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.	)	

MEMORANDUM OF LAW IN RESPONSE TO
NON-PARTY EPA'S MOTION TO QUASH

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Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company (collectively, "ExxonMobil") respectfully submit this memorandum of law in response to EPA's motion to quash the April 4, 2019 subpoena to EPA Region 1's Water Permits Branch Chief, Thelma Murphy.

PRELIMINARY STATEMENT

The underlying suit brought by the Conservation Law Foundation ("CLF") is a test case that seeks to mandate climate change preparedness and misappropriate agency authority. Under the guise of a citizen enforcement suit, CLF seeks to rewrite the operative permit for the Everett Terminal to impose an unprecedented obligation on the permit holder to continually reevaluate the terms of its EPA-issued permit and its agency-approved facility design due to alleged increased risks of extreme weather since the permit became effective. CLF also seeks to compel ExxonMobil to comply with discharge limits different from those required by EPA and which EPA has concluded cannot be reliably measured. CLF invents these obligations out of permit conditions common among the permits EPA administers, which this Court has deemed ambiguous and which have never before been held to impose remotely similar obligations. CLF itself has conceded it believes this "first-of-its-kind" suit could be duplicated against any permit holder at a coastal facility.

ExxonMobil has moved for a stay pending EPA's decision on its permit renewal application for the Everett Terminal. As the agency overseeing the renewal process, EPA is best positioned to discuss (i) the likely duration of a stay contingent on EPA action, and (ii) how EPA allocates its limited resources and prioritizes its responsibilities, which has resulted at present in an administrative continuance of ExxonMobil's Permit. Consistent with the Court's Order, ExxonMobil issued a subpoena to the Chief of EPA Region 1's Water Permits Branch to testify regarding the permitting process at the May 14, 2019 hearing on ExxonMobil's motion to stay.

EPA seeks to quash that subpoena, reasoning primarily that live testimony would be burdensome given that 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." (ECF No. 86 at 12.) ExxonMobil respects that "[t]he letter reflected EPA's 'careful and extended consideration'" (*id.* 12–13), but issued the subpoena based on the Court's preference for live testimony on these issues. In an effort to avoid burdening EPA, ExxonMobil narrowly limited its subpoena to elicit testimony concerning EPA's processes, which will only underscore that the issues raised in CLF's suit are appropriately decided by EPA in the first instance. While ExxonMobil believes that EPA's testimony could aid the Court in resolving the motion to stay, ExxonMobil should prevail on its motion to stay regardless of whether EPA testifies.

STATEMENT OF FACTS

A. Background

Over two years ago, CLF sued ExxonMobil under the citizen suit provisions of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). The suit claims, among other things, that ExxonMobil violated the operative National Pollutant Discharge Elimination System ("NPDES") permit for the Everett Terminal (the "Terminal") by failing to make changes to address alleged increased risks of flooding and extreme precipitation resulting from climate change since the Permit became effective in 2012. (Mar. 13, 2019 Hr'g Tr. 60:9–22, 64:3–18, 70:6–22, 89:23–90:11.)

As detailed in ExxonMobil's prior briefing, the Permit is the product of extensive agency review by both EPA and the Massachusetts Department of Environmental Protection. (ECF No. 82 at 2, 5; ECF No. 42 at 1, 4–5.)[1] Indeed, EPA oversaw and approved the Terminal's extensive redesign and construction of its state-of-the-art stormwater treatment system as a precondition of issuing the Permit. (*Id*; ECF No. 38-2, MOU at 2-4.) In prior submissions to this Court, EPA emphasized that it "committed substantial technical and legal resources toward the

[1] CLF was afforded an opportunity to comment on the Permit during the public notice period. *See* 40 C.F.R. § 124.19(a). It failed to do so, despite having commented on the 2008 permit, which the operative Permit modified. (*Compare* ECF No. 34-1 at 78, *with* ECF No. 38-5 at 2.)

2008 reissuance of the permit," which in connection with the later "modification . . . resulted in a major upgrade to the facility." (ECF No. 64-1 at 3.) On May 31, 2013, ExxonMobil timely submitted its application to renew the Permit, which remains before EPA. The Permit, which otherwise would have expired on January 1, 2014, has been administratively continued by operation of law pending EPA's final decision on the renewal application. *See* 40 C.F.R. § 122.6(a); *Nat. Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 165 (D.C. Cir. 1988).

As CLF itself attests, where a citizen properly brings an enforcement action under the CWA or RCRA, the citizen is meant to "step[] into EPA's shoes to enforce regulatory requirements."[2] (ECF No. 88 at 1.) In this case, however, CLF seeks to circumvent the agency's delegated authority. CLF previously tried and failed to secure a court order that would have directly forced EPA to consider potential climate change impacts under the CWA. *See CLF* v. *EPA*, 964 F. Supp. 2d 175 (D. Mass. 2013). In defeating CLF's claim in that suit, EPA emphasized that it was not required to address indeterminate effects or to "assign a numerical value to the uncertainty associated with climate change."[3] Undaunted by that ruling, CLF merely repackaged its challenge by filing it against a permit holder—plainly hoping to keep EPA, the permit issuer, on the sidelines.

