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

PLAINTIFF CONSERVATION LAW FOUNDATION'S MEMORANDUM IN RESPONSE TO THE COURT'S OCTOBER 6, 2021 ORDER

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Pursuant to the Court's October 6, 2021 Order ("Order"), Plaintiff Conservation Law Foundation, Inc. ("CLF") submits the following memorandum.

This Court has already determined that CLF has alleged facially valid claims that Exxon[1] has violated, and continues to violate, its National Pollutant Discharge Elimination System ("NPDES") permit (the "Permit") under the Clean Water Act ("CWA"), as well as the Resource Conservation and Recovery Act ("RCRA"), by failing to evaluate the risks posed to its bulk petroleum storage terminal (the "Terminal") by foreseeable severe weather events and to "proactively address potential discharges of pollutants" from those risks. Mar. 13, 2019 Mot. to Dismiss Hr'g Tr., ECF 73 at 132–33. The Court has also found that CLF has standing to pursue those claims. Sept. 13, 2017 Order, ECF 29. However, this five-year old case has yet to proceed to discovery; instead, Exxon continuously seeks to relitigate issues this Court has already decided. As more fully explained below, none of the issues Exxon raised at the October 5, 2021 hearing warrant anything other than this case moving forward with a standard discovery schedule, where the Parties can flesh out the implications of any intervening events or changes since CLF's Amended Complaint was filed.

I. Implications of the 2021 Multi-Sector General Permit

The Court's Order directed the parties to describe "[t]he implications of the 2021 Multi-Sector General Permit for this case generally and for the Amended Complaint particularly." ECF 120 ¶ 1(a). As explained fully below, the 2021 Multi-Sector General Permit ("2021 MSGP") has no impact on the Amended Complaint. The only implication the 2021 MSGP might have for this case generally is that it may be some evidence at summary judgment to interpret the Permit.

[1] "Exxon" as used in this brief refers collectively to Defendants ExxonMobil Corp., ExxonMobil Oil Corp. and ExxonMobil Pipeline Co.

CLF's Amended Complaint alleges that Exxon violated the express terms of its Permit, including the requirements to use "good engineering practices" when developing its Stormwater Pollution Prevention Plan ("SWPPP") and to proactively identify and address potential sources of pollutants in its SWPPP. Am. Compl. ¶¶ 270–81; ECF 73 at 132:25–33:18 ("First, the permit requires Exxon to develop an SWPPP using 'good engineering practices.' . . . [G]ood engineering practices include considerations of foreseeable severe weather events, including any caused by climate change. In addition, the permit requires Exxon to proactively address potential discharges of pollutants."). The Amended Complaint does not rely on any version of the MSGP. Indeed, Exxon's Terminal "is not eligible for coverage under the MSGP." Permit, Fact Sheet at 14.[2] Instead, the Permit states only that "[t]he SWPPP shall be consistent with the provisions for SWPPPs included in the most current version of the [MSGP]"; the Permit then proceeds to set forth the specific requirements that Exxon must include in its SWPPP. Permit § I.B.3 at 13. The 2021 MSGP cannot and does not alter the specific provisions of the Permit underlying CLF's claims.

For these same reasons, any claim by Exxon that the 2021 MSGP renders any of the claims in CLF's Amended Complaint moot is without merit. As the First Circuit noted in this case when discussing possible changes to Exxon's Permit, "Whether and on what terms EPA issues the permit for the Everett terminal seems to us largely irrelevant to whether ExxonMobil has violated the conditions of the permit *currently in effect*." *Conservation Law Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 73 (1st Cir. 2021) (emphasis added) (collecting cases). Following that finding, the First

[2] EPA explained in the Permit that Exxon's Terminal is ineligible for coverage under the MSGP because (i) it has an individual permit setting specific numeric water-quality based limitations, and (ii) the Terminal discharges contaminated groundwater. Permit, Fact Sheet at 14.

Circuit would almost certainly find any change to the MSGP irrelevant. Therefore, the 2021 MSGP has no implications for this case, especially at this pre-discovery stage.

That said, the 2021 MSGP and EPA's responses to comments may provide some evidence for interpreting vague permit terms after the evidentiary record has been developed. As explained in detail in Section IV below, the proper time to use extrinsic evidence to interpret ambiguous permit terms is at summary judgment or trial—after the parties have had a chance to develop the factual record that will best aid the Court in its interpretation. Therefore, consideration of the 2021 MSGP at this stage would merely create additional delay and cannot narrow the issues in this case.

Even if the Court were to consider the 2021 MSGP changes now, the changes support CLF's claims and theories asserted in the Amended Complaint and simply reinforce the need for discovery to proceed in this case. EPA's final 2021 MSGP *supports* CLF's interpretation of the Permit as laid out in its Amended Complaint, and therefore provides no basis for delaying discovery, summary judgment, and/or trial. The 2021 MSGP (specifically Part 2.1.1.8) and related response to comments (i) maintain the "good engineering practices" standard and acknowledge that the "good engineering practices" standard includes consideration of climate change, flooding, and severe weather conditions, (ii) provide new additional guidance to MSGP-regulated permittees confirming the requirement to consider these risks and defining major storm events on a site-specific basis, and (iii) clarify that Federal Emergency Management Agency (FEMA) flood insurance rate maps cannot properly provide the sole basis for determining a site's vulnerability to severe weather and therefore its compliance with "good engineering practices."

