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 DEFENDANTS' BRIEF IN RESPONSE TO THE COURT'S OCTOBER 6, 2021 ORDER

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Plaintiff Conservation Law Foundation, Inc. ("CLF") submits the following memorandum in response to Defendants' November 5, 2021 Memorandum in Response to the Court's October 6, 2021 Order, ECF 123 ("Exxon Brief" or "Exxon Br."). In CLF's Memorandum In Response To The Court's October 6, 2021 Order, ECF 124 ("CLF's Brief" or "CLF Br."), CLF explained that:

1. The 2021 MSGP is only relevant to CLF's claims insofar as EPA's Response to Comment may provide some persuasive evidence for interpreting Exxon's Permit for the Terminal after fact and expert discovery (CLF Br. § I);

2. Exxon's 2021 amendments to its SWPPP (i) have no material impact on CLF's claims because, among other things, it still contains no meaningful analysis of the foreseeable risk to the Terminal posed by severe weather, and (ii) cannot moot CLF's claims (CLF Br. §§ II.A, B., D);

3. No amendment to CLF's Amended Complaint is required because Exxon's 2021 SWPPP amendments do not materially impact CLF's claims (CLF Br. § C);

4. The Supreme Court's rulings in *Transunion* and *California* cannot impact CLF's standing because they did not change standing jurisprudence (CLF Br. § III);

5. It is premature and unnecessary to consider extrinsic evidence at this stage of the litigation—after the motion to dismiss and before discovery (CLF Br. § IV); and

6. The Court should enter a standard discovery schedule with no phasing or bifurcation of liability and remedy (CLF Br. § V).

Nothing in Exxon's Brief alters these conclusions. The Court should: (i) decline to re-review CLF's standing for the third time, (ii) reject Exxon's unsupportable mootness argument, (iii) refuse to consider Exxon's improper attempt for pre-discovery judgment on the merits.

I. Exxon's Repeated Motion to Dismiss Arguments on Standing Continue to Fail

A. Exxon Misrepresents the Law to Avoid the Fact it Cannot Meet the Requirements of Reconsideration

Exxon has asked this Court to revisit its prior opinions on standing without providing sufficient justification. The ultimate standard governing Exxon's request for reconsideration is clear. Exxon quibbles with the appropriate category (Exxon Br. 17), but the elements Exxon must meet are substantively identical regardless of whether the Court applies the standard for reconsideration of final judgments under Rule 59(e), the law of the case doctrine, or reconsideration of interlocutory orders. A litigant seeking reconsideration of an issue already decided must show extraordinary circumstances: (i) an intervening change in the law; (ii) new evidence; or (iii) egregious error or injustice. *See Marie v. Allied Home Mortg. Corp*., 402 F.3d 1, 7 n. 2 (1st Cir. 2005) ("The general rule [to prevail on a Rule 59(e) motion] in this circuit is that the moving party must 'either clearly establish a manifest error of law or must present newly discovered evidence.'") (quoting *Pomerleau v. W. Springfield Pub. Sch.,* 362 F.3d 143, 146 n. 2 (1st Cir. 2004)); *United States v. Matthews*, 643 F.3d 9, 14 (1st Cir. 2011) ("A party may avoid the application of the law of the case doctrine only by showing that, in the relevant time frame, 'controlling legal authority has changed dramatically'; or by showing that 'significant new evidence, not earlier obtainable in the exercise of due diligence,' has come to light; or by showing that the earlier decision is blatantly erroneous and, if uncorrected, will work a miscarriage of justice."); *Tomon v. Entergy Nuclear Operations, Inc.,* No. CA 05-12539-MLW, 2011 WL 3812708, at *1 (D. Mass. Aug. 25, 2011) ("Instead, motions for reconsideration [of interlocutory orders] are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant

can demonstrate that the original decision was based on a manifest error of law or was clearly unjust.") (quoting *United States v. Allen*, 573 F.3d 42, 53 (1st Cir.2009)).[1] Here, the most appropriate standard to apply is that of reconsideration of interlocutory orders—the same applied in *U.S. v. Allen* and this Court's opinion in *Tomon*.[2,3]

Any standard for reconsideration applies equally to jurisdictional questions. While other Circuits have noted that "issues such as subject matter jurisdiction may be particularly suitable for reconsideration," *Bishop v. Smith*, 760 F.3d 1070, 1085 (10th Cir. 2014) (cleaned up and citations omitted), they have still demonstrated that it would take "exceptionally narrow circumstances" for a court to diverge from the standard reconsideration principles. *Id.* at 1082. None of the cases Exxon cites say otherwise.[4]

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[1] *See also, e.g.*, *Davis v. Lehane*, 89 F. Supp. 2d 142, 147 (D. Mass. 2000) ("[A] court should grant a motion for reconsideration of an interlocutory order only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order.") (citing *McCoy v. Macon Water Auth.*, 966 F.Supp. 1209, 1222–23 (M.D. Ga.1997)); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure, § 4478*, at 789–90 (1981); *Boniface v. Viliena*, 417 F. Supp. 3d 113, 117–18 (D. Mass. 2019) ("With these principles in mind, 'a court should grant a motion for reconsideration of an interlocutory order only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order.'") (quoting *Davis*, 89 F. Supp. 2d at 147; citing *Tomon* No. 05-cv-12539-MLW, 2011 WL 3812708, at *1)).

[2] Contrary to Exxon's assertion (Exxon Br. 17), *Allen* did not deal with a Rule 59(e) motion to alter or amend a judgment. In *Allen*, the criminal defendant, after entry of a guilty plea, appealed the district court's denial of his motion to suppress, as well as the district court's denial of his motion for reconsideration of that ruling. 573 F.3d at 44–45. The motion for reconsideration under review by the First Circuit was therefore a reconsideration of an interlocutory order—the denial of the motion to suppress—not a post-judgment motion. *Id.* at 53.

[3] Law of the case doctrine generally applies more appropriately to appellate decisions. *United States v. Matthews*, 643 F.3d 9, 13 (1st Cir. 2011) (describing that the "two branches" of the doctrine are designed to: 1) prevent "relitigation in the trial court of issues that were explicitly or implicitly decided by an earlier appellate decision in the same case" and 2) bind a "successor appellate panel in a second appeal in the same case to honor fully the original decision" (citations and internal quotation marks omitted")). Rule 59(e) applies explicitly to judgments and orders that are appealable. Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

[4] *Bishop v. Smith*, 760 F.3d 1070, 1084 (10th Cir. 2014) ("*Christianson* [*v. Colt Industries Operating Corp.,* 486 U.S. 800 (1988)] thus makes clear that the law of the case doctrine is *never* off the table solely because an issue is jurisdictional.") (emphasis added)); *Latin Am. Music Co. Inc. v. Media Power Grp., Inc.*, 705 F.3d 34, 40 (1st Cir. 2013) ("We have sometimes said—instead of an outright statement that law of the case is not applicable to interlocutory orders at all—that law of the case permits a lower court to review prior interlocutory orders as long as that review is not an abuse of discretion.") (quoting *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005)).