By CLF's own admission, this case is not remotely a typical CWA citizen suit. It was conceived as a test case that, if successful, would dramatically expand the scope of the CWA to encompass a constantly evolving obligation to reevaluate a facility in light of allegedly increased risks of climate change or severe weather impacts. On multiple occasions, CLF has boasted that this is a "first-of-its-kind lawsuit addressing extreme weather risks." (ECF No. 81-10 at 2; ECF No. 81-6 at 2.) CLF President Bradley Campbell has publicly voiced his belief that there should be a general duty to consider climate change impacts, applicable to "any industrial or commercial facility that has [an NPDES] permit." (ECF No. 81-7 at 2.) He envisions this suit as a vehicle for

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[2] CLF's acknowledgement that citizen enforcement suits merely allow citizens to "step[] into EPA's shoes" is at odds with positions it has taken at other stages of this litigation. Indeed, CLF previously (and erroneously) argued that it had greater enforcement rights that EPA itself. (ECF No. 39 at 19.)

[3] Mem. in Supp. of Defs.' Mot. for Summ. J., at 27–28 (Sept. 21, 2012), *CLF* v. *EPA*, No. 10–11455–MLW (D. Mass.), ECF No. 37.

imposing that previously unrecognized supposed duty on all NPDES permit holders. In line with that vision, CLF has represented that this lawsuit "could serve as a model for other litigation" that could be duplicated "up and down the Eastern Seaboard and along the Gulf Coast." (*Id.*)

B. ExxonMobil's Motion to Stay.

On April 5, 2019, ExxonMobil filed a motion to stay under the doctrine of primary jurisdiction pending EPA's decision on its permit renewal application. (ECF No. 80.) The motion was prompted not only by the recognition that CLF seeks to usurp EPA's considered discretion, but also by the Court's expressed concern that "EPA ought to be making th[ese] decision[s] in the first instance." (Nov. 30, 2018 Hr'g Tr. 17:16–17; *see* Mar. 13, 2019 Lobby Tr. 11:10 ("[T]his is what EPA is supposed to be doing.").) As the Court aptly noted, "there's something quite anomalous about this major litigation about the meaning of a permit when the agency that's given the responsibility to decide what should be in the permit and monitor compliance with the permit is not a party to it." (Mar. 13, 2019 Hr'g Tr. 10:25–11:3.) Thus, the Court opined "it would be preferable for the EPA, which has the responsibility and the expertise to decide," to determine "what is required" under the present permit and "what should be required in the future under any new permit." (Mar. 13, 2019 Hr'g Tr. 7:10–14.)

The Court has stated that it would "like to know what [EPA] think[s]." (Nov. 30, 2018 Hr'g Tr. 13:21.) It also expressed a preference that EPA communicate its position through live testimony, (Nov. 30, 2018 Hr'g Tr. 150:2–4; Mar. 13, 2019 Hr'g Tr. 53:25–54:5), if not through the permit renewal process (*see* Mar. 13, 2019 Hr'g Tr. 117:4–8). Accordingly, in its March 14, 2019 Order, the Court established a schedule for ExxonMobil to file a motion to stay and to subpoena the EPA. (ECF No. 71.) EPA is uniquely positioned to testify on a number of issues bearing on whether a stay is warranted including the probable timing of EPA's action on the permit renewal, and the potential for prejudice to CLF during the stay.

C. ExxonMobil's Subpoena to EPA.

On April 4, 2019, ExxonMobil served a subpoena on Thelma Murphy requesting her appearance at the May 14 hearing concerning ExxonMobil's motion to stay. (ECF No. 86-1 ¶ 3.) Thelma Murphy is the Water Permits Branch Chief for EPA Region 1.[4] (*Id.*) As ExxonMobil explained in its April 9, 2019 letter to EPA, the subpoena seeks testimony regarding two distinct issues: (1) the likely timeframe for renewing or reissuing the Permit, in light of Region 1's past experience with permit renewal applications and its current competing obligations, and (2) why EPA has determined it is appropriate to assign higher priority to other permit applications while allowing the Terminal's Permit to be administratively continued. (*Id.* at 15, Ex. A3.)

As a 30-year veteran of EPA, ExxonMobil understands that Ms. Murphy is well acquainted with Region 1's permitting process and competing obligations. After receiving ExxonMobil's subpoena, Ms. Murphy confirmed the projected timing of the permit reissuance and the justification for assigning higher priority to other permit applications. (ECF No. 86-1 at 26, Ex. A4, Email from T. Murphy.)

