UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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

JOINT REPORT: PRETRIAL SCHEDULE AND DISCOVERY PLAN

Pursuant to the Court's August 10, 2021 order, Plaintiff Conservation Law Foundation ("CLF") and Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company ("Defendants" or "ExxonMobil") respectfully submit the following Joint Statement. This submission sets forth the parties' respective positions on (i) relevant developments since the Court's March 21, 2020 Memorandum and Order, (ii) each party's proposed next steps, and (iii) each party's proposed schedule. Each party has also submitted proposed scheduling orders. CLF's proposed scheduling order is attached as Exhibit A and Defendants' proposed scheduling order is attached as Exhibit B. Consistent with the Court's order at the March 13, 2019 conference, Defendants have submitted an alternative proposed scheduling order, in the event the Court declines to phase discovery, which is attached as Exhibit C. As detailed below, the parties have identified the following areas of disagreement that require Court consideration:

1. The appropriateness of supplemental briefing regarding recent developments and a court conference;

2. Phasing of discovery;

3. Bifurcation of liability and remedies during fact discovery;

4. The appropriate amount of time for completion of discovery and dispositive motions; and

5. Limitations on discovery events.

In Section I below, the parties describe their respective positions on relevant developments since the Court's March 21, 2020 Memorandum and Order. In Section II, the parties describe their areas of disagreement with respect to (i) the appropriateness of supplemental briefing on recent developments, (ii) phasing of discovery, and (iii) bifurcation of liability and remedies during fact discovery. In Section III, the parties provide their respective proposals for pretrial scheduling. In Section IV, the parties provide their positions on changing the default discovery event limitations. Finally, Sections V and VI describe the parties' discussions concerning: (i) discovery and preservations of electronically stored information, and (ii) protection of confidential and privileged information, respectively.

I. Relevant Developments Since the Court's March 21, 2020 Memorandum and Order

A. CLF's Position on Recent Developments

CLF submits there have been no developments relevant to setting a case schedule that have occurred since the Court's stay order. However, CLF responds to the alleged developments as raised by Defendants, none of which warrant additional pretrial proceedings that will further delay discovery in this matter.

1. Supreme Court Rulings in *Transunion v. Ramirez* and *California v. Texas*

As explained in detail in Section II.B.1(a) below, the Supreme Court's rulings in *Transunion v. Ramirez* and *California v. Texas* are not relevant to setting a schedule in this case and do not alter this Court's prior rulings as to CLF's standing. The cases did nothing to change the standing law applicable here. Neither case concerned environmental laws, citizen suits, or

associational standing. *See Transunion*, 141 S. Ct. 2190 (2021) (discussing standing to raise direct damages claims under the Fair Credit Reporting Act); *California v. Texas*, 141 S. Ct. 2104 (2021) (considering constitutional challenge to the Affordable Care Act's minimum insurance mandate). Neither case changed the standing law applicable to CLF's claims. Defendants' argument concerning these cases is merely the latest in their continued effort to relitigate issues that the Court has already decided in its prior rulings. And, contrary to Defendants' assertions, the Court's obligation to evaluate its own subject-matter jurisdiction does not oblige the Court to reconsider arguments that the Court has already rejected. This is especially true where, as here, Defendants' standing argument is directed only to a subset of CLF's claims. As such, even if Defendants' standing arguments were correct as to some of these claims, the Court would still have subject-matter jurisdiction over this case.

2. Defendants' Revision of the SWPPP Following EPA's Issuance of a New Multi-Sector General Permit

The Environmental Protection Agency's January 2021 adoption of a renewed Multi-Sector General Permit ("MSGP") governing stormwater discharges from industrial activities supports imposition of a standard discovery schedule consistent with CLF's proposed schedule set forth herein. In fact, EPA's adoption of the MSGP (i) retains the long-standing mandatory requirement that permittees covered under the MSGP shall employ "good engineering practices" in development of their Stormwater Pollution Prevention Plan ("SWPPP"), and (ii) confirms that good engineering practices require that flood risks from severe weather be considered and addressed. Defendants' claim that EPA's adoption of the MSGP somehow moots CLF's claims is meritless and does not support more briefing and delay in setting a discovery and trial schedule.

As Defendants acknowledge, their binding Clean Water Act permit incorporates certain provisions of the "currently applicable" MSGP. However, it strains credulity to claim that this

incorporation of EPA's 2021 MSGP and Defendants' alleged response thereto moots CLF's claims under the facility-specific individual permit and under the independently enforceable provisions of the Resource Conservation and Recovery Act. As an initial matter, the First Circuit made clear that CLF's claims under the current permit, which date back to the commencement of the statute of limitations, are justiciable and must be tried regardless of any subsequent EPA regulatory action. *See* ECF 111 ("Appeal Opinion") at 28. Thus, CLF's claims would continue regardless of Defendants' current mootness argument.

Regardless, contrary to Defendants' assertions, EPA's adoption of the 2021 MSGP actually supports the substance of CLF's claims and therefore the schedule CLF proposes. Defendants would have this Court ignore that EPA's permit and response to comments (i) maintain the "good engineering practice" standard and acknowledges that the good engineering practice standard naturally includes consideration of climate and severe weather conditions, and (ii) provides new additional guidance to MSGP-regulated permittees underscoring the pre-existing requirement to consider these risks and defining major storm events on a site-specific basis.

In its detailed and extensive comments on the draft MSGP, CLF argued that the prior version of the MSGP (like the Terminal Permit) included the good engineering practices standard and the resulting requirement to consider and address flood risks posed by climate change impacts. As EPA explains in its response to a portion of CLF's comment:

> EPA acknowledges that the use of "good engineering practices" to develop control measures should consider flood risks. EPA considers the specific provision contained in Part 2.1.1.8 necessary to confirm that operators have expressly considered control measures to mitigate impacts from stormwater discharges from major storm events.

2021 MSGP § 2.1.1.8, Response to Comments ("Response to Comments") at 402.

In responding to another comment, EPA also confirmed that the requirement to consider major storm event and implement necessary control measures was not new:

> The 2021 MSGP *retains* the requirement that operators consider implementing enhanced stormwater control measures for facilities that could be impacted by major storm events, such as hurricanes, storm surge, extreme precipitation, and historic flood incidents.

Response to Comments at 373 (emphasis added).

The 2021 MSGP therefore *retains* the good engineering practices standard, and it acknowledges that the good engineering practices standard considers flood risks. The added language in Section 2.1.1.8 guides the consideration of severe weather to confirm that major storm events have been addressed. EPA further explained its approach in responding to another CLF Comment:

> To address the comment that EPA should strengthen the language in Part 2.1.1.8, EPA notes that the following language from Part 2.1 of the MSGP applies to the measures selected under Part 2.1.1.8, "The selection, design, installation, and implementation of control measures to comply with Part 2 must be in accordance with good engineering practices and manufacturer's specifications."

Response to Comments at 392.

Defendants selectively quote a sentence fragment from EPA's response to CLF's comments to argue that permanent structural control measures are never necessary to mitigate risks of pollution from major storm events. To the contrary, EPA explained that good engineering practices is the controlling standard and may require modifications of structural controls:

> For many facilities, the effluent limits can be achieved without using highly engineered or complex treatment systems. . . . *However, EPA acknowledges that sometimes treatment devices or constructed/installed controls may be necessary, particularly where a facility might otherwise not meet water quality standards.* EPA has added to the 2021 MSGP the following language, "Implementing structural improvements, enhanced/resilient pollution prevention measures, and other mitigation measures will help to minimize impacts from stormwater discharges from major storm events, such as hurricanes, storm surge, extreme precipitation, and historic flood incidents." Therefore, the 2021 MSGP does address storm surge. In addition, EPA has included the following footnote in Part 2.1.1.8 of the 2021 MSGP: "To determine if your facility is susceptible to an increased frequency of major storm events that could impact the discharge of pollutants in stormwater, you may reference FEMA, NOAA, or USGS flood map

> products at https://www.usgs.gov/faqs/where-can-i-find-flood-maps?qt-news_science_products=0#qt-news_science_products.

Response to Comments at 398 (emphasis added); *see also id.* at 373 ("EPA recognizes that not all of the considerations listed in Part 2.1.1, including the controls for major storm events, will be applicable to every facility nor will they always affect the choice of control measures.").

Lastly, it is important to note that CLF's Comments on EPA's 2020 *Draft* MSGP were addressing proposed language that would have narrowed and undermined the good engineering practices standard. In the final 2021 MSGP EPA significantly modified the proposed language, in part due to CLF's comments, to expressly retain the good engineering practices standard and add further guidance on consideration of "major storm events." Response to Comments at 394–399. Defendants' claim that EPA rejected CLF's comments is false. In fact, in response to CLF's comments, EPA (i) abandoned the language it had proposed in the 2020 draft MSGP, (ii) confirmed that the good engineering practices standard was retained as an enforceable standard, and (iii) strengthened the new language in Section 2.1.1.8 to require site-specific consideration of major storm events and consideration of flood maps developed by the U.S. Geological Survey, the National Oceanic and Atmospheric Administration, and the Federal Emergency Management Agency.

EPA's adoption of a renewed MSGP and Defendants' claimed actions in response simply underscore the need for this case to move into discovery. To the extent that any aspect of EPA's action or Defendants' response is relevant and material to the litigation, the issues can be fully explored via discovery and trial. No near-term briefing or delay in discovery is warranted.

