**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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

**MEMORANDUM OF DEFENDANTS**
**IN RESPONSE TO THE COURT'S ORDER OF OCTOBER 6, 2021**

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**CONSTITUTION, STATUTES, AND RULES**



**MISCELLANEOUS**

## INTRODUCTION

The Court requested supplemental briefing on the question whether, in light of certain recent developments, the Conservation Law Foundation (CLF) can maintain its claims against Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company (together ExxonMobil) for alleged violations of the permit under the Clean Water Act's National Pollution Discharge Elimination System and of the Resource Conservation and Recovery Act (RCRA) in connection with the operation of ExxonMobil's Everett Terminal. As explained below, CLF cannot do so.

Two recent decisions from the Supreme Court demonstrate that CLF lacks Article III standing on Counts 6–15, which assert claims concerning the Terminal's Stormwater Pollution Prevention Plan (SWPPP) and under RCRA. One of those decisions confirms that CLF has failed to plausibly allege that there is a serious likelihood of imminent harm from unpermitted discharges at the Terminal due to future extreme weather events. And together, the two decisions show that the alleged risk of harm is not fairly traceable to the bare procedural violations of the Terminal's permit that CLF alleges. Nor does CLF's request for civil penalties salvage its SWPPP claims: one of these recent decisions demonstrates that a party alleging only a risk of future harm cannot obtain retrospective relief.

CLF's SWPPP claims are also moot. Earlier this year, EPA issued a new Multi-Sector General Permit (MSGP) that for the first time required covered facilities to consider flood risk from major storm events when designing control measures to prevent the discharge of pollutants. As required by the Terminal's permit, ExxonMobil substantially revised the Terminal's SWPPP to address that new requirement. CLF's claims that the Terminal's SWPPP is deficient are now plainly moot: they rely on allegations that concern the previous, now-inoperative SWPPP. The revised SWPPP provides the relief that CLF alleges is necessary.

Even setting aside the standing and mootness problems, CLF's SWPPP claims fail on the merits in light of EPA's interpretation of the 2021 MSGP. When EPA issued the draft revised MSGP, CLF commented that the adoption of an express requirement to consider flood risk from major storm events would weaken the protection of water quality. CLF's theory there was the same as the one underlying its SWPPP claims: namely, that the requirement to use "good engineering practices," which the previous MSGP included, already required consideration of any and all major storm events and other climate-change impacts. But EPA squarely rejected that view when responding to CLF's comments, explaining that the requirement to consider major storm events was a new provision with no analogue in the prior MSGP. That explanation demonstrates conclusively that the requirement to use "good engineering practices" in the prior version of the Terminal's SWPPP did not require consideration of increased future flood risk due to climate change, as CLF alleges.

For those reasons, the SWPPP and RCRA claims should be dismissed. If any of those claims survive and proceed to discovery, ExxonMobil proposes that the Court phase discovery for those claims, with the initial phase being limited to questions of permit interpretation, as motion practice on that topic may quickly resolve any issues that remain.

## ARGUMENT

### I. RECENT SUPREME COURT AUTHORITY DEMONSTRATES THAT CLF LACKS STANDING TO PURSUE ITS SWPPP AND RCRA CLAIMS

In June 2021, the Supreme Court issued two major decisions on Article III standing—*TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021), and *California* v. *Texas*, 141 S. Ct. 2104 (2021)—that together demonstrate CLF lacks Article III standing to pursue its SWPPP and RCRA claims. Those cases demonstrate that:

- The plaintiff's assertion of a statutory violation and a statutory cause of action does not provide standing. The plaintiff instead must assert (i) a concrete injury separate from

the statutory violation; (ii) a serious likelihood that concrete future harm is imminent; or (iii) a close relationship between the interest protected by the statute and a harm that traditionally permitted suit in American courts.

- A plaintiff cannot obtain retrospective damages based on a risk of future harm. Only prospective injunctive relief is available.
- Absent a serious likelihood of occurrence, a risk of future harm is too speculative to create standing even to seek prospective relief.
- A plaintiff cannot obtain prospective relief for a future risk of harm that is not traceable to the particular legal violation alleged.

Applying those principles to this case, CLF's lacks Article III standing to pursue its SWPPP and RCRA claims. CLF argues that ExxonMobil must satisfy the standard for reconsideration in order to raise its standing argument at this time, but that argument fails. CLF's SWPPP and RCRA claims (Counts 6–15) should be dismissed for lack of Article III standing.

### A. The Supreme Court's Decisions in *TransUnion* v. *Ramirez* and *California* v. *Texas* Clarified Standing Doctrine in Several Ways Relevant to This Case

In *TransUnion*, a class of over 8,000 consumers alleged that TransUnion, one of the three major credit-reporting firms, violated the Fair Credit Reporting Act by inaccurately identifying them on their credit reports as potential matches to terrorists, narcotics traffickers, or other serious criminals blocked by the federal government from doing business in the United States. 141 S. Ct. at 2201–02. Only a subset of the plaintiffs, however, actually had their credit files with the criminal alert provided to third parties. *See id.* The plaintiffs also alleged that, when they requested copies of their credit reports, TransUnion failed to include a statutorily required information in the mailing. *Id.* The case went to trial, and the jury awarded plaintiffs both statutory and punitive damages. *Id.* The Supreme Court held that the plaintiffs whose credit reports had not been disseminated to third parties lacked Article III standing to seek statutory damages for the inclusion of the alert on their reports. *See id.* at 2209–13. The Court further held that the plaintiffs lacked standing to seek relief based on any deficiencies in the mailing. *Id.* at 2213–14.

The Court's decision focused on the requirement that a harm be "concrete" in order to qualify as an Article III injury in fact. The Court explained that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *TransUnion*, 141 S. Ct. at 2205. While Congress may "enact legal prohibitions and obligations" and "create causes of action," only a plaintiff "concretely harmed by a defendant's statutory violation" has Article III standing to seek redress from the defendant. *Id.* In short, the Court recognized that "an injury in law is not an injury in fact." *Id.*

The Court acknowledged that Congress may enact statutes that "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2205 (citation omitted). But the Court reasoned that Congress may not "simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* (citation omitted). For that reason, the Court explained, Congress's judgment is not dispositive of whether a particular harm qualifies as concrete. *See id.* at 2204–05. The Court concluded that a plaintiff must establish standing by showing either a concrete harm independent of the defendant's statutory violation, or a "close relationship" between the interest protected by the statute and a "harm traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 2204.

In its earlier decision in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), the Court suggested that a "risk of real harm" could qualify as concrete harm in some circumstances, such as where a plaintiff's "harms may be difficult to prove or measure." *Id.* at 1549. The Court explained that, in those instances, "the violation of a procedural right granted by statute" could alone constitute injury in fact. *Id.* In *TransUnion*, however, the Court clarified that "*Spokeo* did not hold that the

mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages"—a retrospective remedy designed to redress past harm. 141 S. Ct. at 2211. Instead, a "material risk of future harm can satisfy the concrete-harm requirement" only in a suit seeking "forward-looking[] injunctive relief." *Id.* at 2210.

Applying those principles, the Court held that the class members whose credit reports had not been distributed to third parties lacked a concrete injury. "A letter that is not sent does not harm anyone," the Court reasoned, "no matter how insulting the letter is." *TransUnion*, 141 S. Ct. at 2210. And the mere risk of future harm did not alone suffice to provide standing to seek statutory damages. *Id.* at 2210–11. Even if it did, the Court added, the plaintiffs also failed to demonstrate a "sufficient risk of future harm to support Article III standing." *Id.* at 2211–12. The problem, the Court explained, was that the alleged risk—"the risk of dissemination" of the erroneous credit reports to third parties—was "too speculative." *Id.* at 2212. The plaintiffs argued that TransUnion "could have divulged their misleading credit information to a third party at any moment," but they did not demonstrate a "sufficient likelihood" that a third party would request the information or that TransUnion would divulge it. *Id.* The Court held that it could not "simply presume a material risk of concrete harm" in the absence of evidence establishing a "serious likelihood of disclosure." *Id.*

The Court also rejected the claims based on deficiencies in the mailings. Because the plaintiffs did not provide "any evidence of harm caused by the format of the mailings," they alleged only "bare procedural violations" that did not confer standing. *TransUnion*, 141 S. Ct. at 2213. The Court further disagreed that a risk of harm from the formatting violations gave rise to standing: a risk of future harm does not provide standing to seek damages, and plaintiffs did not explain how the lack of the statutorily required information affected them. *Id.* at 2213–14. Finally on this

score, the Court rejected the argument that any "informational injury" provided standing, reasoning in part that an "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* at 2214 (citation omitted).