RESPONSE TO EPA'S MOTION TO QUASH

While ExxonMobil believes all the primary jurisdiction factors favor deference to the agency, the Court preliminarily indicated that EPA's timeframe for reissuing the Permit and the process by which EPA assigns higher priority to certain permit applications could be central questions when deciding whether to grant ExxonMobil's motion to stay. EPA has already provided guidance on these issues through its December 17, 2018 letter and subsequent briefing. While this information sufficiently supports ExxonMobil's motion to stay, the subpoena issued seeks testimony that is narrowly tailored to elicit answers to the Court's questions from Ms. Murphy, who is "tasked with eliminating Region 1's backlog." (ECF No. 86-1 at 19, Ex. A4, Letter from C. Dierker.) And given EPA's recognition that a ruling on the merits of this case could

[4] While it was ExxonMobil's understanding that Ms. Murphy was the Acting Chief of Region 1's Water Permits Branch, it notes that EPA referred to her as the "Chief" in its briefing.

interfere with EPA's programs, it appears that there is good reason for EPA to provide testimony on any subjects that would aid the Court in its decision.

I. COURTS MAY REVIEW AN AGENCY'S REFUSAL TO AUTHORIZE COMPLIANCE WITH A CIVIL SUBPOENA ISSUED TO ITS EMPLOYEE

While EPA asserts that "this Court does not have authority to compel Ms. Murphy to testify," EPA notes that the Court does have the power to review a federal agency's refusal to authorize compliance with a civil subpoena issued to its employee. (ECF No. 86 at 1.)

Rule 45 of the Federal Rules of Civil Procedure governs a motion to quash a third party subpoena. *See Delaney* v. *Town of Abington*, 890 F.3d 1, 12 (1st Cir. 2018). Under Rule 45, a subpoena should be quashed if it would impose an undue burden. *See* Fed. R. Civ. P. 45(d)(3)(A)(iv). When determining whether a subpoena imposes an undue burden, courts consider such factors as the relevance and necessity of the information sought, the breadth of the request, and the expense and inconvenience of producing the information. *See Sawyer* v. *Purdue Pharm. Corp.*, No. 12-MC-019, 2012 WL 1949334, at *2 (D.N.H. May 29, 2012); *Demers* v. *LaMontagne*, No. CIV. A. 98-10762-REK, 1999 WL 1627978, at *2 (D. Mass. May 5, 1999); *see also Cusamano* v. *Microsoft*, 162 F.3d 708, 714 (1st Cir. 1998) (courts consider the factors of Rule 26(b)(2) when deciding whether to enforce a subpoena). The party resisting discovery bears the burden of demonstrating that compliance would be unduly burdensome. *See In re New England Compounding Pharmacy, Inc. Prod. Liab. Litig.*, No. MDL 13-2419-FDS, 2013 WL 6058483, at *6 (D. Mass. Nov. 13, 2013); *Thomas & Betts Corp.* v. *New Albertson's, Inc.*, No. 10-CV-11947, 2013 WL 11331377, at *4 (D. Mass. July 11, 2013). Multiple courts of appeals have applied Rule 45 to an agency's refusal to comply with a subpoena issued by a federal court in a civil action. *See, e.g.*, *Watts* v. *S.E.C.*, 482 F.3d 501, 508 & n.* (D.C. Cir. 2007); *Exxon Shipping Co.* v. *U.S. Dep't of Interior*, 34 F.3d 774, 779–80 (9th Cir. 1994); *see also EPA* v. *Gen. Elec. Co.*, 212 F.3d 689, 690 (2d Cir. 2000) (noting that a "plausible argument" can be made that Rule 45 is the appropriate standard for reviewing an agency's decision not to comply with a third party subpoena, without deciding the issue).

But this approach is not unanimous. Other courts have held that the arbitrary and capricious standard of the Administrative Procedure Act ("APA") governs an agency's refusal to comply with a federal civil subpoena. *See, e.g.*, *Cabral* v. *U.S. Dep't of Justice*, 587 F.3d 13, 22 (1st Cir. 2009);[5] *COMSAT Corp.* v. *Nat'l Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999); *Moore* v. *Armour Pharm. Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991). Under the APA standard, the court must "determine whether the agency has examined the pertinent evidence, considered the relevant factors, and 'articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *N.L.R.B.* v. *Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 23 (1st Cir. 1999) (alteration in original) (internal quotation marks omitted) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). EPA endorses this latter view. (ECF No. 86 at 1.)

Pursuant to *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951)—as codified in 5 U.S.C. § 301—federal agencies may prescribe regulations (commonly labeled "*Touhy*" regulations) establishing conditions for the production or disclosure of agency information, including testimony by agency employees. While "[a]n agency's *Touhy* regulations are relevant for internal housekeeping and determining who within the agency must decide how to respond to a federal court subpoena," *Watts*, 482 F.3d at 508–09, as EPA acknowledges (ECF No. 86 at 7), they "do not create an independent privilege authorizing [an agency] to withhold information," *Puerto Rico* v. *United States*, 490 F.3d 50, 61 (1st Cir. 2007) (quoting *Mak* v. *F.B.I.*, 252 F.3d 1089, 1092 (9th Cir. 2001)). Because *Touhy* regulations "do not create a substantive defense to disclosure," *Puerto Rico*, 490 F.3d at 61, the legal basis for any opposition to a subpoena "must derive from an independent source of law such as a governmental privilege or the rules of evidence or procedure," *Watts*, 482 F.3d at 509. EPA's *Touhy* regulations are located at 40 C.F.R. §§ 2.402-

[5] Although *Cabral* suggests that the First Circuit applies the APA standard when reviewing an agency's decision not to comply with a Rule 45 subpoena, the panel in *Cabral* did not consider or address whether Rule 45 provides the appropriate standard of review. At least one court has noted that "*Cabral*'s specific holding that APA review is proper for reviewing third-party subpoenas to the government arising out of *federal* litigation" has been "called into question." *United States* v. *Fuentes-Correa*, No. 13-CR-71, 2013 WL 588892, at *6 n.3 (D.P.R. Feb. 13, 2013).