3. Everett Terminal NPDES Permit Renewal Status

EPA has taken no formal action on the application for permit renewal for the ExxonMobil Terminal since the Court entered the Stay Order. As Defendants note, EPA issued draft permits

for other oil terminals in Massachusetts: one in October 2020; two in December 2020; and five in February 2021. EPA has not issued final permits for any of those terminals and has not issued a draft permit for any other terminals in the last six months. CLF cannot speak to what communications Defendants have had with EPA about the permit renewal. However, contrary to Defendants' assertions, no inference can be drawn either way regarding the likelihood of a draft permit being issued in the near future.

Regardless, speculation regarding EPA's timeline for issuing a renewed permit for the Everett Terminal is not relevant to setting a schedule for this case, and Defendants do not appear to argue that it does.

B. Defendants' Position on Recent Developments

ExxonMobil submits that there have been several relevant developments since the Court's March 21, 2020 Order, and that these developments have profound implications for the Court's subject matter jurisdiction and, ultimately, for the viability of CLF's claims.

1. Supreme Court Rulings in *Transunion* v. *Ramirez* and *California* v. *Texas*

The Supreme Court recently issued two significant decisions clarifying and redefining the standing doctrine. First, in *Transunion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021) the Supreme Court held that a plaintiff cannot demonstrate the concrete harm required for standing by merely pointing to defendant's alleged violation of a federal statute and Congress's creation of a private right of action. Importantly, the Court held plaintiffs lacked standing to assert "bare procedural violation[s]" where they failed to identify any concrete harm they had suffered as a result of the defendant's purported statutory violations, but instead merely alleged a "*risk of future harm*." 141 S. Ct. 2190, 2211, 2213 (2021) (emphasis added). The Supreme Court's conclusion that a risk of future harm cannot supply standing to seek damages, but only injunctive relief, and that the risk

of harm there was too speculative to support standing to seek injunctive relief, is equally applicable to CLF's claims under the Clean Water Act ("CWA") challenging the Everett Terminal's (the "Terminal") Storm Water Pollution Prevention Plan (SWPPP) (Counts 6–14), and its claim under the Resource Conservation and Recovery Act (RCRA) (Count 15). CLF's SWPPP claims similarly plead bare procedural violations of purported permit requirements without any concrete injury to its members. And both the SWPPP and RCRA claims are premised solely on an alleged risk of future harm, which—like the claims in *Transunion*—is too speculative to support CLF's request for injunctive relief. Because CLF identifies no concrete harm it has suffered as a result of its SWPPP and RCRA claims, CLF lacks standing under *Transunion*—particularly where, as discussed below, *supra* §§ I.B.2 & II.B.2, its request for injunctive relief has been mooted because the SWPPP challenged in the Amended Complaint is no longer operative.

Second, in *California* v. *Texas*, the Court clarified that the requirement that the plaintiff's purported injury must be "fairly traceable" means that the injury must be traceable specifically to "the 'allegedly unlawful conduct' of which they complain." 141 S. Ct. 2104, 2113 (2021). CLF's SWPPP claims cannot satisfy this standard because they allege only bare procedural violations (*see, e.g.*, Am. Compl. ¶¶ 331–342 ("Unlawful Certification of SWPPP")), which do not give rise to any injury to CLF's members that is traceable to the allegedly unlawful act. Moreover, in *California* v. *Texas*, the Court held that plaintiffs lacked standing because they challenged the constitutionality of a statutory provision that was no longer enforceable. That ruling is directly applicable to CLF's claims, which challenge the adequacy of a SWPPP that is no longer operative. *See supra* §§ I.B.2 & II.B.

"[B]ecause standing is a prerequisite to a federal court's subject matter jurisdiction, the absence of standing may be raised at any stage of a case." *See Hochendoner* v. *Genzyme Corp.*,

823 F.3d 724, 730 (1st Cir. 2016). Accordingly, it is proper for the Court to take note of these recent Supreme Court rulings in order to satisfy its independent obligation to assure itself of its subject matter at all stages of the case.

There is no merit to CLF's contention that the Court may disregard any defects to its subject-matter jurisdiction so long as CLF maintains standing to assert at least one of its claims. Rather, the law is clear "[t]he standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." *Conservation Law Foundation, Inc.* v. *E.P.A.*, 964 F. Supp. 2d 175, 186 (D. Mass. 2013) (quoting *Katz* v. *Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012).

2. ExxonMobil's Revision of Its SWPPP Following EPA's Issuance of a New Multi-Sector General Permit

CLF's SWPPP claims have been mooted by the Terminal's revised and updated SWPPP, which expressly prescribes procedures designed to minimize the impact of major storm events at the Everett Terminal, in accordance with the new requirements imposed by EPA in its recently issued 2021 Multi-Sector General Permit ("MSGP").[1] As a result, CLF cannot proceed on its current SWPPP claims (Counts 6–14) because each of those claims was premised on purported inadequacies in a SWPPP that has been modified and is no longer operative.

In January 2021, EPA issued a new MSGP, effective March 2021, which includes a new provision (Section 2.1.1.8) that EPA describes as "a *new* effluent limitation or condition over the

[1] The MSGP is a stormwater discharge permit used by certain industrial dischargers that, unlike the Terminal, do not have individual permits. The SWPPP provisions of the MSGP are specifically referenced in the Terminal's Permit, Part I.B.3, which requires the Terminal's SWPPP to "be consistent with the provisions for SWPPPs included in the most current version of the" MSGP.

previous permit"[2] concerning stormwater discharges from "major storm events such as hurricanes, storm surge, extreme/heavy precipitation, and flood events."[3] By adopting this new provision, EPA explained that the 2021 MSGP "for the first time" imposed a requirement that facilities "consider implementing mitigation measures to minimize impacts from major storm events," and "consider implementing structural improvements, enhanced/resilient pollution prevention measures, and other mitigation measures," including eight specific control measures identified by EPA for consideration.[4] Unlike the 2015 MSGP, the 2021 MSGP also requires facilities to "document in [their] SWPPP" any such stormwater control measures already in place "due to existing requirements mandated by other state, local or federal agencies." (MSGP § 2.1.1.8; EPA Response to Comments at 398.) Accordingly, the 2021 MSGP added specific evaluations and measures that permittees must consider beyond the 10-year 24-hour storm event referenced in the Terminal's permit. (*See* ECF 34-1 at 3, 12 of 80.)

Following the issuance of the 2021 MSGP, ExxonMobil's Everett Terminal updated its SWPPP to expressly incorporate procedures to minimize the impact of major storm events at the Everett Terminal, consistent with the new requirements in Section 2.1.1.8 of the 2021 MSGP. ExxonMobil provided CLF with a copy of the updated SWPPP on August 7—three days before the Court entered its Order requiring the parties to confer and report regarding relevant developments.

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[2] *See* Response to Public Comments, EPA NPDES 2021 Multi-Sector General Permit, at 398 (Jan. 15, 2021), *available at* https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0349 (hereinafter "EPA Response to Comments").

[3] 2021 Multi-Sector General Permit ("MSGP") § 2.1.1.8 ("Implementing structural improvements, enhanced/resilient pollution prevention measures, and other mitigation measures can help to minimize impacts from stormwater discharges from major storm events such as hurricanes, storm surge, extreme/heavy precipitation, and flood events."), *available at* https://www.epa.gov/sites/default/files/2021-01/documents/2021_msgp_-_permit_parts_1-7.pdf.

[4] EPA Response to Comments at 399–410 (responding to comments by CLF).

Recognizing the potential impact of the new MSGP condition on its claims, CLF urged EPA in its public comments not to adopt this new condition because of its view that the requirement to use good engineering practices in the prior version of the MSGP already required permit holders to address all climate change impacts, and the revisions therefore would effectively "limit[] permittees' existing duties" under the prior MSGP.[5] CLF's comments on the Proposed MSGP cited many of the same arguments and authorities CLF invoked in this action. (*See* EPA Response to Comments at 393 (citing Goldsmith Declaration and Army Corps of Engineers, Regulation No. 1100-2-8162, at B-1 (Dec. 31, 2013).) EPA nevertheless issued a final MSGP with the provision to which CLF objected. For instance, while CLF argued "Sections 2.1.1.8(c)–(f) weaken the 2020 MSGP by identifying temporary measures to be taken only in the event of an oncoming storm" (EPA Response to Comments at 395), EPA adopted those provisions verbatim in the final MSGP it issued in January 2021.[6]

In response to CLF's Comment that "EPA should not adopt the proposed language of Section 2.1.1.8 of the proposed 2020 MSGP" because, among other things, the "MSGP does not require consideration of ALL climate change-related impacts and therefore relaxes effluent limitations in violation of the [CWA's] anti-backsliding provision,"[7] EPA responded confirming its view that Section 2.1.1.8 was a *new* condition and "[t]he 2015 MSGP had no equivalent provision." (EPA Response to Comments at 398.) As EPA stated in its response to CLF:

> **EPA disagrees** that the requirement that operators consider implementing mitigation measures to minimize impacts from major storm events constitutes backsliding. This is a

[5] *See* Letter from Christopher M. Killian, Esq., Senior Attorney, CLF, to Emily Halter, EPA, at 1, 5 (June 1, 2020), *available at* https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0200.

[6] *Compare* Proposed Multi-Sector General Permit § 2.1.1.8(c)–(f) (2020), *available at* tinyurl.com/proposed-2020-MSGP, *with* 2021 MSGP § 2.1.1.8(c)–(f).

[7] The CWA's anti-backsliding provision prohibits EPA from adopting an effluent limit or condition less stringent than imposed in the prior permit, subject to exceptions not relevant here. *See* 33 U.S.C. § 1342(o); *accord* EPA Response to Comments at 394.