In fact, the only case Exxon cites in direct support of its proposition, *American Canoe Association v. Murphy Farms*, specifically states: "Nor should our decision today be read as opening the door to perpetual litigation of subject matter jurisdiction issues. Law-of-the-case principles are weakened but still present." 326 F.3d 505, 516 n.9 (4th Cir. 2003). And the facts of that case demonstrate why Exxon is not entitled to reconsideration here. There, the district court granted partial summary judgment to plaintiffs on standing eight months into the litigation. *Id.* at 514. Later, the defendants moved for reconsideration based on new evidence, which the district court denied. *Id.* at 511–12. The Fourth Circuit held that the district court abused its discretion by refusing to consider the additional standing evidence because (i) "the district court's decision on the issue was [] rendered early in the litigation, before there had been much factual development, discovery, or opportunity for the defendants to consult experts" and (ii) an early ruling on standing "should not be accorded the preclusive effect of a decision rendered after full trial, or even a decision rendered after full discovery." *Id.* at 516. Here, Exxon will have every opportunity to reargue standing at summary judgment, and there is no risk that refusing to consider standing now will endanger "the paramount importance of achieving a correct judgment on the issue of Article III standing." *Id.*

Exxon's statement that an appellate court would be required to review standing even if not argued in the court below (Exxon Br. 16) is uncontroversial in and of itself, nor does it help Exxon's case; the case law shows that jurisdictional issues can be reviewed at *different stages* of a case. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016) ("[B]ecause standing is a prerequisite to a federal court's subject matter jurisdiction, the absence of standing may be raised *at any stage* of a case.") (emphasis added)). An appeal is necessarily a different stage of a case, as opposed to the circumstances here where standing has been extensively litigated and decided pre-

discovery. Under Exxon's interpretation of the law, they could simply file another motion to dismiss if the Court denies their motion for reconsideration, creating a system "encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would 'gradual[ly] undermin[e] . . . public confidence in the judiciary.'" *Entek GRB, LLC v. Stull Ranches*, LLC, 840 F.3d 1239, 1240 (10th Cir. 2016) (Gorsuch, J.).

Here, this is Exxon's *third attempt* to argue standing at the motion to dismiss stage. The Court should view Exxon's third request as a motion for reconsideration and deny it for the reasons discussed below and in CLF's Brief.

B. Neither *TransUnion* nor *California* Changed the Law on Standing

Both *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) and *California v. Texas*, 141 S. Ct. 2104 (2021), applied traditional standing principles to the facts of the cases and neither constitutes an intervening change in the law on standing. CLF Br. 14–18. Nothing in Exxon's Brief alters this conclusion.

As an initial matter, Exxon admits that *California* provides no change in the law, describing it multiple times as "clarifying" the law on standing. Exxon Br. Exxon Br. 3, 4–5, 17–18). Clarification, however, is not enough to show a change in the law, as the cases cited by Exxon demonstrate. For example, Exxon cites *United States v. Holloway*, in support of its argument that "*California* [] clarified the law sufficiently to 'cast into doubt' CLF's standing." Exxon Br. 17–18 (citing 630 F.3d 252, 258 (1st Cir. 2011)). But, *Holloway*—which dealt with law of the case doctrine as applied to Circuit Court panel opinions—concerned circumstances where prior Circuit

precedent is actually "*undermined* by controlling authority, subsequently announced, such as an opinion of the Supreme Court." 630 F.3d at 258 (quoting *Igartua v. United States*, 626 F.3d 592, 603 (1st Cir. 2010) (emphasis added)).

The distinction here is significant; even if it is colorable that *California* provided some clarification of the law (as any case applying the law to a different set of facts could be said to "clarify" the law), there is simply no argument that *California undermined* previous law on standing and Exxon does not attempt to raise one. *California* simply applied the long-standing concepts of "traceability" and "redressability," drawn from well-known and oft-cited cases such as *DaimlerChrysler Corporation*, 547 U.S. 332, 342 (2006), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992), to determine whether the plaintiffs could sue to have an unenforceable law declared unconstitutional. *California*, 141 S. Ct. at 2113. The answer under those circumstances was no; the plaintiffs' harms were not traceable to the specific statutory provision they challenged and a court order would not provide them any redress, as the law itself was already unenforceable. *Id.* at 2115–16. This Court is very familiar with these standards, having already applied them in this case when it denied Exxon's motion to dismiss on this same issue. *See, e.g.*, Sept. 17, 2017 Mem. & Order, ECF 29 ("First MTD Order") (citing *Lujan*, 504 U.S. at 560).

TransUnion also did no more than clarify the law of standing, if it even did that much. The case focused primarily on the principle that a plaintiff must show "a concrete injury even in the context of a statutory violation." *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo v. Robbins*, 578 U.S. 330, 341 (2016)). Just as with *California*, and as described by Exxon, (Exxon Br. 8), *TransUnion* applied bedrock standing principles to the facts before it and at most clarified when a risk of future harm is insufficient to support standing for retrospective money damages.

TransUnion, 141 S. Ct. at 2212. Just because some of the class members in *TransUnion* did not prove at trial that they were exposed to a risk of future harm does not make this case a change in the law.

Because neither *TransUnion* nor *California* provides an intervening change in the law, the Court need not engage further with Exxon's standing arguments at this stage.

C. Neither *TransUnion* nor *California* Change This Court's Standing Determination

As Exxon concedes, this Court has already determined that CLF alleged a concrete harm and stated "a plausible claim that there is a 'substantial risk' that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants . . . in the near future and while the Permit is in effect." First MTD Order ¶ 1.a.; Exxon Br. 7 (noting this Court has held that CLF plausibly alleged that "foreseeable severe weather events, including climate change-induced weather events[,] pose an imminent risk to the [T]erminal." (quoting Mar. 13, 2019 Mot. to Dismiss Hr'g Tr., ECF 73 at 129) ("MTD Hr'g Tr.")). Because neither *TransUnion* nor *California* changed the law on standing, this Court's original standing analysis and ruling remains correct.

1. *TransUnion* Does Not Change the "Substantial Risk" Analysis

This Court has already held that CLF has stated "a plausible claim that there is a 'substantial risk' that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants . . . in the near future and while the Permit is in effect," First MTD Order ¶ 1(a), rejecting Exxon's arguments that the risk of future harm from flooding is too speculative. But, Exxon ignores the Court's ruling and makes the exact same arguments that the harm from future flooding is too speculative. Exxon Br. 7–10; *see also* Exxon's Mem. in Supp. of

First Mot. to Dismiss ("First MTD"), ECF 17 at 11–13 (arguing that the effects of climate change were too speculative to show a certainly impending threatened future injury); Exxon's Mem. in Supp. of Second Mot. to Dismiss ("Second MTD"), ECF 37 at 21–23 (same).[5] In doing so, Exxon acknowledges that *TransUnion* is merely applying the usual standard: a threatened injury is sufficient for standing when it "is certainly impending, or there is a substantial risk that the harm will occur." Exxon Br. 7–8 (quoting *Aguasvivas v. Pompeo*, 984 F.3d 1047, 1052–53 (1st Cir. 2021)). This is the standard the Court already applied in this case. Accordingly, because Exxon's argument brings nothing new to the table either legally or factually, it is essentially "a request for [this Court] to rethink a decision it has already made" twice, *Villanueva-Mendez v. Nieves Vazquez*, 360 F. Supp. 2d 320, 32, 326 (D.P.R. 2005), *aff'd*, 440 F.3d 11 (1st Cir. 2006) (citation omitted), and this Court should decline to entertain Exxon's argument a third time.[6]