406. They prohibit EPA employees from providing testimony concerning information acquired in their official duties in federal civil proceedings where EPA, the United States, or another Federal agency is not a party, unless EPA authorizes the employee to do so, after determining compliance with the request would "clearly be in the interests of EPA." 40 C.F.R. §§ 2.401(a)(2), 2.402(b), 2.403, 2.404.

While EPA's *Touhy* regulations dictate procedures governing when EPA authorizes its employees to testify, the Court may "review [ ]the reasonableness of the agency's decision" to refuse such authorization. *See Puerto Rico*, 490 F.3d at 62; *Cabral*, 587 F.3d at 23 (reviewing "agency's response to a *Touhy* request"). For instance, the First Circuit has reviewed the FBI's refusal to comply with a nonparty subpoena seeking "sensitive law enforcement protocols and techniques," to determine whether the FBI's assertion of a law enforcement privilege justified its refusal pursuant to *Touhy* regulations. *Puerto Rico*, 490 F.3d at 71; *accord Cabral*, 587 F.3d at 22 (reviewing DOJ's refusal to comply with nonparty subpoena issued to FBI).[6] Moreover, courts have compelled the testimony of EPA employees where the EPA's *Touhy* rationale was deemed insufficient to justify withholding relevant evidence. *See, e.g.*, *U.S. ex rel. Lewis* v. *Walker*, No. 06-CV-16, 2009 WL 2611522, at *4 (M.D. Ga. Aug. 21, 2009) (granting "motion to compel" deposition of EPA employee and ordering EPA to "make [its employee] available for a deposition"); *see also Williams* v. *C. Martin Co.*, No. 07-CV-6592, 2014 WL 3095161, at *4–6 (E.D. La. July 7, 2014) (compelling FEMA employee's deposition in qui tam action); *In re Vioxx Prods. Liab. Litig.*, 235 F.R.D. 334, 346-47 (E.D. La. 2006) (compelling FDA employee's deposition); *In re PE Corp. Sec. Litig.*, No. 00-CV-705, 2005 WL 8061719, at *1 (D. Conn. Apr. 8, 2005) (compelling deposition of Department of Health and Human Services employee).

[6] Although *Cabral* stated that a party "may seek judicial review only under the APA," 587 F.3d at 22–23, such review may occur in the action pursuant to which the subpoena was issued, without initiating a separate APA suit. Indeed, "[t]he majority of courts explicitly addressing the issue have held that no separate action is required," particularly where, as here, the agency "brought the dispute before the [C]ourt in the first instance with its motion to quash." *Doan* v. *Bergeron*, No. 15-CV-11725, 2016 WL 5346936, at *1-2 (D. Mass. Sept. 23, 2016).

By contrast, where courts have granted motions to quash subpoenas for agency testimony, they have often done so on the ground that the agency had already adequately supplied the relevant information. For instance, in *Natural Resources Defense Council* v. *County of Dickson*, No. 10-CV-144, 2010 WL 11478994, at *3 (N.D. Ga. July 20, 2010), EPA moved to quash a nonparty subpoena issued in a RCRA action that sought testimony concerning the basis for EPA's determination that there were no unacceptable human health exposures related to a landfill. EPA argued that, among other things, it had already provided letters detailing the basis for and reasoning behind its position. *See id* at *3–4. The court agreed and concluded that EPA's refusal to comply with the subpoena was thus neither arbitrary nor capricious. *See id.* at *6. In so holding, the court implicitly recognized that an agency may provide evidence in ways other than through live testimony. *See id.*; *see also Davis Enters.* v. *EPA*, 877 F.2d 1181, 1187 (3d Cir. 1989) (emphasizing, in granting EPA's motion to quash, that "EPA agreed to provide Erdman's testimony in the form of an affidavit."); *Bobreski* v. *EPA*, 284 F. Supp. 2d 67, 80 (D.D.C. 2003) (upholding agency decision not to comply with subpoena where "EPA provided the inspector's affidavit, which generally addresses the relevant matters raised by the [Administrative Law Judge].").