Meanwhile, the Supreme Court's decision in *California* v. *Texas* concerned the traceability and redressability requirements for Article III standing in the context of an action for declaratory and prospective injunctive relief. At issue there was the so-called individual mandate in the Affordable Care Act, which required most Americans to obtain minimum essential health insurance coverage and imposed a monetary penalty on those who failed to do so. 141 S. Ct. at 2112. In 2017, Congress reduced the amount of the penalty to $0. *Id.* States and two private individuals filed suit, alleging that the individual mandate was no longer a valid exercise of Congress's constitutional power to tax, *see NFIB* v. *Sebelius*, 567 U.S. 519, 563 (2012), and that the entire act was invalid because the individual mandate could not be severed from the remainder of the statute. *California*, 141 S. Ct. at 2112.

The Supreme Court granted review and held that the plaintiffs lacked Article III standing. *California*, 141 S. Ct. at 2120. The individual plaintiffs argued that they were injured by the mandate to purchase health insurance, but the Court noted that, with the penalty "zeroed out," the federal government had no means of enforcing the mandate. *Id.* at 2114. The individual plaintiffs thus had "not shown that any kind of [g]overnment action or conduct ha[d] caused or w[ould] cause the injury they attribute" to the individual mandate. *Id.* Accordingly, the individual plaintiffs could not obtain injunctive relief because there was "no one, and nothing, to enjoin." *Id.* at 2216. And while the individual plaintiffs had sought declaratory relief, the Court explained that a request for declaratory relief "alone does not provide a court with jurisdiction," requiring the Court to "look elsewhere to find a remedy that will redress the individual plaintiffs' injuries." *Id.*

at 2215–16. Because no such remedy was available, the individual plaintiffs lacked Article III standing. *Id.* at 2216.

With respect to the plaintiff States, the Court held that they lacked Article III standing because they failed to show that the cost of paying for coverage for new enrollees was "directly traceable" to any "actual or possible" action by the government. *California*, 141 S. Ct. at 2217 (emphasis and citation omitted). Nor did the States show that the $0 enforcement penalty was likely to lead to greater numbers of their citizens to seek health insurance, some portion of the premiums for which the State would have to pay. *Id.* As the Court explained, "where a causal relation between injury and challenged action depends upon the decision of an independent third party," "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* (citation and internal quotation marks omitted).

### B. Under *TransUnion* and *California*, CLF Lacks Standing To Pursue Its SWPPP and RCRA Claims

This Court previously held that CLF's amended complaint sufficiently pleads an injury-in-fact associated with its SWPPP and RCRA claims by alleging that "foreseeable severe weather events, including climate change-induced weather events[,] pose an imminent risk to the [T]erminal." ECF No. 73, at 129. The decision in *TransUnion*, however, shows that the facts actually pleaded by the complaint do not demonstrate a serious likelihood that such risk will materialize imminently. And even if CLF had adequately alleged an imminent, non-speculative risk, CLF would lack standing under *TransUnion* and *California* because it cannot trace any alleged future risk to the bare procedural violations of the permit asserted in the complaint.

#### 1. *The Alleged Risk of Harm from Future Flooding at the Everett Terminal Is Too Speculative to Support Article III Standing*

As the First Circuit has explained, "an allegation of future injury" satisfies the injury-in-fact requirement for Article III standing "only if the threatened injury is certainly impending, or

there is a substantial risk that the harm will occur." *Aguasvivas* v. *Pompeo*, 984 F.3d 1047, 1052–53 (1st Cir. 2021) (internal quotation marks and citation omitted). It is the plaintiff's burden to allege that "the risk of harm is sufficiently imminent and substantial"—that is, a "serious likelihood" of imminent future harm. *TransUnion*, 141 S. Ct. at 2207–08, 2210, 2212; *see Signs for Jesus* v. *Town of Pembroke*, 977 F.3d 93, 99 (1st Cir. 2020).

The Supreme Court applied that principle in *TransUnion*. There, the plaintiffs contended that the risk of dissemination of their credit reports gave them standing and noted that "TransUnion could have divulged their misleading credit information to a third party at any moment." 141 S. Ct. at 2212. Indeed, credit checks are ubiquitous, being required to obtain utilities, secure financing or insurance, rent real property, lease a car, and apply for employment. *See* Nakita Q. Cuttino, *The Rise of "Fringetech": Regulatory Risks in Earned-Wage Access*, 115 Nw. U. L. Rev. 1505, 1553 (2021); Richard M. Hynes, *"Maximum Possible Accuracy" in Credit Reports*, 80 L. & Contemp. Probs. 87, 87 (2017). Still, the Court held that the plaintiffs did not establish a "sufficient likelihood" that their "individual credit information would be requested by" or "otherwise intentionally or accidentally release[d]" to third parties. *TransUnion*, 141 S. Ct. at 2212.

As alleged, the risk of harm here is far more speculative and far less imminent than the risk at issue in *TransUnion*. The multiple risks that CLF alleges—all of which must occur for harm to be possible—are that (i) a severe weather event will flood the Terminal in the near future, (ii) the flooding will result in the failure of some structure at the Terminal, (iii) the Terminal's control measures will prove inadequate to address the failure, and (iv) an unpermitted discharge of pollutants will occur. *See, e.g.*, Am. Compl. ¶ 14, ECF No. 34. CLF devotes a significant amount of space in the amended complaint to allegations that extreme precipitation events are

increasing, flooding is becoming more likely, severe storms are arising with more frequency, sea levels are rising, and the sea surface is warming. *See id.* ¶¶ 111–205. CLF also makes the conclusory allegation that "ExxonMobil has not taken information regarding th[ose] factors . . . into account in designing, constructing, and operating the Everett Terminal." *Id.* ¶ 232. But CLF does not allege facts indicating a serious likelihood that severe precipitation or flooding will exceed the design capacity of the Terminal's permitted stormwater treatment system imminently. Nor does CLF allege that the Terminal ever impermissibly discharged pollutants as a result of extreme precipitation or flooding in the past.

In fact, it is undisputed that, during the life of the permit, there has never been a storm of a magnitude that the Terminal was incapable of handling in accordance with the Permit. That is why the Terminal has never discharged through Outfall 01B, which the permit authorizes the Terminal to use if the capacity of its stormwater treatment system is exceeded in "extreme weather events." Permit for Everett Terminal pt. I.A.23.c, ECF No. 34-1. Indeed, the Terminal's current SWPPP shows that "no significant spills or leaks of oil or toxic chemicals have occurred in the past three years." *See* Revised SWPPP § 2.2, at 15 (Ex. 1 to Toal Decl.). The passage of time without a single allegation of unpermitted discharges due to extreme precipitation or flooding renders CLF's threatened injuries "more and more speculative." *See Beck* v. *McDonald*, 848 F.3d 262, 275 (4th Cir. 2017).

Even if CLF had alleged a sufficient likelihood of imminent severe precipitation or flooding, it still failed to plead facts to suggest that those events would cause infrastructure failures leading to unpermitted discharges. For example, the complaint does not state what severity of storm CLF believes would be necessary to overrun the Terminal's controls. It does not allege how likely it is that a storm of that severity will occur in the immediate future. It does not allege what

the particular problem is with the Terminal's stormwater controls that would lead to unpermitted discharges. Nor does it explain why any alleged discharges that it believes are "certainly impending" would be sufficient to harm their members' interests. *Cf.* Am. Compl. ¶ 15. To be sure, the complaint alleges that "[t]here is a substantial and imminent risk of ExxonMobil's Everett Terminal discharging and/or releasing pollutants because the Terminal has not been properly engineered, managed, and fortified or, if necessary, relocated to protect against" extreme weather events. *Id.* ¶ 347. But that is merely a conclusory allegation of the sort that is entitled to no weight and cannot prevent dismissal. *See, e.g.*, *Hochendoner* v. *Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016).

Absent more substantial factual allegations, the risk alleged here does not qualify to confer Article III standing. In *TransUnion*, the Court held that the plaintiffs failed to show that the risk of harm from the improper credit alerts was sufficiently imminent, even though a third party could have pulled the plaintiffs' credit reports "at any moment." 141 S. Ct. at 2212. Here, CLF similarly suggests that a severe weather event could happen at any time, but that is not enough under *TransUnion*. CLF then fails to allege facts sufficient to explain how or why such an event would lead to unpermitted pollutant discharges. As *TransUnion* demonstrates, such allegations are insufficient to demonstrate a substantial and non-speculative risk of future harm. For that reason, CLF lacks standing to seek injunctive relief on its SWPPP and RCRA claims, both of which rely on the risk of future harm from the unpermitted discharge of pollutants caused by extreme weather events.

