IN THE 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 1:16-cv-11950 (MLW) **Leave to File Excess Pages Granted on December 1, 2016**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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Defendants Exxon Mobil Corporation ("EMC"), ExxonMobil Oil Corporation ("EMOC"), and ExxonMobil Pipeline Company ("EMPCo") (collectively, "Defendants" or "ExxonMobil") respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

Although styled as an enforcement action, this suit is nothing more than an improper effort by the Conservation Law Foundation, Inc. ("CLF") to rewrite the very same Environmental Protection Agency ("EPA") regulations it asserts were violated. Everett Terminal (the "Terminal") operates pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit validly issued and approved by EPA. Nowhere does that permit mandate consideration of the speculative risks of climate change. CLF's thinly veiled effort to second-guess EPA and to create a new NPDES permit regime falls outside the scope of a valid citizen suit under the Clean Water Act ("CWA")[1] and the Resource Conservation and Recovery Act ("RCRA"). The Court should dismiss the Complaint because CLF lacks standing to bring any of the asserted claims, the Court lacks subject matter jurisdiction to adjudicate the alleged violations, and the Complaint fails to state a claim for relief.

First, CLF has previously tried, and failed, before this Court to force EPA to consider potential climate change impacts under the CWA. *See CLF* v. *EPA*, 964 F. Supp. 2d 175, 192–93 (D. Mass. 2013) (Wolf, J.) ("*CLF* v. *EPA*"). Having been rebuffed by the Court, CLF has repackaged its agenda as an enforcement action under the citizen suit provisions of the CWA and RCRA. But CLF's Complaint is merely another attempt to usurp agency authority, in defiance

[1] The Clean Water Act is the name commonly used to refer to the Federal Water Pollution Control Act.

of Supreme Court decisions establishing that citizen suits may not be employed to supplant the role of EPA.

Second, CLF failed to heed this Court's warnings in *CLF* v. *EPA* regarding the constitutional prerequisites for standing. In that case, the Court dismissed CLF's claims because CLF failed to present sufficient evidence that (i) its members incurred any actual injury; or (ii) their purported injuries would be redressed were EPA to incorporate the climate change considerations that CLF urged. *See CLF* v. *EPA*, 964 F. Supp. 2d at 186-93. The same fatal deficiencies foreclose this suit. CLF has not identified a single injured member, let alone alleged any concrete injuries purportedly caused by ExxonMobil's actions at the Everett Terminal. Crucially, as CLF has not alleged that any of its members even use the Island End or Mystic Rivers, it necessarily fails to plead impairment to any member's use or enjoyment of either river.

Nor do CLF's pleadings plausibly allege that a favorable action by this Court would enable its members to swim, fish, or boat in the waters in the immediate vicinity of the Terminal, which—separate and apart from any alleged violations by Defendants—are clouded by other pollutants that are not alleged to flow from the Terminal. CLF's speculative allegations of potential injuries that might be suffered decades from now due to rising sea levels serve only to expose the legal deficiencies of its suit. The Complaint itself acknowledges that such alleged climate change impacts are not expected to occur *within this century*, fatally undermining CLF's conclusory assertion of imminent harm to the unspecified activities of its members in the Island End and Mystic Rivers. Furthermore, the sources that CLF references in the Complaint concede that the impacts alleged by Plaintiff—such as sea level rise—are too speculative to satisfy the Article III requirement that future risks be "certainly impending." The Court should dismiss the

Complaint in its entirety under Rule 12(b)(1) because CLF has identified no redressible injury that is traceable to ExxonMobil's lawful conduct.

Third, for the same reasons that Plaintiff cannot establish an imminent injury for purposes of establishing Article III standing, it necessarily fails to allege an "imminent and substantial endangerment to health or the environment," as required to support its RCRA claim. The Complaint's first cause of action therefore should be dismissed for failure to state a plausible claim for relief.

Fourth, Plaintiff's attempt to distort the CWA to serve its climate change agenda fails because there is no support in the law or the pleadings for its assertion that Defendants are obligated to consider alleged climate change impacts on stormwater discharges and oil spills. EPA's position with respect to NPDES permits, Stormwater Pollution Prevention Plans ("SWPPPs"), and Spill Prevention, Control and Countermeasure plans ("SPCCs") is clear: remote and speculative effects of climate change need not be addressed. As a result, the Court should dismiss Claims 5, 6, 7, 8, 9, 10, 11, and 12 under Rules 12(b)(1) and 12(b)(6).

Fifth, this Court lacks subject matter jurisdiction to adjudicate CLF's assertion that ExxonMobil's SPCC must take climate change into account. SPCCs address oil spill prevention measures and are regulated by a section of the CWA to which the citizen suit provision of the statute has no application. As such, any claim about ExxonMobil's SPCC is not properly before this Court. The Court therefore should dismiss the Complaint's eleventh cause of action under Rule 12(b)(1).

Finally¸ the non-climate change–related allegations are also facially defective. The violations alleged in claims 2–4 are barred by the CWA's permit shield and also represent an impermissible collateral attack on the Terminal's current NPDES permit (the "Permit") issued in

2011. Claims 3 and 13 fail because CLF has not plausibly alleged that the violations at issue are ongoing, and thus subject to the CWA's citizen suit provision. And Claim 14 cannot withstand scrutiny because CLF has not plausibly alleged that the half-moon shaped pond, which is manmade, qualifies as a "navigable water" of the United States, *see* 33 U.S.C. § 1362(7), or even that the Terminal discharges any pollutants into it. The Court should dismiss each of these claims under Rule 12(b)(6).

For these reasons, and others set forth below, Plaintiff's Complaint should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS[2]

The Complaint Does Not Allege That the Waters Surrounding the Terminal Are Impaired Because of Discharges Emanating from the Terminal

The Terminal, an EMC-owned facility leased to EMOC, receives, stores, and distributes petroleum products. The Terminal operates pursuant to a NPDES permit issued and approved by EPA. (Compl. ¶ 44.)[3]

CLF alleges that the Terminal is adjacent to the Island End River, which feeds into the Mystic River. (*See* Compl. ¶ 46–47.) The lower reach of the Mystic River, which incorporates the Island End River, has been impaired by numerous pollutants, including the human pathogen "Fecal Coliform." (Compl. ¶ 52.) These pollutants, however, are not alleged to be connected to the stormwater, groundwater, or other wastewaters that the Terminal discharges into the Island

[2] Defendants adopt the facts as alleged in the Complaint for purposes of this motion only. *See New Comm Wireless* v. *Sprintcom, Inc.*, 213 F. Supp. 2d 61, 64 n.2 (D.P.R. 2002). Further, on a motion to dismiss, a court may consider the pleadings as augmented by "documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Haley* v. *City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011).

[3] The current Permit, No. MA0000833, was issued on October 12, 2011 and became effective on January 1, 2012. *See* Toal Ex. A. "Toal Ex. __" are references to exhibits to the Declaration of Daniel J. Toal in Support of ExxonMobil's Memorandum of Law in Support of Its Motion to Dismiss.

End River in accordance with its Permit. (*Compare* Compl. ¶¶ 52–53, *with* Compl. ¶¶ 34–37.) Instead, the Complaint alleges that the Terminal has discharged Total Suspended Solids ("TSS") and Polycyclic Aromatic Hydrocarbons ("PAHs") "in excess of permit levels." (Compl. ¶ 202.)[4] But the Complaint acknowledges that neither of these pollutants has caused the Mystic or Island End Rivers to be designated as "impaired" water bodies since 2010. (Compl. ¶¶ 51–53.)[5]

By Its Own Admission, the Distant Scenario Contrived by CLF Is Exaggerated and Uncertain

The Complaint generically alleges that CLF's members use unidentified New England waterways for recreational and aesthetic purposes. (Compl. ¶ 8.) But nowhere in the Complaint does CLF allege that its members actually use the Island End or Mystic Rivers, the waterways into which discharges from the Terminal flow. (*See* Compl. ¶ 46.)