> **new effluent limitation or condition over the previous permit**, and as such not "effluent limitations which are less stringent" as specified in section 402(o) of the Act or the regulations at 40 CFR 122.44(l). Anti-backsliding simply does not apply to a **new condition**. The 2021 MSGP includes this provision to consider implementing structural improvements, enhanced/resilient pollution prevention measures, and other mitigation measures **for the first time as the 2015 MSGP did not include a similar provision**. The 2021 MSGP asks operators to both document in their SWPPP any existing stormwater control measures in place if required by state, local, or federal agency and consider implementing additional stormwater control measures. **The 2015 MSGP had no equivalent provision.** Thus, the 2021 MSGP provides conditions that enhance the protection of water quality standards. Nevertheless, **EPA also disagrees with the commenter's characterization of the provision**. . . .

(EPA Response to Comments at 398.) EPA also identified various points of disagreement with CLF, stating, among other things, that "EPA does not agree [with CLF] that permanent, structural control measures are necessary to mitigate risks of pollution from major storm events." (EPA Response to Comments at 398.)

Because "a citizen suit under the CWA must be grounded on an ongoing violation," CLF cannot proceed on a theory that challenges a SWPPP that is no longer operative. *Nat. Res. Council of Maine* v. *Int'l Paper Co.*, 424 F. Supp. 2d 235, 244 (D. Me. 2006). Moreover, CLF's purely forward-looking SWPPP claims (Counts 6–14), which seek only injunctive relief, have been mooted because the SWPPP that CLF purports to challenge has already been revised to comply with requirements for addressing major storm events established by EPA in the 2021 MSGP. *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987); *see also Massachusetts Public Interest Research Group* v. *ICI Americas Inc.*, 777 F. Supp. 1032, 1035–36 (D. Mass. 1991) (holding issuance of more relaxed permit, which effectively authorized prior violations, mooted claims for "both . . . civil penalties and injunctive relief.").

Contrary to CLF's contention, *see infra* § II.B.1(b), nothing in the First Circuit's decision supports CLF's assertion that it is entitled to discovery on claims for which it lacks standing or which have already become moot.

3. Everett Terminal NPDES Permit Renewal Status

Consistent with EPA's representations to this Court that it intended to address ExxonMobil's renewal application in Fiscal Year 2021,[8] Region 1 of the EPA is currently conducting its review of ExxonMobil's renewal application for the Terminal NPDES permit. EPA has indicated it expects to issue a draft permit for public comment in September or October of this year. EPA started conferring with ExxonMobil in March of this year and conducted a site visit of the Terminal on June 2, 2021. As part of EPA's standard permit reissuance process, in June and August of this year, Region 1 permit writers requested supplemental information from ExxonMobil regarding the design and management of the Everett Terminal. ExxonMobil continues to work with EPA to provide information to facilitate its review of the Terminal's permit renewal application.

The review of the Terminal's permit appears to be part of a larger effort from Region 1 to issue NPDES permits to other bulk petroleum storage facilities in and around the Mystic River watershed. Between October 2020 and February 2021, Region 1 issued eight draft NPDES permits to petroleum facilities in Chelsea, Revere, Quincy, and East Braintree, Massachusetts. This is again consistent with the representations EPA made to this Court in 2019, when the agency stated that it intended to group similar permits together to facilitate their permit writing and review processes. (May 14, 2019 Hr'g Tr. 35:21–36:4) ("I know they are also trying to group permits in a watershed or similar types of permits so that they can do multiple permitting addressing the same issues with one permit team"). Region 1 also jointly issued the new Multi-Sector General Permit referenced above in January 2021 along with the eight other EPA region 1 permits. These

[8] *See* May 14, 2019 Hr'g Tr. 32:7–9 (stating EPA may not issue a draft permit until "fiscal year 2021"); ECF 86-1 at 21 of 28 (stating EPA "anticipates commencement of public notice and comment on the draft permit within the next two fiscal years").

developments confirm that EPA is making progress on clearing the backlog of permits and can be expected to issue a draft permit for the Everett Terminal—which EPA is already in the process of drafting—in the near future.

II. Areas of Disagreement

The parties' respective positions on pretrial scheduling, supplemental briefing, phasing of discovery, and bifurcation are presented below.

A. The Parties' Positions

1. CLF's Position on Areas of Disagreement

CLF proposes an efficient schedule that ensures a just, speedy, and inexpensive resolution of the case going forward and preserves scarce judicial resources. As detailed in Section III.A, CLF proposes to conduct all fact discovery over a period of 7 months, followed by expert discovery over 5 months, and a single round of dispositive motions following the close of discovery. This structure is the quickest and most efficient manner to resolve all the issues raised in the case, and it avoids relitigating issues that the Court has already decided when it ruled on Defendants' two motions to dismiss in 2017 and 2019, respectively.

By contrast, Defendants' proposal injects needless further delay and wastes judicial resources with *four* separate sets of dispositive motions, three phases of discovery, and three rounds of expert reports. In addition to a *third* motion to dismiss before discovery even begins, Defendants propose a phased discovery approach that, combined with their request to bifurcate all pretrial proceedings between liability and remedy, will result in years more litigation before this case finally goes to trial.

2. Defendants' Position on Areas of Disagreement

The parties have been unable to reach agreement on whether the Court would benefit from supplemental briefing on recent developments in this case and whether discovery should be

phased. They also disagree on whether a conference with the Court should be held to resolve these issues.

Under Defendants' proposal, the parties would simultaneously submit supplemental briefing addressing the legal implications of recent developments that occurred during the stay, which Defendants submit have implications for the Court's jurisdiction, the scope and viability of Plaintiff's claims, and the proper subjects for discovery. Depending upon what claims remain after the Court addresses CLF's standing in light of the recent Supreme Court decisions and case developments, the parties would then proceed with discovery that is divided into two phases. The first phase of discovery would be limited to information relevant to interpreting the disputed terms in Everett Terminal's NPDES Permit. The parties would then have an opportunity for dispositive motions, which could resolve CLF's claims without the need for further discovery. The second phase of discovery, if necessary, would then address any remaining issues necessary to resolving the Terminal's liability under the CWA or RCRA. ExxonMobil also proposes that discovery concerning questions of liability and remedy be bifurcated, to avoid potentially unnecessary and burdensome discovery regarding how to "cure" supposed violations (ECF 90 at 3), which in all likelihood will not be found to exist.

While CLF emphasizes that its schedule is shorter when measured from beginning to end, CLF's schedule lacks any opportunity to resolve the case before the conclusion of all discovery. Moreover, this Court has already noted that CLF's ambitious schedule is "perhaps unrealistic." (ECF 106 at 36–37.) ExxonMobil submits that discovery narrowly tailored to dispositive issues will permit resolution of CLF's claims more efficiently than granting CLF's request for roving discovery into, among other topics, (i) issues that have been mooted by recent developments,

(ii) corporate-wide practices that have no relevance to the claims at issue, and (iii) remedies prior to any finding of liability.

B. Supplemental Briefing

1. CLF's Position on Defendants' Request to File A Third Challenge to the Sufficiency of CLF's Standing Allegations

CLF opposes Defendants' request to file a third attack on the sufficiency of CLF's standing allegations.

Defendants' request for further briefing on CLF's standing is another attempt to re-litigate their motions to dismiss and to delay resolution of this matter for as long as possible. Defendants maintain that further briefing is necessary to address (i) the impact of two recent Supreme Court opinions on CLF's standing for all of its claims, and (ii) the effect of Defendants' recent amendment to its SWPPP on CLF's Clean Water Act claims. As explained below, neither argument holds water. *First*, neither of the cases cited by Defendants changed the standing law applicable to CLF's claims, and Defendants' request to brief them is merely a request for reconsideration of the Court's opinion on the motion to dismiss. *Second*, Defendants' amendment of their SWPPP cannot moot CLF's claims that were valid when the Complaint was filed. Defendants' arguments to the contrary misstate the law on standing and subject-matter jurisdiction.

(a) The *Transunion* and *California v. Texas* Opinions Did Not Alter the Law Applicable to CLF's Claims, And Defendants' Argument Is A Meritless Request for the Court to Reconsider its Order on the Motion to Dismiss

CLF opposes Defendants' request to file a *third pre-discovery attack* on CLF's standing allegations. Defendants have already argued in their Motion to Dismiss the Amended Complaint that CLF's allegations of the risk of future harm were not concrete enough to give CLF's standing. The Court expressly rejected those arguments, finding "the Amended Complaint adequately alleges facts establishing standing for present purposes, motion to dismiss purposes, because it

contains new allegations of foreseeable severe weather events allegedly induced by climate change that are allegedly already occurring or will occur in Massachusetts in the near future." Mar. 13, 2019 Hr'ing Tr. (ECF 73) at 127-28. The mere passage of time since the Court's order does not now entitle Defendants to a further bite at the apple. Defendants will have the opportunity to challenge CLF's standing at the appropriate time—in summary judgment motions, based on a full discovery record.

Defendants cannot satisfy the legal standard governing their request for further briefing—which amounts to a request for reconsideration of the Court's Order on Defendants' Motion to Dismiss the Amended Complaint. Mem. & Order, ECF 71 (Mar. 14, 2019) ("MTD Order"). To justify their request to attack CLF's standing, Defendants cite two Supreme Court opinions issued since the MTD Order, neither of which impact CLF's standing here. One of the primary grounds for seeking reconsideration is an intervening change in law. *See De Giovanni v. Jani-King Int'l, Inc.*, 968 F. Supp. 2d 447, 450 (D. Mass. 2013) (*quoting United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009)) ("[M]otions for reconsideration are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been *an intervening change in the law*, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." (emphasis added)). But, Defendants cannot meet the standard of establishing an intervening change in law.