Even if the Court were to apply *TransUnion* to the facts of this case, it becomes quickly apparent that *TransUnion* is inapplicable. As explained in CLF's Brief (15–17), *TransUnion* expressly limited its ruling to claims for retrospective money damages, *see TransUnion*, 141 S. Ct. at 2210, and therefore does not impact CLF's claims for civil penalties or injunctive relief. Even if it did, the Court's ruling was specific to the facts at issue and noted that there may be some

[5] *Compare* Exxon Br. 8 ("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.") *with* Second MTD at 23 ("CLF's alleged injuries are thus premised on a chain of speculative and uncertain events, none of which are supported by factual allegations. CLF posits that (i) a hurricane will hit Boston in the near future; (ii) that hurricane will inundate the Terminal; (iii) the inundation will cause the Terminal to release an unspecified quantity of unidentified contaminants; and (iv) these contaminants will impair CLF's use or enjoyment of the affected water.").

[6] Exxon also incorrectly asserts that "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." Exxon Br. 9. This is untrue. CLF does not know one way or the other whether the Terminal has been overwhelmed by a storm, which is exactly why discovery should begin without delay.

instances where a claim for retrospective damages can be sustained where "the exposure to the risk of future harm itself causes a *separate* concrete harm." *Id.* at 2211–12 (emphasis in original). In addition, CLF has alleged ongoing and continuous violations; the risk of harm of pollutant discharges caused by Exxon's CWA violations existed at the time the initial Complaint was filed and it continues throughout this case, unlike in *TransUnion* where the risk of harm was narrowed by class certification to a period of about seven months, all of which predated the filing of the case. *Id.* at 2202. Here, CLF's standing affiants stated that the ongoing risk of future harm detrimentally impacts their use and enjoyment of local waterways and gives them concern for their safety. *See* ECF 21-1; 21-2; 21-3; 21-4; 21-5; *see also* Am. Compl. ¶¶ 8–10.

In the same vein, Exxon's attempt to map the factual underpinnings of *TransUnion* to the allegations in CLF's Amended Complaint also fails because it ignores the very different procedural posture of the two cases: *TransUnion* was decided after a jury trial, *id.* at 2202, while this case has yet to begin discovery. The Supreme Court's reasoning was based on certain class members' lack of *evidence at trial* that a third party would review their inaccurate credit reports. *Id.* at 2208 ("[I]n a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial.") (internal quotation marks omitted); *id.* at 2212 ("Because no *evidence in the record* establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm.") (internal citations omitted) (emphasis added)). Contrary to Exxon's assertion, the Supreme Court did not determine that, even though "a third party could have pulled the plaintiffs' credit reports 'at any moment,'" the class members had no standing. Exxon Br. 10. What the Court in fact said was that despite the plaintiffs' claim that a third party could have pulled the credit reports at any moment,

> the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion during the relevant time period. Nor did the plaintiffs demonstrate that there was a sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties.

TransUnion, 141 S. Ct. at 2212. Essentially, the plaintiffs did not prove that there was a likelihood that third parties would see their incorrect credit reports.

This distinction is most notable because of the vastly different burdens at the pleading stage and at trial. *TransUnion*, 141 S. Ct. at 2208 ("A plaintiff must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'") (quoting *Lujan*, 504 U.S. at 561)). To hold CLF to a pleading burden akin to having had full discovery *and* a trial is not only unfair, but also unsupported by any law. *See* Fed. R. Civ. P. Rule 8(b) (stating that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,'" it simply requires "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he Constitution does not require that the plaintiff offer . . . proof [of injury] as a threshold matter in order to invoke the District Court's jurisdiction." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987). Accordingly, to say that CLF's alleged risk of harm from prospective flooding is more speculative than the risk to the class members of their credit records being pulled is both wrong and misses the point. CLF has adequately *alleged* a substantial risk of harm from flooding, as this Court has found; it will still need to *prove* the risk at trial.

2. Violations of Exxon's NPDES Permit and SWPPP Are More Than "Bare Procedural Violations"

Exxon briefs for the first time here that Counts 6–14—that Exxon inaccurately describes as CLF's "SWPP claims"[7]—allege "bare procedural violations," equating substantive deficiencies in a plan to prevent an industrial Terminal housing millions of gallons of oil from polluting nearby communities and waterways to formatting deficiencies in mailings regarding customers' credit information. Exxon Br. 11–12 (citing *TransUnion*, 141 S. Ct. at 2214). As an initial matter, a motion for reconsideration is not the proper vehicle "to raise new legal theories that should have been raised earlier." *Vega v. Hernandez*, 381 F. Supp. 2d 31, 35 (D.P.R. 2005) (internal citations omitted). The Supreme Court law on "bare procedural violations" dates back to at least to the Supreme Court's 2016 decision in *Spokeo*, *TransUnion*, 141 S. Ct. at 2213 (quoting *Spokeo*), and could have been fully briefed in either of Exxon's prior motions to dismiss. *Marks 3 Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc.*, 455 F.3d 7, 16 (1st Cir. 2006) ("[A]rguments that could have been raised before may not be raised for the first time in a motion for reconsideration.").

As a substantive matter, Exxon's characterization of CLF's claims as alleging "procedural" failures to "prepare a written document in a certain manner" (Exxon Br. 11) are false and directly contrary to the Court's ruling on the motion to dismiss. CLF's Climate Change Claims allege that Exxon has failed in its affirmative duties to evaluate the risks posed to the Terminal by foreseeable severe weather events and to "proactively address potential discharges of pollutants" from those risks. MTD Hr'g Tr. at 132–33. The Permit requires Exxon to "develop [and] *implement* . . . a

[7] Exxon's shorthand for Counts 6–14 is partially misleading for two reasons. First, as explained in CLF's Brief at 6, Counts 11 and 12 do not primarily rely on the SWPPP despite making reference to it. Second, the term inaccurately implies that the Permit violations that CLF claims are merely ministerial or recordkeeping. As explained, the Permit provisions underlying Counts 6–14 place substantive, affirmative duties of Exxon to analyze the risks posed to the Terminal by foreseeable severe weather events and to take proactive action to address those risks.

[SWPPP] designed to reduce, or prevent, the discharge of pollutants in storm water to the receiving waters" Am Compl. ¶ 71 (quoting Permit Part I.B.1) (emphasis added). That SWPPP must (1) "be prepared in accordance with good engineering practices"; (2) "identify potential sources of pollution that may reasonably be expected to affect the quality of the storm water discharges"; and (3) both "describe *and ensure implementation of* practices which will be used to reduce the pollutants and assure compliance with this permit." Am. Compl. ¶¶ 73–75 (quoting Permit Part I.B.1) (emphasis added). These duties are a far cry from the "informational injury" that Exxon describes. Exxon Br. 12. Indeed, the Court held that CLF had adequately alleged Exxon's failure to evaluate foreseeable weather risks, in part, because "there have been no changes in the facility after the permit issued." MTD Hr'g Tr. at 134.