Rather, Plaintiff alleges that, because "ExxonMobil has not taken climate change impacts into account in its . . . SWPPP . . . and SPCC," CLF members "have no reasonable assurance that they will be protected from pollutants released and discharged from the Everett Terminal" *in the event* the Terminal is "flooded by a severe storm and/or sea level rise." (Compl. ¶¶ 10, 11.) The Terminal's supposed vulnerability stems from CLF's alleged fear that "a four-foot or greater rise in sea level will inundate much of the Terminal" (Compl. ¶81), causing the release of waste "into the Island End River, Mystic River, and directly onto the city streets of Everett" (Compl. ¶ 183). But CLF acknowledges that such a sea level rise, if it occurs at all, will not occur anytime this century. (*See, e.g.*, Compl. ¶ 93(f).) Indeed, the Complaint relies upon projections which predict

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[4] PAHs include Anthracene, Acenaphthene, Acenaphthylene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(k)fluoranthene, Benzo(ghi)perylene, Benzo(a)pyrene, Chrysene, Dibenz(a,h)anthracene, Fluoranthene, Fluorene, Indeno(1,2,3-cd)pyrene, Naphthalene, Phenanthrene, and Pyrene, all of which, in addition to TSS, are listed in Compl. ¶ 202. *See* Toal Ex. A at 3.

[5] *See Massachusetts Integrated List of Waters* (2010) (Nov. 2011), http://www.mass.gov/eea/docs/dep/water/resources/07v5/10list6.pdf., and *Massachusetts Integrated List of Waters* (2014) (Dec. 2015), http://www.mass.gov/eea/docs/dep/water/resources/07v5/14list2.pdf. (cited in Compl. ¶¶ 52–53).

that, at its current rate, sea level is expected to rise by no more than "another one foot" by the end of the century. (Compl. ¶ 93(b).)

Moreover, the Complaint's own source materials underscore that the rate and extent of alleged climate change are shrouded in uncertainty:

- "As with other climate predictions (such as precipitation and storm events), future sea level rise projections are uncertain because they attempt to predict inherently complex forces and processes, including human response and actions."[6]
- "Key remaining uncertainties relate to the precise magnitude and nature of changes at global, and particularly regional, scales, and especially for extreme events and our ability to simulate and attribute such changes using climate models."[7]
- In order to address potential risks associated with "rising sea level and new, more frequent, or more severe flooding," "better mapping data" must be developed.[8]

For these very reasons, and those laid out below, EPA does not require the Terminal to account for the potential effects of climate change in the manner advocated by CLF.

EPA Does Not Require SWPPPs or SPCCs to Address Speculative Climate Change Risks

As recently as 2012, EPA told this Court that it cannot "be faulted for refraining from guess[work]" about how to incorporate alleged effects of climate change into calculations of total maximum daily loads for pollutants until "science can support assumptions about [those]

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6 *Mass. Office of Coastal Zone Mgmt., Sea Level Rise: Understanding and Applying Trends and Future Scenarios for Analysis and Planning* 7–8 (Dec. 2013), http://www.mass.gov/eea/docs/czm/stormsmart/slr-guidance-2013.pdf. (cited in Compl. ¶ 94).

7 *See U.S. Global Change Research Program, Climate Change Impacts in The United States: The Third National Climate Assessment* 60 (Rev. Oct. 2014), http://s3.amazonaws.com/nca2014/low/NCA3_Climate_Change_Impacts_in_the_United%20States_LowRes.pdf?download=1. (cited in Compl. ¶ 92); *id.* at 73 (noting the "critical uncertainty in projecting the impacts of climate change on regional water cycles").

8 *Exec. Office of Energy and Envtl. Affairs, Massachusetts Climate Change Adaptation Report* 69 (Sept. 2011), http://www.mass.gov/eea/docs/eea/energy/cca/eea-climate-adaptation-report.pdf. (cited in Compl. ¶ 93).

effects."[9] In so doing, EPA emphasized that it is not required to address hypothetical effects or to "assign a numerical value to the uncertainty associated with climate change."[10]

Where it seeks to require consideration of climate change, EPA does so explicitly. In its NPDES Permit Writers' Manual, for example, EPA mandates consideration of climate change only in connection with requests for thermal effluent variances and patterning upstream flow of a discharge—neither of which is alleged to apply to the Terminal or to bear any relationship to the Terminal's SWPPP or SPCC.[11] By contrast, the Manual, which separately discusses SWPPPs[12] and SPCCs, does not consider or raise climate change as a relevant factor in the context of either plan.[13] EPA's SWPPP Manual and the Multi-Sector General Permit for Stormwater Discharges Manual do not mention climate change either.[14] Nor is climate change mentioned in the regulation governing SPCCs, *see* 40 C.F.R. § 112, or any agency guidance interpreting SPCC obligations.[15]

The Terminal's SWPPP and SPCC do not expressly consider potential climate change impacts (Compl. ¶¶ 250–273) because agency regulations and guidance do not require it. While the other agencies referred to in CLF's Complaint have—in the exercise of their discretion—

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9 Mem., *CLF* v. *EPA*, C.A. No. 10–11455–MLW (D. Mass.), Sept. 21, 2012, at 27–28.

10 *Id.*

11 *NPDES Permit Writers' Manual* §§ 5.2.2.7, 6.2.4.2 (Sept. 2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf.

12 SWPPPs, which are incorporated into NPDES permits, are "designed to reduce, or prevent, the discharge of pollutants in storm water to the receiving waters." Toal Ex. A at 13; Compl. ¶ 61.

13 *See NPDES Permit Writers' Manual*, *supra* n. 10 at § 2.3.2.3.

14 *See U.S. Envtl. Prot. Agency, Developing Your Stormwater Pollution Prevention Plan* (Feb. 2009), https://www3.epa.gov/npdes/pubs/sw_swppp_guide.pdf; *U.S. Envtl. Prot. Agency, Multi-Sector General Permit (MSGP) for Stormwater Discharges*, https://www.epa.gov/sites/production/files/2015-0/documents/msgp2015_finalpermit.pdf.

15 *See U.S. Envtl. Prot. Agency, Office of Emergency Mgmt., SPCC Guidance for Regional Inspectors* (Dec. 16, 2013), https://www.epa.gov/sites/production/files/201404/documents/spcc_guidance_fulltext_2014.pdf (making no mention of climate change in the 921-page manual published by EPA to acquaint regulated entities with SPCC requirements and ensure "consistent national policy").

incorporated potential climate change impacts on their facilities in the planning phase (Compl. ¶ 168), EPA does not mandate such considerations in applications for NPDES permits or in SPCCs. Moreover, the agencies that have opted to consider such potential long-term impacts have done so in the context of civil and municipal works projects with lifespans far in excess of the five-year term applicable to NPDES permits and SPCCs.[16]

CLF Did Not Timely Object to EPA's Decision to Issue the Current NPDES Permit

As required by the CWA, EPA subjected a draft of EMOC's current Permit to a public notice and comment process, providing interested parties with the opportunity both to comment on the draft permit and to object to its issuance.[17] This draft permit included stock language such as a mandate to employ "good engineering practices" and to "identify sources of pollution, " the meaning of which CLF now seeks to dispute. (Compl. ¶¶ 231, 237.)[18] During the span of the month-long comment period, CLF stood silent.[19] Its silence bars it from raising its voice now—seven years later.