Indeed, courts often accept agency positions as expressed through non-testimonial evidence, such as briefs, declarations, and letters, particularly in the permit interpretation context. *See, e.g.*, *Nat. Res. Def. Council* v. *County of L.A.*, 725 F.3d 1194, 1207–08 (9th Cir. 2013) ("amicus brief . . . is clearly instructive."); *Piney Run Preservation Ass'n* v. *Cty. Comm'rs of Carroll Cty*, 268 F.3d 255, 269–70 (4th Cir. 2001) (courts can consider "extrinsic evidence to determine the intent of the permitting authority"); *S. Appalachian Mountain Stewards* v. *Red River Coal Co.*, No. 14-CV-24, 2015 WL 1647965, at *4 (W.D. Va. Apr. 14, 2015) (giving deference to agency's interpretation of permit term stated in declaration of agency employee); *see also Carney* v. *U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (courts consider and "accord[] a presumption of good faith" to affidavits or declarations submitted by agencies in connection with Freedom of Information Act cases (quoting *Safecard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1200

(D.C. Cir. 1991))); *Dusek* v. *Pfizer Inc.*, No. 02-CV-3559, 2004 WL 2191804, at *5 n.7 (S.D. Tex. Feb. 20, 2014) ("plac[ing] weight, though not dispositive weight, on the agency's view as expressed in the amicus brief"). Accordingly, in the event the Court concludes that the subpoena is unduly burdensome or that EPA's *Touhy* decision is sufficiently supported, the Court may rely on statements of the agency's position as expressed through its letters, briefs, and declarations.

II. THE SUBPOENA IS DESIGNED TO ELICIT RELEVANT TESTIMONY WHILE MINIMIZING THE BURDEN ON EPA

A. The Subpoena Seeks Testimony Relevant to the Motion to Stay.

This Court has the discretion to compel the testimony of an agency employee, notwithstanding *Touhy* regulations, where the Court determines that the employee is likely to possess information "relevant to" the issues in the litigation. *Walker*, 2009 WL 2611522, at *4 (compelling compliance with subpoena to EPA employee whose "deposition [wa]s likely to lead to the discovery of relevant evidence"). Consistent with the Court's Order, the subpoena seeks testimony "limited to matters relevant to whether the court should stay this case under the doctrine of primary jurisdiction," (ECF No. 71 at 2), which concerns EPA's own administrative processes. Testimony on (i) the timeline and process for EPA's action on the pending permit renewal application, and (ii) why EPA has assigned precedence to other permits is relevant to (but not dispositive of) whether the Court should enter a stay to allow EPA to exercise its expertise and discretion through the permitting proceedings.

On December 17, 2018, EPA provided both parties with a letter explaining the position of EPA Region 1 on the status of the Terminal's permit renewal application. (ECF No. 64-1, Ex. A4, Letter from K. Moraff.) That letter explained that EPA plans to release a "draft permit for public notice and comment" within this or the next fiscal year (*i.e.*, by October 2020), and no later than "2022," by which time EPA has "committed to eliminating" the Region's backlog. (*Id.* at 2.) EPA also explained that it has given precedence to addressing "a number of pressing environmental [problems] and other priorities critical to EPA's mission" before releasing the Everett Terminal's permit. (*Id.*) While EPA noted the "importance" of the Terminal's Permit, it also explained that

"the Region committed substantial technical and legal resources toward the 2008 reissuance of the Permit, and subsequent appeal, settlement and modification, which resulted in a major upgrade to the facility." (*Id.*) EPA reaffirmed this position in affidavits submitted with its motion to quash. (ECF No. 86-2, Moraff Decl. ¶ 3–4.)

EPA's submissions on these issues already sufficiently support ExxonMobil's motion to stay. Nonetheless, ExxonMobil also agrees that EPA's participation would aid the Court by clarifying and potentially expounding on certain factual questions on which the agency has already commented, but which remain debated among the parties. *See Green* v. *Cosby*, 152 F. Supp. 3d 31, 37–38 (D. Mass. 2015), *modified on other grounds*, 160 F. Supp. 3d 431 (D. Mass. 2016).

First, the Court has indicated that the timing of EPA's action on the pending permit renewal application is relevant to its decision on the motion to stay. Despite EPA's written submissions, which confirm that EPA plans to issue a draft permit "within the next two fiscal years," CLF continues to challenge the likelihood that EPA will act in the near term. (ECF No. 86-1 at 21, Ex. A4, Letter from C. Dierker.) CLF goes so far as to assert that EPA "could not give assurances" regarding the release of a new draft permit, and that, even if EPA publishes a draft permit in 2020 "at the earliest," it "will likely take years for that draft permit to become final." (ECF No. 63 at 2–3.) More fundamentally, CLF repeatedly alleges that it may take decades for a new or reissued permit to take effect. (*See* Nov. 30, 2018 Hr'g Tr. 9:9–23, 26:4–8; Mar. 13, 2019 Lobby Tr. 7:6–10.) For this point, CLF relies on four outlier facilities, none of which has a permitting history similar to that of the Everett Terminal. (ECF No. 63 at 3–7.) In the absence of clear guidance on this issue, the Court has expressed concern that the operative Permit could continue to "run for 25 years" without EPA review. (Mar. 13, 2019 Hr'g Tr. 52:20–21; *see id.* at 9:25–10:2.) Given the Terminal's history of much more frequent permit renewals and EPA's assurances that a renewed permit will be forthcoming, CLF's outlier examples have no bearing on the Everett Terminal. Indeed, the current Permit went into effect after only four years, despite a petition to the U.S. Environmental Appeals Board, which was resolved through the negotiated design and construction of a multi-million dollar state-of-the-art stormwater treatment system. Nevertheless, to the extent