To justify reconsideration, Defendants need to show the law governing CLF's standing has changed since the Court denied Defendants' most-recent motion to dismiss. Defendants only claim that the opinions "clarifi[ed] the standing doctrine." *Supra* § I.B.1. Defendants do not even argue, let alone show, that *Transunion* or *California v. Texas* actually *changed* the standing law applicable to CLF's claims. That deficiency, standing alone, is dispositive of Defendants' request.

Also, a cursory review of each case (and Defendants' arguments) confirm that the applicable standing law has not changed. Starting with *California v. Texas*, Defendants' argument is a single sentence, asserting that the opinion "clarified that the requirement that the plaintiff's purported injury must be 'fairly traceable' means that it must be traceable specifically to the 'allegedly unlawful conduct' of which they complain.'" *See* Section I.B.1 above (quoting *California v. Texas*, 141 S. Ct. at 2113). But the "fairly traceable" standard is not new. The language Defendants quote from *Calfornia v. Texas* is quoted directly from the Supreme Court's 2006 opinion in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Indeed, the Court here applied this same standard when it denied Defendants' motion to dismiss. *See, e.g.*, Mem. & Order, ECF 29 (Sept. 17, 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Regarding *Transunion*, it is important to note at the outset that the case's holding is expressly limited to claims for *damages*. *Transunion*, 141 S.Ct. at 2211-13. The plaintiffs there sought individual damages, on a class basis, for alleged violations of the Fair Credit Reporting Act. Meanwhile, CLF's suit is a citizen enforcement action—it does not seek damages. By its express terms, the *Transunion* holding does not impact CLF's claims.

Despite this clear limitation, Defendants cite *Transunion* for two propositions: (i) allegations of "bare procedural violations," by themselves, are insufficient to create standing, and (ii) allegations of "risk of future harm" that is too "speculative" is insufficient to create standing for "statutory damages." Neither proposition is new or relevant to CLF's case.

First, *Transunion*'s one-paragraph discussion of "bare procedural violations" quotes the proposition directly from the Supreme Court's 2016 *Spokeo* decision. *See Transunion*, 141 S. Ct. at 2213 (quoting *Spokeo v. Robbins*, 578 U. S. 330, 341 (2016)). Had Defendants wished to make a *Spokeo* argument, they needed to do so in their motions to dismiss—both of which were decided

after the *Spokeo* decision. A motion for reconsideration is not a venue for a party to raise arguments that they could have raised the first time around.[9]

Second, Defendants' discussion of *Transunion* adds nothing new to arguments that failed on the prior motions to dismiss. As noted above, the Court already rejected Defendants' arguments that CLF's allegations of future risk are too speculative. Defendants do not—and cannot—explain how the *Transunion* case alters the standard that the Court already applied.

Despite Defendants' repeated invocation, the Court's independent obligation to evaluate its own subject-matter jurisdiction does not alter this analysis. This Court has already rejected, on multiple occasions, the arguments that Defendants are making now, and, as explained above, nothing in prevailing standing law has changed since the Court's last ruling on these arguments. While "[c]hallenges to the Court's subject matter jurisdiction . . . may be filed at any time. This does not mean . . . that the defendant may continue to file motions challenging the Court's jurisdiction on grounds the Court has already rejected." *United States v. McLaughlin*, 2018 WL 3148370, at *4 (D. Conn. June 27, 2018) (internal citation omitted).

(b) Defendants' Changes to Their SWPPP Cannot Moot CLF's Claims

Defendants' amendment of its Stormwater Pollution Prevention Plan does not support a further pre-discovery attack on CLF's SWPPP-related claims, for at least three reasons.

First, Defendants' argument fundamentally misunderstands the standing inquiry. Defendants' post-complaint amendment of its SWPPP cannot remove the Court's subject matter jurisdiction. "The critical point for determining standing is the date suit was filed." *Nat. Res.*

[9] Moreover, CLF's claims that Defendants have a duty to take affirmative action to address the reasonably foreseeable risks that climate change poses to the Terminal are a far cry from the allegations in *Transunion*—that a credit reporting agency violated the Fair Credit Reporting Act by sending mandatory information disclosures in two mailings instead of one, consolidated mailing. *Transunion*, 141 S.Ct. at 2213 at 25.

Council of Maine v. Int'l Paper Co., 424 F. Supp. 2d 235, 244 (D. Me. 2006). Where, as here, the Court has found that CLF had standing when the Complaint was filed, Defendants' alteration of its SWPPP cannot remove CLF's standing. *See id.* (holding that issuance of a permit for the defendant's facility did not moot the plaintiff's unpermitted discharge claims because the permit was issued after the complaint was filed); *Conservation L. Found., Inc. v. Shell Oil Prod. US*, No. CV 17-396 WES, 2020 WL 5775874, at *4 (D.R.I. Sept. 28, 2020) (finding that new permit's removal of certain pollution monitoring requirements did not moot CLF's claims because the permit in force when complaint was filed included them). Indeed, the First Circuit in its ruling here found that "even if [a new] permit moots [CLF]'s request for injunctive relief, the parties would still have to begin discovery on the counts alleging past violations." Appeal Opinion at 28. If issuance of a new permit cannot moot CLF's claims, Defendants' amendment of their SWPPP certainly cannot.

Second, delaying discovery to allow Defendants to attack CLF's standing on a subset of its claims is inefficient and unnecessarily delays the case. Defendants' argument concerns what they describe as CLF's "SWPPP claims" not all of CLF's claims. Defendants do not argue that further briefing on this issue will resolve the case. Indeed, regardless of how many of CLF's Clean Water Act claims that Defendants envision challenging, the Resource Conservation and Recovery Act claim would survive.[10]

Third, even assuming that *substantial* and *specific* changes to Defendants' SWPPP could moot some of CLF's request for injunctive relief—they cannot—the mere fact that Defendants made *some changes* cannot. Discovery is required to determine the impact of any changes Defendants have made. For example, CLF would need discovery on, *inter alia*, what analyses

[10] CLF addresses Defendants' argument concerning CLF's RCRA claims in Section II.C.1, below.

Defendants have done, what data Defendants used, what precise changes Defendants have made, and expert opinion on the sufficiency of those changes. As the Court found in its ruling on the motion to dismiss, Defendants' obligations under the Permit are not merely ministerial—Defendants are required to "proactively address potential discharges of pollutants" through, if necessary, "changes in the facility." Mar. 13, 2019 Hr'ing Tr. (ECF 73) at 134.

The fact of changes, standing alone, has no impact on CLF's claims.

2. Defendants' Position on the Benefits of Supplemental Briefing Regarding Recent Developments

ExxonMobil proposes that the parties first submit supplemental briefing apprising the Court of significant developments that have occurred during the time this action has been stayed, and their implications for the Court's jurisdiction, the claims in this case, and the potential scope of discovery. ExxonMobil's proposed schedule first calls for expedited briefing concerning: (i) the issuance of two significant decisions by the Supreme Court clarifying the standing doctrine as it relates to claims premised on alleged procedural violations or risk of future harm; and (ii) ExxonMobil's adoption of a revised SWPPP for the Everett Terminal. Under ExxonMobil's proposal, the parties would simultaneously submit briefs to the Court on the issues identified above, and shortly thereafter be afforded the opportunity to respond to the opposing party's submission. ExxonMobil respectfully submits that supplemental briefing on these developments prior to commencing discovery will narrow the issues in dispute and clarify the scope of any necessary discovery.

CLF's attempt to characterize ExxonMobil's proposal as a motion for reconsideration fails because it disregards the Court's independent obligation to assure itself of its subject matter jurisdiction, and it disregards the significant developments since this action was last before this Court, which warrant reconsideration.

Contrary to CLF's assertion, ExxonMobil need not establish that the elements for granting reconsideration are present, since the Court has an independent obligation to assure itself of its subject matter jurisdiction. It is well established that standing "is a prerequisite to a federal court's subject matter jurisdiction," which "may be raised at any stage of the case." *See Hochendoner*, 823 F.3d at 730. Similarly, "[m]ootness can arise at any stage of litigation." *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996). The Court thus has an independent obligation to assure itself that CLF has standing under the Supreme Court's binding precedent and that intervening events have not mooted the case.

CLF's contention that "Defendants' amendment of their SWPPP cannot moot CLF's claims that were valid when the Complaint was filed" is wrong. *See supra* § II.B.1. It is well established that "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013). Importantly, CLF seeks only injunctive relief for its SWPPP claims. CLF's RCRA claim is likewise brought pursuant to "an environmental statute that authorizes only *prospective relief*." *See Marrero Hernandez* v. *Esso Standard Oil Co.(Puerto Rico)*, 597 F. Supp. 2d 272, 283 (D.P.R. 2009) (emphasis added) (citing *Gwaltney*, 484 U.S. at 57 n.2). Accordingly, in order for CLF to maintain its claims for "forward-looking, injunctive relief" under either statute, CLF cannot rely on purely past harms (which it has not alleged), but must establish an imminent and substantial threat of future injury. *See TransUnion LLC*, 141 S. Ct. at 2210; *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983). This presents an insurmountable burden given that CLF's climate change CWA claims challenge a SWPPP that is no longer operative.