The Terminal Treats and Discharges Water in Accordance with Its NPDES Permit

The Permit regulates water discharges in two ways. At the front end, it establishes water treatment requirements based on flow from a defined 10-year, 24-hour storm, which the Terminal accomplishes through its wastewater treatment system, including a Continuous Flow

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[16] The planned life of the Deer Island Sewage Treatment Plant in Boston, Massachusetts extends until 2050. (Compl. ¶ 168.) *See also* U.S.A.C.E., CECW-P Regulation No. 1100-2-8162 (cited in Compl. ¶ 164) (recommending a "project planning horizon" of "100 years"). By contrast, the term of a NPDES permit is five years, which term may be administratively continued pending review of a permit renewal application. *See* 40 C.F.R. § 122.6(a); *see also* 40 C.F.R. § 112.5(b) (requiring review of SPCC, and amendment if necessary, at least every five years).

[17] *See* Toal Ex. B at 1 ("The Region received timely comments from one party: Michael Fager of Mystic River Watershed Association (MyRWA).") (cited in Compl. ¶ 57).

[18] *Compare* PJ Keating Company NPDES Permit No. MA0029297, https://www3.epa.gov/region1/npdes/permits/2007/finalma0029297permit.pdf, *with* CSX Transportation, Inc. NPDES Permit No. MA0025704, https://www3.epa.gov/region1/npdes/permits/2014/finalma0025704permit.pdf.

[19] *See* Toal Ex. B at 1.

Treatment System;[20] at the back end, the Permit establishes effluent limitations on discharges. (Compl. ¶¶ 59–60.)

There are three points through which the Terminal discharges water: Outfalls 01A, 01B, and 01C, each of which empties into the Island End River. (Compl. ¶¶ 55–56.) The Permit regulates the specific conditions and limitations governing discharges from each outfall. (Compl. ¶ 56.) It requires the Terminal in any given minute to discharge up to 280 gallons per minute ("gpm") of water through Outfall 01C before any additional water is discharged to Outfall 01A.[21] Use of Outfall 01B is limited to situations where the combined capacities to collect water of Outfalls 01C and 01A are exceeded.[22] (Compl. ¶ 190.)

CLF alleges four instances "in which discharges associated with the Terminal and/or Sprague Energy facility were reported" to have allegedly caused visible oil sheens, foam, or floating solids to appear on the water, in 2011, 2014, and 2015. (Compl. ¶¶ 285–86.) According to the Complaint itself, however, ExxonMobil is the source of only one of the four past incidents.[23] Sprague Energy, an entirely separate corporate entity that is unaffiliated with the Defendants, is identified as the source of two of the incidents, and the fourth source is unidentified.[24]

Finally, the Complaint alleges that unspecified "discharges of pollutants" into what CLF refers to as "the half-moon shaped pond" "are unpermitted." (Compl. ¶¶ 288, 294.) That small

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[20] *See* Toal Ex. A at 11 ("The collection, storage and treatment systems shall be designed, constructed, maintained and operated to treat the total equivalent volume of storm water, . . . which would result from a 10-year 24-hour precipitation event, which volume shall be discharged through outfall 01C and 01A. All wet weather and dry weather discharges less than or equal to the design capacity of the continuous treatment system [280 gpm] shall be treated through the continuous treatment system and discharged at outfall 01C.").

[21] *Id.*

[22] *Id.*

[23] *See* Compl. Ex. A (July 8, 2016 NOI) at Ex. 4.

[24] *Id.*

body of water wholly contained within Terminal property, which EPA describes as the "Former Effluent Pond," collects groundwater infiltration and rainwater, and "currently serves no purpose."[25]

As discussed *infra*, the facts alleged by CLF regarding violations of the Permit do not withstand legal scrutiny.

Procedural History

On September 29, 2016, after the requisite notice period, CLF filed the Complaint alleging one claim under RCRA and 13 claims under the CWA. The claims brought under the CWA fall into two categories: those related to climate change (the "Climate Change Claims")[26] and those unrelated to it (the "Non-Climate Change Claims").[27]

APPLICABLE LEGAL STANDARD

To survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp*. v. *Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Nor do efforts to "camouflage conclusory statements" as factual allegations. *A.G. ex rel. Maddox* v. *Elsevier, Inc.*, 732 F.3d 77, 81 (1st Cir. 2013). And, where "a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Twombly*, 550 U.S. at 557. Well-pleaded facts that "do not permit the court to infer more than the mere possibility of misconduct" do not entitle the

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[25] *See* Toal Ex. C (incorporated by reference in Compl. ¶ 36) at 12 of 26.

[26] As used herein, the phrase "Climate Change Claims" refers collectively to Claims 5–12 (Compl. ¶¶ 211–282).

[27] As used herein, the phrase "Non-Climate Change Claims" refers collectively to Claim 2 (Compl. ¶¶ 187–197), Claim 3 (*id.* ¶¶ 198–205), Claim 4 (*id.* ¶¶ 206–210); Claim 13 (*id.* ¶¶ 283–286), and Claim 14 (*id.* ¶¶ 287–294).

pleader to relief. *Iqbal*, 556 U.S at 679.

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is subject to the same standard of review as a motion to dismiss under Rule 12(b)(6). *Muller* v. *Bedford VA Admin. Hosp.*, C.A. No. 11–10510–DJC, 2013 WL 702766, at *2 (D. Mass. Feb. 25, 2013) (citing *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir.1999)). "Federal courts are obliged to resolve questions pertaining to subject-matter jurisdiction before addressing the merits of a case." *Acosta–Ramirez* v. *Banco Popular de P.R.*, 712 F.3d 14, 18 (1st Cir. 2013).

ARGUMENT

I. CLF Lacks Article III Standing

CLF has failed to allege any personal interest whatsoever in the immediate vicinity of the Terminal. Nor has CLF identified a single member whose use of the Island End or Mystic Rivers has been impaired by discharges from the Terminal made in alleged violation of the Permit, or by hyperbolic fears that the Terminal might become inundated at some unspecified time in the future. With respect to each of the claims brought, an association must plead that its members have (1) suffered a particularized and concrete "injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Because CLF's allegations fail to satisfy any of these elements, the Complaint must be dismissed.

First, CLF does not allege a particularized injury. An association, such as CLF, has Article III standing to bring an action based on injuries to its members' interests *only if*, among other requirements, "at least one of the group's members would have standing as an individual." *Draper* v. *Healey*, 827 F.3d 1, 3 (1st Cir. 2016). But the Complaint does not allege "specific information . . . regarding the harm, if any, that has befallen [any] individual plaintiff."

Hochendoner v. *Genzyme Corp.*, 823 F.3d 724, 732 (1st Cir. 2016). As the Complaint is devoid of allegations as to any individual member of CLF, Plaintiff lacks standing to bring suit.

The Complaint's vague allegation that "CLF members use and enjoy New England's waterways for recreational and aesthetic purposes" (Compl. ¶ 8) does not establish the requisite "connection" between "the identities" of CLF's members and "the relevant geographic area" allegedly suffering from environmental harm. *United States* v. *AVX Corp.*, 962 F.2d 108, 116–17 (1st Cir. 1992). Contrary to the dictates of *Lujan*, CLF does not plead that it uses "the area affected by the challenged activity," *Lujan*, 504 U.S. at 565–66—*i.e.*, the Island End River into which discharge from the Terminal flows. Instead, CLF claims generally that its members use New England's waterways, an allegation that is not even limited to a single state, much less the specific area at issue. (Compl. ¶ 8.)[28] The First Circuit long ago rejected this type of generic allegation, even where a complaint contains more specific allegations than those raised here. For example, in *AVX Corp.*, the court affirmed the dismissal of a complaint where an association alleged that its members (i) "use and enjoy" the environment and natural resources in the New Bedford Harbor area, and (ii) "have been and will continue to be harmed" by the pollutants that are the subject of the litigation. *AVX Corp.*, 962 F.2d at 116.