CLF filed comments on EPA's 2020 draft revisions of the MSGP. CLF's comments addressed *proposed* language that CLF was concerned would have narrowed and undermined the "good engineering practices" standard. In response to CLF's comments, EPA's final 2021 MSGP

not only abandoned the language of concern, but it also significantly modified the language to: (i) further clarify that the "good engineering practices" standard was retained as an enforceable standard; (ii) strengthen the new language in Part 2.1.1.8 to require site-specific consideration of the risks of major storm events; and (iii) provide guidance on potential sources that permittees might consider when evaluating major storm potential, such as flood maps developed by the U.S. Geological Survey ("USGS"), the National Oceanic and Atmospheric Administration ("NOAA"), and FEMA.

In its detailed and extensive comments on the draft MSGP, CLF specifically argued that the 2015 version of the MSGP (like the Permit) included the requirement to consider and address flood risks posed by climate change impacts with specific reference to the "good engineering practices" standard in the 2015 MSGP. As EPA explained in its response to 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 EPA Response to Comments, Docket ID #: EPA-HQ-OW-2019-0372 (Jan. 15, 2001) ("EPA Response to Comments") at 402.[3]

In responding to a comment from the National Waste & Recycling Association, EPA underscored that the requirement to consider major storm events and implement necessary control measures was *retained* from previous permits:

> 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.

[3] *Available at* https://downloads.regulations.gov/EPA-HQ-OW-2019-0372-0349/content.pdf.

EPA Response to Comments at 373.

The 2021 MSGP therefore *retains* the "good engineering practices" standard, acknowledges that the "good engineering practices" standard considers flood risks, and *adds* language in Part 2.1.1.8 that serves to clarify and guide consideration of severe weather and confirm that major storm events have been addressed by the permittee. EPA further explained its approach in responding to CLF's 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." To address the comment that EPA should provide outreach and compliance assistance, footnote 6 in Part 2.1.1.8 the MSGP provides a link to USGS flood map resources and related information.

EPA Response to Comments at 392.

Accordingly, even considering extrinsic evidence such as CLF's Comment and EPA's Response, EPA's adoption of a renewed MSGP has no implications on the Amended Complaint and simply underscores the need for this case to move into discovery. To the extent that any aspect of EPA's action or Exxon's alleged response to the 2021 MSGP is material to the litigation, the issues must be fully explored via discovery. No further delay in discovery is warranted.

II. Implications of the 2021 Revision of Exxon's Stormwater Pollution Prevention Plan

The Court's Order directed the parties to address:

> [t]he implications of the 2021 revision of defendants' Stormwater Pollution Prevention Plan (the "2021 SWPPP"), including: (1) whether any changes in the 2021 SWPPP from the 2015 version referenced in the Amended Complaint are material with regard to any claims or particular paragraphs in the Amended Complaint; (2) the implications of the 2021 SWPPP for the claims seeking injunctive relief in the Amended Complaint; (3) whether this case can and should proceed on the existing Amended Complaint or whether the court should require

> the filing of a Second Amended Complaint if plaintiff does not propose filing one; and (4) whether any existing claims are rendered moot by the 2021 SWPPP.

ECF 120 ¶ 1(b).

A. There are No Changes to the 2021 SWPPP that Materially Impact CLF's Claims Asserted in the Amended Complaint.

None of the changes in the 2021 SWPPP are material to CLF's claims. At the outset, it is important to note that Counts 11, 12, and 15 do not rely primarily on the contents of the SWPPP and, therefore, the 2021 SWPPP cannot be material to those counts. Count 11 is based largely upon Exxon's Spill Prevention Control and Countermeasures Plan ("SPCC"), *see, e.g.*, Am. Compl. ¶ 297 (alleging that the SPCC was not prepared in accordance with "good engineering practices"), and Count 12 concerns Exxon's permit applications and reports to EPA, *see, e.g.*, Am. Compl. ¶ 317 (alleging that Exxon failed to submit relevant information "in its permit application and in reports to the Regional Administrator"). Count 15, meanwhile, is CLF's imminent and substantial endangerment claim under RCRA and consequently has no relation to the SWPPP required by Exxon's CWA Permit. *See Conservation Law Found., Inc.*, 3 F.4th at 75 (explaining that discovery would still be necessary on CLF's RCRA imminent and substantial endangerment claim even if a new permit issued because "that count does not even involve consideration of the permit's terms"). Exxon's amendments to its 2021 SWPPP are largely cosmetic and are immaterial to CLF's claims. CLF's Climate Change Claims allege, *in part*, that (i) "good engineering practices include considerations of foreseeable severe weather events, including any caused by climate change," ECF 73 at 133:14–16, and (ii) "[i]f . . . increasingly frequent and severe weather events threaten the terminal, then Exxon must consider such events in order to satisfy the permit's requirement that Exxon identify and proactively address potential discharges of pollutants." *Id.* at 134:10–14. As this Court further explained, "the provisions of the permit that underlie CLF's climate change

counts require Exxon to consider the kinds of climate-induced weather events that CLF alleges threaten the terminal." *Id.* at 136:13–16. No changes in the 2021 SWPPP have any material bearing on CLF's claims. Indeed, the only changes worthy of mention made by Exxon are two statements that appear on page 18.

