have authority to compel Ms. Murphy to testify. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The Court should quash the subpoena because making Ms. Murphy appear in Court to announce that she must respectfully refuse to provide testimony would be unnecessary and unduly burdensome.

Moreover, even if ExxonMobil seeks judicial review under the Administrative Procedure Act ("APA") of EPA's determination not to allow Ms. Murphy to testify, EPA's determination is not arbitrary, capricious, or an abuse of discretion. This further supports granting EPA's motion to quash. After receiving ExxonMobil's subpoena, EPA's Regional Counsel evaluated the relevant regulatory factors and determined that Ms. Murphy's testimony at the May 14 hearing would not clearly be in the interests of EPA. *See* 40 C.F.R. § 2.404(a). He explained his

reasoning in a decision document that discusses the burdens of diverting Ms. Murphy from her official duties, the cumulative further demands by private litigants who might be motivated by a decision to authorize Ms. Murphy's testimony to similarly seek EPA's assistance, and impacts on EPA's decision-making. He also found that the testimony ExxonMobil seeks from Ms. Murphy would be duplicative and cumulative. On December 17, 2018, EPA provided the parties with a letter that contained the information that ExxonMobil identified as the anticipated topics of Ms. Murphy's testimony. ExxonMobil's demand for duplicative information—but in the burdensome form of live testimony—creates an undue burden. The subpoena diverts government resources into the service of private litigants to the detriment of the smooth functioning of EPA operations and in the implementation of EPA's statutory responsibilities.

BACKGROUND

A. EPA's "*Touhy*" Regulations

By statute, federal agencies possess the authority to prescribe the manner in which their employees respond to requests for information from outside sources. 5 U.S.C. § 301; *see Puerto Rico v. United States,* 490 F.3d 50, 61 (1st Cir. 2007). Under this statutory authority, government agencies such as EPA have issued regulations that govern an agency's response to demands for testimony in matters in which the federal government is not a party. Such regulations are commonly called "*Touhy*" regulations, in reference to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Supreme Court recognized that when agency employees decline to provide information based on the regulations agencies establish for disclosure to third-parties, courts lack the authority to compel that information by contempt. *Id.* at 468-69.

EPA's *Touhy* regulations, 40 C.F.R. §§ 2.401-406, set forth the procedures an employee

must follow when requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. These procedures serve several important purposes. They ensure that employees' official time is used only for official purposes. 40 C.F.R. § 2.401(c). They serve to maintain the impartiality of EPA among private litigants. *Id.* They ensure that public funds are not used for private purposes. *Id.*

An EPA employee may only provide testimony concerning official matters in response to a subpoena when EPA's General Counsel or his designee, in consultation with the appropriate senior agency officials, determines that compliance with the subpoena would "clearly be in the interests of EPA." 40 C.F.R. § 2.404(a). The Regional Counsel for EPA Region 1 has the delegated authority for making this determination for subpoenas served on employees of EPA Region 1, in consultation with the Regional Administrator, and upon recommendation of the subpoenaed employees' supervisors. Declaration of Carl F. Dierker, submitted as Exhibit A, ¶ 2.

B. The Litigation

Plaintiff Conservation Law Foundation's ("CLF") amended complaint seeks to enforce certain terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA to ExxonMobil that authorizes discharges of pollutants from ExxonMobil's Everett Terminal facility to waters of the United States. ECF No. 34, ¶ 1. The complaint also contains a claim seeking a finding of imminent and substantial endangerment under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. *Id.* ExxonMobil moved to dismiss the amended complaint.