Second, Plaintiff fails to allege actual or imminent harm to its members. As an initial matter, the Complaint is bereft of any allegation that CLF members have ceased, or will cease, using the waters immediately surrounding the Terminal. *Cf. CLF* v. *EPA*, 964 F. Supp. 2d at

[28] This barebones allegation is "too vague to confer standing," *Wilderness Soc., Inc.* v. *Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010), because New England's waterways comprise "too large" an area to infer any injury to Plaintiff as a result of Defendants' conduct in one portion of it, *Friends of the Earth, Inc.* v. *Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996). Similarly, although CLF alleges that "its members are also concerned about, and have an interest in eliminating the risk" that pollutants from the Terminal "will wash into . . . nearby communities" (Compl. ¶ 9), CLF pleads no facts to suggest that its members would be "'directly' affected" by any speculative and hypothetical pollution to those communities, "apart from their 'special interest' in the subject." *See Lujan*, 504 U.S. at 563 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972)).

188–89 (collecting cases in which environmental plaintiffs sufficiently claimed that defendants' conduct impeded their use of the affected environment). Furthermore, any desire CLF may have to "some day" use the Mystic or Island End Rivers is insufficiently concrete to support a finding of actual or imminent injury. *Lujan*, 504 U.S. at 564; *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("vague desire" to visit affected area is insufficient to satisfy "imminent injury" requirement). And with harms that will allegedly occur in the future, the "concreteness of the controversy" is lessened, weighing against a finding of standing. *Harrington* v. *Bush*, 553 F.2d 190, 208 (D.C. Cir. 1977).

The imminence assessment is particularly damning as applied to CLF's Climate Change Claims, which are premised on nothing more than a generalized concern that CLF and its members lack "reasonable assurance that they will be protected from pollutants released and discharged from the Everett Terminal" *if* the Terminal is "flooded by a severe storm and/or sea level rise." (Compl. ¶¶ 10–11, 70, 169.) The controlling case law is clear, however, that the fear of a potential future injury is too hypothetical to confer standing. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013). Rather, "[a] threatened future injury must be 'certainly impending' to grant Article III standing." *In re Fruit Juice Prod. Mktg. & Sales Practices Litig.*, 831 F. Supp. 2d 507, 510 (D. Mass. 2011); *accord Clapper*, 133 S. Ct. at 1147. Plaintiff's allegedly anticipated injuries are not only remote, but also uncertain. CLF's attenuated fears concerning a four-foot sea level rise by the year 2100 are belied even by projections recited in the Complaint, which in fact predict a sea level rise of no more than one foot "by the end of the century." (Compl. ¶ 92(b), (e), (g)).[29] CLF's doomsday scenario is thus "sheer speculation"

[29] The sources from which CLF draws its projections are also replete with caveats regarding "the uncertainty of future climate conditions and impacts." Massachusetts Office of Coastal Zone Mgmt., *Exec. Office of Energy and Envtl. Affairs, Massachusetts Climate Change Adaptation Report* 24 (2011); *id.* at 27 (explaining that "100-

about the distant future, which is the antithesis of an actual and imminent injury. *Shain* v. *Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (holding that danger of flood was remote on its own, but "the possibility the flood will occur while [the plaintiffs] own or occupy the land becomes a matter of sheer speculation").[30]

Third, CLF has failed to plausibly allege a sufficiently direct causal connection between the alleged harm and Defendants' challenged conduct. It is well-established that standing is not "'an ingenious academic exercise in the conceivable,'" in which a plaintiff may simply "'imagine circumstances in which he could be affected.'" *Katz* v. *Pershing, LLC*, 672 F.3d 64, 71–72 (1st Cir. 2012) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973)). But CLF attempts to predicate its claims on precisely such an act of imagination here. With regard to the non-climate change claims, CLF asserts that the Terminal is in violation of the PAH and TSS discharge limits of the Permit. But CLF does not even attempt to link those claimed violations to any injury suffered by CLF's members, such as diminished use of the Island End River. According to the Complaint, the lower reach of the Mystic River, which includes the Island End River, has been impaired since at least 2010 by numerous pollutants, such as the human pathogen "Fecal Coliform," which are not alleged to be connected to any discharge from the Terminal. (*Compare* Compl. ¶¶ 52–53, *with* Compl. ¶¶ 34–37.) The Complaint thus belies any suggestion that any CLF member would use the Island End River for recreation but for alleged and infrequent PAH and TSS discharges in excess of limits prescribed by the Permit.

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year flood" events refer to floods that have a "1 percent chance of [occurring] during a given year"); *see also supra* nn.6–8 and accompanying text.

[30] *See also Amigos Bravos* v. *U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1130 (D.N.M. 2011) (climate change risks in "years or decades" are too remote to qualify as imminent); *see also Center for Biological Diversity* v. *U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (claim that "significant adverse effects of climate change 'may' occur at some point in the future" does not satisfy imminence requirement).

The causal link between the purported injury to CLF members that may result from Defendants' supposed failure to account for the risks of climate change is also too attenuated to satisfy the requirements of Article III standing. *Clapper*, 133 S. Ct. at 1148. Plaintiff's fear of injury is premised on a chain of speculative and uncertain events: (i) that the sea level will rise by four or more feet, which the Complaint itself acknowledges as unlikely (*See* Compl. ¶ 93 (b)); (ii) that the rise in sea level (whenever it might occur) would necessarily inundate the Terminal; (iii) that the inundation would release an unspecified quantity of unidentified contaminants into the Island End River;[31] and (iv) that these contaminants would impair some CLF member of his or her use or enjoyment of New England's waterways. (Compl. ¶¶ 8–11, 81–88, 171–86.) "Given the multiple strands of speculation and surmise from which [this] hypothesis is woven," a finding of standing based on Plaintiff's alleged theory would stretch the doctrine "past its breaking point." *See Katz*, 672 F.3d at 80.

Fourth, issuance of declaratory relief, an injunction, or civil penalties would not necessarily put CLF's members in a position to use and enjoy the Island End and Mystic Rivers. To the contrary, relief pursuant to this action will have no impact on the impairment of these rivers by pollutants wholly unrelated to Terminal discharges. (Compl. ¶¶ 52–53.) And it would be the height of speculation to suppose that any interest CLF has in the affected areas would be protected from remote and distant potential risks of climate change by an order enjoining Defendants from "further violations of the Clean Water Act" (Compl. ¶ 295(b)), or an order requiring Defendants to explicitly consider speculative climate change effects when making operational decisions for the Terminal or when preparing a SWPPP or SPCC.

[31] CLF has offered no factual allegations to support its suggestion that inundation of the Terminal would produce a discharge of pollutants, much less that such discharges would impair its members' use or enjoyment of the affected areas.

Plaintiff thus has failed to satisfy each of the three prongs necessary to establish standing: (1) an actual or imminent injury that is concrete and particularized, (2) causation, and (3) redressability. CLF therefore is not the "proper party to invoke judicial resolution of the dispute." *FWB/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975)).