First, Exxon states that the Terminal is not susceptible to increased major storm events because the FEMA flood map does not identify the Terminal's location as falling within a Special Flood Hazard Area. 2021 SWPPP at 18. From this premise, Exxon conveniently concludes that it is not required to implement "additional stormwater control measures." Exxon's reliance on the FEMA maps is misplaced and does nothing to relieve it of the obligation to analyze or address the known flood risks at the Terminal. For instance, as made clear in CLF's Amended Complaint, Exxon's cursory review of the FEMA maps ignores many of CLF's allegations, including (i) the NOAA SLOSH model that predicts the Terminal would flood in a Category 1 hurricane, Am. Compl. ¶¶ 170–172, and (ii) the insufficiency of the FEMA maps in Everett to identify flood risks, Am. Compl. ¶¶ 157–62.[4] Second, Exxon also states that it has re-evaluated its stormwater treatment system and determined that it has sufficient capacity to handle the 10-year, 24-hour precipitation estimate from NOAA's most recent precipitation frequency estimate. 2021 SWPPP at 18. The Court's ruling on the motion to dismiss already rejected this argument, concluding that if meeting the 10-year, 24-hour storm was sufficient, it would render "many other provisions of the permit . . . superfluous." ECF 73 at 135:9.

[4] Exxon's reliance on the FEMA maps also ignores the actual requirements of the 2021 MSGP. The MSGP makes explicit the Permit's requirement that permittees evaluate flood susceptibility, and footnote 6 identifies some potential sources of information that can be considered in making that determination, including FEMA flood maps.

Because none of the revisions to the 2021 SWPPP substantively address the foundational issue of the near-term risk posed to the Terminal by severe weather, none of the other minor changes can materially impact any of CLF's claims. Indeed, the 2021 SWPPP amendments do not disclose any of the information in Exxon's possession concerning severe weather risks to the Terminal. *See, e.g.*, Am. Compl. ¶ 337–38 (Count 14) (alleging that Exxon's SWPPP certifications were unlawful because Exxon failed to disclose information about severe weather risks that Exxon relies on "in its business decision-making"). CLF is seeking to enforce the existing, operative Permit, including all of its terms—those have not been altered by the SWPPP and the obligations in connection with the development, implementation and update of the SWPPP remain the same. *Student Pub. Interest Research Grp. of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1537 (D.N.J. 1984) (finding "no justification for weakening the effectiveness of the [CWA] citizen's suit by finding that the mere filing of a renewal application ousts the district court's jurisdiction for the time that the EPA spends considering the application").

On its face, the 2021 SWPPP remains in violation of the Permit because these requirements have not been complied with; therefore, the violations are ongoing and remain viable. *Cf. U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 33 (1st Cir. 2003) (noting that once a violation is established at the time the suit was filed, voluntary secession by defendant does not moot injunctive relief). Just like the First Circuit's recognition in this case that "[w]hether and on what terms EPA issues the permit for the Everett terminal seems to us largely irrelevant to whether ExxonMobil has violated the conditions of the permit currently in effect," *Conservation Law Found., Inc.,* 3 F.4th at 24–25, Exxon's cursory amendments to their SWPPP can hardly be material to CLF's claims.

The 2021 SWPPP amendments do materially impact *two specific paragraphs* of CLF's Amended Complaint, but the impact does not materially impact any of CLF's claims. The relevant paragraphs are:

- Paragraph 78: "ExxonMobil has amended its SWPPP without making any structural changes to the Terminal seven times since the Permit became effective in 2012, most recently in November 2015. See Sept. 12, 2017 Hr'g Tran. at 31."
- Paragraph 322: "ExxonMobil has amended its SWPPP seven times since the Permit became effective in 2012, most recently in November 2015, without making any structural changes to the facility. See Sept. 12, 2017 Hr'g Tran. at 31."

Exxon's 2021 SWPPP amendment renders these paragraphs inaccurate in as much as they refer to (i) the number of times that Exxon has amended its SWPPP since the Permit became effective, and (ii) the date of the most recent SWPPP amendment. However, these differences do not materially affect CLF's claims or necessitate amending the Amended Complaint.

B. Exxon's 2021 SWPPP Amendments Do Not Impact CLF's Requested Injunctive Relief.

In the Amended Complaint, CLF seeks injunctive relief (i) "ordering ExxonMobil to perform and pay for such work as may be required to respond to the hazardous waste and solid waste present at the Everett Terminal and restraining ExxonMobil from further violating RCRA" and (ii) "to prevent further violations of the Clean Water Act." Am. Compl. ¶ 357. In brief, CLF's Climate Change Claims allege that Exxon has violated both RCRA and the CWA by failing to evaluate the risks posed to the Terminal by foreseeable severe weather events and to "proactively address potential discharges of pollutants" from those risks. ECF 73 at 132–33. Since Exxon's

2021 SWPPP makes no changes material to CLF's claims, *see* Section II.A above, it also does not impact CLF's requested injunctive relief.