During the Court's consideration of ExxonMobil's motion to dismiss, the parties requested that EPA provide information related to the status of the NPDES permit renewal for

the Everett Terminal facility. Declaration of Ken Moraff, submitted as Exhibit B, ¶ 2. By a letter dated December 17, 2018, EPA responded to the inquiry by providing an estimate of the timing of the release of a draft permit for the Everett Terminal facility. Exhibit B2 to the Moraff Decl., at page 2. The letter also identified the pressing environmental and other priorities critical to EPA Region 1's mission for the current fiscal year. *Id.* EPA explained its position on the permit reissuance and anticipated timetable for EPA action. *Id.*

The hearing for which ExxonMobil seeks Ms. Murphy's testimony addresses ExxonMobil's motion for stay pursuant to the doctrine of primary jurisdiction. *See* ECF No. 71 at 2. Because ExxonMobil proposed to take testimony from EPA at the hearing on the motion for stay, the Court ordered ExxonMobil to issue a subpoena to EPA. *Id.* The Court ordered that the EPA employee's testimony would be limited to "matters relevant to whether the court should stay this case under the doctrine of primary jurisdiction." *Id.* at 2. The Court further ordered that the testimony "will not include EPA's views on the meaning of the National Pollutant Discharge Elimination System permit for the Everett Terminal or the merits of this case." *Id.*

C. ExxonMobil's Subpoena

ExxonMobil served a subpoena on Ms. Murphy in accordance with the Court's order. Dierker Decl. ¶ 3 and Exhibit A1. Ms. Murphy is the Water Permits Branch Chief of EPA Region 1. Dierker Decl., ¶ 3. The subpoena did not indicate the nature of the testimony sought or the topics on which Ms. Murphy would be questioned. *See* Dierker Decl., Exhibit A1.

In order for EPA to determine whether Ms. Murphy's testimony would clearly be in EPA's interest, EPA's Regional Counsel asked ExxonMobil to provide details regarding the subjects about which ExxonMobil seeks testimony from Ms. Murphy. Dierker Decl., Exhibit A2. He also asked ExxonMobil to explain why her testimony in this matter would clearly be in

the interests of EPA. *Id.*

In response, ExxonMobil identified the two topics on which it seeks Ms. Murphy's testimony. Dierker Decl., Exhibit A3, at page 3. First, ExxonMobil seeks testimony regarding "the likely timeframe for renewing or reissuing the Permit for Everett Terminal, in light of Region 1's past experience with permit renewal applications and current competing obligations." *Id.* Second, ExxonMobil seeks testimony regarding "why EPA has determined it is appropriate to assign higher priority to other permit applications and allow the Everett Terminal's Permit to administratively continue while the application is pending." *Id.* ExxonMobil clarifies that this testimony may include discussion of the substantial resources EPA dedicated to reissuing and modifying the current Permit. *Id.* ExxonMobil also articulated its reasons why it believed Ms. Murphy's testimony would be in the interests of EPA. *Id.* at 3-4.

D. EPA's *Touhy* Decision

On April 18, 2019, Regional Counsel Carl Dierker determined that compliance by Ms. Murphy with ExxonMobil's subpoena would not clearly be in the interests of EPA. *See* Dierker Decl., Exhibit A4.

The Regional Counsel's letter addressed the factors in EPA's *Touhy* regulations relevant to a determination of whether the testimony is in EPA's interest. The Regional Counsel determined that compliance with the subpoena would divert Ms. Murphy's use of her official time to non-official purposes. Dierker Decl., Exhibit A4 at pages 2-3. Specifically, authorizing Ms. Murphy to testify in this private litigation would prevent her from working on major EPA permitting initiatives and policy objectives to implement statutory responsibilities, including implementation of the program to reduce the NPDES permit backlog in Region 1. *Id.* at 2-3. Ms. Murphy's testimony would also likely make it difficult to maintain the impartiality of EPA

between CLF and ExxonMobil by disrupting EPA's statutorily authorized decision-making process, which is particularly important here in light of ExxonMobil's pending application for reissuance of the Everett Terminal NPDES permit. *Id.* at 4. The Regional Counsel also recognized that allowing testimony in this case would likely lead to further resource demands by other private litigants, placing a further strain on EPA's limited resources. *Id.* at 3-4. Finally, the Regional Counsel relied on the fact that EPA had already provided the parties with its projected timeline for permit reissuance and a description of its permitting priorities. *Id.* at 4-5. This made the requested testimony duplicative and cumulative.