II. CLF's RCRA Claim Fails to Allege "Imminent and Substantial Endangerment"

Many of the defects that negate CLF's standing also foreclose CLF's RCRA claim on the merits. RCRA governs the treatment, storage, and disposal of solid and hazardous waste. *See* 42 U.S.C. § 6902(b). The statute's primary purpose is to reduce such waste and to ensure its proper treatment, storage, and disposal "so as to minimize the present and future threat to human health and the environment." *Id*. The Act authorizes "citizen suits when there is a reasonable prospect that a serious, *near-term* threat to human health or the environment exists." *Maine People's All. and Nat. Res. Def. Council* v. *Mallinckrodt, Inc.*, 471 F.3d 277, 279 (1st Cir. 2006) (emphasis added). Where, as here, a citizen brings suit under 42 U.S.C. § 6972(a)(1)(B), it must establish that the defendants' handling, storage, treatment, transportation, or disposal of solid or hazardous waste "may present an imminent and substantial endangerment to health or the environment." *Id.*

For much the same reason that the Complaint does not satisfy the imminent injury prong required for standing,[32] it fails to allege an "imminent and substantial endangerment to health or the environment" as required to plead RCRA liability. *Id.* "[A]n endangerment can only be 'imminent' if it 'threatens to occur immediately.'" *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 480 485–86 (1996) (explaining that RCRA does not authorize citizen suits to recover prior cost of

[32] *See supra* Part I.

cleaning up toxic waste where the waste does not continue to pose danger to health or environment); *Mallinckrodt*, 471 F.3d at 279 n.1 ("the threat . . . must be close at hand"). Latent risks do not support a finding of "imminent and substantial endangerment" where the endangerment is "'remote in time'" or "'speculative in nature.'" *Sanchez* v. *Esso Standard Oil de Puerto Rico, Inc.*, No. CIV 08-2151, 2010 WL 3809990, at *6 (D.P.R. Sept. 29, 2010) (quoting *Smith* v. *Potter*, 187 F. Supp. 2d 93, 98 (S.D.N.Y. 2001)); *see also H&H Holding, L.P.* v. *Chi Choui Lee*, No. 12–5433, 2014 WL 958878, at *5 (E.D. Pa. Mar. 6, 2014) (holding potential for migration of perchloroethylene ("PCE") into permeable bedding materials around local utilities was not imminent where there was no evidence that PCE was actually moving toward the utilities).

CLF's RCRA claim is premised on the Terminal's alleged failure to plan for the risks of climate change, such as sea level rise and storm surges, which CLF contends may ultimately impact the Terminal due to its elevation and location. (Compl. ¶¶ 174–183.) In pleading imminence, CLF offers only conclusory allegations that the threat of "significant storm surge" and "sea level rise" at the Terminal is imminent (Compl. ¶¶ 176–77), and therefore may cause the release of waste "into the Island End River, Mystic River, and directly onto the city streets of Everett" if the facility is flooded. (Compl. ¶ 183.) These threadbare allegations are apparently predicated on generalized predictions, forecasts, and projections about climate change, none of which are immediate or relate specifically to the potential effects of climate change on the Terminal, let alone any such effects during the five-year term of the Permit and SPCC.[33] (Compl. ¶¶ 93(a)–(b), 115.)

[33] CLF's RCRA claim appears to be based, at least in part, on the failure to address climate change in the Permit and SPCC. *See, e.g.*, Compl. ¶¶ 11, 79, 125, 153–61, 168–69, 178–83. *See infra* Parts III–IV (discussing reasons dismissal is required with respect to these claims).

The "purely theoretical possibility" that the Terminal may not be sufficiently equipped to handle purported climate change impacts that the Complaint predicts may happen decades from now (Compl. ¶ 93(e)) "simply does not rise to the level of a reasonably impending threat." *Katz*, 672 F.3d at 79. CLF has not alleged a "near-term threat" of storm surges or sea level rise. *Mallinckrodt*, 471 F.3d at 279. Nor has it even suggested that the Terminal is incapable of adequately preparing for these remote threats absent immediate action. CLF thus fails adequately to allege an imminent threat of harm requiring present action and it consequently has failed to state a RCRA claim. *See, e.g.*, *Price* v. *United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (holding that imminent and substantial endangerment requires some necessity for action to address the threat now).

III. CLF's CWA Climate Change Claims Must Be Dismissed

Although recast in various formulations, Claims 5–12 fundamentally assert a single claim: that Defendants failed to take account of climate change in administering the Terminal's SWPPP and SPCC. (Compl. ¶¶ 211–282.) As no authority supports CLF's efforts to style this grievance as a violation of the CWA, 33 U.S.C. § 1365, each of these claims must be dismissed.

The CWA "prohibits the discharge of any pollutant into navigable waters, unless authorized by a valid National Pollutant Discharge Elimination System (NPDES) permit." *Paolino* v. *JF Realty, LLC*, 710 F.3d 31, 34 (1st Cir. 2013) (internal citations omitted). For NPDES permit holders, "[c]ompliance with [the] permit . . . shall be deemed compliance" with the CWA. *See* 33 U.S.C. § 1342(k). While state and federal authorities have broad authority to bring CWA enforcement actions, *see* 33 U.S.C. §§ 1319, 1342(b)(7), "private citizens are given a *more limited* enforcement role," *Paolino*, 710 F.3d at 35 (emphasis added). Their role is confined to holding NPDES permit holders liable for failures to comply with the conditions of the permit. *Id.*; *see also EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200,

223 (1976) (holding that a CWA "suit against a permit holder" must "necessarily be brought" for a violation of "the conditions of an NPDES permit"). This limited role for private enforcement actions comports with the Supreme Court's admonition that "the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60–61 (1987).

Neither the Permit, which provides for the SWPPP, nor the CWA's regulations on SWPPPs and SPCCs impose any obligation to expressly consider or disclose potential climate change impacts at the Terminal, and the Complaint does not suggest otherwise. CLF's attempt to create such an obligation through an enforcement action therefore is not only contrary to the purpose and structure of the CWA, but also constitutes a prohibited collateral attack on the agency's permitting authority.

A. The Permit Shield Bars CLF's SWPPP-Related Climate Change Claims

The CWA's "permit shield" insulates NPDES permit holders from liability when they comply with the terms of their permits. *See* 33 U.S.C. § 1342(k); *S. Appalachian Mountain Stewards* v. *A&G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014). In other words, compliance with the terms of a NPDES permit is deemed to be compliance with the CWA itself. *See* 33 U.S.C. § 1342(k). The purpose of the shield is to "prevent permit holders from being forced to change their procedures due to changes in regulations, or to face enforcement actions over 'whether their permits are sufficiently strict.'" *A&G Coal Corp.*, 758 F.3d at 564 (quoting *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 n.28 (1977)). A citizen suit under the CWA thus may target only a permittee that "discharges pollutants in excess of the levels specified in the permit," or otherwise fails to comply with the permit's conditions. *Nat. Res. Def. Council, Inc.* v. *Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013). Here, the permit shield prevents CLF from attempting to impose an obligation on ExxonMobil to do more than

the Permit requires.

Yet, bringing an enforcement action to challenge whether the Terminal's Permit is sufficiently strict is precisely what CLF seeks to do here. None of CLF's Climate Change Claims allege that the Terminal "discharge[d] pollutants in excess of the levels specified in the permit." *Id*. Instead, CLF alleges that Defendants' supposedly improper interpretation of basic certification requirements, such as the duty to "certify that the SWPPP has been completed or updated and that it meets the requirements of the permit" (Compl. ¶ 220), constitutes failure to comply with the Permit. This type of allegation, which relies on strained readings of the unambiguous text of the Permit, seeks not to enforce the Permit, but to rewrite it. *See id.* at 1205–06.

Because CLF's conclusory pleadings fail to plausibly suggest that the Climate Change Claims involve discernible violations of terms actually contained in the Permit, the SWPPP-Related Climate Change Claims should be dismissed in their entirety.

B. CLF's Climate Change Claims Are Untimely

The time for legal review of the Permit has long passed. In order to challenge the EPA Administrator's actions, CLF was required to comment on the draft Permit during the public notice period. *See* 40 C.F.R. § 124.19(a). CLF failed to do so.[34] As such, CLF is jurisdictionally barred from challenging the terms of the Permit in Court. *See* 33 U.S.C. § 1369(b); 40 C.F.R. § 124.19(a); *Chesapeake Bay Found.* v. *Bethlehem Steel Corp*., 608 F. Supp. 440, 443 (D. Md. 1985) ("The obligations and limitations of NPDES permits are binding unless timely challenged, and may not be reexamined in an enforcement proceeding.").