While the SWPPP does set forth procedures "to ensure that facilities are acting to reduce the risk of unpermitted discharges in stormwater" (Exxon Br. 11), a facility is bound by its SWPPP, MTD Hr'g Tr. at 21 (Exxon stating, "The requirement is that you have a SWPPP that has these required elements and you do have to comply with the terms of the SWPPP."). If the SWPPP does not adequately evaluate the foreseeable severe weather risks to the Terminal or implement adequate control measures to address those risks, , then Exxon is not instituting proper control measures or satisfying "good engineering practices", and therefore the Terminal is vulnerable to imminent pollutant discharges, which is a concrete harm much different than receiving credit information in two mailings rather than one.[8] When viewed properly, the harm from the risk of

[8] To erroneously frame certain CLF's claims as procedural violations, Exxon's cites several cases that cite *TransUnion* merely describing what concrete harm is in the context of informational injury—which is not what CLF claims here. Exxon Br. 12; *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021); *Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 363 (6th Cir. 2021); *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 334 (7th Cir. 2019).

pollutant discharges is clearly traceable to Exxon's permit violations. *California*, 141 S. Ct. at 2115; *Lujan*, 504 U.S. at 561–62.

3. TransUnion Does Not Apply to Claims for Civil Penalties

As discussed above and in CLF's November 5 filing, *TransUnion* does not apply to cases involving civil penalties or injunctive relief. CLF Br.16–17. In the Amended Complaint, CLF seeks civil penalties for all CWA and RCRA violations. *See* Am. Compl. ¶¶ 357(b), (e). Civil penalties are different from money damages, as courts in Clean Water Act cases have made clear. *See, e.g.*, *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 213 (D. Conn. 1985) (distinguishing civil penalties from private money damages). To maintain a claim for civil penalties at the pleading stage, a plaintiff must "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). This requirement "suggests a connection between injunctive relief and civil penalties" in the CWA citizen suit provision, *id.* at 58 (1987), and the Supreme Court has subsequently made clear the purpose of civil penalties in CWA cases is to deter future violations. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) ("Under § 1365(a), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones."). The Supreme Court has also made clear that civil penalties are appropriate in cases where a plaintiff has alleged a risk of harm: "To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or *threatened with injury* as a consequence of ongoing unlawful conduct." *Laidlaw*, 528 U.S. at 186 (emphasis added). And, indeed, the Court has made clear that civil penalties remain available even if injunctive relief

is not. *Id.* at 193 ("Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter.").[9]

For the sake of clarity, CLF does not take the position that its request for civil penalties would give CLF standing if the Court were to determine that CLF had failed to establish standing at the time the case was filed. Instead, CLF has adequately alleged imminent and substantial injury which includes civil penalties. Moreover, CLF's case would not be moot, if the Court determined that post-complaint events had mooted CLF's request for injunctive relief. The Supreme Court has made clear that civil penalties remain available even if injunctive relief has become moot. *Laidlaw*, 528 U.S. at 193 ("Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter."); *see also Grand Canyon Tr. v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1200 (D. Utah 2017) ("[I]n most citizen suits, a plaintiff's claim for civil penalties is not rendered moot by the defendant's compliance with the law because the plaintiff retains a concrete interest in deterring the defendant from future violations.").

CLF alleged ongoing and continuous violations of the CWA and RCRA and therefore civil penalties are appropriate here even for claims where CLF has alleged a risk of future harm. *TransUnion*'s discussion of damages is therefore inapplicable, and to the extent *TransUnion* has any bearing, it's approval of "forward-looking, injunctive relief" in cases where there is a

[9] The fact that some courts have described civil penalties as being retrospective in nature does not negate the statutory goal, affirmed by the Supreme Court, of civil penalties as a forward-looking tool for deterrence. Even where the challenged conduct ceased after the filing of the complaint, courts have still held civil penalties to be appropriate. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134–37 (11th Cir. 1990) (holding claims for civil penalties appropriate despite defendant's compliance with permit); *Nat. Res. Def. Council v. Texaco Ref. & Mktg.*, 2 F.3d 493, 502–03 (3d Cir. 1993) (holding that even when violations could not reasonably be expected to reoccur, claims for civil penalties were available 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).

threatened risk of harm merely confirms that civil penalties are an appropriate form of relief here. *TransUnion*, 141 S. Ct. at 2210.

II. Impact of the 2021 SWPPP Amendment

A. Exxon Has Not Met Its Burden of Establishing that CLF's Claims Are Moot

As explained in CLF's Brief (6–9), the 2021 SWPPP has no material impact on CLF's claims. CLF has alleged that the Permit places a duty on Exxon to evaluate the risks posed to the Terminal by foreseeable severe weather events and to "proactively address potential discharges of pollutants" from those risks. MTD Hr'g Tr. at 133. The Court has held that CLF has plausibly alleged that "foreseeable severe weather events, including climate change-induced weather events[,] pose an imminent risk to the [T]erminal" and that Exxon must take action to address it. MTD Hr'g Tr. at 129. In particular, the Court held "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 [T]erminal." *Id.* at 136:13–16. The Court specifically pointed to two provisions in the Permit creating this duty: the "good engineering practices standard" and the duty to "proactively address the discharge of pollutants." MTD Hr'g Tr. at 132-33. The Court held that (i) "good engineering practices include considerations of foreseeable severe weather events, including any caused by climate change," MTD Hr'g Tr. at 133, 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. The 2021 SWPPP neither alters these Permit requirements nor conclusively resolves the deficiencies that CLF adequately alleged in its Amended Complaint.

Exxon bears a "heavy" burden to establish that CLF's claims are moot, *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)), and it has not done so. To satisfy the burden, the movant must show that "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). The court must be convinced 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 light of CLF's claims and the mootness standard, Exxon must persuade the Court that the 2021 SWPPP amendments (i) sufficiently evaluated the risk posed to the Terminal by foreseeable severe weather to satisfy the "good engineering practices" standard and its obligation, and (ii) implemented adequate control measures to mitigate those risks to satisfy the obligation to "proactively address potential discharges of pollutants."

Exxon's primary argument is that Counts 6–14 are moot because the 2021 SWPPP changes "address fully the alleged deficiencies CLF has raised," but Exxon's arguments cannot satisfy the mootness standard and makes no attempt to do so.[10]

First, Exxon's argument requires resolution of a disputed issue of fact—the adequacy of the 2021 SWPPP—that cannot be resolved without discovery. Determining whether Exxon has now adequately evaluated and addressed the risk to the Terminal will require both fact discovery on exactly what Exxon has done and expert discovery on, among other things, (i) what factors a

[10] Exxon's mootness arguments are only directed towards Counts 6–14, that Exxon dubs CLF's "SWPPP claims." Exxon admits, as it must, that its mootness arguments cannot apply to CLF's RCRA claim. Despite Exxon's arguments to the contrary, its arguments cannot apply to Counts 11 or 12 because they do not primarily rely on the SWPPP. *See* CLF Br. 6.

reasonable engineer would consider in evaluating the risk to the facility, and (ii) what actions a reasonable engineer would take to address those risks. Without that evidence, the sufficiency of Exxon's 2021 SWPPP cannot be evaluated and Exxon cannot meet its "heavy burden" of establishing that it "is impossible for a court to grant any effectual relief whatever to the prevailing party."