#### 2. *CLF Cannot Trace Its Alleged Future Risk of Harm to the Bare Procedural Violations Alleged in the SWPPP Claims*

CLF's SWPPP claims seek relief for "bare procedural violations" of the Terminal's permit (and thus the Clean Water Act). A SWPPP is a written plan prepared by facilities that is "intended

to document the selection, design, and installation of stormwater control measures to meet the permit's effluent limits." 2021 MSGP pt. 6, at 55 (Ex. 2 to Toal Decl.). CLF's SWPPP claims allege that ExxonMobil failed to properly prepare that written plan in several ways:

- Count 6 alleges that the SWPPP "fail[s] to include information documenting, or plans to address, pollutant discharges associated with" flood risks from extreme weather events, Am. Compl. ¶ 266;

- Count 7 alleges that ExxonMobil did not prepare the SWPPP in accordance with "good engineering practices" because ExxonMobil purportedly did not consider risks from heavy precipitation and flooding, *id.* ¶ 272;

- Count 8 alleges that the SWPPP "fail[s] to identify sources of pollution" resulting from heavy precipitation and flooding. *Id.* ¶ 280;

- Count 9 alleges that the SWPPP does not "describe or ensure implementation of practices which will be used to prevent and address pollutant discharges and/or releases" resulting from heavy precipitation and flooding, *id.* ¶ 284;

- Count 10 alleges that the SWPPP fails to identify flood risks from extreme weather events as "pollutant sources"; "areas where spills associated with" flooding from extreme weather events "could occur"; or "expected drainage paths" associated with heavy precipitation and flooding, *id.* ¶¶ 288–90;

- Count 11 alleges that the Terminal's Spill Prevention, Control, and Countermeasure plan "was not prepared in accordance with good engineering practices because it is not based on consideration of" risks from heavy precipitation and flooding, *id.* ¶ 297; Count 11 also alleges the SWPPP improperly relies upon two other written plans for details regarding spill prevention and response, *see id.* ¶ 306;

- Count 12 alleges that ExxonMobil "failed to submit relevant facts and/or submitted incorrect information" regarding risks from heavy precipitation and flooding to EPA, *id.* ¶ 317;

- Count 13 alleges that ExxonMobil failed to "amend[] or update[] its SWPPP based on information regarding" risks from heavy precipitation and flooding, *id.* ¶ 323; and

- Count 14 alleges that ExxonMobil improperly certified the SWPPP to EPA without "disclos[ing] and consider[ing]" risks from heavy precipitation and flooding, *id.* ¶ 340.

Each of those alleged violations concern *procedures* designed by EPA to ensure that facilities are acting to reduce the risk of unpermitted discharges in stormwater. In particular, CLF is faulting ExxonMobil for failing to prepare a written document in a certain manner and for failing to submit

certain data to EPA. And largely, CLF is arguing that the SWPPP lacks information that it believes the SWPPP should contain. Those are classic procedural violations.

Because the requirement to prepare an administrative document in a certain way does not bear a "close relationship" with a "harm traditionally recognized as providing a basis for lawsuits in American courts," *TransUnion*, 141 S. Ct. at 2204, CLF lacks Article III standing to seek relief for bare alleged deficiencies in the SWPPP. Indeed, the Supreme Court expressly recognized in *TransUnion* that an "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* at 2214. Notably, in the wake of *TransUnion*, several courts of appeals have applied that holding in additional contexts, concluding that the failure to provide certain information, even when that information is designed to protect some separate concrete interest, is a mere procedural violation that does not alone give rise to Article III standing. *See Wadsworth* v. *Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 666–68 (7th Cir. 2021); *Ward* v. *Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 362 (6th Cir. 2021); *In re Coca-Cola Prods. Mktg. & Sales Pracs. Litig (No. II)*, No. 20-15742, 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021) (unpublished memorandum disposition); *see also Casillas* v. *Madison Ave. Assocs., Inc.*, 926 F.3d 329, 334 (7th Cir. 2019) (Barrett, J.) (cited with approval in *TransUnion*); *Hagy* v. *Demers & Adams*, 882 F.3d 616, 621–22 (6th Cir. 2018) (same).

Because CLF is seeking redress for procedural violations, it cannot pursue its SWPPP claims without demonstrating a separate concrete injury that has already materialized or for which there is a substantial likelihood of imminent occurrence *and* that is caused by the alleged deficiencies in the SWPPP. The only injury that CLF alleges is the risk of future harm if the Terminal were to discharge pollutants beyond the levels authorized by its permit during heavy precipitation or flooding. *See* Am. Compl. ¶¶ 13–15. But under *California*, CLF lacks standing

if it fails to show that the alleged deficiencies in the SWPPP "will cause the injury [it] attribute[s]" *to those deficiencies*. 141 S. Ct. at 2214.

The amended complaint does not explain how alleged failure to consider heavy precipitation and flooding when preparing the SWPPP—a regulatory document—is "directly traceable" to an imminent risk of future harm. *Id.* at 2217. For example, CLF does not explain how the failure to "include information documenting, or plans to address, pollutant discharges associated with [heavy precipitation and flooding]" in the SWPPP *itself* increases the likelihood of harm. *See* Am. Comp. ¶ 266 (Count 6). Any such risk of harm is traceable not to the alleged omission of information from the SWPPP, but instead to ExxonMobil's alleged failure *to implement additional control measures* to deal with heavy precipitation and flooding. Under *California*, however, what matters for purposes of traceability is the link between the alleged legal violation (here, claimed deficiencies in the SWPPP) and the alleged harm; not the link between separate conduct by the defendant and the alleged harm. *See* 141 S. Ct. at 2116.

Consider also CLF's claim that ExxonMobil failed to identify in the SWPPP sources of pollution that allegedly would result from heavy precipitation and flooding. *See* Am. Comp. ¶¶ 277–81 (Count 8). The inclusion of that information would not reduce the risk of future harm of pollution unless the listing of those sources prompted ExxonMobil to adopt additional control measures. Again, any increased risk of harm comes from the lack of additional control measures, not the inclusion or exclusion of particular information in the SWPPP. The same is true of ExxonMobil's alleged failure to use "good engineering practices" when preparing the SWPPP and the Spill Prevention, Control, and Countermeasures Plan, *see* Am. Compl. ¶¶ 272, 297 (Counts 7 and 11); to describe certain practices in the Terminal's SWPPP, *see id.* ¶ 284 (Count 9); to identify sources and locations of potential spills, *see id.* ¶¶ 287–90 (Count 10); to submit certain facts or

corrected information to EPA, *see id.* ¶ 317 (Count 12); to amend or update the SWPPP, *see id.* ¶¶ 323–324 (Count 13); and to certify the SWPPP in accordance with EPA's requirements, *see id.* ¶¶ 337–339 (Count 14).

### 3. *CLF Lacks Standing to Seek Civil Penalties for Alleged Past Deficiencies in the SWPPP*

At the hearing on ExxonMobil's motion for a stay under the doctrine of primary jurisdiction, CLF indicated that it was seeking civil penalties only for the "past exceedances and spills." ECF No. 102, at 89; *see also id.* at 61 (equating the "exceedances" with the "discharge counts). At the most recent hearing, however, CLF took the position that it is also seeking civil penalties on its SWPPP claims. *See* Oct. 5, 2021 Hr'g Tr. 34; Am. Compl. ¶ 357(c). Setting aside CLF's apparent change in position, its request for civil penalties runs headlong into *TransUnion*. As explained above, the Supreme Court held in *TransUnion* that a plaintiff lacked standing to seek statutory damages based on an alleged future risk of harm. That is because, "if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm." *TransUnion*, 141 S. Ct. at 2211. If the plaintiff cannot show that "the risk of future harm materialized," then it lacks standing to seek damages based on that "asserted risk of future harm." *Id.*

The Supreme Court's holding on the risk of future harm follows from the retrospective nature of damages. The Court explained in *TransUnion* that a plaintiff alleging a risk of future harm may pursue "forward-looking, injunctive relief to prevent the harm from occurring," provided that the risk of future harm is certainly impending. 141 S. Ct. at 2210. Such relief comports with the nature of the alleged injury because it acts prospectively to prevent an imminent risk of harm from materializing. *See, e.g.*, *United States* v. *Or. Med. Soc.*, 343 U.S. 326, 333 (1952); *Ulstein Mar., Ltd.* v. *United States*, 833 F.2d 1052, 1055 (1st Cir. 1987). Damages,

however, are "retrospective in nature—they compensate for past harm." *CMR D.N. Corp.* v. *City of Philadelphia*, 703 F.3d 612, 622 (3d Cir. 2013); *see TransUnion*, 141 S. Ct. at 2210. It makes little sense to provide a plaintiff with a retrospective remedy when the plaintiff does not allege that it has yet suffered any harm.