Courts have found that *styling* claims as enforcement actions, as CLF has done here, is

[34] *See* Toal Ex. B. at 1.

insufficient to evade the statutory prohibition on time-barred review of an Administrator's actions. In *Conewango Creek*, for example, a complaint purported to challenge a NPDES permittee's compliance with the CWA when in actuality it was merely using this framework as a "veneer on the counts," which at bottom challenged the state agency's decision to issue the NPDES permit. *Defs. of Conewango Creek* v. *Echo Developers, LLC.*, No. CIV.A. 06-242 E, 2007 WL 3023927, at *7–9 (W.D. Pa. Oct. 12, 2007). The court dismissed the complaint for lack of subject matter jurisdiction on the ground that the plaintiff was required to challenge the state administrator's issuance of the permit in court within the time period permitted by law. *Id.*[35]

Although admittedly styled as an enforcement action, CLF's claims are in reality an objection to the Permit's failure to mandate consideration of speculative climate change risks. But the time for bringing such a challenge was during the comment period. CLF itself has acknowledged this constraint in prior briefing before this Court, stating: "EPA NPDES permit appeal regulations include an express waiver requirement, putting the public on fair notice of its obligation to raise issues directly with the agency or forego judicial review."[36] Nevertheless, when EPA issued the modified Permit at issue here, CLF declined to object or comment.[37] Having failed to act within the statutory review period, CLF may not do so now.

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[35] The Fourth Circuit reached a similar conclusion in the context of an analogous provision in the RCRA statute governing judicial review. *See* 42 U.S.C. § 6976. In *Palumbo*, the Fourth Circuit ruled that the district court should have dismissed a complaint for lack of subject matter jurisdiction because plaintiffs merely styled their challenges to the issuance of a RCRA permit as an enforcement action contesting the permit-holder's emissions. *See Palumbo* v. *Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993). In *Southern Union Co.*, the First Circuit similarly held that a defendant could not collaterally attack the EPA Administrator's actions in a criminal enforcement action well after the period for such judicial review had expired. *See United States* v. *S. Union Co.*, 630 F.3d 17, 27 (1st Cir. 2010), *overturned on other grounds*, 132 S. Ct. 2344 (2012) (reversing fine assessment).

[36] Mem. of Law in Opp. to Defs.' Mot. for Summ. J. & in Further Supp. of Pls.' Mot. for Summ. J. at 17, *Conservation Law Found.* v. *EPA*, No. 10-cv-11455-MLW (D. Mass. Nov. 30, 2012) (citations omitted).

[37] *See* Toal Ex. B at 1.

C. The Court Should Defer to EPA's View That the CWA Does Not Require SWPPPs or SPCCs to Consider Speculative Climate Change Impacts

CLF does not cite any authority to support its view that Defendants have any obligation under the CWA to consider potential climate change impacts in the context of the Terminal. All the while, administrative interpretations of the CWA make clear that speculative climate change considerations are not required to form part of a SWPPP or a SPCC.

The Complaint purports to find such obligations through (i) a strained reading of isolated phrases in the Permit's SWPPP section and invocation of identical phrases in EPA regulations describing SPCCs,[38] such as "good engineering practices" and "pollutant sources," (Compl. ¶¶ 68, 231, 237, 245 (citations omitted)); and (ii) a baseless interpretation of the Permit's general obligations, including, for example, the requirements that ExxonMobil (a) develop a SWPPP "designed to reduce, or prevent, the discharge of pollutants in storm water," (Compl. ¶ 212), and (b) "certify that the SWPPP has been completed or updated and that it meets the requirements of the permit," (Compl. ¶ 220). With these phrases, CLF struggles to invent a CWA obligation related to purported climate change risks that a plain reading of the language forecloses.

Phrases such as "good engineering practices" and "identify sources of pollution" are not unique to the circumstances at the Terminal. In addition to the SPCC regulations that expressly reference "good engineering practices," these phrases appear in near-identical form in other publicly available permits.[39] As such, by this lawsuit, CLF seeks not merely a ruling that Defendants' Permit and the SPCC regulations impose obligations related to speculative climate change impacts, but also—and notwithstanding that neither Congress nor EPA ever intended

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[38] Without support, CLF improperly describes the SPCC as part of the Permit. (Compl. ¶¶ 64, 273.) However, SPCCs are not actually part of a NPDES permit; rather they fall under a completely separate set of regulations. *Compare* 40 C.F.R. § 122.1(a) (governing NPDES permits), *with* 40 C.F.R. § 112.1(e) (governing SPCCs).

[39] *See supra* n.18.

such a result—that all NPDES permits and SPCCs adhere to this requirement.

Congress has entrusted EPA with the responsibility to make policy determinations concerning enforcement of the CWA, and EPA has refrained from requiring consideration of purported climate change impacts in NPDES permits and SPCCs as advocated by CLF. SWPPPs are governed by EPA's SWPPP Manual and the Multi-Sector General Permit for Stormwater Discharges Manual.[40] Neither source of guidance mentions climate change even in passing. Nor is climate change mentioned in the regulation governing SPCCs, *see* 40 C.F.R. Pt. 112, or any agency rule or guidance interpreting SPCC obligations.[41] If EPA had intended to require express consideration of the potential effects of climate change into SWPPPs or SPCCs, it surely knew how to do so.[42] EPA's decision not to require consideration of climate change in the context of SWPPPs and SPCCs, particularly when it has done so in other contexts, is entitled to deference. *See, e.g.*, *Molosky* v. *Wash. Mut., Inc.*, 664 F.3d 109, 118 (6th Cir. 2011) (Department of Housing and Urban Development).

Indeed, EPA does not require NPDES permitees to account for potential climate change impacts on their facilities as advocated by CLF because the agency has not yet determined a method by which this could or should be done.[43] Because NPDES permits are reevaluated at "regular intervals," when issuing a permit, EPA need only consider reasonably and currently available scientific information. *See Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 22, 24 (1st Cir. 2012) (rejecting challenge to effluent limitation in NPDES permit based on claim that EPA should have delayed authorization of permit to consider more advanced

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40 *See supra* n.14.

41 *See supra* n.15.

42 *See supra* nn.11–15.

43 *See supra* n.9.

scientific data in progress because the Act "requires reevaluation of the relevant factors, and allows for the tightening of discharge conditions" in "regular intervals").

Reading into the Permit or SPCC regulations a tacit obligation to consider climate change would amount to requiring Defendants retroactively to perform an analysis of speculative climate change risks for which even EPA lacks tools. This would contravene the basic purpose and structure of the CWA, which grants the agency Administrator authority to interpret the Act's requirements, *see* 33 U.S.C. §§ 1312, 1319(a)(1), 1342(a)(2), and guards against the use of citizen suits in a manner that is "potentially intrusive" on the agency's authority, *see Gwaltney*, 484 U.S. at 60–61.

Accepting CLF's position would not only contravene the CWA, but also would violate fundamental "fair warning" limits on the retroactive application of new interpretations of agency regulations. *See United States* v. *Hoyts Cinemas Corp.*, 380 F.3d 558, 573 (1st Cir. 2004). Due process demands some modicum of fair notice in enforcement actions such that "regulated parties should know what is required of them." *FCC* v. *Fox Television*, 132 S. Ct. 2307, 2317 (2012). These principles apply with full force in the context of a CWA enforcement action brought under a NPDES permit. *See, e.g.*, *Wis. Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 708–09 (7th Cir. 2013) (holding that defendant lacked notice that its NPDES permit was not valid in part because it could not infer this fact from the regulations).

The Court therefore should decline CLF's invitation to usurp EPA's role and deny all of Plaintiff's Climate Change Claims.