Second, all of Exxon's argument fail because they are based on the same misreading of the Permit that the Court has already rejected. As described in Section 1.B., Exxon improperly describes CLF's claims as mere "procedural violations," and tries to further boil CLF's claims down to a requirement that Exxon write *something* in the SWPPP, and that the *substance* of what it writes doesn't matter. Exxon Br. 21–23 (arguing the "revised SWPPP thus now contains information responsive to the alleged procedural deficiencies identified by CLF in its amended complaint"). For example, Exxon selectively quotes portions of one paragraph of the Amended Complaint to argue that Count 7 is moot because the 2021 SWPPP now mentions FEMA flood maps and updated 10-year 24-hour precipitation numbers from the NOAA Precipitation Frequency Data Server. Exxon Br. 22–23. But, CLF's claim is not that Exxon did not mention flood maps or storms in its SWPPP; instead, Count 7 alleges that Exxon's SWPPP does not satisfy "good engineering practices" because it failed to consider the foreseeable risks of severe weather at the Terminal. Am. Compl. ¶¶ 271–75; MTD Hr'g Tr. at 136–38 (finding that CLF adequately alleged a claim under Count 7). A claim is only moot if 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). The Court can only determine what relief is available and appropriate under Count 7 after discovery and expert testimony on, for example, what risk models would be relied upon by a reasonable engineer. *See, e.g.*, Mem. and Order on Mot. to Stay, ECF

106 at 27 ("[I]n order to decide whether to grant CLF's requested injunctive relief, the court would have to determine whether and to what extent climatologists believe weather patterns in Boston are changing, and how prudent industrial engineers would respond to such changes.").

The above analysis also does away with Exxon's arguments about each of CLF's specific claims. Exxon Br. 22–23. For example, Exxon selectively quotes portions of one paragraph of the Amended Complaint to argue that Count 6 is moot because the 2021 SWPPP includes some language mentioning storm preparedness. Exxon Br. 22. But CLF's claim is not that Exxon's SWPPP does not include the word "climate change" or "major storm"; Count 6 alleges that Exxon had not "developed and is not implementing a SWPPP designed to prevent or reduce the discharge of pollutants in storm water" because it did not address the imminent risks posed by severe weather at the Terminal. Am. Compl. ¶¶ 265–68. To determine what relief is available for this claim will require the Court to analyze the *substance* of the 2021 SWPPP against what Exxon is required to disclose in its SWPPP.

Third, while a full record is necessary to determine if Exxon's SWPPP amendments have any impact on the appropriate relief in this case, even a cursory review of the 2021 SWPPP demonstrates that it does not materially impact CLF's claims. As explained in CLF's Brief, the 2021 SWPPP fails in Exxon's threshold obligation to evaluate the risk of reasonably foreseeable severe weather to the Terminal. CLF Br. 7–8. *See* MTD Hr'g Tr.. Exxon's sole reliance on the FEMA map, runs contrary to the Court's ruling on the motion to dismiss. The Court has already found that CLF adequately alleged that that climate-change induced severe weather events will occur in the near future in Massachusetts, relying on several examples from CLF's Amended Complaint, including "the National Oceanographic and Atmospheric Administration models that show the terminal lies in an area vulnerable to inundation from storm surge, including from a

Category 1 hurricane." MTD Hr'g Tr. at 128–129 (citing Am. Compl. ¶¶ 171–72); *see also id.* at 136 ("[T]he 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."). Moreover, CLF has already alleged that the FEMA map for the Terminal is particularly outdated and unreliable. *See* Am. Compl. ¶¶ 157–62. Exxon's failure to address the risk models addressed in the Amended Complaint and the Court's order means that Exxon cannot carry its heavy burden of establishing that CLF's claims are moot.[11]

B. Exxon Has Waived Any Argument that Amendment Is Necessary

The Courts October 6, 2021 Order required the parties to address "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." Oct. 6, 2021 Order ECF 120 ¶ 1.b(3). As explained in CLF's Brief, no amendment is necessary. CLF Br. 10. Exxon does not respond to this portion of the Court's order and accordingly, has waived any argument that CLF must file a Second Amended Complaint. *United States v. Guzman-De Los Santos*, 944 F. Supp. 2d 126, 128 (D.P.R. 2013) (citing *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), ("[T]he defendant fails to respond to this argument and, therefore, waives these arguments."); *cf. Fernandez-Salicrup v. Figueroa-Sancha*, 790 F.3d 312, 327 (1st Cir. 2015) ("Plaintiffs' failure to make *any* argument here—let alone a developed one—is fatal to their claim.") (emphasis in original).

[11] Exxon also briefly argues in one sentence that the mere existence of a new SWPPP moots CLF's claims because, according to Exxon, there is "no ongoing conduct to enjoin." Exxon Br. 21. But, a new SWPPP, by itself, cannot moot CLF's claims. As explained in CLF's Brief, CLF is alleging violations of provisions of the Permit, and those provisions have not changed. CLF Br. 13. Indeed, even when a new permit is issued, alleged violations of the prior permit are not mooted. *See* CLF Br. 11–12 (collecting cases).

III. EPA's 2021 MSGP Is Not Dispositive for Interpreting Exxon's Clean Water Act Permit

As explained in CLF's Brief, the 2021 MSGP cannot moot CLF's claims for the simple reason that CLF's claims do not rely on the MSGP; they rely on the express terms of Exxon's Permit. *See* CLF Br. 1–3. The First Circuit has noted that CLF's claims would remain even if EPA issued a new permit to Exxon. *Conservation Law Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 73 & n.4 (1st Cir. 2021) ("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.") (collecting cases)). Indeed, courts regularly find that even reissuance of the operative permit does not moot an existing permit enforcement case. *See* CLF Br. 11–12 (collecting cases).

Apparently recognizing that a mootness argument is unavailable, Exxon's Brief improperly asks the Court to dismiss Counts 6–14 under Rule 12(b)(6)) *on the merits* without the benefit of discovery. Exxon Br. 28; *see also id.* at 32. More specifically, Exxon argues that EPA's Response to CLF's Comments on the 2020 Draft MSGP is dispositive on the "good engineering practices" standard. Exxon Br. 26–29. Exxon's arguments are meritless.

At the outset, Exxon's argument fails for three threshold reasons.

First, Exxon has not even attempted to satisfy the standard for reconsideration of the Court's order on the motion to dismiss. As explained in CLF's Brief and in Section 1.A above, Exxon's challenge to CLF pleadings must meet the standard for reconsideration and Exxon has not even attempted to explain how that standard is met.