C. No Further Amendment to CLF's Complaint is Necessary.

CLF's Amended Complaint requires no amendment for the same reasons described in Section II.A above—nothing in the 2021 SWPPP materially impacts the allegations in CLF's Amended Complaint. A complaint needs only to "provide fair notice to the defendants and state a facially plausible legal claim." *Graf v. Hosp. Mut. Ins. Co.*, 754 F.3d 74, 76 (1st Cir. 2014) (citations omitted). Indeed, courts regularly grant relief in CWA permit enforcement suits without requiring amendment even where the permit has been superseded while the case was pending. *See, e.g., Conservation Law Found. of New England v. City of Fall River*, No. 87–3067N, 1990 WL 106751, at *2 n.1 (D. Mass. July 24, 1990); *Arizona v. Int'l Boundary & Water Comm'n, U.S. Section*, No. CV-12-00644-TUC-FRZ (DTF), 2015 WL 13661674, at *5 (D. Ariz. June 18, 2015), report and recommendation adopted sub nom., 2015 WL 5730580 (D. Ariz. Sept. 30, 2015).

Here, this Court has already held that CLF's Amended Complaint adequately alleged that Exxon had violated its CWA permit by failing to (i) analyze the risks to the Terminal from reasonably foreseeable severe weather events, and (ii) take action to address those risks. The 2021 SWPPP does not change, nor remedy, the violations CLF has pled, and Exxon cannot reasonably argue that it is not on notice of CLF's claims. The 2021 SWPPP merely continues the same violations from the prior SWPPP, and thus, no amendment is necessary. *See, e.g.*, *Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1250–51 (3d Cir. 1995) (no additional notice or amendment necessary for post-complaint violations that were related to the pled violations).

D. None of CLF's Claims Are Moot

In similar fashion, Exxon's 2021 SWPPP amendments do not moot any of CLF's claims. The dispositive question in determining mootness is whether it "is impossible for a court to grant any effectual relief whatever to the prevailing party." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 220 (1st Cir. 2019) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Where "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* The party raising mootness bears the burden of establishing mootness, and "the burden is a heavy one." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). "To satisfy the burden, the [party] must show that, after the case's commencement, intervening events have blotted out the alleged injury and established that the conduct complained of cannot reasonably be expected to recur." *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 100 (1st Cir. 2006). "A case is moot only if the [party] meets [the] 'heavy burden' of persuading the court that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adams v. Bowater Inc.*, 313 F.3d 611, 613 (1st Cir. 2002) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

In cases brought under the CWA, courts consistently find that even the issuance of a new permit "in and of itself, does not moot a case for injunctive relief." *Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1103 (9th Cir. 2016); *Arizona v. Int'l Boundary I*, No. CV-12-00644-TUC-FRZ (DTF), 2015 WL 13661674, at *5 (D. Mass. June 18, 2015). Indeed, even where a superseding permit relaxes conditions on the permittee, "it is not the law that any relaxation of NPDES permit standards, no matter how *de minimis*, necessarily moots the case." *Cty. of Los Angeles*, 840 F.3d at 1103. If the movant has not demonstrated that it is "absolutely clear" there

can be no further violation, the Court retains jurisdiction. *Id.* at 1102–03; *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 73 (E.D. Tex. 1995) (holding claims for injunctive relief not moot where superseding permit relaxed limits because the "[d]efendant ha[d] not demonstrated that it is 'absolutely clear' that [] permit violations could not reasonably be expected to recur").

As a threshold matter, even if the 2021 SWPPP eliminated the need for some of CLF's requested injunctive relief—it does not, as discussed in Section II.B above—that could not moot CLF's claims because the demand for civil penalties would remain. In the Amended Complaint, CLF seeks civil penalties for all CWA violations. See Am. Compl. ¶ 357(b). The Supreme Court has made clear the purpose of civil penalties in CWA cases is to deter future violations, even where the defendant has voluntarily ceased its violations and the court finds an injunction improper. *Laidlaw*, 528 U.S. at 192–93 (overturning circuit court's mootness ruling). Civil penalties will remain even if Exxon otherwise comes into compliance with its Permit; CLF's claims cannot be mooted by the 2021 SWPPP. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134–37 (11th Cir. 1990) (holding claims for civil penalties not moot even where injunctive relief is mooted by a defendant's compliance with permit); *Nat. Res. Def. Council v. Texaco Ref. & Mktg.*, 2 F.3d 493, 503 (3d Cir. 1993) (holding that even when violations could not reasonably be expected to reoccur, claims for civil penalties not moot if plaintiff establishes ongoing violations when complaint was filed); *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 890 F.2d 690, 696–97 (4th Cir. 1989) (same). Indeed, Exxon's present assertion that the 2021 SWPPP amendments moot CLF's claims is effectively an admission that the prior SWPPPs did violate the Permit's requirements and civil penalties are appropriate.