that the Court is inclined to give CLF's arguments any credence and is not satisfied by the EPA submissions already before the Court, Ms. Murphy could address any concerns related to the anticipated timeline for action on the Terminal's Permit through testimony. EPA might also be able to speak to how frequently (or infrequently) permits are administratively extended for "longer than a decade" without "being reviewed." (Mar. 13, 2019 Lobby Tr. 7:7–10.)

Second, the Court has expressed concern that EPA's lack of action on the permit renewal application reflects an "abdication of [its] responsibility." (Nov. 30, 2018 Hr'g Tr. 11:4–5.) In particular, the Court has questioned whether "EPA has looked at anything in the last seven years." (Mar. 13, 2019 Hr'g Tr. 52:21–22.) And the Court has cautioned that it does not presently presume that EPA's proposed timing on the Terminal's permit renewal application reflects an exercise of considered discretion, rather than inattention while EPA is "busy on other things." (Nov. 30, 2018 Hr'g Tr. 13:18–19; *see also id.* at 28:25–29:2 ("It just might mean they're very busy and they're not paying attention to the Everett Terminal.").)

By contrast, EPA has set forth the position that "no permits can be ignored."[7] Rather, EPA makes considered determinations to "prioritize[] permits that have greater environmental impact" for more immediate action. *See In re Sierra Club, Inc.*, No. 12-1860, 2013 WL 1955877, at *1 (1st Cir. May 8, 2013). For instance, in a suit challenging EPA's failure to act on a backlogged Permit, EPA submitted an affidavit explaining that it places the highest priority in its "permitting efforts on the most environmentally and programmatically significant permits within the backlog," such as "a facility that discharges more (or more harmful) pollutants, or that affects a relatively more significant or sensitive ecosystem."[8] So too in this case. EPA has explained that the Region has given precedence to addressing "a number of pressing environmental [problems] and other priorities critical to EPA's mission" before releasing the Everett Terminal's permit. (ECF No. 64-

[7] Decl. of David M. Webster in Support of Opp'n to Pet. For a Writ of Mandamus ¶ 29, add. to EPA's Response to Pet. for Mandamus, *In re Sierra Club*, No. 12-1860 (1st Cir. Mar. 14, 2013).

[8] *Id.*

1 at 2; ECF No. 86 at 4.) While EPA appears to have addressed the Court's concerns, live testimony would provide the opportunity to respond to any lingering questions on this issue.

B. The Subpoena Is Limited in its Request for EPA Testimony.

This Court has the discretion to compel an agency employee to testify where the agency "fail[s] to show that the [testimony] of [the employee] will subject it to an undue burden." *Vioxx*, 235 F.R.D. at 344. Courts do not defer to the agency's assertion of burden, but instead may compel compliance where the court determines that "any burden on [the agency] is significantly outweighed by the importance of th[e] evidence to the litigation." *Williams*, 2014 WL 3095161, at *5.

Here, ExxonMobil designed the subpoena in an effort to minimize the burden on EPA by seeking only a single appearance of one employee to address delineated questions during some portion of a one-day hearing. Courts have enforced minimally burdensome subpoenas where an agency employee can offer "highly relevant" testimony, *Nat. Res. Def. Council* v. *Berhnardt*, No. 1:05-cv-01207 (LJO) (EPG), 2019 WL 691195, at *2 (E.D. Cal. Feb. 19, 2019), or possesses "in-depth knowledge of many aspects of the project [at issue], as well as the problems leading up to the present litigation," *Eagle Rock Timber, Inc.* v. *Town of Afton*, No. 08-CV-219-B, 2009 WL 10665040, at *5 (D. Wyo. Nov. 18, 2009).

The Court could determine its "interest in obtaining" live testimony from Ms. Murphy outweighs EPA's asserted burden. *Connaught Labs., Inc.* v. *SmithKline Beecham P.L.C.*, 7 F. Supp. 2d 477, 480 (D. Del. 1998); *accord Williams* v. C. *Martin Co.*, No. 07-6592, 2014 WL 3095161, at *3 (E.D. La. July 7, 2014); *see also Thomas & Betts*, 2013 WL 11331377, at *5 (denying motion to quash Rule 30(b)(6) deposition). Although EPA's letters and briefing have indicated that EPA will address ExxonMobil's permit renewal application sometime "within the next two fiscal years," the Court may benefit from a live witness who can describe this process and provide a more fulsome explanation of why the agency assigned a higher priority to other permit applications. (ECF No. 86-1 at 4, Ex. A4, Letter from C. Dierker.) Ms. Murphy "directly

implements or oversees the Region's NPDES program in each New England state." (ECF No. 86-1 at 2, Ex. A4, Letter from C. Dierker.) And EPA states that Ms. Murphy has been "tasked with eliminating Region 1's permit backlog." (*Id.*) Based on these representations, it appears that Ms. Murphy would be able to offer testimony regarding the likely timeframe for renewing or reissuing ExxonMobil's Permit and regarding why EPA has allowed the Everett Terminal's Permit to be administratively continued while giving precedence to other applications. ExxonMobil believes the agency's reasons as already expressed in its letters and briefing, and as could be elaborated upon in live testimony, at a minimum, demonstrate that EPA has properly discharged, not abdicated, its responsibilities. And such reasons are also probative to establishing that CLF is unlikely to suffer prejudice during the duration of a stay.