As the Supreme Court explained when addressing CWA citizen suits in *Gwaltney*, "[l]ongstanding principles of mootness . . . prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'" *Gwaltney*, 484 U.S. at 66. Multiple courts thus have dismissed CWA and RCRA claims where, as here, the complained-of conduct had ceased. *See, e.g.*, *Massachusetts Public Interest Research Group*, 777 F. Supp. at 1035–36 (holding issuance of more relaxed permit mooted claims); *Dubois* v. *U.S. Dep't of Agriculture*, 20 F. Supp. 2d 264, 268 & n.6 (D.N.H. 1998) (dismissing claims for civil penalties because "[a]bsent evidence of continuing misconduct, there are no imminent violations of the CWA for civil penalties to deter"); *Crandall* v. *City & Cty. of Denver, Colo.*, 594 F.3d 1231, 1239 (10th Cir. 2010) (affirming denial of injunctive relief under RCRA following defendant's cessation of conduct that served as basis of RCRA claim); *see also Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (holding defendant's "achievement of substantial compliance with its permit requirements, might moot the case" if this event made it absolutely clear that the "permit violations could not reasonably be expected to recur"). Indeed, CLF's own authority confirms this proposition. In *Natural Resources Council of Maine* v. *International Paper Co.*, the "[c]ourt easily conclude[d] that [defendant] ha[d] met its heavy burden of proving mootness in conjunction with [plaintiff's] claims for injunctive and declaratory relief" where defendant's "permit was not valid when the complaint was filed, [but] it is now." 424 F. Supp. 2d at 255 (cited *supra* § II.B.1(b)). Under these precedents, the Court's independent obligation to assure itself of its jurisdiction does not hinge on the factors for granting reconsideration in other contexts.

Nevertheless, the conditions for granting reconsideration are satisfied here in light of the intervening change in law and the discovery of new evidence not previously available.

Reconsideration is warranted when "the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *Davis* v. *Lehane*, 89 F.Supp.2d 142, 147 (D. Mass. 2000); *Vermont Pure Holdings, Ltd.* v. *Nestle Waters North America, Inc.*, 2006 WL 839486, at *3 (D. Mass. 2006). The first two of these conditions are present here.

First, the Supreme Court's recent decisions on standing in *Transunion* and *California* v. *Texas* constitute an intervening change in the law, which alone suffices to warrant reconsideration. The recent Supreme Court rulings clarify that CLF lacks standing to assert its SWPPP and RCRA claims, which are premised entirely on a mere risk of future harm. As the First Circuit has recognized, it is appropriate for a court to revisit an earlier ruling where "an intervening Supreme Court decision has cast into doubt the logic of" the court's earlier decision. *Hochendoner*, 823 F.3d at 730.

The Supreme Court's two decisions on mark a change in the Court's jurisprudence on standing and the requirement to plead a concrete injury, particularly where, as here, the plaintiff alleges a purely procedural violation and the only injury alleged is a risk of future harm.[11] For instance, in *Transunion*, the Supreme Court clarified its earlier statement in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016), that a "risk of real harm" can "satisfy the requirement of

[11] *See, e.g.*, *Ward* v. *Nat'l Patient Account Servs. Solutions, Inc.*, 2021 WL 3616067, at *2–3 (6th Cir. Aug. 16, 2021) ("Recently, the Supreme Court abrogated th[e] holding" that "plaintiffs satisfied the concreteness requirement where [statutory] violations created a material risk of harm to the interests recognized by Congress," by "finding that 'in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm.' Rather, plaintiffs must demonstrate that . . . 'the risk of future harm materialized,' or that the plaintiffs 'were independently harmed by their exposure to the risk itself.'" (quoting *TransUnion*, 141 S. Ct. at 2210–11)); *Kale* v. *Procollect, Inc.*, 2021 WL 2784556, at *2–4 (W.D. Tenn. July 2, 2021) ("Until recently, [plaintiff] could have established the disputed element of standing, an injury in fact" by "alleg[ing] that [defendant] 'violated the statute in [ways] that caused [her] concrete harm' or that [Defendant's] 'violation[s] of the statute did not cause tangible harm but created a risk of harm that Congress intended to prevent.' . . . "The Supreme Court [in *Transunion*] recently clarified the risk-of-harm language in *Spokeo*. . . . The Supreme Court held that risk-of-harm analysis applies only in suits seeking injunctive relief and cannot be used to establish standing in a suit for damages."); *Bassett* v. *Credit Bureau Servs., Inc.*, 2021 WL 3579073, at *2 (D. Neb. Aug. 13, 2021) ("[T]he Supreme Court has further delimited the scope of Article III standing in *TransUnion*. . . .").

concreteness." *Id.* at 1549. In *Transunion*, the Court clarified this statement did not mean that "that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages." *TransUnion*, 141 S. Ct. at 2211. As Justice Thomas explained in his dissent, the majority decision in *Transunion* is a "reworking of *Spokeo*" in that it "all but eliminate[es] the risk-of-harm analysis" and holds an imminent risk of harm "may support only a claim for injunctive relief." *See id.* at 2222 (Thomas, J., dissenting) (quoting majority at 2210–11, 2213–14). This fundamental reworking of the standing doctrine is unquestionably relevant to the standing analysis here.

Under the revised *Transunion* framework, "a mere risk of harm" cannot supply standing to bring a damages claim (or any claim seeking non-injunctive relief) absent allegations that "the risk of future harm materialized" or that the plaintiffs "were independently harmed by their exposure to the risk itself." *Id.* at 2211. Even as to claims for forward-looking, injunctive relief, the Court clarified that the harm must be "sufficiently imminent and substantial" to establish an injury-in-fact for each of the claims asserted. *Id.* at 2210. The Court further held that allegations regarding the risk that plaintiffs' credit information would be disseminated to third parties was "too speculative to support Article III standing." *Id.* at 2212. So too here. The *Transunion* decision thus marks a change in the law—although it is enough that the decision "cast[s] into doubt" the court's earlier decision. *See Hochendoner*, 823 F.3d at 730.

Second, reconsideration is also warranted by the discovery of two new pieces of evidence not previously available: (i) the Terminal's revised and updated SWPPP and (ii) EPA's issuance of the 2021 MSGP. *See Davis*, 89 F. Supp.2d at 147. Here, the Terminal was required to update its SWPPP to comply with the new MSGP that EPA issued in January 2021. Those updates have profound implications for the Court's jurisdiction and the viability of CLF's claims for at least two

reasons. First, as a result of the update, the SWPPP claims asserted in the Amended Complaint challenge a SWPPP that is no longer operative, and are now moot. Second, the Terminal updated its SWPPP to address a "new effluent limitation or condition" concerning major storm events, which EPA promulgated in the 2021 MSGP after receiving comments from CLF addressing many of the same issues that CLF raises in this suit. Accordingly, the issuance of the new MSGP—along with EPA's impending issuance of the draft permit for Everett Terminal—have and will fully resolve the question of the Terminal's obligations to consider climate change impacts and to implement mitigation measures to minimize these impacts.

CLF cites no authority for its contention that discovery is required to determine the impact of the changes the Terminal has made to its SWPPP and ExxonMobil's internal analyses underlying those changes. Three days before this Court issued its Order instructing the parties to submit a joint statement addressing relevant developments, ExxonMobil provided CLF with a copy of its updated SWPPP on August 7, 2021. CLF is not entitled to turn discovery into a fishing expedition concerning the updated SWPPP absent any allegations that the operative SWPPP fails to comply with any term in the Terminal's permit. Rather, CLF's argument only highlights the need for supplemental briefing to clarify the parties' positions in light of this newly discovered evidence.

C. Phasing of Discovery

1. CLF's Position on Phasing of Discovery

Phasing discovery in this case would needlessly delay its resolution and subject CLF and the Court to multiple rounds of unnecessary dispositive motions. Phased discovery is only appropriate where it would "render other discovery unnecessary." Manual for Complex Litigation (Fourth) § 11.422. Any benefits of phased discovery must be balanced against "later duplicative discovery should it be necessary to resume the deposition of a witness or the production of

documents." *Id.* Defendants' argument that limited discovery on the interpretation of the permit could be dispositive of CLF's case is meritless.

First, permit interpretation is irrelevant to CLF's claim under the Resource Conservation and Recovery Act ("RCRA"). Contrary to Defendants' assertion, CLF's RCRA claim does not rise and fall with its Clean Water Act claims. Defendants made the same argument on appeal (Br. of Appellees, No. 20-1456 at 54-55 (1st Cir. Oct. 8, 2020)), which the First Circuit rejected, explaining that: CLF's RCRA imminent and substantial endangerment claim "does not even involve consideration of the permit's terms." Appeal Opinion at 28 (citations omitted). CLF's RCRA claim is entirely independent of what Defendants write in their SWPPP. While Defendants' statements, or lack thereof, in their SWPPP evidence their failure to design their facility to withstand the reasonably foreseeable impacts of climate change—they are nothing more. Defendants' proposed Phase 1 of discovery would have no impact on CLF's RCRA claim.

Second, contrary to Defendants' position, interpretation of the permit is not a "central issue" for discovery in this case. The Court has already stated that "I don't think that [the case is] going to disappear on a contract interpretation." Mar. 13, 2019 Lobby Tr. (ECF 74) 9:4-6. The terms of the permit are unambiguous, and, as the Court has already held, Defendants' interpretation of the permit's requirements are legally untenable. *See, e.g.,* March 13, 2019 Hr'ing Tr. (ECF 73) at 135 (holding Defendants' interpretation violated the principles of construction by rendering elements of the permit superfluous).

ExxonMobil's proposed phases would needlessly complicate discovery efforts, increase motion practice, and would not promote the just, speedy, and inexpensive resolution of the pressing matters presented in this case. Defendants' phasing plan would draw artificial lines between Defendants' stated interpretation of the permit and its actual implementation. For example, the

permit requires, among other things, that ExxonMobil employ "good engineering practices." Permit Part I.B.4 at 13-14, ¶ 4 (Doc. 34-1). What that term means, and whether it has been satisfied, will necessarily involve discovery relating to Defendants' application of that term in connection with its operations at the Terminal. Attempting to draw a distinction between the permit's terms will lead to needless discovery disputes over what exactly is at issue during each phase of discovery.