The Regional Counsel also addressed ExxonMobil's contentions that the testimony would clearly be in the interests of EPA. *Id.* at 5. ExxonMobil justified its demand for Ms. Murphy's testimony in part on a chain of events that results in CLF prevailing in this litigation. The outcome of this litigation is speculative at this time. EPA does not have a clear interest in testifying at this early stage of the litigation. *Id.* The Regional Counsel acknowledged the risk that rulings in this litigation could be contrary to EPA's interests, but he determined this risk does not differentiate this case from most private environmental litigation, and does not, by itself, justify finding Ms. Murphy's testimony to be clearly in EPA's interests. *Id.* For similar reasons, the Regional Counsel did not find the conjecture about the potential volume of future litigation brought by CLF or similar plaintiffs to justify Ms. Murphy's testimony; in contrast, if he authorized Ms. Murphy's testimony here, that could lead to an increase in the number of future subpoenas in citizen suit litigation. *Id.*

STANDARD OF REVIEW

On timely motion, a court "must quash or modify a subpoena" that "subjects a person to undue burden." Fed. R. Civ. P. 45(d(3(iv. While a motion to quash requires the court to

weigh the burden to the subpoenaed party against the information's value to the serving party, the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).

If a federal agency declines a persons' request to obtain information from the agency, the person "may seek judicial review only under the APA." *Cabral v. U.S. Dep't. of Justice*, 587 F.3d 13, 22-23 (1st Cir. 2009); *Puerto Rico,* 490 F.3d at 61 n.6. In general, an agency's "choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources." *Puerto Rico*, 490 F.3d at 61 (quoting *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 278 (4th Cir.1999)).

In evaluating the EPA's decision, the Court should take into account both EPA's *Touhy* regulations governing the disclosure of materials and the standards for quashing subpoenas under the Federal Rules of Civil Procedure. *See Puerto Rico*, 490 F.3d at 61.[1]

ARGUMENT

The Court should quash ExxonMobil's subpoena. EPA's Regional Counsel issued a *Touhy* determination declining authorization for Ms. Murphy to testify. As a result, Ms. Murphy is instructed not to testify. Moreover, EPA's *Touhy* determination is not arbitrary or capricious. The subpoena presents an undue burden to EPA because it impairs government operations, may impact the perception of EPA's impartiality in future administrative proceedings relating to the Everett Terminal NPDES permit, and is duplicative and cumulative of information EPA already

1 The *Touhy* regulations do not create an independent privilege authorizing an agency to withhold information. *Puerto Rico*, 490 F.3d at 61. Rather, they "set forth administrative procedures to be followed when demands for information are received." *Id.* at 61-62.

provided.

A. The Court Should Quash the Subpoena Because Ms. Murphy is Not Authorized to Testify.

In accordance with EPA's determination under its valid *Touhy* regulations, Ms. Murphy is not authorized to testify at the hearing on May 14. As a result, Ms. Murphy is required to appear in response to the subpoena and state that she "respectfully refuse[s] to provide any testimony." 40 C.F.R. § 2.404(b). She cannot be held in contempt for refusing to testify due to compliance with EPA's *Touhy* regulations. *See Touhy,* 340 U.S. 462; *In re Recalcitrant Witness Richard Boeh*, 25 F.3d 761, 763-64 (9th Cir. 1994). In this situation, the court should quash the subpoena because the burden on Ms. Murphy to appear only to announce that she cannot testify outweighs any benefits of the appearance.

B. The Court Should Quash the Subpoena Because EPA's *Touhy* Determination Establishes Undue Burden, and that Determination Is Neither Arbitrary Nor Capricious.

ExxonMobil might challenge EPA's *Touhy* determination by asserting a claim under the APA. *See Cabral*, 587 F.3d at 22-23. However, even if it did, EPA's determination that Ms. Murphy's testimony would not clearly be in EPA's interests is neither arbitrary nor capricious. For this reason, too, the subpoena should be quashed.