Similarly, as explained above, Counts 11, 12, and 15 could not be impacted by the 2021 SWPPP because they do not primarily rely on deficiencies in the SWPPP. For example, the First

Circuit noted in its reasoning for overturning the stay in this case that even issuance of a new CWA permit would not moot CLF's RCRA claim (Count 15) because "that count does not even involve consideration of the permit's terms." *Conservation Law Found*., 3 F.4th at 75. Exxon's amendment of its SWPPP certainly cannot moot the RCRA claim.

Regardless, Exxon's 2021 SWPPP does not moot any of CLF's claims. CLF's CWA claims seek to enforce the requirements of Exxon's CWA Permit, and that Permit has not materially changed. *See* Section I above (explaining 2021 MSGP merely reiterated some requirements that already existed). As explained in Section II.A above, the 2021 SWPPP also did not make any changes that are material to CLF's claims. Nothing in the 2021 SWPPP addresses Exxon's foundational failures to analyze the risk posed to the Terminal by foreseeable severe weather and to disclose information in their possession concerning those risks. Thus, the 2021 SWPPP remains deficient, and the Permit violations continue "such that an injunction could still provide effectual relief." *See Cty. of Los Angeles*, 840 F.3d at 1103. Any minor changes Exxon made to the 2021 SWPPP are only potentially relevant to the extent of Exxon's non-compliance—not whether CLF's claims are moot. Accordingly, discovery is required to determine the extent to which any changes to Exxon's SWPPP (and ultimately their compliance with the SWPPP) satisfies the Permit requirements and the CWA.

III. Implications of the Supreme Court Rulings in *Transunion v. Ramirez* and *California v. Texas*

The Court's Order directed the parties to address:

> [t]he implications of Transunion LLC v. Ramirez, 141 S. Ct. 2190 (2021) and California v. Texas, 141 S. Ct. 2104 (2021) for this case, including whether either or both constitute an intervening change in the law which should cause the court to reconsider its 2019 ruling that plaintiff has standing to litigate certain claims. See United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009).

ECF 120 ¶ 1(c).

Because the Court has previously ruled that CLF has standing to pursue its claims, the proper standard to review the implications of *Transunion v. Ramirez* and *California v. Texas* is through that of a motion reconsideration. "[M]otions for reconsideration are appropriate only in a limited number of circumstances," and the only circumstance applicable here is whether "there has been an intervening change in the law." *De Giovanni v. Jani-King Int'l, Inc.*, 968 F. Supp. 2d 447, 450 (D. Mass. 2013) (Wolf, J.) (quoting *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009)). "[A] request for reconsideration cannot be used merely to reargue a point already decided," nor is it a "means to simply raise a point of disagreement between the court and the litigant." *Villanueva-Mendez v. Nieves Vazquez*, 360 F. Supp. 2d 320, 325, 326 (D.P.R. 2005), *aff'd*, 440 F.3d 11 (1st Cir. 2006). Here, neither case (i) even purports to change standing law in any way, nor (ii) addresses any of the relevant elements of this case: environmental laws, citizen enforcement 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).

California v. Texas, although a high-profile case because of its subject matter, merely reiterated the long-established principle that to have standing to sue in federal court, a plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. at 2113 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). The concepts of "traceability" and "redressability" were drawn from well-known and oft-cited cases such as *DaimlerChrysler Corp.*, a 2006 case, and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992), a 1992 case. In

fact, the Court here applied this exact standard when it denied Exxon's motion to dismiss on this same issue. *See, e.g.*, Sept. 17, 2017 Mem. & Order, ECF 29 (citing *Lujan*, 504 U.S. at 560).

California merely represents an application of the law to the facts, and the facts of that case are markedly different than here. In *California*, more than a dozen State plaintiffs and two individual plaintiffs challenged the constitutionality of the provision of the Affordable Care Act requiring minimum health care coverage, 26 U.S.C. § 5000A(a), which had been rendered unenforceable by another statutory provision prior to the plaintiffs filing suit. 141 S. Ct. at 2112–13. The Supreme Court held that neither set of plaintiffs had standing because at the time they filed their lawsuit there was no possibility that the challenged provision could be enforced against them; essentially, the plaintiffs' alleged injury was not traceable to § 5000A(a), and without any threat of enforcement for a court to enjoin, the requested remedy of a declaratory judgment finding § 5000A(a) unconstitutional would amount to an impermissible advisory opinion. *California*, 141 S. Ct. at 2115–16.

Here, CLF has pursued an environmental citizen suit to enforce permit requirements and statutory provisions that it alleges Exxon are currently violating and have been violating since before the case began. The applicable law, Permit, and SWPPP were enforceable at the time the case was filed and remain enforceable despite any updates to the MSGP and nonmaterial changes Exxon have allegedly made to their SWPPP.

TransUnion LLC v. Ramirez dealt with the uncontroversial and long-standing rule that, to have standing, a plaintiff must show a concrete injury. *TransUnion*, 141 S. Ct. at 2204. *TransUnion*'s analysis relied expressly on the rule expressed in *Spokeo v. Robbins*, 578 U. S. 330 (2016). *See TransUnion*, 141 S. Ct. at 2204–07. *Spokeo* was decided in 2016, before Exxon filed either its first or second motion to dismiss, and it is not a basis for an intervening change in the

law when relied on in a subsequent Supreme Court case five years later. Had Exxon wished to make a *Spokeo* argument, they needed to do so in those motions; instead, they merely cited *Spokeo* for the typical three components that make up the standard for standing. ECF 17 at 11. A motion for reconsideration is not a venue for a party to raise arguments that they could have raised the first time around.