Third, contrary to Defendants' assertion, CLF's climate change claims are not dependent on its pollutant discharge claims. As noted above, the Court held that the permit requires Defendants to consider the risks of climate-change induced severe weather to the Terminal and to proactively address those risks. *See* March 13, 2019 Hr'g Tr. (ECF 73) at 132-136. Defendants' violations of the permit's numeric effluent limitations, which underlie CLF's pollutant discharge claims, are relevant evidence of the risks to the Terminal. But discovery is needed quickly to determine the full extent of Defendants' ongoing violations. For example, CLF is entitled to discovery concerning exactly what Defendants have done to protect against severe weather events consistent with both the terms of the permit and as directed within the Corporation. This will go beyond the limited discovery of Defendants' proposed first phase, and, to the extent relevant and admissible, could certainly be conducted concurrently with any relevant discovery that Defendants wish to conduct related to the interpretation of the effluent limits set forth in the permit.

Defendants' argument about the 2021 MSGP are meritless as addressed in detail in Section I.A.2 above.

2. Defendants' Position on Phasing Discovery

Following briefing, should the case proceed to discovery, ExxonMobil proposes that the parties proceed with phased discovery that is limited, in the first instance, to information relevant to interpretation of the terms in Everett Terminal's NPDES Permit ("Phase 1 Discovery").

ExxonMobil submits that Plaintiff's claims may be resolved by establishing the appropriate permit interpretation, which can be developed and decided through discovery narrowly tailored to this issue. Phasing discovery is consistent with the Court's September 24, 2018 Scheduling Order, which encouraged the parties to consider "phased discovery in which the first phase is limited to developing information needed for a realistic assessment of the case." (ECF No. 49.)

CLF essentially attacks the efficiency of phased discovery but offers no justification for its proposal to immediately pursue discovery of the most factually complex issues in this case, all of which may prove irrelevant if the EPA's permit does not mean what CLF claims. Moreover, the schedule CLF advances as the fastest method for resolving all issues in the case is inconsistent with its request to more than double the number of fact depositions that it may seek, and to exempt Rule 30(b)(6) depositions from that limit. CLF's previously stated intention to conduct discovery on all ExxonMobil facilities "corporate-wide" (ECF 90 at 4) is also unnecessary, disproportionate to the needs of this case, and would not facilitate its efficient resolution—particularly since this case is limited to whether any violations of this particular permit occurred at the Everett Terminal.

As this Court has recognized, "the focus" of this suit should be whether there have been violations "of the current permit." (Sept. 12, 2017 Hr'g Tr. 121:13–15.) ExxonMobil believes that question can be resolved by determining what the permit requires, without roving discovery into CLF's allegations concerning the causes and impacts of climate change—much less protracted discovery into the extensive, yet unspecified, remedies CLF seeks to pursue. Rather, with respect to CLF's two remaining non-climate change claims, the principal disagreements between the parties concern (i) whether the Permit's compliance limit expressly modified the PAH effluent limits—which EPA itself has acknowledged are too low to be reliably measured; and (ii) whether state

Water Quality Standards are measured in the receiving waters, after dilution—as required by regulation—or "at the end of the pipe," as CLF has unsuccessfully argued to EPA in the past.

CLF's climate change claims concerning the adequacy of the Terminal's SWPPP (Counts 6–14) likewise hinge on CLF's idiosyncratic and unprecedented interpretation of the Permit as imposing obligations that EPA has expressly declined to adopt. Through targeted discovery, ExxonMobil expects to show that CLF's permit interpretation is untenable and has been rejected by EPA. Notably, the Terminal's SWPPP incorporates the SWPPP provisions of the MSGP that EPA issued in January 2021. In responding to CLF's public comments on the MSGP, EPA addressed—and rejected—many of the positions urged by CLF in this case regarding facilities' obligations to address major storm events. CLF's only response is to mischaracterize EPA's statements and to point to EPA's continued reference to "good engineering practices" in *other* provisions of the 2021 MSGP.[12] But the fact that EPA has retained other provisions from the 2015 MSGP that require facilities to use good engineering practices in preparing a SWPPP, while adopting an entirely "new" provision not present in the 2015 MSGP governing major storm events only confirms that the term "good engineering practices" was not alone sufficient to impose the slew of obligations CLF argues were embedded in that term. EPA nowhere equated the new conditions in Section 2.1.1.8 of the 2021 MSGP with the requirement to use good engineering practices in the 2015 MSGP, despite numerous invitations by CLF to do so. (*See* Response to Comments at 391–92, 394–95, 399–402.)

[12] Selectively quoting EPA's response to another commenter, CLF inaccurately contends that EPA confirmed the requirement to consider major storm events and implement necessary control measures was not new, but had been "*retain[ed]*" from the 2015 MSGP. *See supra* § I.A.2. But it is unmistakably clear in the context of that EPA response—and in EPA's numerous unequivocal statements in its response to CLF—that EPA is merely stating that "[t]he 2021 MSGP retains" the provision from the Proposed 2020 MSGP on which it received comments, *not* from the 2015 MSGP. (EPA Response to Comments at 372–73.) CLF's suggestions to the contrary are mistaken.

Critically, in its response to CLF's comments, EPA expressly disagreed with CLF's contention that the MSGP's new requirement to "consider implementing additional stormwater control measures" was unnecessary because it was already inherent in the 2015 MSGP's requirement to use "good engineering practices." (EPA Response to Comments at 397–98 (stating "[t]he 2015 MSGP had no equivalent provision").) EPA also did "not agree [with CLF] that permanent, structural control measures are necessary to mitigate risks of pollution from major storm events." (*Id.* at 398.) Nor did EPA adopt CLF's suggestion that it "acknowledge[]" that, in some instances, "retreat will be necessary in order to meet environmental standards and protect the public health, safety, and welfare." (*Id.* at 400–401.) Moreover, by expressly directing facilities in the 2021 MSGP to determine their "susceptib[ility] to an increased frequency of major storm events" using "FEMA, NOAA, or USGS flood map products," *see* MSGP § 2.1.1.8 at n.6, EPA rejected CLF's contention that reliance on retrospective FEMA designations was insufficient to address flood risks in light of anticipated climate change impacts. (EPA Response to Comments at 394–95, 398.) EPA also did not revise the 2021 MSGP to require consideration of "sea-level rise," notwithstanding CLF's comment that the 2021 MSGP "narrow[ed] the scope of control measures to exclude consideration of all climate change related impacts, including sea-level rise. . . ," which CLF contended was required by the 2015 MSGP. (*Compare* Response to Comments at 394, *with id.* at 398.) ExxonMobil submits that targeted discovery into these issues will aid the Court in interpreting the permit and determining the Terminal's obligations and may obviate the need for more protracted discovery into issues not germane to the resolution of CLF's claims.

Similarly, CLF's contention that ExxonMobil was required to redesign its facilities to address increased risks of extreme precipitation relies on a flawed interpretation of the express definition of a "10-year 24-hour precipitation event" in the Terminal's Permit (ECF No. 34-1 at 3

of 80), which CLF claims—without support—required ExxonMobil to "calculat[e] and recalculat[e] on an annual basis," considering both "historical[ ]" data and prospective modeling regarding potential climate change impacts. (Mar. 13, 2019 Hr'g Tr. 60:9–65:18.) While the Court preliminarily accepted CLF's proffered interpretation of this term as sufficiently plausible to survive a motion to dismiss, it did so without considering relevant evidence illuminating the meaning of these terms, which could not be considered on a motion to dismiss. Indeed, a ruling interpreting the Permit based on extrinsic evidence may not be made at the pleading stage. *See, e.g.*, *C.A. Acquisition Newco, LLC* v. *DHL Exp. (USA), Inc.*, 696 F.3d 109, 112–3 (1st Cir. 2012). Accordingly, because the Court can now consider extrinsic evidence, it would be more efficient to first resolve whether the Permit in fact imposes a requirement to continuously recalculate this express term, before conducting extensive factual and expert discovery regarding the appropriate figure and what measures—if any—are necessary to address allegedly increased risks. Similarly, targeted discovery on whether Permit provisions concerning the SWPPP even implicate the design of the Terminal may obviate the need to conduct discovery and litigate what—if any—redesign is purportedly necessary.

Contrary to CLF's assertions, the Court has not already adopted CLF's interpretations of the Permit and SWPPP requirements. In fact, the Court explained that its ruling was "based on [its] present informed but not final understanding of the law" and that it would "continue to consider the complex law in this case." (Mar. 13, 2019 Hr'g Tr. 141:24–142:8.) At summary judgment or trial, ExxonMobil intends to offer evidence on the proper interpretation of the permit, which could not be considered by the Court at the motion to dismiss stage. Accordingly, if the Court were to agree with the Permit interpretation endorsed by both ExxonMobil and EPA, the discharges and activities CLF has alleged would establish no violations of those conditions, but

instead would confirm the Terminal's compliance and the absence of any need for further discovery. ExxonMobil therefore requests that the Court (i) order an initial phase of narrowly tailored discovery directed at clarifying the Permit's requirements, and (ii) allow the parties to submit dispositive motions in support of their proposed interpretations of the Permit at the completion of Phase 1 Discovery.