The same reasoning applies to a request for civil penalties. "[C]ivil penalties—as opposed to injunctive relief—are necessarily retrospective." *United States* v. *EME Homer City Generation, L.P.*, 727 F.3d 274, 292 n.20 (3d Cir. 2013). Indeed, they are designed to "exact[] punishment," "similar to the remedy of punitive damages." *Tull* v. *United States*, 481 U.S. 412, 422 n.7 (1987). The First Circuit has expressly referred to civil penalties as "retrospective" in nature, *see Maine* v. *Dep't of Navy*, 973 F.2d 1007, 1011 (1st Cir. 1992), and another court of appeals described civil penalties available under the Clean Water Act as being "assessed for past acts of pollution." *Chesapeake Bay Found., Inc.* v. *Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989). A plaintiff asserting a risk of future harm cannot pursue a claim for civil penalties, just as it cannot pursue a claim for retrospective damages.

CLF thus cannot obtain civil penalties on its SWPPP claims. It asserts no past concrete harm from any alleged deficiencies in the SWPPP and instead seeks to proceed based only on an alleged future risk of injury. For that reason, CLF's request for civil penalties does not save its SWPPP claims. CLF also does not (and cannot) seek civil penalties under RCRA, *see* Am. Compl. ¶ 357; 42 U.S.C. § 6972(a), meaning that CLF lacks Article III standing on all of Counts 6–15.

### C. ExxonMobil Can Raise Its Standing Arguments at Any Time

CLF has argued that ExxonMobil's standing argument under *TransUnion* and *California* "amounts to a request for reconsideration" of the Court's prior ruling on standing and thus cannot

proceed without satisfying the legal standard for reconsideration. Joint Report 18, ECF No. 115. CLF is mistaken for three independent reasons.

*First*, Article III standing is a "prerequisite to a federal court's subject matter jurisdiction." *Dantzler, Inc.* v. *Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 46 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2624 (2021). The Federal Rules of Civil Procedure expressly state that, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). The rules further permit a defendant to seek dismissal on the pleadings for lack of subject-matter jurisdiction "after the pleadings are closed." Fed. R. Civ. P. 12(c). Even the First Circuit would be required to address this argument if ExxonMobil raised it for the first time on appeal from final judgment. *See Hochendoner*, 823 F.3d at 730; *Elgin* v. *Dep't of Treasury*, 641 F.3d 6, 9 (1st Cir. 2011), *aff'd*, 567 U.S. 1 (2012). At least one court of appeals has held, moreover, that a district court abused its discretion by failing to consider a question of subject-matter jurisdiction on the ground that the defendant was seeking reconsideration. *See Am. Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515–16 (4th Cir. 2003); *see also Bishop* v. *Smith*, 760 F.3d 1070, 1085 (10th Cir. 2014) (stating that "[i]ssues such as subject matter jurisdiction . . . may be particularly suitable for reconsideration, even where the doctrine otherwise might counsel against it" (internal quotation marks omitted)). Indeed, the standards courts apply for determining whether to consider a motion for reconsideration are derived from law-of-the-case doctrine, 18B Charles Alan Wright, et al., *Federal Practice and Procedure* § 4478.1, at 660–62 (3d ed. 2019); *cf. Harlow* v. *Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005), which does not apply to questions of subject-matter jurisdiction. *See Latin Am. Music Co.* v. *Media Power Grp., Inc.*, 705 F.3d 34, 40 (1st Cir. 2013). A motion for reconsideration is thus irrelevant to the issue of standing.

*Second*, even for questions not related to subject-matter jurisdiction, ExxonMobil respectfully submits that satisfaction of the standard in *United States* v. *Allen*, 573 F.3d 42 (1st Cir. 2009), is not required to permit reconsideration. *See* ECF No. 120, at 2. That case concerned a *post-judgment* motion for reconsideration, which is governed by Rule 59(e). *See id.* at 53; *Marie* v. *Allied Home Mortg. Corp.*, 402 F.3d 1, 7 (1st Cir. 2005) (cited in *Allen*, 573 F.3d at 53). As this Court has recognized, Rule 59(e) is "inapplicable" to interlocutory orders because that rule "appl[ies] only to final judgments." *Tomon* v. *Entergy Nuclear Operations, Inc.*, Civ. No. 05-12539, 2011 WL 3812708, at *1 (D. Mass. Aug. 25, 2011). The reconsideration of interlocutory orders is a purely discretionary matter, and the First Circuit will reverse a decision to reconsider a prior order "only for a particularly egregious abuse of discretion." *Harlow*, 432 F.3d at 56; *see* Fed. R. Civ. P. 54(b). Demonstration of an "intervening change in the law" is thus not required. *Allen*, 573 F.3d at 53.

*Third*, the Supreme Court's decisions in *TransUnion* and *California* constitute such a change in the law and thus satisfy the *Allen* standard in any event. There should be no question that *TransUnion* constituted a change in law on standing doctrine. As explained above, the Supreme Court had suggested in *Spokeo* that a "risk of real harm" could qualify as concrete harm in some circumstances, such as where a plaintiff's "harms may be difficult to prove or measure." 136 S. Ct. at 1549. In *TransUnion*, however, the Court held for the first time that "the mere risk of future harm" does not suffice to demonstrate Article III standing in a case seeking retrospective relief. 141 S. Ct. at 2210–11. Justice Thomas, writing in dissent, labeled the major decision a "reworking of *Spokeo*" in that it "all but eliminat[es] the risk-of-harm analysis" and holds that an imminent risk of harm "may support only a claim for injunctive relief." *Id.* at 2222 (citation omitted). The Supreme Court's decision in *California* also clarified the law sufficiently to "cast

into doubt" CLF's standing. *United States* v. *Holloway*, 630 F.3d 252, 258 (1st Cir. 2011). It makes clear that CLF must allege that an imminent risk of harm to its members arises from the allegedly unlawful conduct—here the purportedly deficient provisions in the SWPPP—instead of, for example, from the risk of severe weather events at the facility or even from ExxonMobil's alleged failure to employ control measures at the Terminal. *See California*, 141 S. Ct. at 2116; *see also id.* at 2133 (Alito, J., dissenting) (calling this aspect of the majority's holding "new and revolutionary"). The Court should therefore reach the question of CLF's standing to maintain the SWPPP and RCRA claims and hold that CLF lacks standing to proceed.

## II. CLF'S SWPPP CLAIMS ARE MOOT

Earlier this year, EPA revised the Multi-Sector General Permit to require permit holders, for the first time, to consider flood risks from major storm events when creating a SWPPP. ExxonMobil revised the Terminal's SWPPP to account for that new condition. As a result, CLF's request for injunctive relief on its SWPPP claims (Counts 6–14) is now moot because those claims challenge an inoperative SWPPP, and the current SWPPP provides the relief CLF seeks.

### A. ExxonMobil Has Revised the Terminal's SWPPP

The MSGP is a stormwater discharge permit required to be used by certain industrial dischargers that, unlike the Terminal, do not have individual permits. The permit for the Everett Terminal requires its SWPPP to "be consistent with the provisions for SWPPPs included in the most current version" of the MSGP. Permit for Everett Terminal pt. I.B.3, at 13. The 2015 MSGP was in effect and incorporated in the Terminal's SWPPP at the time the amended complaint was filed. *See* Am. Compl. ¶ 78.

In January 2021, EPA published the final version of a new, revised MSGP, which became effective on March 1. The 2021 MSGP included a new condition—Part 2.1.1.8—which expressly requires facilities to consider "structural improvements, enhanced/resilient pollution prevention

measures, and other mitigation measures, to minimize impacts from stormwater discharges from major storm events." *Id.* pt. 2.1.1.8, at 18. Part 2.1.1.8 explains that the phrase "major storm events" includes "hurricanes," "storm surge," "extreme/heavy precipitation," and "flood events." *Id.* EPA clarified that "heavy precipitation" means that "precipitation is occurring in more intense or more frequent events." *Id.* at 18 n.5.

EPA further provided a list of "additional storm water control measures" in Part 2.1.1.8 that a permittee "may . . . consider[]" if its facility "may be exposed to or has previously experienced such major storm events." 2021 MSGP pt. 2.1.1.8, at 18. Significantly, none of the listed control measures requires major structural changes; indeed, many are temporary measures that may be employed in advance of an approaching storm. *See id.* EPA added a note after Part 2.1.1.8 stating that the provisions of Part 2.1.1 in general (including Part 2.1.1.8) "do[] not require nor prescribe specific control measure[s] to be implemented"; they require only that facilities "document in [the] SWPPP" the "consideration made to select and design control measures at [the] facility to minimize pollutant discharges via storm water." *Id.* at 19.

In March 2021, ExxonMobil revised the SWPPP for the Everett Terminal in light of the issuance of the 2021 MSGP. The revised SWPPP contains significant changes and new provisions that account for flood and spill risk due to major storm events, in accordance with Part 2.1.1.8 of the 2021 MSGP.