III. EXXONMOBIL BELIEVES THAT TESTIFYING IS IN EPA'S INTEREST.

A. CLF's Suit May Have Wide-Ranging Consequences for EPA.

As EPA acknowledges, CLF's suit may have wide-ranging consequences for EPA. (ECF No. 86-1 at 5, Ex. A4, Letter from C. Dierker.) If CLF prevails, this lawsuit will directly impede EPA's regulatory discretion by disrupting its NPDES permitting regime and expanding the scope of environmental enforcement actions far beyond the limited role contemplated by the CWA.

CLF's claims rely on standard permitting conditions common across Region 1. And CLF has argued the Court should interpret these conditions in an unprecedented manner that is inconsistent with EPA's interpretation of those same conditions. (*See, e.g.*, Mar. 13, 2019 Hr'g Tr. 60:9–22, 64:3–18, 89:23–90:11.) The implications for this Permit alone would be an intrusion on agency discretion. But this suit also has the potential to promote increasing numbers of activist citizen suits seeking to creatively reinterpret the various NPDES permits EPA administers. This outcome would undermine EPA's authority over its permitting program. The result would be a dual regulatory system, in which citizens avoid the agency administrative process and instead use the guise of CWA enforcement actions to rewrite permits issued and approved by EPA (or state agencies). That is a vast expansion of the role envisioned by Congress, who intended the role of

citizen suits to be "interstitial," not "intrusive" on agency discretion. *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) ("[t]he citizen suit is meant to supplement rather than to supplant governmental action").

CLF has already made clear that it has no intention of limiting itself to an interstitial role. To the contrary, CLF has publicly declared that it envisions this litigation as a test case for allowing private citizens to mandate climate change readiness. (ECF No. 81-6 at 2; ECF No. 81-7 at 2; ECF No. 81-10 at 2.) CLF, after all, has admitted that it is focused not merely on the Everett Terminal, but also on changing the standards applicable to all "industrial or commercial" facilities. (ECF No. 81-7 at 2.) The suits envisioned by CLF need not solely relate to climate change; rather, they could include myriad other suits challenging the policy considerations and general standards articulated in EPA's regulations. CLF's model could thus result in countless lawsuits employing creative pleading to usurp and override EPA's exercise of agency discretion.

As EPA has recounted, it has already invested substantial resources related to ExxonMobil's redesign of the Terminal's stormwater treatment system, in accordance with an agreement between EPA and ExxonMobil. (ECF No. 86-1 at 4, Ex. A4, Letter from K. Moraff.) Accordingly, EPA testimony in this case could highlight the critical importance of preserving the full scope of agency discretion during the permitting process, both to enter into such agreements prospectively and to determine the extent to which permittees meet the standards EPA has determined are appropriate to safeguard the waters of the United States. Insight into these issues could validate ExxonMobil's position that a stay under the primary jurisdiction doctrine is necessary to preserve EPA's discretion over those tasks Congress delegated to the agency.

EPA does not dispute these risks, but responds that "[a]t 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." (ECF No. 86 at 14–15.) ExxonMobil submits, however, that this risk will only become greater the further CLF is permitted to proceed on the merits of its claims.

B. Authorizing Ms. Murphy's Testimony Would Not Conflict with the Purposes of 40 C.F.R. § 2.401.

EPA's *Touhy* regulations exist (i) "to ensure that employees' official time is used only for official purposes," (ii) "to maintain the impartiality of EPA among private litigants," and (iii) "to ensure that public funds are not used for private purposes." 40 C.F.R. § 2.401(c); *see also Walker*, 2009 WL 2611522, at *2 (discussing EPA *Touhy* regulations). While EPA reasonably wishes to avoid "the drain on EPA resources associated with proliferation of environmental-related litigation," (ECF No. 86 at 104), we respectfully submit that EPA's compliance with this particular subpoena would not run afoul of EPA's policy.