Second, EPA's Response to Comment cannot be dispositive evidence for interpreting Exxon's Permit because EPA's Response was not made in the context of Exxon's Permit. Even if

EPA's Response to Comment is entitled to some form of deference for interpreting the MSGP, *Friedrich v. S. Cty. Hosp. Healthcare Sys.*, 221 F. Supp. 3d 240, 243 (D.R.I. 2016),[12] EPA's Response to Comment on a different permit is merely potentially persuasive here and cannot compel dismissal of the claims this Court has already held to be adequately alleged. *Cf. Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 46 (D.D.C. 2004) (finding EPA manual explaining meaning of different permit provisions than the permit at issue "can hardly be said to provide extensive guidance, but it is the only evidence presented by the parties").

Third, as CLF discussed in its brief, CLF Br. 18–22, interpretation of a disputed or ambiguous permit term, like "good engineering practices" here, may not be decided on a motion to dismiss. Interpretation of an ambiguous permit term is a "question of fact," *Farmers Ins. Exch. V. RNK, Inc.*, 632 F.3d 777, 783 (1st Cir. 2011), and it cannot be decided on a motion to dismiss. *Kolbe v. BAC Home Loans Servicing*, 738 F.3d 432, 465 n.37 (1st Cir. 2013) ("If the language of a contract is ambiguous a motion to dismiss must be denied.") (internal quotations omitted). What's more, "[w]hen there is dispute or ambiguity in a contract, during the motion to dismiss stage, a court 'should resolve any contractual ambiguities *in favor of the plaintiff*.'" *Rivera v. Marriott Int'l*, 456 F. Supp. 3d 330, 340 (D.P.R. 2020) (quoting *Young v. Well Fargo Bank*, 717 F.3d 224, 237 (1st Cir. 2013) (emphasis added). Instead, the trier of fact must resolve the ambiguity after involved substantial fact and expert discovery is taken. CLF Br. 20–22. While the 2021 MSGP and related comments may provide some evidence for to assist the

[12] Exxon provides no support for its assertion that EPA's Response to Comment is subject to "substantial deference" for interpreting the Exxon's Permit. Exxon Br. 29. None of the cases Exxon cites concern responses to comments or applying interpretation of one permit to a different permit.

factfinder's interpretation, CLF Br. 3, they cannot support pre-discovery dismissal of CLF's claims.

Regardless, even if it were appropriate to consider the 2021 MSGP and Response to Comment at this stage, neither support Exxon's argument. As explained in CLF's Brief, the 2021 MSGP and comments: (i) acknowledge that the "good engineering practices" standard requires permittees to analyze the risks of severe weather, (ii) provides new guidance to MSGP permittees that confirms the requirement to address major storm risks on a site-specific basis, and (iii) clarifies that FEMA flood maps are not always sufficient for determining flood risk. CLF Br. 3–5. Nothing in Exxon's Brief alters this result.

According to Exxon, EPA's Response to Comment conclusively states that before the 2021 SWPPP, permittees were not required to consider risks for foreseeable severe weather, Exxon Br. 28–29, but EPA's Response makes no such statement. In fact, EPA's Response to Comment did just the opposite. EPA confirmed that "the use of 'good engineering practices' to develop control measures should consider flood risks." EPA Response to Comments at 402. EPA continued:

> 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."

EPA Response to Comments at 392.[13] The "good engineering practices" standard is not a new requirement of the 2021 MSGP; it was also in the prior version, as Exxon has recognized. ECF 82 at 15 n.6 (noting that 2015 MSGP includes "good engineering practices" standard). Far from

[13] Contrary to Exxon's assertions (Exxon Br. 31), there is nothing circular in the finding the "good engineering practices" standard both (i) applies to Section 2.1.1.8's specific requirements, and (ii) creates an overriding duty to evaluate and address the risks of foreseeable severe weather events more broadly. The "good engineering practices" standard governs the implementation of *all* aspects of the SWPPP.

saying that consideration of severe weather risks was a new provision, EPA clarified that permittees should have been doing it all along.

Exxon unsuccessfully attempts to avoid this result by selectively quoting from EPA's response to CLF about potential backsliding.[14] Exxon Br. 28, 30. In Excerpt 4 of its Comments,[15] CLF argued that (i) the 2015 MSGP "requires consideration of all climate change impacts and requires a prospective risk assessment based on good engineering practices," and (ii) the language of Section 2.1.1.8 in the proposed 2020 MSGP appeared to impermissibly limit those preexisting requirements. Response to Comment at 394. EPA responded that the requirements in Section 2.1.1.8 could not be backsliding because Section 2.1.1.8 was adding a new condition—not removing or changing pre-existing language—and "[a]nti-backsliding simply does not apply to a new condition." Response to Comment at 398.

Exxon's Brief argues that because EPA referred to Section 2.1.1.8 as "new" and stated that "the 2015 MSGP did not include a similar provision," therefore the "good engineering practices" standard in the 2015 Permit did not require permittees to consider severe weather. Exxon Br. 28. But Exxon's argument turns EPA's logic on its head. EPA's Response to Excerpt 4 points to the itemized, specific requirements in Section 2.1.1.8 and concludes that adding them cannot limit water quality protection because it does not change any pre-existing "similar provision" in the 2015 MSGP. Response to Comment at 398. EPA's Response was limited to weather anti-backsliding provisions were implicated; it expressed no opinion on the merits of CLF's

[14]The CWA's anti-backsliding provision prohibits renewed, reissued, and modified permits from having less stringent effluent limitations than the previous permit. 33 U.S.C. § 1342(o); *see also* EPA, NPDES PERMIT WRITERS' MANUAL 7-4 (2010), https://www3.epa.gov/npdes/pubs/pwm_chapt_07.pdf. ("CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed.").

[15] EPA Response to Comment separated CLF's full-length comment into seven separate excerpts and then individually responded to each excerpt.

interpretation of the 2015 MSGP requirements. Had EPA wished to reject CLF's interpretation of the 2015 MSGP's "good engineering practices" standard, it could have done so. EPA provided no opinion in this Response and, in fact, its Response to Excerpt 4 does not discuss the "good engineering practices" standard at all.

The Excerpts where EPA does address the "good engineering practices" standard confirms CLF's above interpretation of EPA's Excerpt 4 Response. In Excerpt 7, CLF commented: "The 2015 MSGP already requires permittees to construct their facilities in a manner that avoids flooding and damage from the reasonably anticipated impacts of climate change during the facilities' design life by imposing a "good engineering practices" standard to the facilities' control measures and SWPPP preparation." EPA Response at 401. EPA has agreed with CLF's interpretation of the 2015 MSGP, stating: "EPA acknowledges that the use of 'good engineering practices' to develop control measures should consider flood risks." EPA Response at 402. EPA then confirmed that Section 2.1.1.8 does not limit this obligation in any way: "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." *Id.* (emphasis added).[16] Especially in light of EPA's Excerpt 7 Response, the Excerpt 4 Response cannot reasonably be construed as rejecting any prior obligation in the 2015 MSGP to consider extreme weather risk.