Most prominently, the revised SWPPP contains a new section expressly addressing major storm events. That section explains that ExxonMobil reviewed the applicable FEMA Flood Map, *see* 2021 MSGP pt. 2.1.1.8, at 18 n.6, and determined that "additional structural stormwater control measures beyond those described in the SWPPP" were not required because the Terminal is not in a "Special Flood Hazard Area subject to inundation by the 1% annual chance flood." Revised

SWPPP § 3.0, at 18. The SWPPP also documents that ExxonMobil designed the Terminal's stormwater treatment system to "exceed the requirements of the individual permit," and that ExxonMobil had a "Registered Professional Engineer" reevaluate the system's capacity to withstand a 10-year, 24-hour storm, as measured by the applicable NOAA Precipitation Frequency Data Server. *Id.*; *see* Permit for Everett Terminal pt. I.A.23.b, at 11 (stating that the Terminal's stormwater treatment system must have the capacity to handle the stormwater created by a 10-year, 24-hour storm). The facility, the SWPPP explains, was "determined to have sufficient capacity to accommodate both the increased volume of precipitation as well as the increased peak instantaneous flow." Revised SWPPP § 3.0, at 18. The SWPPP further notes that ExxonMobil implemented the particular stormwater control measures listed in Part 2.1.1.8 of the 2021 MSGP. *Id.*

In a separate section, the 2021 SWPPP added language explaining the controls used to minimize the potential for leaks and spills in the event of "a major storm event or an extreme/heavy precipitation event." Revised SWPPP § 3.4, at 26. This section notes that, 48 hours before a major storm event, the facility will "remove any accumulated material" from the oil-water separator and test "all generators and storm water pumps" for "readiness for immediate deployment." *Id.* In addition, the section reflects that, 12 hours before the storm event, the terminal will deploy "[s]ausage booms" around the oil-water separator "as a spill prevention measure." *Id.* Finally, the SWPPP provides that, prior to storm events, all "tank roof hatche[s] and loading arms are secured." *Id.* at 27. And if the terminal must be shut down because of the threat of "extreme flooding," "all tank valves are closed and pressure relief valves are left open to avoid oil spills into the storm water." *Id.*

The SWPPP contains numerous additional provisions designed to account for risks presented by major storm events. For example, the SWPPP identifies areas of the Terminal that "are subject to an increased potential for a leak in the event of a major storm." 2021 SWPPP § 2.2, at 14 n.**; *see id.* at 13–15. The SWPPP also sets forth control measures to prevent pollution during a major storm event, including securing tarps in salt storage areas to avoid runoff; filling above-ground storage tanks to a certain level to ensure sufficient weight and to avoid structural compromises during heavy winds; delaying deliveries within 48 hours of an anticipated major storm event; moving tank trunks to higher elevation and away from high-velocity stormwater flow areas; and temporarily relocating or securing outdoor storage and dumpsters. *See id.* §§ 2.4, 3.1, 3.2, 3.11, at 16–17, 19, 20, 22, 23, 24, 31–32. The SWPPP also provides for inspections in the event of an impending major storm, and documents employee training regarding scenarios involving major storm events. *See id.* §§ 3.9, 5, at 31, 38.

### B. The Revised SWPPP Moots CLF's Request for Injunctive Relief on Its SWPPP Claims

In light of ExxonMobil's adoption of the revised SWPPP, CLF's request for injunctive relief on its SWPPP claims is moot. As explained above, CLF seeks injunctive relief on the SWPPP claims only to "prevent further violations" of the Clean Water Act and thus to abate an alleged risk of *future* injury. Am. Compl. ¶ 357(b). Even if the previous SWPPP were deficient (and it was not), it cannot possibly contribute to any such alleged future risk; only the SWPPP currently in effect could do so. There is thus "no ongoing conduct to enjoin" with respect to the previous SWPPP, and CLF's claims alleging a risk of future injury caused by that SWPPP are now moot. *Town of Portsmouth* v. *Lewis*, 813 F.3d 54, 58 (1st Cir. 2016); *see Princeton Univ.* v. *Schmid*, 455 U.S. 100, 103 (1982) (per curiam).

In addition, CLF's SWPPP claims in the amended complaint are founded on allegations based on the previous SWPPP that have no application to the current SWPPP. Count 6, for example, alleges that the SWPPP "failed to include information documenting, or plans to address, pollutant discharges associated with" heavy precipitation and flooding. Am. Compl. ¶ 266. While the prior SWPPP was not required to provide such information, the revised SWPPP includes numerous provisions documenting control measures designed to address those very risks. *See* pp. 18–21, *supra*.

Count 7 is similar. It alleges that the SWPPP "was not prepared based on information regarding" heavy precipitation and flooding, and "the substantial risks of pollutant discharges and/or releases associated with those factors." Am. Compl. ¶ 273. That allegation refers to what CLF incorrectly alleged was required to be included in the previous SWPPP. The revised SWPPP expressly states that ExxonMobil reanalyzed its stormwater control measures in light of the applicable FEMA Flood Map and NOAA Precipitation Frequency Data Server. *See* Revised SWPPP § 3.0, at 18.

Allegations for the remaining SWPPP claims likewise have no relevance to the current SWPPP:

- Count 8 alleges that the Terminal's SWPPP does not "identify sources of pollution" from heavy precipitation and flooding. Am. Compl. ¶ 280. The revised SWPPP does. *See* Revised SWPPP § 2.2, at 14 n.**; *see id.* at 13–15.

- Count 9 alleges that the SWPPP does not "describe or ensure implementation of practices which will be used to prevent and address pollutant discharges and/or releases" from heavy precipitation and flooding. Am. Compl. ¶ 284. The revised SWPPP does. *See* pp. 18–21, *supra* (citing relevant portions of the revised SWPPP).

- Count 10 alleges that the SWPPP "does not identify areas where spills associated with" heavy precipitation and flooding "could occur." Am. Compl. ¶ 289. The revised SWPPP does. *See* Revised SWPPP § 2.2, at 14 n.**; *see id.* at 13–15.

- Count 11 alleges that the SWPPP "reli[es] solely on its [Spill Prevention and Control Countermeasure plan] and its [Facility Response Plan] for '[d]etails regarding spill

prevention and response.'" Am. Compl. ¶ 306. The revised SWPPP does not. *See* Revised SWPPP § 3.4, at 26–27.

- Count 12 alleges that ExxonMobil "failed to submit relevant facts and/or submitted incorrect information regarding . . . the substantial risk of pollutant discharges and/or releases associated with" heavy precipitation and flooding." Am. Compl. ¶ 317. The revised SWPPP contains such information. *See* pp. 18–21, *supra* (listing relevant provisions).

- Count 13 alleges that "ExxonMobil has not amended or updated its SWPPP based on information regarding" heavy precipitation and flooding and "the substantial risks of pollutant discharges and/or releases associated with these factors." Am. Compl. ¶ 323. The revised SWPPP addresses those factors. *See, e.g*, Revised SWPPP § 3.0, at 18.

- Count 14 alleges that ExxonMobil executed a certification associated with the SWPPP "without developing, implementing, and updating a SWPPP based on information in its possession" regarding heavy precipitation and flooding. Am. Compl. ¶ 338. The revised SWPPP addresses heavy precipitation and flooding, making the certification proper under CLF's theory. *See* pp. 18–21, *supra* (listing relevant provisions).

The Terminal's revised SWPPP thus now contains information responsive to the alleged procedural deficiencies identified by CLF in its amended complaint. That is not to say that the previous SWPPP was deficient—it was not. But it is to say that revisions to the SWPPP address fully the alleged deficiencies CLF has raised. Indeed, it is hard to understand how CLF can properly maintain many of the allegations in the amended complaint with respect to the 2021 SWPPP. *Cf.* Oct. 5, 2021 Hr'g Tr. 45 (noting CLF's obligation to comply with Rule 11). It is thus clear that CLF cannot seek injunctive relief on the SWPPP claims in the current complaint, rendering those claims for relief moot.

That CLF's claims became moot because of conduct by ExxonMobil does not require a different conclusion. As the First Circuit recently made clear, the voluntary-cessation exception to mootness "does not apply if the change in conduct is unrelated to the litigation." *Boston Bit Labs, Inc.* v. *Baker*, 11 F.4th 3, 10 (1st Cir. 2021). Indeed, "[c]ircuit courts have routinely held that the voluntary cessation exception is not invoked when the challenged conduct ends because of an event that was scheduled before the initiation of the litigation, and is not brought about or

hastened by any action of the defendant." *Am. Civil Liberties Union* v. *U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013). Here, the 2015 MSGP "expired according to its terms." *Id.* EPA stated when it promulgated the 2015 MSGP that it would expire on June 4, 2020. *See* 2015 MSGP, cover page (Ex. 3 to Toal Decl.). EPA has now issued a new MSGP, which includes the requirement in Part 2.1.1.8 to consider control measures to account for flood risk from major storm events. Only in response to that regulatory action did ExxonMobil amend the SWPPP for the Terminal to include provisions addressing such risk. Accordingly, there is "no basis upon which to conclude" that ExxonMobil revised its SWPPP "in order to make the present litigation moot." *Lewis*, 813 F.3d at 59.