Moreover, the facts and application of *TransUnion* are markedly different from this case. In *TransUnion*, the Supreme Court held, among other things, that certain class members did not have standing to pursue claims for money damages because their theory of risk of future harm was not a sufficiently concrete injury. *See Transunion*, 141 S. Ct. at 2210–13. The plaintiffs in *TransUnion* sought individual damages, on a class basis, for alleged violations of the Fair Credit Reporting Act based on TransUnion's failure to use reasonable measures in maintaining their credit files accurately, as well as defects in mailings sent from TransUnion to class members. *Id.* at 2202. The Court held that certain class members did not have standing because (i) their inaccurate credit files were not published to third parties; and, (ii) the risk that TransUnion would publish inaccurate credit reports in the future was insufficient to establish the required concrete injury for damages, especially where the plaintiffs did not demonstrate knowledge of the inaccuracy at the time. *Id.* at 2208–09.

Importantly, the Court expressly limited its decision to claims for retrospective money damages, *see Transunion*, 141 S. Ct. at 2210, which are not at-issue in this case. "As the Court has consistently recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Id.* at 2210 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013), among other cases). Here, CLF's claims differ notably from the Supreme

Court case, both in the harm alleged and requested relief. CLF's suit is a citizen enforcement action—it does not seek damages but rather injunctive relief and civil penalties. By its express terms, the *TransUnion* holding does not impact CLF's claims, especially its request for injunctive relief. Moreover, even if the case somehow applied to CLF's claims for civil penalties (which are different than money damages), the Court expressly noted that there may be situations where "the exposure to the risk of future harm itself causes a separate concrete harm" and therefore a damages action could be sustained. *Id.* at 2211–12. CLF's claims would fall within the noted exception because CLF's standing affiants expressly stated—at the outset of the case—that the risk of future harm detrimentally impacted their use and enjoyment of local waterways. *See* ECF 21-1; 21-2; 21-3; 21-4; 21-5; *see also* Am. Compl. ¶¶ 8–10.

Given the above discussion, it is clear that the standard for reconsideration cannot be met and Exxon's arguments to the contrary are simply the latest in their continued effort to relitigate issues that the Court has already decided in its prior rulings.[5]

If the Court were to consider extrinsic evidence, such as events that have transpired since the case has been filed, the question would become one of mootness rather than standing. "The First Circuit has noted the Supreme Court's 'repeated statements that the doctrine of mootness can be described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, _F. Supp. 3d_, Nos. 11-10230-MLW, 2021 WL 2201191, at *4 n.6 (D. Mass. June 1, 2021) (quoting *Becker v. Fed. Election*

[5] To the extent *California* and *TransUnion* apply to a standing analysis of CLF's claims, due process dictates the appropriate time to readdress that inquiry is at the summary judgment stage after the case has gone through discovery, as this Court has already noted. Oct. 5, 2021 Sched. Conf. Hr'g Tr., ECF 121 at 16:17–19 ("[W]hen I denied the motion to dismiss I said I might [] reconsider this on summary judgment. It would depend on what the evidence is.").

Comm'n, 230 F.3d 381, 386 n.3 (1st Cir. 2003)). However, as this Court has recognized, even the mootness inquiry requires additional discovery before an informed decision can be made. Oct. 5, 2021 Sched. Conf. Hr'g Tr., ECF 121 at 16:20–25 ("Now, when you tell me what's happened in the last three years, it sounds like you're converting it to a motion for summary judgment. You want to give me evidence, and then the plaintiffs are going to want to give me evidence too. They'll want to have some discovery. And maybe there would be some."). Accordingly, the Court should deny Exxon's motion for reconsideration and allow this case to proceed to discovery.

IV. Extrinsic Evidence

In addition to the questions above, the Court's Order directed the parties to address "[w]hether the court should consider extrinsic evidence in deciding any of the foregoing questions, and, if so: (1) what extrinsic evidence should be considered; and (2) the implications of such evidence." ECF 120 ¶ 1(d).

As discussed in each of the above sections, it is premature at the current stage of this case—post-denial of Exxon's Motion to Dismiss and pre-discovery—to consider any extrinsic evidence for two reasons. First, the Court has already determined that the Permit contains material patent ambiguities, eliminating the need to consider extrinsic evidence on the issue of ambiguity. Second, because there are factual disputes about the proper interpretation of the Permit's terms and Exxon's compliance with those terms, extrinsic evidence is appropriate only after discovery when the parties have had the opportunity to develop and identify the factual record and relevant extrinsic evidence.