This approach is consistent with the well-established principle that courts must "give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit." *Nat. Res. Def. Council, Inc.* v. *County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013); *see also Piney Run Preservation Ass'n* v. *Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 269–70 (4th Cir. 2001) (considering "extrinsic evidence to determine the intent of the permitting authority"). For instance, when interpreting permits issued pursuant to the Clean Water Act, courts consider (i) "correspondence and memoranda between [the permit holder] and [the regional EPA office]" or "EPA headquarters," *United State*s v. *Aluminum Co. of Am.*, 824 F. Supp. 640, 646 (E.D. Tex. 1993); *accord Congaree Riverkeeper, Inc.* v. *Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 752 (D.S.C. 2017) (considering letters from agency to defendant), (ii) internal agency memoranda, *Nw. Env't Advocs.* v. *City of Portland*, 56 F.3d 979, 983 (9th Cir. 1995); *California Pub. Int. Rsch. Grp.* v. *Shell Oil Co.*, 840 F. Supp. 712, 718 (N.D. Cal. 1993), and (iii) site inspection reports, *Friends of Outlet Creek* v. *Grist Creek Aggregates, LLC*, No. 16-cv-00431-JSW, 2018 WL 2573139, at *9 (N.D. Cal. Apr. 23, 2018).

Phase 1 Discovery to resolve the interpretation of the permit and the obligations EPA imposed will also help to resolve CLF's RCRA claims, which CLF has told the Court are predicated on the aggregation of supposed CWA violations. According to CLF, it is "the sum total" of the alleged violations the Terminal's permit that "gives rise to [the] RCRA" claim. (Sept.

12 Hr'g Tr. 4:20– 5:5; Mar. 13, 2019 Hr'g Tr. 141:4–10; ECF No. 39 at 16 ("It is the cumulative impact of Exxon's CWA violations . . . that creates a [claim] . . . under RCRA.").) That position is also reflected in the Amended Complaint, which pleads the same allegations concerning a risk of unpermitted discharges in support of the RCRA claim as CLF alleges in support of its CWA claims. (Am. Compl. ¶¶ 347–351.) The Complaint lacks any factual allegations regarding historic violations of RCRA. Instead, CLF brings a single, forward-looking RCRA claim for "imminent and substantial endangerment" under 42 U.S.C. § 6972(a)(1)(B), which is premised entirely on a potential future risk of the Terminal discharging unpermitted pollutants because it allegedly "has not been properly engineered, managed, and fortified or, if necessary, relocated, to protect against" climate change impacts. (Am. Compl. ¶¶ 347, 356.) Such allegations overlap entirely with CLF's SWPPP claims. CLF's RCRA claim will therefore fail to the extent the Terminal's conduct is found to be authorized by its permit. And the RCRA claim is likewise subject to the restrictions imposed in *Transunion*, regarding citizen standing to bring claims asserting solely a "risk of future harm." 141 S. Ct. at 2205, 2211, 2213. Because the RCRA and SWPPP claims rise and fall together, phased discovery is appropriate to allow the Court to determine, in the first instance, what obligations—if any—EPA has imposed on the Terminal to address climate change impacts.

Accordingly, at the conclusion of this "limited" initial phase of discovery, the Court may be able to dispose of the case in its entirety. Such "phasing and sequencing [of] the topics which are the subject of discovery" has the potential to facilitate both a realistic assessment of the case and potential resolution. *See* Local Rule 26.3. ExxonMobil's proposal therefore would increase the likelihood of resolving this case efficiently prior to trial.

CLF has not justified its assertion that there is any exigency to adjudicating its claims. Nor has it offered any explanation why it would not be in the interest of its members to resolve liability

on the purportedly ongoing violations as quickly as possible, before proceeding to extended litigation regarding the Terminal's alleged failure to plan for purportedly foreseeable climate change impacts. Apparently perceiving no exigency in CLF's claims, EPA explained that it has given precedence to "a number of pressing environmental and other priorities critical to EPA's mission" before acting on the Permit renewal application for the Terminal, for which EPA oversaw a "major upgrade" only seven years ago. (ECF No. 64-1 at 2.) In all events, for the reasons outlined above, the schedule proposed by ExxonMobil is the best method for prompt and efficient resolution of this case.

D. Bifurcation

The parties' positions raise two issues related to bifurcation. *First*, the parties agree that bifurcation of trial between liability and remedy is appropriate. *Second*, the parties disagree about bifurcating the entire case between liability and remedy.

1. Bifurcation of Trial between Liability and Remedy

The parties agree that trial should be bifurcated between liability and remedy.

2. CLF's Position on Bifurcation of the Case between Liability and Remedy

CLF opposes bifurcating pretrial proceedings between liability and remedy. Defendants are attempting to draw an artificial and unworkable distinction between discovery related to liability and discovery related to remedy. The two are inextricably linked. Evidence of Defendants' obligations and failure to satisfy those obligations is, by its nature, also relevant to

determining what Defendants must do to rectify those failures. Attempting to differentiate which bucket particular evidence falls in merely invites future motion practice between the parties.

3. Defendants' Position on Bifurcation of Liability and Remedies During Fact Discovery

Consistent with Defendants' phased approach, Defendants request bifurcation of both fact discovery and trial as to the issues of liability and remedies. As the First Circuit has recognized, bifurcation is frequently deemed appropriate "when litigation of one issue may eliminate the need to try another issue." *Lund* v. *Henderson*, 807 F.3d 6, 12 (1st Cir. 2015) (citing *Wilson* v. *Town of Mendon*, 294 F.3d 1, 7 (1st Cir. 2002)). Thus, "where a single issue could be dispositive of the entire case," courts hold that the "advantages" of bifurcation "are not outweighed by the possibility" that some overlapping evidence could be used at the second proceeding. *See Chapman ex rel. Estate of Chapman* v. *Bernard's Inc.*, 167 F. Supp. 2d 406, 417 (D. Mass. 2001).

Here, "bifurcating the issues of liability and [remedy], would be superior in terms of judicial economy and fairness," *Pruitt* v. *Allied Chem. Corp.*, 85 F.R.D. 100, 113 (E.D. Va. 1980). In the absence of bifurcation, Plaintiff has conceded it otherwise intends to front-load onerous discovery into "how to cure" alleged violations (ECF 90 at 3), which in all likelihood will not be found to exist. Given the novelty of Plaintiffs' claims, which concern highly technical questions in a developing area of scientific inquiry and demand unprecedented engineering solutions, such discovery is likely to consume a disproportionate amount of time and resources for both the Court and the Parties. By contrast, Defendants propose resolving liability at the earliest possible stage based on narrowly cabined discovery solely concerning permit interpretation. A determination of how to interpret the Permit may obviate the need for any further discovery. Under these circumstances, bifurcation is likely to conserve resources and speed the resolution of this case.

III. Proposed Pretrial Schedule

A. CLF's Proposed Discovery Plan

1. Rule 26(f) Conference

(a) No deadline is necessary because the parties have already held a 26(f) conference.

2. Initial Disclosures

(a) Initial disclosures shall be served by September 30, 2021.

3. Factual Discovery

(a) All fact discovery is to be completed on or before February 25, 2022, including depositions of fact witnesses and entry upon land pursuant to Rule 26(b), with the possibility of additional such discovery to allow for any necessary seasonal and/or weather-dependent site visits or site visits needed in the context of expert discovery.

(b) Within 7 days of the parties' completion of Initial Disclosures, the parties shall confer by phone as to the possibility and appropriateness of Cooperative Discovery of any or all types of information pursuant to Local Rule 26.1(A) and shall continue to confer as appropriate as discovery proceeds.

(c) No deposition shall exceed eight (8) hours over one (1) calendar day, unless otherwise agreed upon by the parties.

4. Expert Disclosure and Discovery

(a) CLF shall disclose experts pursuant to Fed. R. Civ. P. 26(a)(2) and produce any expert reports on or before March 25, 2022.

(b) Defendants shall disclose experts pursuant to Fed. R. Civ. P. 26(a)(2) and produce any expert reports on or before May 24, 2022.

(c) CLF shall produce rebuttal expert reports, if any, on or before June 23, 2022.

(d) The parties shall be entitled to depose any expert identified by the other side. Expert Depositions shall be completed by July 22, 2022.

5. Motions for Summary Judgment

(a) Motions for summary judgment shall be filed on or before September 9, 2022.

(b) Responses shall be filed by October 11, 2022.

(c) Replies, where leave has been obtained, shall be filed be filed by October 25, 2022.

(d) Memoranda in support of motions for summary judgment and responses thereto shall be limited to 40 pages, and replies to 20 pages, double spaced.

B. Defendants' Proposed Discovery Plan

1. Supplemental Briefing:

(a) Briefs shall be filed by both parties within 30 days of entry of the scheduling order.

(b) Responsive briefs shall be filed by both parties within 14 days of the filing of each party's initial brief.

2. Scheduling Conference:

(a) A scheduling conference shall be held at a date to be scheduled by Judge Wolf after his review and consideration of the parties' supplemental briefing.

3. Initial Disclosures:

(a) Initial disclosures shall be exchanged 21 days after the scheduling conference.

4. Phase 1 Discovery:

(a) "Phase 1 Discovery" shall be limited to discovery relevant to the interpretation of the terms in Everett Terminal's NPDES Permit.

(b) All Phase 1 Discovery shall be completed within 90 days of the deadline for completing initial disclosures.

5. Expert Discovery I:

(a) Plaintiff's experts, if any, shall be designated, and the information required by Fed. R. Civ. P. 26(a)(2) shall be disclosed by the close of Phase 1 fact discovery.

(b) Plaintiff's experts shall be deposed within 30 days of the close of Phase 1 fact discovery.

(c) Defendants' experts, if any, shall be designated and the information required by Fed. R. Civ. P. 26(a)(2) shall be disclosed by the deadline for completing depositions of Plaintiff's experts.

(d) Defendants' experts shall be deposed within 30 days of the deadline for Defendants' expert disclosures.

6. Dispositive Motions I:

(a) Dispositive motions, such as motions for summary judgment or partial summary judgment, shall be filed within 45 days after the close of all Phase 1 discovery.