## III. CLF'S SWPPP CLAIMS FAIL ON THE MERITS UNDER EPA'S INTERPRETATION OF THE 2021 MULTI-SECTOR GENERAL PERMIT

When EPA published the draft version of the new MSGP, CLF submitted comments arguing that EPA should delete Part 2.1.1.8 on the theory that the requirement to use "good engineering practices" in the 2015 MSGP already required facilities to consider major storm events when designing control measures. EPA rejected that argument in a response to CLF's comments. EPA's response confirms that the requirement to use "good engineering practices" did not require consideration of increased flood risk due to climate change-induced weather events, as alleged in the complaint, when designing the previous SWPPP.

### A. EPA's Response to CLF's Comments on the 2020 Draft MSGP

In February 2020, EPA published proposed revisions to the 2015 MSGP for public comment. The draft 2020 MSGP included an iteration of Part 2.1.1.8. The draft version of Part 2.1.1.8 required MSGP-permitted facilities to consider "structural improvements, enhanced pollution prevention measures, and other mitigation measures, to minimize impacts from stormwater discharges from major storm events," but it did not explain what constituted a "major

storm event[].” 2020 MSGP Draft pt. 2.1.1.8, at 14 (Ex. 4 to Toal Decl.). Draft Part 2.1.1.8 included the same basic list of potential mitigation measures as the final version. *See id.*

CLF submitted comments on the 2020 draft, urging EPA “not to adopt the proposed language of Part 2.1.1.8.” CLF Comment 2 (Ex. 5 to Toal Decl.). CLF argued that adoption of Part 2.1.1.8 would “unlawfully narrow the scope of necessary consideration of flood risk from the 2015 [MSGP] in violation of the [Clean Water Act’s] anti-backsliding provision.” *Id.* at 4. CLF’s theory was that the requirement in the 2015 MSGP to “select, design, install, and implement control measures . . . in accordance with good engineering practices” already required facilities “to assess their vulnerabilities in light of climate change, develop engineering design plans to adequately address those vulnerabilities, and ultimately implement measures that will protect each facility and other surrounding communities from contamination from th[e] facility.” *Id.* at 4–5 (quoting Goldsmith Declaration).

In particular, CLF identified a number of control measures not included in the 2020 draft Part 2.1.1.8 that it claimed were already required under the 2015 MSGP. For example, CLF argued that Part 2.1.1.8 “does not address methods for preventing flooding” and maintained that it should include a provision requiring control measures to “prevent flood waters from entering the facility for any reasonably anticipated flooding that might occur during the life of the facility.” CLF Comment 6. CLF also argued that, in addition to requiring consideration of “major storm events that cause extreme flooding conditions,” Part 2.1.1.8 must require consideration of “increased frequency and severity of storms,” “sea-level rise,” “storm surge flooding,” and “dry weather tidal flooding.” *Id.* at 9, 10. CLF further contended that EPA should require permittees to identify present and future flood risks “over the design life of their facilities, as well as the information supporting that determination”; to “self-designate exposure to flood risk if any part of [the]

facility's footprint is located within a geographic area at risk of flooding based upon the best available flood projection information"; to implement "stronger control measures when the facility is handling large amounts of potentially hazardous materials and constituents"; and to develop a "resilience plan" to assess "flood risk and appropriate flood mitigation options in both the near and long-term." *Id.* at 10–11. CLF argued that EPA "must" adopt those requirements and others because they were already contained in the 2015 MSGP; to do otherwise, CLF argued, would violate EPA's policy against "backsliding." *Id.* at 12.

The 2021 MSGP retained Part 2.1.1.8 in largely the same format as in the draft 2020 MSGP, with slight revisions. Three of the revisions are relevant here. First, EPA provided examples of "major storm events," listing "hurricanes," "storm surge" "extreme/heavy precipitation," and "flood events." 2021 MSGP pt. 2.1.1.8, at 18. EPA added that "heavy precipitation" means that "precipitation is occurring in more intense or more frequent events." *Id.* at 18 n.5. Second, EPA revised the language introducing the list of "additional storm water control measures" to provide that a permittee "may . . . consider[]" those measures if its facility "may be exposed to or has previously experienced such major storm events." *Id.* at 18. Finally, EPA added the note after Part 2.1.1.8 stating that the MSGP was not requiring any "specific control measure[s] to be implemented" but rather mandating only that facilities "document" the "consideration made to select and design control measures." *Id.* at 19.

In its response to CLF's comment on the draft 2020 MSGP, EPA "disagree[d]" that requiring facilities to "consider implementing mitigation measures to minimize impacts from major storm events constitutes backsliding." EPA Response to Comments 398 (Ex. 6 to Toal Decl.). EPA unequivocally stated that the requirements in the 2021 MSGP Part 2.1.1.8 constituted "a new effluent limitation or condition" adopted "for the first time," as "the 2015 MSGP did not

include a similar provision." *Id.* As EPA explained, the 2021 MSGP thus "enhance[d] the protection of water quality standards." *Id.*

EPA added that it "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 398. Instead, "[t]he specific limits in Part 2.1 of the MSGP emphasize 'low-tech' controls, such as minimizing exposure to stormwater, regular cleaning of outdoor areas where industrial activities may take place, [and] proper maintenance." *Id.* While EPA acknowledged that "sometimes treatment devices or constructed/installed controls may be necessary, particularly where a facility might otherwise not meet water quality standards," Part 2.1.1.8 states only that such improvements "can help" to avoid unpermitted discharges due to major storm events. *See* 2021 MSGP pt. 2.1.1.8, at 18. EPA further clarified that Part 2.1.1 does not require any "specific control measure to be implemented" and instead requires only documentation in the SWPPP of the considerations made to select and design control measures. *See* 2021 MSGP note following pt. 2.1.1.8, at 19.

Notably, EPA also declined to adopt a number of the control measures that CLF argued were necessary to prevent backsliding. For example, Part 2.1.1.8 does not require consideration of sea-level rise or dry-weather flooding. It does not require consideration of flood risks over the design life of the facility. It does not require self-identification of a facility as a flood risk if any portion is within a geographic area at risk of flooding. It does not require stronger control measures when the facility is handling large amounts of potentially hazardous materials. And it does not require development of a "resilience plan" to consider current and future flood risk.

### B. CLF's SWPPP Claims Are Not Viable Given EPA's Rejection of CLF's Interpretation of the Relevant Permit Terms

CLF's SWPPP claims all rest on a similar theory of liability. According to CLF, ExxonMobil has violated the Terminal's permit because it did not consider flood risks due to heavy

precipitation events, major storms, storm surge, sea-level rise, and increased sea temperature when designing and implementing the SWPPP. *See, e.g.*, Am. Compl. ¶¶ 218–19, 232, 267–68. CLF argues that the previous SWPPP was required to identify the sources of those alleged risks and include plans to mitigate the potential for unpermitted discharges in light of those risks. *See id.* ¶¶ 266, 280, 284, 288.

EPA's interpretation of Part 2.1.1.8 of the 2021 MSGP demonstrates that CLF's novel interpretation of the Terminal's permit is incorrect. As noted above, the 2015 MSGP required facilities to "select, design, install, and implement control measures . . . in accordance with good engineering practices." 2015 MSGP pt. 2.1, at 14. CLF argued to EPA that the "good engineering practices" requirement in the 2015 MSGP already required facilities to consider risks from heavy precipitation and flooding when preparing a SWPPP. CLF Comment 4–5. But EPA disagreed with CLF and responded that "the 2015 MSGP did not include a similar provision" to Part 2.1.1.8, and that the requirement in that section for facilities to "consider implementing mitigation measures to minimize impacts from major storm events" constituted "a new effluent limitation or condition." EPA Response to Comments 398. Part 2.1.1.8 was thus an "enhance[ment]" of the MSGP's "protection of water quality standards." *Id.* In addition, EPA declined to adopt many of the requirements proposed by CLF, and EPA squarely rejected CLF's view that the "good engineering practices" provision requires permanent, structural control measures to account for risk from major storm events over the life of the facility. *See* pp. 25–27, *supra*.

The same reasoning applies to the Terminal's permit. The permit requires ExxonMobil to prepare the SWPPP in accordance with "good engineering practices." Permit for Everett Terminal pt. I.B.3, at 13. CLF interprets that phrase to require consideration of risks from heavy precipitation and flooding in the design and implementation of the SWPPP. *See* Am. Compl.