Under the APA, a reviewing court may overturn an agency's decision to deny disclosure only if the decision is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* (citing 5 U.S.C. § 706(2)(A)). In applying the arbitrary and capricious standard of review, federal courts are deferential to the agency's decision. *Id.; see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (the arbitrary and capricious standard "is narrow and a court is not to substitute its judgment for that of the agency"). Under this standard, the reviewing court may not set aside agency action so

long as the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

The policy behind *Touhy* regulations is to conserve government resources where the United States is not a party to a lawsuit and to minimize government involvement in matters unrelated to official duties. *Reynolds Metal Co. v Crowther*, 572 F. Supp. 288, 290-91 (D. Mass. 1982; *see Boron Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir. 1989. If EPA employees were routinely permitted or compelled to testify in private civil actions, significant loss of worker hours would predictably result and agency employees would be drawn from other important agency assignments. *Boron Oil*, 873 F.2d at 70. The concerns associated with undue burden in this case are more salient because the information ExxonMobil seeks duplicates information EPA previously provided the parties, who forwarded it to the Court.

The Regional Counsel's reasonable determination that Ms. Murphy's testimony would not clearly be in the interests of EPA is consistent with these policies. The Regional Counsel's determination addressed the relevant factors in EPA's *Touhy* regulations. First, the Regional Counsel found that compliance with the subpoena would divert Ms. Murphy's use of her official time to non-official purposes. *See* 40 C.F.R. § 2.404; Dierker Decl., Exhibit A4 at pages 2-3. If required to testify, Ms. Murphy's time devoted to this private litigation would draw her away from her important agency assignments, including, ironically, addressing the permit backlog of 216 NPDES permits in Region 1 that has contributed to the delayed action on the Everett Terminal permit. Dierker Decl., Exhibit A4 at pages 2-3. EPA has a "valid and compelling" interest in keeping its employees free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest. *Boron Oil*, 873 F.2d at 71; *see COMSAT Corp*, 190 F.3d at 278.

This disruption of EPA's important statutory responsibilities in administering the Clean Water Act results in an undue burden. EPA is entitled to the highest deference in deciding priorities among issues, including the sequence and grouping in which it tackles them. *Allied Local and Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 72 (D.C. Cir. 2000); *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (EPA has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities). In this context, EPA properly considers the drain on resources potentially caused by the impact of authorizing the testimony of EPA witnesses in private litigation.

Second, the Regional Counsel's consideration of further resource demands by other private litigants was not arbitrary. Both the Third and Fourth Circuits have recognized the legitimacy of this concern. In *Davis Enterprises v. EPA*, 877 F.2d 1181, 1187 (3d Cir. 1989), the Third Circuit affirmed EPA's determination under its *Touhy* regulations not to authorize the testimony of an EPA employee as a fact witness, in part based on the drain on EPA resources associated with the proliferation of environmental-related litigation. *Id.* at 1187. The court emphasized the *cumulative* impact of allowing the testimony, observing that consideration of the arguably minimal burden on the EPA employee's testimony in that particular case failed to take into account "EPA's legitimate concern with the potential cumulative effect of granting such request." *Id.* at 1187. The Fourth Circuit similarly recognized that the concerns that motivated EPA not to authorize the testimony of its employee properly extended beyond the burdens represented by its employee giving testimony in that particular case. *Boron Oil*, 873 F.2d at 71-72; *COMSAT Corp*., 190 F.3d at 278.

This is not a hypothetical concern in EPA Region 1. For example, three days before ExxonMobil served its subpoena in this case, the defendant in a different citizen suit brought by

CLF in this Court served a subpoena on EPA Region 1 that seeks documents and deposition testimony on a different cutting-edge Clean Water Act issue. Dierker Decl., Exhibit A4 at page 5 (subpoena in *Conservation Law Foundation v. Longwood Venues and Destinations, et al*., Civil No. 1:18-cv-11821-WGY).[2] Thus, in considering a motion to quash a subpoena on a government employee, the Court may consider "not only the direct burden caused by the testimony, but also the "government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations." *Town of Wolfeboro v. Wright-Pierce*, 2014 WL 1713508 at *1 (D.N.H. Apr. 30, 2014).