A. The Court Has Already Determined that Certain Sections of the MSGP and SWPPP Are Ambiguous

"[A] court's task in interpreting and enforcing an NPDES permit is [] like any other contract." *Nat. Res. Def. Council v. Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013); *see also Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 138 (4th Cir. 2017). "Courts may look at extrinsic evidence for the very purpose of deciding whether the documentary expression of a contract is ambiguous for there is the real possibility that extrinsic evidence may in fact reveal an ambiguity not otherwise patent." *LPP Mortg., Ltd. v. Sugarman*, 565 F.3d 28, 32 n.2 (1st Cir. 2009) (internal citations and quotations omitted). "[I]f the contract's terms are ambiguous, contract meaning normally becomes a matter for the factfinder." *Farmers Ins. Exch. v. RNK, Inc.*, 632 F.3d 777, 784 (1st Cir. 2011) (quoting *Bank v. Int'l Bus. Machs. Corp*., 145 F.3d 420, 424 (1st Cir. 1998)).

As the Court has already determined, certain sections of the Permit are ambiguous. For example, considering extrinsic evidence such as guidance from the U.S. Army Corps of Engineers and other civil works projects, the Court held that "the permit does not define 'good engineering practices'" and thereby indicated that the phrase is ambiguous. ECF 73 at 133:1–2; *see also City of New Bedford v. AVX Corp.*, No. 15-10242-WGY, 2015 WL 13697608, at *6 (D. Mass. Aug. 27, 2015) (citing *LPP Mortg.*, 565 F.3d at 30) (deciding not to dismiss a case based on arguments of mootness because the scope of the relevant language to be interpreted was "ambiguous and the matter must be resolved by factfinding at trial"). Therefore, the Court should not consider further extrinsic evidence at this stage in litigation to answer questions about the Permit, the 2021 MSGP or Exxon's revised SWPPP.

B. Considering Extrinsic Evidence is Appropriate After Discovery

The appropriate time for the Court to consider extrinsic evidence is after discovery, at the time of considering motions for summary judgment or at trial. "[I]nterpretation of a contract is ordinarily a question of law for the court . . . unless there are material disputes as to extrinsic facts bearing on the correct interpretation." *20 Atl. Ave. Corp. v. Allied Waste Indus., Inc.*, 482 F. Supp. 2d 60, 83 (D. Mass. 2007) (Wolf, J.) (quoting *Bank v. Int'l Bus. Machs. Corp.*, 145 F.3d 420, 424 (1st Cir. 1998); *McAdams v. Mass. Mut. Life Ins. Co*., 391 F.3d 298, 298 (1st Cir. 2004)). Cases analyzing whether and to what extent to consider extrinsic evidence in interpreting CWA permits generally do so at the summary judgment stage—after discovery. *See, e.g.*, *Conservation Law Found. v. Pease Dev. Auth.*, No. 16–cv–493–SM, 2017 WL 4310997, at *17 (D.N.H. Sept. 26, 2017); *City of New Bedford v. AVX Corp.*, No. 15-10242-WGY, 2015 WL 13697608, at *6 (D. Mass. Aug. 27, 2015).

In *Pease Development*, CLF claimed that the defendant was violating its NDPES permit. *Pease Dev.*, 2017 WL 4310997, at *17. The defendant moved to dismiss the case, arguing that it was in compliance with its permit and thus entitled to the permit shield defense. *Id.* However, the court refused to consider the defendant's argument because

> [t]he parties' arguments regarding the defense raise questions well beyond the factual allegations in CLF's complaint, and draw support from *extrinsic evidence not properly before the court at this early stage of the litigation*. Accordingly, at this juncture, the court denies [the defendant's] motion to dismiss CLF's claim on the basis of the permit shield defense. [The defendant] is, of course free to raise the defense at the *summary judgement stage, supported by a fully developed record and briefing*.

Id. (emphasis added).

In *New Bedford*, the plaintiff brought a case against a manufacturing facility seeking reimbursement for clean-up and remedial costs of a Comprehensive Environmental Response,

Compensation, and Liability Act (CERCLA)-designated Superfund site, along with tort and property damages. *New Bedford*, 2015 WL 13697608, at *3. The defendant asserted mootness as a defense and pointed to a prior CERCLA consent decree entered into by the defendant and the United States and the Commonwealth of Massachusetts which included a clause "protecting [the defendant] from future contribution lawsuits from others who might seek to recover damages and costs regarding the contamination of the [covered sites]." *Id.* at *2. However, the court determined that the consent decree was ambiguous on whether it covered the site at issue and refused to dismiss the case based on the defendant's mootness argument, ruling "as matter of law that the scope of the contribution protection clause in the Consent Decree [was] ambiguous and the matter must be resolved by factfinding at trial." *Id.* at *6 (citing *LPP Mortg.*, 565 F.3d at 30); *see also Nat. Res. Def. Council v. Cty. of Los Angeles*, 725 F.3d 1194, 1205 (9th Cir. 2013) (considering extrinsic evidence to interpret a NPDES permit at the summary-judgment stage); *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 (2000) (noting that the defendant's compliance and prospect of future violations is a "disputed factual matter . . . [that] ha[d] not been aired in the lower courts"); *Den Norske Bank AS v. First Nat'l Bank of Boston*, 75 F.3d 49, 53 (1st Cir. 1996) (holding summary judgment generally inappropriate to resolve material contract ambiguity "unless the extrinsic evidence presented about the parties' intended meaning is so one-sided that no reasonable person could decide to the contrary").[6]