¶¶ 141–205. But as shown by EPA's responses to CLF's comments on the draft 2020 MSGP, the phrase "good engineering practices" does not impose those requirements. Instead, EPA added Part 2.1.1.8 in order to impose some of those requirements, and EPA declined to add other requirements suggested by CLF altogether. If Part 2.1.1.8 imposed a new requirement to consider major storm events when designing and implementing control measures—and thus "enhance[d] protection of water quality standards" over the 2015 MSGP, EPA Response to Comments 398—it follows that the preexisting requirement to use "good engineering practices" could not have previously imposed that requirement. So too for the Terminal's permit: the requirement to use "good engineering practices" in preparing the SWPPP plainly did not, and does not, itself require consideration of increased future flood risk due to climate change.

EPA's views here are particularly salient because "one of [a court's] obligations in interpreting an NPDES permit is to determine the intent of the permitting authority." *Nat. Res. Def. Council, Inc.* v. *County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) (internal quotation marks and citation omitted). Indeed, the permitting authority's "reasonable interpretation of the NPDES permit" is entitled to "substantial deference." *Russian River Watershed Prot. Comm.* v. *City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *see County of Los Angeles*, 725 F.3d at 1208; Oct. 5, 2021 Hr'g Tr. 23 (recognizing that "in interpreting a permit . . . significant weight is to be given to the issuing agency's interpretation."). EPA's interpretation of the 2021 MSGP thus demonstrates that CLF's SWPPP claims rest on an erroneous interpretation of the Terminal's permit.

CLF has argued that three of EPA's responses to comments nonetheless "confirm[] that good engineering practices require that flood risk from severe weather be considered and

addressed." Joint Report 3. The cited responses do not remotely bear the weight CLF places on them.

CLF first cites EPA's acknowledgment that "the use of 'good engineering practices' to develop control measures should consider flood risks" and EPA's further statement that the addition of Part 2.1.1.8 was "necessary to confirm that operators have expressly considered control measures designed to mitigate impacts from stormwater discharges from major storm events." EPA Response to Comments 402. CLF interprets those comments to reveal EPA's understanding that the use of "good engineering practices" already required consideration of major storm events. *See* Joint Report 4. But that interpretation of EPA's statements squarely conflicts with EPA's express statement that the requirement to "consider implementing mitigation measures to minimize impacts from major storm events" constitutes "a new effluent limitation or condition." EPA Response to Comments 398. The more sensible reading of EPA's comment is that the use of "good engineering practices" requires consideration of "flood risks" *generally*, but that EPA wanted facilities to consider risk from major storm events *specifically*; Part 2.1.1.8 was necessary for EPA to "confirm" that facilities have done so. That reading makes the most sense in context because it is consistent with EPA's understanding that Part 2.1.1.8 imposed new conditions that "enhance[] the protection of water quality standards." *Id.*

CLF next cites EPA's statement that the "2021 MSGP retains the requirement that operators consider implementing enhanced stormwater control measures for facilities that could be impacted by major storm events." EPA Response to Comments 373. According to CLF, EPA thus confirmed that "the requirement to consider major storm event[s] and implement necessary control measures [is] not new." Joint Report 4. CLF is overreaching. The comment to which EPA was responding did not mention the 2015 MSGP at all; instead, it contended that requirements

in the "proposed MSGP" were "overly prescriptive" and thus deprived facilities of "flexibility to determine suitable stormwater control measures that take into account local conditions." EPA Response to Comments 373. EPA responded that the MSGP "retains" Part 2.1.1.8, but made clear that it was "not requiring operators to implement additional controls if the operator determines it unnecessary." *Id.* By using the word "retains," EPA thus was plainly intending to compare the *draft* 2020 MSGP to the *final* 2021 MSGP.

Finally on this score, CLF raises EPA's comment that use of "good engineering practices" is necessary in the "selection, design, installation, and implementation of control measures" under Part 2.1.1.8 (in addition to the rest of Part 2.1.1). *See* Joint Report 5; EPA Response to Comments 392. But that comment undermines, rather than supports, CLF's position. After all, if the use of "good engineering practices" itself requires consideration of major storm events and applies to Part 2.1.1.8, then facilities would redundantly be required to consider flood risks from major storm events (as part of using "good engineering practices") in the consideration of control measures to address flood risks from major storm events (in compliance with Part 2.1.1.8). EPA surely did not intend to create such a circular requirement. Rather, the term "good engineering practices" does not require consideration of flood risks from major storm events; Part 2.1.1.8 alone imposes that requirement—which, once again, the EPA characterized as "a new effluent limitation or condition." EPA Response to Comments 398. For that reason, CLF's SWPPP claims would fail on the merits even if CLF had standing to assert those claims and the claims were not moot.

## IV. THE COURT MAY CONSIDER MAY CONSIDER THE 2021 MSGP AND THE REVISED SWPPP

The Court asked the parties to address the question whether it can consider extrinsic evidence when deciding whether the SWPPP claims are moot and whether they fail on the merits in light of EPA's interpretation of the 2021 MSGP. The Court may consider the revised SWPPP

and documents related to the 2021 MSGP, and doing so requires dismissal of CLF's SWPPP claims.

Mootness implicates the Court's subject-matter jurisdiction, *see, e.g.*, *In re Sundaram*, 9 F.4th 16, 20 (1st Cir. 2021), and "[t]he proper vehicle for challenging a court's subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1)," *Valentin* v. *Hosp. Bella Vista*, 254 F.3d 358, 362 (1st Cir. 2001). In deciding Rule 12(b)(1) motions, a court "can consider whatever evidence has been submitted." *Martinez-Rivera* v. *Puerto Rico*, 812 F.3d 69, 74 (1st Cir. 2016) (internal quotation marks omitted). The Court is thus permitted to consider the revised SWPPP when assessing whether the SWPPP claims are moot.

The Court can also consider the documents related to the 2021 MSGP, including CLF's comments and EPA's responses, when assessing whether the SWPPP claims fail on the merits. Rule 12(b)(6) governs a motion to dismiss for failure to state a claim, and a court deciding a motion under that rule can consider "implications from documents attached to or fairly incorporated into the complaint" and "facts susceptible to judicial notice." *Lyman* v. *Baker*, 954 F.3d 351, 360 (1st Cir. 2020) (internal quotation marks omitted). Here, the 2021 MSGP is fairly incorporated in the complaint—which includes the Terminal's permit as an attachment, *see* ECF No. 34-1, because the permit requires the Terminal's SWPPP to "be consistent with the provisions for SWPPPs included in the most current version" of the MSGP. Permit for Everett Terminal pt. I.B.3, at 13; *cf. Town of Norwood* v. *New England Power Co.*, 202 F.3d 408, 413 (1st Cir. 2000) (considering, on a Rule 12(b)(6) motion, certain tariff rates that were "filed with FERC and incorporated by reference into power contracts" at issue in the case). In addition, "courts normally can take judicial notice of agency determinations." *Manguriu* v. *Lynch*, 794 F.3d 119, 121 (1st Cir. 2015). The 2021 MSGP and EPA's responses to comments on the draft 2020 MSGP (which reproduce CLF's

comments in relevant part) are official agency documents and matters of public record. *Cf. Ms. S.* v. *Reg'l Sch. Unit 72*, 829 F.3d 95, 103 n.4 (1st Cir. 2016) (taking judicial notice of "proposed agency rules and the public record materials relating to the rulemaking process"). The Court is therefore free to consider them, in addition to the Terminal's revised SWPPP, when assessing whether CLF can proceed on its current complaint.

## V. ANTICIPATED DISCOVERY AND DISCOVERY SCHEDULES

If any of CLF's claims remain, those claims should be resolved efficiently by targeted discovery into the proper interpretation of the Everett Terminal's NPDES Permit. As the Court itself has noted, "the focus" of CLF's claims are whether there have been violations "of the current permit." ECF No. 30, at 121. Focusing discovery and motion practice on the permit interpretation issues initially has the significant potential to save the Court and the parties considerable resources and to allow for faster resolution than the expansive expert discovery that will be required otherwise. Accordingly, in each of the scenarios the Court has asked the parties to address, ExxonMobil proposes that the parties first undertake discovery and briefing on the narrow issue of the proper interpretation of the disputed terms in the permit. Only after the Court has resolved those issues would the parties undertake additional discovery, if any is required.

### A. Discovery If Only Counts 2 and 3 Remain

If only Counts 2 and 3 remain, discovery, which would concern only the interpretation of certain disputed terms in the Terminal's permit, can be completed within a few months, on the Phase 1 schedule proposed in Section V.B below. As the Court has noted, "Counts Two and Three allege, in essence, that the Terminal discharges more pollutants than the Permit allows." ECF No. 106, at 14. In Count 2, CLF purports to enforce an effluent limit that is not only well below the unambiguous compliance threshold set forth in the permit, but also that the permit itself indicates is too low to be reliably measured. *See* ECF No. 37, at 12–15; Joint Report 29. In Count 3, CLF

alleges that the Terminal has violated its permit based on end-of-pipe pollutant concentrations (as opposed to receiving water concentrations), and again seeks to impose an effluent limitation that is directly contrary to the terms of the permit. *See* ECF No. 37, at 15–17; ECF No. 114, at 29–30.