In fact, ExxonMobil highlighted the prospect of such an increase in claims similar to those asserted by CLF to justify ExxonMobil's subpoena. ExxonMobil prophesized an "onslaught of likely legal actions" if CLF's suit is allowed to proceed with its challenge to EPA's discretion reflected in the current Everett Terminal permit. Dierker Decl., Ex. A3 at page 4; *see also id.* at 3 (CLF's suit will "expand[] the scope of private environmental enforcement actions nationwide far beyond the interstitial role contemplated by the Clean Water Act."). Thus, EPA's reliance on this concern was not arbitrary or capricious. *Davis Enterprises*, 877 F.2d at 1187 (EPA's "concern about the effects of proliferation of testimony by its employees is within the penumbra of reasonable judgmental decisions it may make"); *Boron Oil*, 873 F.2d at 71-72 (the significant quantity of private environmental litigation must surely give warning to EPA that a

2 The subpoena in *Longwood Venues* seeks testimony concerning application for NPDES permits for septic systems or other discharges to the ground or to groundwater. The Supreme Court recently accepted *certiorari* to address the issue of "[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." *Cty. of Maui v. Haw. Wildlife Fund*, Case No. 15-17447 (U.S.)

strict adherence to its internal regulations is essential if it is to be successful in preventing its employees from being targeted as potential witnesses in private actions). The Court should quash the subpoenas because of the undue burden on government resources. *See Davis Enterprises,* 877 F.2d at 1187; *Boron Oil*, 873 F.2d at 71-72.

Third, the Regional Counsel appropriately considered the importance of maintaining impartiality and not circumventing EPA's traditional decision-making process under its statutory authorities and the APA. Authorizing an EPA employee to give testimony at this stage of this private-party litigation would disrupt the traditional process for Agency decision-making. EPA anticipates both parties' active involvement in the administrative proceeding addressing the reissuance of the Everett Terminal's NPDES permit. Dierker Decl., Exhibit A4 at page 4. The Regional Counsel's determination that allowing Ms. Murphy to testify as a fact witness at this early stage of the litigation could circumvent the Agency's traditional decision-making process was not arbitrary or capricious in light of the pending permit proceeding. *See, e.g.*, *Davis Enterprises*, 877 F.2d at 1187 (EPA determination that factual testimony could give appearance of taking sides is not capricious).

Fourth, the testimony ExxonMobil seeks from Ms. Murphy will cause undue burden because it is duplicative and cumulative. ExxonMobil seeks testimony from Ms. Murphy on two topics: (i) the timetable for EPA's anticipated action on the pending permit renewal application for the Everett Terminal; and (ii) why EPA has determined it is appropriate to assign higher priority to other permit applications. Dierker Decl., Exhibit A3 at page 3. EPA already provided, in December 2018, the parties and the Court with its anticipated timetable for taking action on the Everett Terminal NPDES permit renewal and the information necessary for the Court to understand EPA's schedule. Moraff Decl., Exhibit B2. The letter reflected EPA's

"careful and extended consideration." *Id.* EPA identified its priorities for this fiscal year (October 2018- September 2019), which included several geographic initiatives and NPDES permitting of several large power plants, major transportation facilities, and sand and gravel sites. *Id.* These priorities, when viewed against the Region's resources, makes release of a draft permit of the Everett Terminal unlikely this fiscal year. *Id.* The Region acknowledged that the release of the draft permit for the Everett Terminal and public notice and comment may not begin until the fiscal year commencing October 2019. *Id.* The letter stated the Region's commitment to eliminate the backlog of NPDES permits by 2022. *Id.* The timetable and priorities provided in the December 17, 2018, letter have not materially changed as of the date of this motion. Moraff Decl. ¶ 4.