A primary policy consideration behind prohibiting EPA employees from testifying in private litigation is "to minimize governmental involvement in controversial matters unrelated to official business." *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 70 (4th Cir. 1989). The Court has already ruled that Ms. Murphy's testimony must be "limited to matters relevant to whether the court should stay this case under the doctrine of primary jurisdiction." (ECF No. 71 ¶ 5(b).) Moreover, the Court has broad discretion to "impose reasonable time limits on the presentation of evidence." *See Borges* v. *Our Lady of the Sea Corp.*, 935 F.2d 436, 442–43 (1st Cir. 1991). The Court could thus impose further limitations, including time limitations, to minimize any burden on Ms. Murphy. Ms. Murphy's testimony in this action therefore need not produce a "significant loss of manpower hours" or draw agency employees away "from other important agency assignments." 873 F.2d at 70; *see Williams*, 2014 WL 3095161, at *5 (narrow focus of subpoena served on FEMA demonstrated that compliance with the subpoena would not result in significant expenditure of time and resources); *Vioxx*, 235 F.R.D.at 345 (that plaintiffs sought to depose only one FDA employee weighed against finding that providing the testimony would divert agency time and resources). In any event, by providing testimony in this matter, EPA and Ms. Murphy will preserve EPA's discretion to prioritize permit renewal applications without interference from private citizens who seek to promote an agenda contrary to that of the agency.

EPA understandably seeks to avoid having its employees routinely compelled to testify in private actions in which EPA is not a party, and in which it likely has no interest. But compliance with this subpoena does not mean that EPA will have to comply with future subpoenas. Upon receiving a subpoena for the testimony of an employee, EPA must make a decision based on the particular facts pertinent to the subpoena in question. *See NLRB*, 174 F.3d at 23. A court likewise must make a particularized determination when deciding a motion to quash. *See Vioxx*, 235 F.R.D. at 345. These case-by-case determinations ensure that *Touhy* regulations "do not create an independent privilege authorizing [agencies] to withhold information" in every case. *See Puerto Rico*, 490 F.3d at 61 (quoting *Mak* v. *FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001)).

In addition, EPA's compliance with the subpoena need not compromise its impartiality. ExxonMobil issued the subpoena at the direction of the Court. (ECF No. 71 ¶ 5(b).) And the testimony sought pertains to limited issues, not encompassing the substance of CLF's claims. (*Id.*) Consistent with the Court's Order, Ms. Murphy's testimony will not address "EPA's views on the meaning of the National Pollutant Discharge Elimination System Permit for the Everett Terminal" or any other issue bearing on the merits of this action. (*Id.*) In other cases, courts have found that an agency's production of one witness at a single deposition to provide testimony unrelated to the merits of the case would not cause the agency to become unduly embroiled in an action. *See Vioxx*, 235 F.R.D. at 346.

In any event, this litigation already implicates EPA. This action is a citizen suit in which CLF purports to "stand[] in the shoes of EPA," *Riggs* v. *Curran*, 863 F.3d 6, 10–11 (1st Cir. 2017), and asks the Court to resolve issues that EPA will ultimately have to decide. Further, any award of civil penalties would go to the United States. *See* 33 U.S.C. §§ 1319(d), 1365(a); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 175 (2000). These facts set this case apart from numerous cases in which an imposition on agency time and resources has been deemed unjustified. *Compare Davis*, 877 F.2d at 1182–83, 1187 (upholding EPA determination that providing testimony could create an appearance of taking sides in private suit for damages arising from gasoline spill where EPA, as a nonparty, performed tests defendants believed

supported their position on damages), *with Williams*, 2014 WL 3095161, at *1, *5 (compelling FEMA, in qui tam suit in which the United States had declined to intervene, to comply with a deposition subpoena because the United States (and therefore FEMA) was not a disinterested party given its financial stake in the outcome of the litigation).

Finally, Ms. Murphy's testimony is unlikely to redirect public funds toward private purposes. As an initial matter, ExxonMobil will reimburse Ms. Murphy for time spent testifying and gas mileage. *See* Fed. R. Civ. P. 45(b)(1). In addition, the purpose of Ms. Murphy's testimony is to ensure that the entity most versed in the technical and policy-laden issues raised in this case decides those issues. That is reasonably a question of significant importance to the Court. Because Ms. Murphy's testimony will not assist either party on the merits, there is little risk that public funds will be used for private purposes.

CONCLUSION

The subpoena issued to Thelma Murphy seeks narrowly tailored testimony concerning the agency's permitting process, which is directly relevant to ExxonMobil's motion to stay. While ExxonMobil's motion to stay should be granted even in the absence of EPA testimony, the testimony solicited would further validate ExxonMobil's position and would aid the Court in deciding whether to enter a stay pending EPA's decision on the Terminal's permit renewal application. Testimony regarding the timing of EPA's action on the renewal application and testimony regarding the reasons why EPA prioritized other matters is particularly within the personal knowledge of Ms. Murphy. To the extent the Court concludes that live testimony is necessary to properly address these issues, the Court has the authority to review the agency's determination to withhold testimony. In ExxonMobil's view, authorizing Ms. Murphy to testify in this particular case, which already implicates EPA's interest, would not undercut the policies underlying EPA's *Touhy* regulations.

Respectfully submitted this 26th day of April, 2019,

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CERTIFICATE OF SERVICE

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), this memorandum was filed through the ECF system on April 26, 2019 and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Deborah E. Barnard*
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