Exxon's only response to EPA's discussion of "good engineering practices" is to claim that "[t]he more sensible reading of EPA's comment is that the use of 'good engineering practices'

[16] Retaining the evolving "good engineering practices" standard is consistent with EPA's practice of using evolving terms because the use of narrowly-drawn standards runs the risk of "freezing" standards in place "which may swiftly become outdated or obsolete." *See* Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 67 Fed. Reg. 47042, 47070 (July 17, 2002).

requires consideration of 'flood risks' *generally*" but not "consideration of flood risks from major storm events." Exxon Br. 30–31 (emphasis in original). But, Exxon provides no support for this alleged special exclusion of "major storm events" from otherwise required consideration of flood risks. Indeed, most flood risk would presumably be the result of some form of severe weather. Contrary to Exxon's arguments, the only sensible reading of EPA's Response to Comments is that EPA (i) acknowledge the "good engineering practice" standard requires consideration of flood risks from any relevant source, and (ii) Section 2.1.1.8 could not qualify as backsliding because it only added specific reporting requirements that did not limit the pre-existing obligations of the "good engineering practice" standard.

Exxon's remaining arguments fare no better.

First, Exxon quotes EPA's Response to Excerpt 4 to argue that "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." Exxon Br. 28; *see also id.* at 27 (quoting EPA Response to Excerpt 4). This argument is beside the point. EPA expressly recognized that "sometimes treatment devices or constructed/installed controls may be necessary," EPA Response at 398, and CLF never claimed that permanent structural controls are required for all facilities covered under the MSGP. The MSGP is a generally applicable permit that applies to facilities in a wide variety of industries and geographic areas. The same structural controls that might be necessary for a coastal facility might be unnecessary for an inland facility with no risk of storm surge.

Second, Exxon argues that "EPA also declined to adopt a number of the control measures that CLF argued were necessary to prevent backsliding." Exxon Br. 27. But, as explained above, EPA confirmed that the 2021 MSGP did not withdraw any pre-existing protections from the 2015

MSGP. Regardless, no inference can be drawn from EPA's silence on some of CLF's suggestions and it cannot serve as a basis for dismissal on the merits.

At most, the 2021 MSGP and EPA's Response to Comment may provide some evidence for the factfinder to consider, along with a full factual record and expert opinion, when interpreting the Permit, but it cannot support dismissal of CLF's case on the pleadings.

IV. The Court May Not Consider Extrinsic Evidence at This Stage in Litigation

This stage of litigation—post-denial of Exxon's Motion to Dismiss and pre-discovery—is not the appropriate time to consider extrinsic evidence, such as EPA's Response to Comments, for a merits determination. As CLF explained in its Brief (18–22), at the pleading stage, a court may consider extrinsic evidence to determine whether a NPDES permit is ambiguous, but resolving a disputed ambiguous term must wait for summary judgment. *Kolbe v. BAC Home Loans Servicing*, 738 F.3d 432, 465 n.37 (1st Cir. 2013) ("If the language of a contract is ambiguous a motion to dismiss must be denied.") (citation omitted)). In fact, "[w]hen there is dispute or ambiguity in a contract, during the motion to dismiss stage, a court 'should resolve any contractual ambiguities *in favor of the plaintiff*.'" *Rivera v. Marriott Int'l*, 456 F. Supp. 3d 330, 340 (D.P.R. 2020) (quoting *Young v. Well Fargo Bank*, 717 F.3d 224, 237 (1st Cir. 2013) (emphasis added)). The Court has already determined that "good engineering practices" is an ambiguous term. MTD Hr'g Tr. at 133, 136. Therefore, as explained in Section III above, it is improper to resolve the interpretation at this stage.

Exxon's Brief is an improper motion to dismiss disguised as a memorandum of law in response to the Court's October 6, 2021 Order, and does nothing to alter this analysis. Exxon cites cases for the uncontroversial propositions that, when deciding a Rule 12(b)(6) motion, the Court may consider (i) documents attached to or incorporated in the complaint, and (ii) facts susceptible

to judicial notice. Exxon Br. 32–33 (citing *Lyman v. Baker*, 954 F.3d 351, 360 (1st Cir. 2020)). But, these cases do nothing to support Exxon's position.

At the outset, Exxon's citations to the 12(b)(6) standard are irrelevant because, as discussed in Section I.A above, Exxon is subject to the reconsideration standard, not the 12(b)(6) standard. Regardless, neither of the exceptions for extrinsic evidence apply to the EPA Response to Comments. *First*, they are not incorporated into the Amended Complaint, being at least two steps removed from Exxon's individual permit and SWPPP. *Second*, the comments are not subject to judicial notice at this stage, and the cases Exxon cites do not say otherwise. Exxon Br. 32–33 (citing *Manguriu v. Lynch*, 794 F.3d 119 (1st Cir. 2015); *Ms. S. v. Reg'l Sch. Unit 72*, 829 F.3d 95 (1st Cir. 2016)).[17] "Judicial notice is the means by which a court recognizes a fact in the absence of evidentiary proof." *Tri Union Frozen Prods., Inc. v. United States*, 161 F. Supp. 3d 1333, 1335–36 (Ct. Int'l Trade 2016). The Court may only take judicial notice of an adjudicative fact that is "not subject to reasonable dispute." FED. R. EVID. 201(b). The onus was on Exxon to demonstrate that the EPA Response to Comments is not subject to reasonable dispute and thus proper for judicial notice, and Exxon has not done so. *AES Puerto Rico, L.P. v. Trujillo-Panisse*, 199 F. Supp. 3d 492, 498 (D.P.R. 2016), *vacated on other grounds*, 857 F.3d 101 (1st Cir. 2017) ("[The] party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice.").

Moreover, "judicial notice" is not an appropriate mechanism to resolve a disputed term. As *Tri Union* makes clear, "[i]nformation that is relevant and supports one's position is not the same

[17] Neither *Manguriu* nor *Ms. S.* took judicial notice of an agency action at the motion to dismiss stage as a means of interpreting agency language. *See Manguriu*, 794 F.3d at 120–21 (immigration appeal taking judicial notice of the fact of agency's revocation of approval of petitioner's separate petition for relief from removal); *Ms. S.*, 829 F.3d at 103 n.4 (taking judicial notice of proposed rules in direct challenge to promulgation of final regulation).

as information that is 'not subject to reasonable dispute.'" *Tri Union*, 161 F. Supp. 3d at 1336. "[T]he unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018). "As Rule 201(b) teaches, judges may not defenestrate established evidentiary processes, thereby rendering inoperative the standard mechanisms of proof and scrutiny, if the evidence in question is at all vulnerable to reasonable dispute." *Lussier v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995). As CLF stated in its initial brief, the proper interpretation of the Permit is an issue of fact to be fleshed out through discovery, not an issue for a motion to dismiss. CLF Br. 18–22. While CLF's comments and EPA's response regarding the 2021 MSGP may be relevant to Permit interpretation, CLF and Exxon disagree on what the comments and responses mean, as well as their impact on Exxon's Permit and SWPPP. Exxon cannot now rely on "judicial notice" to ask the Court to make a final determination on a motion to dismiss.