IV. This Court Lacks Subject Matter Jurisdiction Over CLF's SPCC Claim

Separate and apart from the defects discussed above, Claim 11—which alleges that the Terminal's SPCC fails adequately to consider potential climate change impacts (Compl. ¶¶ 250–273)—must be dismissed for lack of subject matter jurisdiction.

As an initial matter, SPCCs, which address oil spill prevention measures, are not incorporated into or governed by NPDES Permits issued pursuant to the CWA. Since a "suit against a permit holder" brought under the CWA must "necessarily be brought" for violations of "the conditions of an NPDES permit," claims concerning SPCCs, which bear no relation to NPDES permits, fall outside of the subject matter authorized by the CWA's citizen suit provision. *See State Water Res. Control Bd.*, 426 U.S. at 223 (analyzing 33 U.S.C. § 1365(f)(6)).

Citizen suits under the CWA are limited and a private citizen can only bring an action "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator . . . with respect to such a standard or limitation." 33 U.S.C. § 1365(a); *see EPA ex rel. McKeown* v. *Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173, 188 (S.D.N.Y. 2001). In 33 U.S.C. § 1365(f), the statute enumerates the "specific and limited types of violations" that qualify as an "effluent standard or limitation." *See Atchafalaya Basinkeeper* v. *Chustz*, 682 F.3d 356, 358 (5th Cir. 2012); *accord Askins* v. *Ohio Dep't of Agric.*, 809 F.3d 868, 875 (6th Cir. 2016). None of the violations listed relate to SPCCs, which address oil spill prevention measures, not effluent limits or standards on the discharge of water pollutants. Further, Section 1321 is the only section of the CWA that governs oil spills. *See* 33 U.S.C. § 1321. But that section does not authorize citizen suits. *See Chesapeake Bay Found., Inc.* v. *Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619 (D. Md. 2011) (granting motion to dismiss CWA claim based on § 1321).

This Court thus lacks subject matter jurisdiction to assess the merits of any CLF claim premised on Defendants' alleged failure to prepare an adequate SPCC or to comply with SPCC regulations. Such claims land outside the scope of a valid CWA citizen suit.

V. CLF's Non-Climate Change Claims Also Fail as a Matter of Law

The Non-Climate Change Claims suffer from equally fatal defects. Claims 2–4 are

barred by the NPDES permit shield defense and constitute impermissible collateral attacks on the Permit. Claims 3 and 13 require dismissal because they are premised on allegations of wholly past violations, which are not properly asserted in CWA citizen suits. And Claim 14 fails because CLF does not, and cannot, plead that the Terminal discharges pollutants into the half-moon shaped pond, which, in any event, is not a navigable water of the United States.

A. The Permit Shield and Collateral Attack Doctrines Bar Claims 2–4

Mischaracterizing the Permit's requirements, CLF attempts to bypass the bar placed on its claims by the permit shield and collateral attack doctrines. Compliance with the express terms of a NPDES permit satisfies the obligations of the permit holder under the CWA, such that the permittee cannot be liable for discharges in accordance with the permit. *See, e.g.*, *Coon* v. *Willet Diary, LP*, 536 F. 3d 171, 173 (2d Cir. 2008). And, to the extent CLF is attempting to impose obligations different from those contained in the Permit, it may not collaterally attack the Permit now because it failed to challenge the Permit during the public comment period.[44]

1. Claims 2–3 Are Premised on a Misinterpretation of the Permit's Requirements

Claims 2 and 3 are premised on alleged violations of a requirement contained nowhere in the Permit itself. As a part of Claims 2 and 3, CLF contends that (i) "[c]ontrary to the express terms of the Permit, discharges from Outfall 01A frequently occur even when Outfall 01C has not reached its 280 [gpm] capacity," (ii) a CWA violation exists on each day that this occurs (Claim 2), and (iii) each pollutant discharged on each of those days (regardless of concentration) constitutes a distinct CWA violation (Claim 3). (Compl. ¶¶ 194–97, 204.)

The July 8, 2016 Notice of Intent ("NOI") attached to the Complaint[45] demonstrates in

[44] *See supra* Part III.B.

[45] The NOI is a mandatory prerequisite to filing a lawsuit under the CWA. *See* 33 U.S.C. § 1365(b)(1)(A).

detail that CLF's claims are based on a misinterpretation of the Permit. CLF contends that the Permit prohibits ExxonMobil from discharging water from Outfall 01A unless Outfall 01C discharges at its maximum 280-gallon capacity for every minute of every hour, all day long. Under this theory, the Terminal must discharge 403,200 gallons of water each day (280 gpm x 1,440 minutes in a day) through Outfall 01C *before* it may discharge any water through Outfall 01A.[46] No such prohibition exists. The Terminal may discharge water through Outfall 01A whenever Outfall 01C is required to treat and process water at a rate higher than 280 gallons per *minute*. CLF pleads no facts suggesting that ExxonMobil failed to comply with this requirement.

In Claim 3, CLF also alleges that ExxonMobil has on at least 164 occasions since 2010 discharged pollutants in amounts exceeding the maximum allowable levels set by the numeric effluent limits in the Permit. (Compl. ¶ 201.) The NOI demonstrates that nearly all of the alleged effluent limit violations relied upon by CLF involve PAH discharges.[47] These discharges exceed the Permit's daily maximum limits for PAHs, but comply with the Permit's PAH compliance limits.[48] CLF's claim disregards that the daily maximum limits are expressly modified in the Permit by the compliance limits.[49] Instead, CLF contends that the compliance limits "merely explain[] how EPA will exercise its own enforcement discretion."[50] Even if CLF's interpretation of the Permit were correct, which it is not, CLF could have challenged EPA's decision to enforce the compliance limits over the daily maximum limits during the public

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[46] *See* Compl. Ex. A (July 8, 2016 NOI) at 15; Ex. A at Ex. 1 (calculating "[u]nused [d]aily [c]apacity at Outfall 01C" as the difference between the amount discharged and 403,200 gpd).

[47] *See* Compl. Ex. A (July 8, 2016 NOI) at 15, Ex. 3.

[48] *Compare* Compl. Ex. A (July 8, 2016 NOI) at Ex. 3, *with* Toal Ex. A at 3–4 & nn.7–10.

[49] *See* Toal Ex. A at Part I.A.2 & n. 7; Part I.A.4 & nn.9–10.

[50] *See* Compl. Ex. A (July 8, 2016 NOI) at 15.

comment process. Having failed to do so then, it cannot challenge the Permit's PAH compliance limits now.[51]

Claims 2 and 3 therefore require dismissal.

2. Claim 4 Is Premised on a Misapplication of the State's Water Quality Standards

CLF's allegation that 26 PAH discharges exceeded the applicable State Water Quality Standards (the "WQS"), (Compl. Ex. A (July 8, 2016 NOI) at Ex. 2), is premised on an inaccurate and overzealous interpretation of the WQS and the Permit's numeric compliance limits. *First*, neither the WQS nor the Permit prohibits the discharges themselves from exceeding the WQS. *See Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 14 (distinguishing state water quality standards, which "specify the amounts of pollutants that may be present in these water bodies without impairing their designated uses" from "federal, technology-based effluent limitations on individual discharges of pollution into navigable waters"). Rather, the WQS require that the discharges, once released and diluted by the receiving water, not cause the *receiving water* to be polluted at levels above the WQS. *See* 40 C.F.R. § 122.44(d). *Second*, the Terminal need only comply with the PAH numeric compliance limits established *by the Permit* because the Permit's limits already factor in the WQS of the receiving water. 40 C.F.R. § 122.44(d)(1)(vii). There is no requirement that the effluent limits applicable to Terminal discharges be the same as those that apply to wide swaths of receiving waters. *See* 314 C.M.R. 4.05(e).