As ExxonMobil indicated at the October 5 hearing, "there is no disagreement on the underlying facts. The facility reports its discharge numbers. It makes those available to the EPA." Oct. 5, 2021 Hr'g Tr. 32. Rather, the parties primarily disagree about the proper interpretation of some provisions of the permit. If only Counts 2 and 3 remain, therefore, ExxonMobil's discovery requests would be narrowly focused on EPA's consideration and issuance of the relevant provisions of the permit, discovery from CLF about the basis (if any) for its interpretation of the relevant provision, evidence of regulatory enforcement of similar provisions in other NPDES permits, and expert evidence on the relevant provisions. Under this scenario, ExxonMobil would request a discovery schedule consistent with the Phase 1 proposal set forth below and in the Joint Report (to be completed in five months after initial disclosures). *See* Joint Report 39.

**B. Discovery If All of CLF's Claims Remain**

If all of CLF's claims that survived the previous motion to dismiss remain (Counts 2, 3, and 6–15), then the parties should proceed with phased discovery, with the first phase limited to discovery concerning the interpretation of disputed terms in the Terminal's permit.

As discussed above, the principal disagreements between the parties with respect to Counts 2 and 3 (the effluent-discharge claims) concern only issues of permit interpretation: whether the permit expressly sets the minimum discharge at a level below the level EPA has recognized can be reliably quantified; and whether state water quality standards are measured at the point of discharge or within the receiving waters, after dilution. *See* Joint Report 29–30. Likewise, the SWPPP claims (Counts 6–14) and the RCRA claim (Count 15), which the Court held relies on

Counts 6–14, *see* ECF No. 73, at 140–141, all hinge on CLF's interpretation of the permit as imposing certain obligations that ExxonMobil contends it is not required to undertake. *See id.* at 30–32. In other words, if ExxonMobil's interpretation of the disputed terms in the permit is correct, all claims will be resolved, and no additional discovery will be necessary.

Through targeted discovery, ExxonMobil expects to show that CLF's interpretations of the relevant provisions of the permit were expressly considered and rejected by EPA or are otherwise erroneous. ExxonMobil anticipates seeking discovery related to EPA's issuance of both the permit and the current and prior MSGPs. ExxonMobil expects that discovery will include correspondence with third parties before and during the notice-and-comment periods for both the Permit and MSGPs; internal EPA reports, memoranda, and other materials; and other extrinsic evidence bearing on the meaning of the disputed terms. *See* Joint Report 33 (collecting cases in which courts considered precisely these types of evidence when interpreting permits issued under the Clean Water Act). ExxonMobil also will seek expert evidence regarding the enforcement of similar terms in other NPDES permits. If adopted by the Court, such extrinsic evidence would resolve all claims and forestall the need for expansive discovery into ancillary issues.

CLF has offered no justification for why the parties and the Court should expend the time and resources required to pursue discovery into the most expansive and complex issues in the case when resolution of the narrow issue of permit interpretation could lead to expeditious resolution of the matter. CLF has not demonstrated any exigency requiring rapid adjudication of its claims. In fact, this case has been pending for more than five years, and none of the "imminent" risks that CLF claims exist has yet materialized. Nor does EPA itself perceive the Terminal's current discharge practices and capabilities to be a matter of urgency. Rather, 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.

Accordingly, if all claims remain following supplemental briefing, ExxonMobil requests that the Court order an initial phase of discovery narrowly tailored to the proper interpretation of the permit, followed by dispositive motions in support of the parties' proposed interpretations. The approach recommended by ExxonMobil is consistent with the Local Rules, which expressly provide for "phasing and sequencing" of discovery where such phasing presents the potential for "a realistic assessment of the case" or resolution. L.R. 26.3.

Under a phased discovery approach, ExxonMobil believes that its discovery schedule set forth in the Joint Report provides a realistic and efficient plan for the completion of discovery. Phase 1 of fact discovery could be completed within 90 days of the deadline for the completion of initial disclosures; Phase 1 expert discovery (including submission of reports and depositions) would be completed 60 days later; and the parties would then have three months to fully brief dispositive motions. *See* Joint Report 39–40. If additional discovery is required after resolution of dispositive notions, Phase 2 fact discovery, limited to issues of liability on any remaining claims, would be completed within 120 days, and expert discovery would be completed in another 120 days, followed by dispositive motions. *See id.* at 40–41. Discovery on questions of remedies would follow at a later date. *See* pp. 35–37, *infra*.

In the event that all of CLF's claims remain and the Court determines that phased discovery is not warranted, ExxonMobil proposes a discovery schedule similar to the amended discovery schedule entered in *Conservation Law Foundation, Inc.* v. *Shell Oil Products US*, Civ. No. 17-396 (D.R.I. Sept. 1, 2021) (ECF No. 64), in which fact discovery would be completed within 15 months

of the deadline for completion of initial disclosures, and expert discovery would be completed within 200 days of the close of fact discovery. *See id.* at 42.*

### C. Bifurcation Between Liability and Remedy Should Apply to Both Discovery and Any Trial

In the event that any of CLF's SWPPP or RCRA claims remain, ExxonMobil requests that both discovery and trial be bifurcated as to the issues of liability and remedies. This matter presents a paradigmatic case in which "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, 115 (E.D. Va. 1980). Even CLF concedes that bifurcation is desirable for purposes of trial. *See* Joint Report 35. But the same rationale applies to discovery. Put simply, there is no need to take burdensome discovery regarding how to "cure" supposed violations, *see* ECF No. 90, at 3, unless those violations have been found to exist. Without bifurcation of discovery, the parties will spend an inordinate amount of time and expend substantial resources discovering and contesting a number of highly technical issues regarding the investments, upgrades, and structural changes necessary to meet the "good engineering practices" standard to which CLF claims the terminal is required to, but does not, adhere.

To be sure, issues of liability and remedies are often intertwined. But here, the complex and novel engineering solutions that CLF seeks to impose on ExxonMobil—including a possible redesign or even relocation of the Terminal—are entirely distinct from the issues on which it must

* In the August Joint Report, ExxonMobil pegged its proposed discovery deadlines, in case phased discovery is rejected, off of an earlier scheduling order in *Shell Oil Products*. *See* Joint Report 42. As mentioned in ExxonMobil's Supplemental Report, the parties in that matter subsequently filed a joint motion to amend their discovery deadlines because they "now believe that they will require additional time to complete factual discovery." ECF No. 117, at 2 (quoting *Shell Oil Products*, ECF No. 63, at 2.). Given that the original schedule obviously did not afford sufficient time for fact discovery, ExxonMobil has amended its earlier proposal accordingly.

prevail in order to prove liability. CLF must demonstrate that its interpretations of disputed terms in the permit are correct, and that its projections of the imminent risks from heavy precipitation and flooding are accurate. Neither requires the onerous discovery into "how to cure" ExxonMobil's alleged violations on which CLF has admitted it wants to take immediate discovery. *See* ECF No. 90, at 3. Even if there were some evidence relevant to both liability and remedies, the "advantages" of bifurcation "are not outweighed by the possibility" of limited overlap. *See Chapman ex rel. Estate of Chapman* v. *Bernard's Inc.*, 167 F. Supp. 2d 406, 417 (D. Mass. 2001).

It is premature to speculate on the scope and schedule of discovery related to remedies. The discovery that the parties may require will depend on determinations made in the merits phase. For example, if CLF succeeds in convincing the Court that permanent structural control measures are necessary to mitigate the risk of pollution from major storm events, notwithstanding EPA's express rejection of CLF's argument, the parties will seek certain evidence that they would have no need to adduce if CLF fails to make such a showing. *See, e.g.*, Joint Report 5, 12, 31. If the issue of how to remedy any possible violation alleged by CLF is not deferred until after liability has been determined, it will prolong discovery and drastically increase its costs. ExxonMobil therefore requests that the Court bifurcate both discovery and trial between liability and remedies if Counts 6–14 remain.

## CONCLUSION

Counts 6–14 should be dismissed for lack of Article III standing, mootness, and failure to state a claim. Count 15 should be dismissed for lack of Article III standing. If any claims remain, discovery should be limited in the first instance to issues of permit interpretation, which have the potential to resolve CLF's claims in their entirety.

Respectfully submitted this 5th day of November 2021.

EXXON MOBIL CORPORATION,
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**CERTIFICATE OF SERVICE**

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), this memorandum was filed through the ECF system on November 5, 2021, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
Deborah E. Barnard