(b) Oppositions to dispositive motions shall be filed within 30 days of the deadline for filing dispositive motions.

(c) Replies in further support of dispositive motions shall be filed within 14 days of the deadline for filing oppositions.

7. Phase 2 Discovery:

(a) If necessary to resolve disputed issues of material fact, the parties shall conduct a second phase of discovery ("Phase 2 Discovery"). Phase 2 Discovery shall be limited to fact discovery relevant to liability on any remaining claims under the Clean Water Act or the Resource Conservation and Recovery Act.

(b) All Phase 2 Discovery, other than the expert discovery described below, shall be completed within 120 days of the Court's ruling on any dispositive motions.

8. Expert Discovery II:

(a) As discussed below, expert discovery shall initially be limited to questions relevant to resolving liability.

(b) Plaintiff's trial experts, if any, shall be designated, and the information required by Fed. R. Civ. P. 26(a)(2) shall be disclosed by the close of Phase 2 fact discovery.

(c) Plaintiff's trial experts shall be deposed within 60 days of the close of Phase 2 fact discovery.

(d) Defendants' trial and rebuttal experts, if any, shall be designated and the information required by Fed. R. Civ. P. 26(a)(2) shall be disclosed by the deadline for completing depositions of Plaintiff's experts.

(e) Defendants' trial and rebuttal experts shall be deposed within 60 days of the deadline for Defendants' expert disclosures.

9. Dispositive Motions II:

(a) Dispositive motions, such as motions for summary judgment or partial summary judgment, shall be filed within 45 days of the close of all discovery.

(b) Oppositions to dispositive motions shall be filed within 30 days of the deadline for filing dispositive motions.

(c) Replies in further support of dispositive motions shall be filed within 14 days of the deadline for filing oppositions.

10. Pretrial Conference:

(a) A pretrial conference will be scheduled at the Court's convenience following the close of discovery and the Court's ruling on any dispositive motions.

C. Defendants' Alternative Proposed Discovery Plan

In the alternative, and without waiving its right to seek phased discovery, ExxonMobil proposes the following schedule for Fact Discovery in the event the Court determines that phased discovery is not warranted in this case.

1. **Supplemental Briefing:**

   (a) Briefs shall be filed by both parties within 30 days of entry of the scheduling order.

   (b) Responsive briefs shall be filed by both parties within 14 days of the filing of each party's initial brief.

2. **Scheduling Conference:**

   (a) A scheduling conference shall be held at a date to be scheduled by Judge Wolf after his review and consideration of the parties' supplemental briefing.

3. **Initial Disclosures:**

   (a) Initial disclosures shall be exchanged 21 days after the scheduling conference.

4. **Fact Discovery:**

   (a) Similar to the schedule entered in *CLF* v. *Shell*, C.A. No. 1:17-CV-00396, all fact discovery, other than the expert discovery, shall be completed within eight months of the deadline for completing initial disclosures.

5. **Expert Discovery:**

   (a) Also akin to the schedule entered in *CLF* v. *Shell*, No. 1:17-CV-00396, all expert discovery shall be completed within 275 days of the close of Fact Discovery, in accordance the expert discovery deadlines set forth in the Table below.

D. Summary of Proposed Schedules

<table>
<tr><th colspan="6">SUMMARY OF PARTIES' PROPOSED SCHEDULES</th></tr>
<tr><th>EVENT</th><th colspan="2">CLF'S PROPOSED DEADLINES</th><th colspan="2">DEFENDANTS' PROPOSED DEADLINES</th><th>DEFENDANTS' ALTERNATIVE PROPOSED DEADLINES</th></tr>
<tr><td>Supplemental Briefing</td><td colspan="2">N/A</td><td colspan="2">Briefs filed within 30 days of approval of scheduling order
Reply briefs filed 14 days after initial briefs</td><td>Briefs filed within 30 days of approval of scheduling order
Reply briefs exchanged 14 days after opening briefs</td></tr>
<tr><td>Scheduling Conference</td><td colspan="2">As soon as practicable, if the Court deems necessary</td><td colspan="2">To be scheduled by Judge Wolf after reviewing supplemental briefing</td><td>To be scheduled by Judge Wolf after reviewing supplemental briefing</td></tr>
<tr><td>Initial Disclosures</td><td colspan="2">By September 30, 2021</td><td colspan="2">21 days from scheduling conference</td><td>21 days from scheduling conference</td></tr>
<tr><td>Fact Discovery</td><td colspan="2">Completed by February 25, 2022</td><td colspan="2">Phase 1 completed 90 days after deadline for filing initial disclosures
Phase 2 completed 120 days after the Court's ruling on Dispositive Motions I</td><td>8 months from deadline for filing initial disclosures</td></tr>
<tr><td rowspan="5">Expert Discovery</td><td>Pl.'s expert disclosures</td><td>Mar. 25, 2022</td><td>Expert Discovery I: Pl.'s expert disclosures</td><td>At conclusion of Phase 1 Discovery (90 days after deadline for filing initial disclosures)</td><td>Pl.'s expert disclosures</td><td>45 days after close of fact discovery</td></tr>
<tr><td>Defs.' expert disclosures</td><td>May 24, 2022</td><td>Expert Discovery I: Deposition of Pl.'s experts</td><td>30 days following disclosure</td><td>Defs.' Expert Discl.</td><td>90 days after Plt's Expert disclosure</td></tr>
<tr><td>Pl.'s rebuttal expert reports</td><td>June 23, 2022</td><td>Expert Discovery I: Defs.' expert disclosures</td><td>At close of Pl. expert depos. (30 days following Pl.'s expert disclosures)</td><td>Rebuttal Expert Disc.</td><td>60 days following Defs.' Expert disclosure</td></tr>
<tr><td>Expert depositions</td><td>July 22, 2022</td><td>Expert Discovery I: Deposition of Defs.' Experts</td><td>30 days following disclosure</td><td>Close of Expert Disc. Including Depositions of All parties' Experts</td><td>80 days following Rebuttal Expert disclosure</td></tr>
<tr><td colspan="2">N/A</td><td>Expert Discovery II: Pl.'s expert disclosures</td><td>By the close of Phase 2 Discovery (120 days after the Court's ruling on Dispositive Motions)</td><td colspan="2">N/A</td></tr>
</table>

SUMMARY OF PARTIES' PROPOSED SCHEDULES					
EVENT	**CLF'S PROPOSED DEADLINES**		**DEFENDANTS' PROPOSED DEADLINES**		**DEFENDANTS' ALTERNATIVE PROPOSED DEADLINES**
			Expert Discovery II: Deposition of Pl.'s experts	Within **60 days** of the deadline for Pl.'s expert disclosures	
			Expert Discovery II: Defs.' expert disclosures	By the deadline for deposing Pl.'s experts	
			Expert Discovery II: Deposition of Defs.' experts	Within **60 days** of the deadline for Defs.' expert disclosures	
Dispositive Motions	Motion for Summary Judgment	By September 9, 2022	Dispositive Motions I	**45 days** from close of Phase 1 Discovery	N/A
	Oppositions	By October 11, 2022	Oppositions	**30 days** from filing of opening briefs	
	Replies	By October 25, 2022	Replies	**14 days** from filing of oppositions	
			Dispositive Motions II	**45 days** from close of discovery	**152 days** from close of discovery
			Oppositions	**30 days** from opening briefs	**30 days** from opening briefs
			Replies	**14 days** from oppositions	**15 days** from oppositions
Pretrial Conference	To Be Scheduled by the Court				

IV. Changes to Discovery Event Limitations.

The parties could not reach agreement as to whether the limits on fact discovery contained in Local Rule 26.1(c) should be expanded.

A. CLF's Position on Discovery Event Limits

CLF believes the complexity of this case warrants enlargement of the discovery limits set forth in Local Rule 26.1(c). In addition, CLF proposes that successive depositions of a corporation under a single 30(b)(6) notice shall not constitute multiple depositions. Further, Defendants'

proposal does not address their successive phasing proposal as it limits discovery as to the entirety of the case rather than for each phase.

B. Defendants' Position on Discovery Event Limits

Defendants believe that the default limits on discovery events authorized by Local Rule 26.1(c) are sufficient to resolve the material issues in this case, which are primarily legal in nature. CLF offers no justification for its proposal to unreasonably expand these limits, and use Rule 30(b)(6) depositions to exempt itself from the limits on the number of depositions under Rule 26.1(c). Each 30(b)(6) deposition should count against the limits imposed by Local Rule 26.1(c).

C. Summary of Parties' Positions on Discovery Event Limits

Discovery	Local Rule 26.1(c)	CLF's Proposal	Defendants' Proposal
Fact Depositions	10	20 per party	10 per party
Interrogatories	25	40 per party	25 per party, counted in accordance with Local Rule 26.1(c)
Requests for Admission	25	50 per Defendant on substantive issues No limit on requests to establish evidentiary admissibility	25 per party
Sets of Requests for Production	2	4, with all responses due before the close of fact discovery	2 per party

V. Discovery and Preservation of Electronically Stored Information.

The parties acknowledge their obligation to preserve electronically stored information ("ESI") and have conferred about an agreed upon format for production of ESI. The parties shall submit a proposed ESI Discovery and Preservation Protocol to the Court within 30 days of entry of a schedule.

VI. Protection of Confidential and Privileged Information.

The parties have conferred about a proposed Protective Order governing the exchange of privileged or confidential communications. The parties shall submit a proposed Protective Order to the Court within 30 days of the entry of a schedule.

DATED: August 27, 2021

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By its attorneys,

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Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I, Deborah E. Barnard, hereby certify that this document filed through the ECF system on August 27, 2021 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
Deborah E. Barnard