The Permit authorizes the Terminal to discharge PAHs at a higher level than the PAH limits prescribed by the WQS so long as, through dilution, the PAH concentrations in the

[51] *See supra* Part III.B.

receiving water do not exceed the limits prescribed by the WQS. *See Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 33 (rejecting CLF's challenge that a numeric limit set by EPA in a NPDES permit was not sufficiently stringent). Indeed, the Massachusetts Integrated Lists of Waters, upon which CLF relies in the Complaint, confirm that the Island End and Mystic Rivers are not impaired by PAHs. (Compl. ¶¶ 52–53.)

In short, Claims 2, 3, and 4 all attempt to impose upon ExxonMobil stricter requirements than those contained in the Permit. This constitutes an impermissible collateral attack on the Permit and is precluded by the permit shield.[52]

B. This Court Lacks Jurisdiction Over Wholly Past Violations

Claims 3 and 13 must be dismissed because CLF has not plausibly alleged ongoing violations of the CWA. Citizen suits under the CWA may be brought only for an *ongoing* violation at the time of suit. *See U.S. Pub. Interest Research Grp.* v. *Atl. Salmon of Maine, LLC*, 339 F.3d 23, 33 (1st Cir. 2003). CLF therefore must offer plausible factual allegations of ongoing CWA violations. *See Twombly*, 550 U.S. at 557.

Claim 3 alleges CWA violations based on alleged discharges in excess of the Permit's numeric limits for TSS and PAHs. (Compl. ¶ 202.) Because CLF erroneously interprets the applicable PAH effluent limits in the Permit,[53] only the two remaining alleged historical exceedances for TSS in 2010 and 2014 require consideration. ExxonMobil's "self-reported" data—incorporated into the Complaint by reference and which CLF uses to craft a list of alleged discharges that it attaches to the Complaint—reflects two TSS samples tested on May 17, 2014.[54]

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[52] Claims 2–4 must also be dismissed as to all alleged violations that occurred prior to July 31, 2011. This is because a five-year statute of limitations applies to CWA claims. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 451 F.3d 77, 88 n.14 (2d Cir. 2006).

[53] *See* discussion of claim 3 in *supra* Part V.A.1.

[54] *See* Toal Ex. D at 6–7 of 17 (cited in Compl. Ex. A (July 8, 2016 NOI) at 15).

The first sample recorded a TSS measurement of 127 mg/L; the second sample recorded a TSS measurement of 49.2 mg/L.[55] But the list created by CLF ignores the 49.2 mg/L TSS sample taken on May 17, 2014.[56] CLF relies exclusively on the 127 mg/L test result,[57] failing to average the two samples together, as required by 40 C.F.R. 122.2.[58] Had CLF correctly applied the federal regulations, it would have concluded, in the same vein as ExxonMobil did in its "self-reported" data, that the two samples from May 17, 2014 "yielding the reported value of 88.1 mg/L," below the daily maximum limit of 100 mg/L TSS set by the Permit.[59] Thus, the only actual alleged TSS exceedance occurred in 2010, a singular, wholly past violation that purportedly occurred during the term of the Terminal's prior NPDES permit.[60] "A ceased improper discharge does not 'continue.'" *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1092 (1st Cir. 1986) (barring a citizen suit based on allegations consisting entirely of past conduct and noting that defendants could not continue to violate the CWA permit in the future because the defendant had ceased operating under the permit).[61]

Claim 13 fares no better. CLF alleges only that (a) there have been "four instances in which discharges associated with the Terminal and/or Sprague Energy facility were reported"; (b) the incidents occurred in 2011, 2014, and 2015; and (c) the incidents "resulted in a discharge that reached the water, identified as the Mystic River and/or Island End River," and supposedly

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55 *Id.*

56 Compl. Ex. A (July 8, 2016 NOI) at Ex. 3.

57 *Id.*

58 40 C.F.R. § 122.2 ("For pollutants with limitations expressed in . . . units of measurement [other than mass], the 'daily discharge' is calculated as the average measurement of the pollutant over the day.").

59 *See* Toal Ex. D at 1.

60 *See supra* n. 3.

61 *See also Hamker* v. *Diamond Shamrock Chemical Corp.*, 756 F.2d 392, 398 (5th Cir. 1985) (allegation of a single, past violation was insufficient to state an ongoing violation of the CWA).

caused visible oil sheens, foam, or floating solids to appear on the water. (Compl. ¶ 285.) The Complaint identifies ExxonMobil as the source of only one of four incidents. (Compl. Ex. B. Ex. 4.) Sprague, an entirely separate corporate entity, is identified as the source of two of the remaining incidents. (*Id.*) Even if the source of the remaining incident, which is listed as "unknown," were attributed to ExxonMobil, Defendants would only have caused an oil sheen twice, once each in October 2011 and October 2015. These events do not constitute an ongoing violation of the CWA. *See U.S. Pub. Interest Research Grp.*, 339 F.3d at 33.

Moreover, CLF fails specifically to allege that any of Defendants were responsible for these alleged discharges, claiming only that the discharges were "*associated with* the ExxonMobil Everett Terminal and/or the Sprague Energy Facility." (Compl. ¶ 285 (emphasis added).) Conclusory allegations of association fail to plausibly allege conduct by any Defendant that supposedly caused the alleged violations referenced in Claim 13. *See Twombly*, 550 U.S. at 557.

C. CLF Fails to Plausibly Allege That the Half-Moon Shaped Pond Is a Navigable Water or That the Terminal Discharges Pollutants into It

In an attempt to plead yet another violation of the CWA, CLF alleges that the half-moon shaped pond is a "navigable water[]" and "water[] of the United States" and, therefore, "ExxonMobil's discharges of pollutants into [the pond] are unpermitted" and violate the CWA. (Compl. ¶¶ 289, 294.) But the "man-made" pond, (Compl. ¶ 289), is not a navigable water, as defined in 33 U.S.C. §1362(7), and therefore is not governed by the Permit. *See Vill. of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 964–65 (7th Cir. 1994) (deciding that an "artificial pond" is not a "water[] of the United States"). CLF also fails to plausibly allege that any pollutants from the Terminal, including from Outfalls 01A, 01B, and 01C, discharge into the pond from a point source, which is the only kind of discharge governed by the Permit.

See Hamker, 756 F.2d at 397 (quoting 33 U.S.C. § 1362(14)) (affirming the grant of a motion to dismiss a CWA citizen suit that failed to allege a continuing addition to the groundwater from a discernible point source).

CLF even fails to plausibly allege that there are actual discharges into the pond. To the contrary, EPA observed that "[a] small body of water known as the [Former] Effluent Pond . . . currently serves no purpose," but "collect[s] groundwater and rainwater."[62]

Claim 14 requires dismissal because the Terminal does not make any unpermitted discharges into this man-made pond and, in any event, the pond does not constitute a navigable water of the United States.

CONCLUSION

In this case, CLF improperly attempts to employ a RCRA and CWA action to require all EPA-issued NPDES permits, SWPPPs, and SPCCs to take climate change into account, and to target ExxonMobil for the federal government's alleged inaction regarding climate change. This Court should not allow CLF to advance that political agenda here under the guise of an enforcement action.[63] For the reasons set forth above, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

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[62] Toal Ex. C (incorporated by reference in Compl. ¶ 36) at 12 of 26.

[63] Defendants reserve their right to move to strike CLF's jury demand. The jury demand is improper because CLF's civil penalty claims are inextricably intertwined with its requests for injunctive and declaratory relief, and therefore those claims are primarily equitable in nature. *See Sanchez* v. *Esso Standard Oil De Puerto Rico, Inc.*, No. 08-2151 (JAF), 2010 WL 3087485, at *2 n.2, *4 (D.P.R. Aug. 5, 2010) (granting motion to strike jury demand on these grounds in a RCRA lawsuit).

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CERTIFICATE OF SERVICE

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), this document was filed through the ECF system on December 6, 2016 and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
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