[6] *See also Berezin v. Regency Sav. Bank*, 234 F.3d 68, 71 (1st Cir. 2000) (holding district court erred by dismissing case because the plaintiff adequately alleged mistake thus allowing consideration of extrinsic evidence); *Great Clips, Inc. v Hair Cuttery of Greater Boston, LLC*, 591 F.3d 32, 35–36 (1st Cir. 2010) (noting, in a contract case, the defendant "was free in the summary judgment proceedings to identify pertinent extrinsic evidence . . . or to seek discovery"); *Bank v. Int'l Bus. Machs. Corp.*, 145 F.3d 420, 431 (1st Cir. 1998) (holding that had the plaintiff argued that the contract was ambiguous, then summary judgment for the plaintiff would have "presented serious problems of unfair surprise to [the defendant], which was entitled to develop parol evidence of its own").

Here, only after the parties have had an opportunity to develop the factual record through discovery can CLF identify the best evidence relevant to interpretation of the Permit. For example, CLF can identify the exact expert testimony to explain what "good engineering practices" entails—exactly the evidence courts generally consider when applying professional duties of care as well as narrative permit standards. *See, e.g.*, *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 20 F. Supp. 2d 700, 708–09 (D. Del. 1998) (interpreting a NPDES permit to enforce a prior judgment against a defendant and relying on expert testimony); *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) (noting that while "the underlying scientific issues are clearly technical ones . . . expert testimony was employed in the court proceeding"); *Arkansas River Power Auth. v. Babcock & Wilcox Power Co.*, No. 14–cv–00638–CMA–NYW, 2016 WL 9734684, at *5 (D. Colo. Oct. 24, 2016) (allowing expert testimony on whether party "followed good engineering practice"); *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1336 (N.D. Ga. 2010) (stating that the plaintiff presented sufficient expert testimony to support claim for failure to maintain "best management practices"). Therefore, the Court should not consider extrinsic evidence at this stage in litigation.

V. Discovery Sought

The Court's Order directed the parties to include:

> [a] detailed description of the discovery the party will request: (1) if all claims remain in this case; (2) if only Counts 2 and 3 remain in this case; and (3) if discovery is bifurcated between the issues of liability and remedy or otherwise phased; as well as a proposed schedule for each.

ECF 120 ¶ 1(e).

A. All Claims Remain

If all claims remain, CLF anticipates taking discovery on the following topics:

- Exxon's knowledge of climate change risks to infrastructure, including risks to the Terminal specifically and risks to its infrastructure more generally.
- Exxon's policies concerning the preparedness of its infrastructure for climate change.
- Communications between Exxon, EPA, and state regulators regarding the Terminal.
- Information regarding the level of control exercised by corporate parents over the Terminal.
- Information on any environmental monitoring or assessment done at the Terminal.
- Information regarding Exxon's CWA Permit.
- Information regarding contamination at the Terminal.
- Information regarding the handling of solid waste and hazardous materials at the Terminal.
- Information regarding the daily operation and maintenance of the Terminal.
- Information regarding Exxon's pollutant discharges at the Terminal.

CLF proposes the following discovery schedule if all the claims remain:

EVENT	**CLF'S PROPOSED DEADLINES**
Initial Disclosures	By November 30, 2021
Fact Discovery	Completed by April 18, 2022

EVENT	CLF'S PROPOSED DEADLINES	
Expert Discovery	Disclosure of Initial Experts	May 16, 2022
	Disclosure of Responsive Experts	July 15, 2022
	Disclosure of Rebuttal Experts	August 15, 2022
	End of Expert Discovery	September 12, 2022
Dispositive Motions	Motions for Summary Judgment	By October 31, 2022
	Oppositions	By December 2, 2022
	Replies	By December 16, 2022
Pretrial Conference	To be scheduled by the Court	

B. Counts 2 and 3

If only Counts 2 and 3 remain, CLF anticipates taking discovery on the following topics:

- Communications between Exxon, EPA, and state regulators regarding the Terminal.
- Information regarding the level of control exercised by corporate parents over the Terminal.
- Information on any environmental monitoring or assessment done at the Terminal.
- Information regarding Exxon's CWA Permit.
- Information regarding contamination at the Terminal.
- Information regarding the handling of hazardous materials at the Terminal.
- Information regarding the daily operation and maintenance of the Terminal.
- Information regarding Exxon's pollutant discharges at the Terminal.

CLF proposes the same discovery schedule as above even if only Claims 2 and 3 remain, as these two claims would still require significant fact and expert discovery.

C. Bifurcation Between Liability and Remedy

CLF does not anticipate any substantial difference in discovery if it is bifurcated between liability and remedy. Discovery concerning Exxon's failure to follow the requirements of "good engineering practices" will largely form the basis for determining the appropriate injunctive relief and civil penalties.

VI. No Significant Developments

The Court's Order directed "[t]he parties [to] inform the court of any significant developments relating to this case." ECF 120 ¶ 4.

CLF informs the Court that there have been no significant developments relating to this case.

DATED: November 5, 2021

Respectfully submitted,

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By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the above-referenced date the foregoing document was filed through the Court's electronic filing system ("ECF"), by which means a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Ian D. Coghill
Ian D. Coghill