The Regional Counsel reasonably relied on this prior disclosure of information in the *Touhy* determination. Decisions not to authorize testimony when the relevant information is provided in documents are not arbitrary or capricious. *See Davis Enterprises*, 877 F.2d at 1183, 1187 (EPA provided the results of EPA air monitoring in documentary form); *see also Moore v. Armour Pharm. Co.,* 129 F.R.D. 551, 555 (N.D. Ga. 1990), *aff'd*, 927 F.2d 1194 (11th Cir. 1991) (Center for Disease Control provided official CDC publications and other documents relating to the case).

Further, Ms. Murphy's requested testimony regarding EPA's timetable is unnecessary. Ms. Murphy indicated that her knowledge is consistent with the statements in the December 18, 2018, letter. Dierker Decl., Exhibit A4 at page 5. Thus, her testimony will be cumulative and materially duplicative of the materials in the letter. *See Cabral*, 587 F.3d at 23 (affirming denial of subpoena seeking duplicative information). Further, EPA Region 1 has cooperated with the parties' prior requests for information relevant to its timetable for acting on the permit

reissuance. *See Puerto Rico,* 490 F.3d at 66 (affirming denial of subpoena because United States had been reasonably forthcoming in releasing relevant information to assist the parties). Consequently, this is not a case of agency stonewalling; instead, in this case, EPA has attempted to cooperate in a meaningful manner by voluntarily providing evidence on the precise question at issue.

In sum, the Regional Counsel's *Touhy* determination considered the relevant factors and articulated a rational connection between the facts found and his decision not to authorize Ms. Murphy's testimony at the hearing on May 14. Because the EPA's *Touhy* determination is not arbitrary or capricious and establishes the undue burden of ExxonMobil's subpoena, the Court should quash the subpoena of Ms. Murphy.

C. ExxonMobil's Efforts to Establish that Ms. Murphy's Testimony Will Clearly Be in the Interests of EPA Are Not Persuasive.

The Regional Counsel's response to ExxonMobil's contentions that Ms. Murphy's testimony would clearly be in the interests of EPA is not arbitrary or capricious. If, as ExxonMobil suggests, CLF relies in this litigation "solely on idiosyncratic and unprecedented interpretations of certain Permit provisions," then EPA has no clear interest in its employee providing testimony at this early stage of the litigation. *See* Dierker Decl., page 5 and Exhibit A3 at page 2. ExxonMobil also suggests that rulings in this case could be contrary to EPA's positions and interfere with EPA's programs. Dierker Decl., Exhibit A3 at page 3. But that risk is present in most private environmental litigation; if this risk was a sufficiently clear EPA interest to justify authorization of testimony by EPA witnesses, EPA would be compelled to provide witnesses to all parties that could hypothesize a potential risk to EPA programs. *See id.* at 5. For similar reasons, the Regional Counsel did not find a clear interest as a result of conjecture about future litigation usurping EPA discretion. *Id.* At this early stage of the case,

risks to EPA's priorities to eliminate the backlog of expired permits overshadow any risk associated with CLF's claims here, including alleged risks to its discretion to enter into settlement agreements. *Id.* Finally, as previously discussed, *supra* at 13-15, the Regional Counsel found that providing testimony that would be cumulative of information previously provided in EPA's December 17, 2018, letter did not justify an EPA employee's participation as a witness. None of these responses is arbitrary or capricious.

CONCLUSION

For the reasons explained above, the Court should quash the subpoena issued by ExxonMobil to Ms. Murphy to testify at the hearing on May 14, 2019.

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Certificate of Service

I hereby certify that, on April 18, 2019, a copy of the foregoing UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH was electronically transmitted to the Court using the CM/ECF System and will be sent electronically to registered counsel as identified on the Notice of Electronic Filing.

/s/ Alan D. Greenberg
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