CLF does not dispute Exxon's assertion that the 2021 SWPPP is permissible extrinsic evidence that could be considered in a mootness analysis (Exxon Br. 32), if a mootness analysis were appropriate at this time. But, as explained in Section III above, the 2021 SWPPP cannot moot CLF's claims. Fact and expert discovery must be completed before the impact of the 2021 SWPPP can be determined. *See Manguriu*, 794 F.3d at 121–22 (remanding for "additional factfinding" to resolve factual disputes that arose in deciding whether the case was moot).

For these reasons, the Court should decline to review Exxon's extrinsic evidence and enter an order setting a discovery schedule.

V. Exxon's Proposed Discovery Plan Adds Unnecessary Delay and Wastes Judicial Resources

CLF's proposed discovery scheduled is efficient and will ensure a just, speedy, and inexpensive resolution of the case going forward. As previously explained to the Court, CLF proposes to conduct all fact discovery over a period of seven months, followed by expert discovery over five months, with a single round of dispositive motions after the close of discovery. *See, e.g.*, CLF Br. 22–24.

Exxon's proposal, on the other hand, adds unnecessary delay to this case and wastes judicial resources with what amounts to three phases of discovery, three rounds of expert reports, and four separate sets of dipositive motions. Exxon's proposed phased approach, along with bifurcation of all pretrial proceedings between liability and remedy, will result in years more litigation before this case finally goes to trial.

The claims in this case have withstood more than one motion to dismiss and proceeding to discovery on all of the claims is the natural and most expedient route to efficiently resolve this case. As CLF has previously explained in the Joint Report (ECF 115 at 26–28) and in its Brief (CLF Br. 22–25), and as further described below, discovery in this case should not be phased, should not be limited to issues of permit interpretation, and should not be bifurcated between liability and remedy.

A. Phasing Discovery is Inappropriate

Phased discovery is only appropriate where it would "render other discovery unnecessary." Manual for Complex Litigation (Fourth) § 11.422. Such is not the case here. Because Exxon's proposed phases of discovery to first focus on permit interpretation would not render additional

discovery unnecessary in this case, discovery of all issues identified by CLF in its Brief (22–24), should proceed together in a single phase, to be completed within five months.

Exxon asserts that prior to proceeding with discovery, the parties should initially undertake discovery and briefing limited to the proper interpretation of the disputed terms of its Permit. Exxon Br. 33. Only after the resolution of these issues would the parties proceed with a second phase of discovery regarding issues of liability, and then a third phase of discovery would be necessary on issues of remedy. Interpretation of Exxon's Permit, however, is not a central issue for discovery in this case and would not obviate the need for future discovery, which is a cornerstone for the justification of phased discovery.

First, with regard to Claims 2 and 3 specifically, Exxon's claim that these counts would only require discovery on the interpretation of certain disputed terms in the Permit is incorrect. To properly proceed with these claims, CLF anticipates taking discovery related to a number of factual issues as set forth in CLF's Brief, including those involving contamination at the Terminal, the handling of solid waste and hazardous materials at the Terminal, and the daily operations and maintenance of the Terminal. CLF Br. 24. Exxon's proposed phasing would draw artificial lines between Exxon's stated interpretation of the Permit and its actual implementation, which would improperly impede the efficient progression of this case.

Second, Permit interpretation is irrelevant to CLF's RCRA claim, which addresses the imminent and substantial endangerment caused by Exxon's failure to properly protect the surrounding environment and citizens from the foreseeable increased risks associated with climate change. This count does not rise and fall on the CLF's Clean Water Act claims, as this Court has acknowledged. MTD Hr'g Tr. at 141. The First Circuit similarly rejected this argument from Exxon, explaining that CLF's RCRA claim "does not even involve consideration of the permit's

terms." *Conservation Law Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 75 (1st Cir. 2021). CLF's RCRA claim is entirely independent of what Defendants write in their SWPPP. Defendants' statements, or lack thereof, in their SWPPP only evidence their failure to design their facility to withstand the reasonably foreseeable impacts of climate change. Defendants' proposed permit interpretation phase would have no impact on CLF's RCRA claim.

Third, phased discovery on permit interpretation will merely delay resolution of this case for no reasonable benefit. The Court has already stated that "I don't think that [the case is] going to disappear on a contract interpretation." Mar. 13, 2019 Lobby Conf. Tr., ECF 74, at 9. The Court has also already held that Exxon's interpretation of the permit's requirements are legally untenable. *See, e.g.*, MTD Hr'g Tr. at 135 (holding Defendants' interpretation violated the principles of construction by rendering elements of the permit superfluous).

Exxon's apparent concession, if the Court denies phasing of discovery, to propose a schedule akin to the one negotiated and agreed to by the parties in *CLF v. Shell Oil Co., et al.*, is misleading. Exxon Br. 36–37. The Shell matter has factual distinctions not considered by Exxon and includes twenty-two causes of action, whereas there are only eleven live claims in this case. The scheduling needs of *CLF v. Shell Oil Co., et al.*, negotiated by the parties, cannot be generically mapped onto this case.

B. Bifurcation

Discovery of issues related to liability and those related to remedy are inextricably linked in this case. Evidence of Defendants' obligations and failures to satisfy those obligations is also extremely relevant to how to cure those failures. There is no clear-cut way to distinguish the discovery required of the two.

Exxon's citation to *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) does not counsel otherwise. Exxon Br. 37. In that "mass accident" class action, the court found it inappropriate to certify a single class and thus divided the proposed class into six distinct subclasses "so as to facilitate a manageable and fair adjudication of the plaintiffs' claims." *Id*. at 104. But, there was no mention of bifurcated discovery. The *Pruitt* court reasoned that for the *trials* of the actions of those six subclasses, "bifurcating the issues of liability and damages, would be superior in terms of judicial economy and fairness to any of the suggested alternatives," including the adjudication of thousands of individual lawsuits. *Id*. at 115. Exxon's citation of *Chapman ex rel. Estate of Chapman v. Bernard's Inc*., 167 F. Supp. 2d 406 (D. Mass. 2001) supports bifurcation of discovery even less. Exxon Br. 38. There, the court granted the defendants' motion to bifurcate the trials between product identity and liability/damages, but discovery had already been completed and motions for summary judgment already ruled upon. *Id.* at 423–24. Here, CLF agrees that trial should be bifurcated between liability and remedy, as in *Pruitt* and *Chapman*; however, that same reasoning does not apply to discovery.

Because the facts related to the Permit violations necessarily overlap with the facts related to the remedies for those violations, bifurcating discovery of the two is not the superior means to litigate this case. To bifurcate discovery of issues between liability and remedy would require further motion practice between the Parties to determine the bounds of each additional phase of discovery, would likely require multiple depositions of the same experts, and would result in multiple rounds of dispositive motion practice, thus resulting in additional delays and expenditure of resources. CLF's proposal to conduct all discovery in a single phase without bifurcation is clearly the most efficient way forward for the Parties and this Court.

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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