UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, Defendant.	Civil Action No. 11-353-JL

PLAINTIFF CONSERVATION LAW FOUNDATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION TO DISMISS FOR LACK OF STANDING

Plaintiff Conservation Law Foundation ("CLF") submits this memorandum of law in opposition to Defendant Public Service Company of New Hampshire's ("PSNH") Motion to Dismiss for Lack of Standing (Doc. #14, hereinafter, the "Standing Motion"), as accompanied by a memorandum of law (Doc. #14-1, hereinafter, the "Standing Memo.").

INTRODUCTION AND BACKGROUND

Section 304 of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7604, provides jurisdiction for federal district courts to hear cases brought by citizens to enforce CAA requirements, especially when government regulators have failed to do so. As established in the CAA and in parallel provisions of other statutes, citizen suits are a vital part of modern environmental law and have proved effective in holding polluters accountable, catalyzing needed regulatory action and securing environmental improvements.[1]

[1] *See, e.g.*, *Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 536 (2d Cir. 2004) ("[C]itizen suits play an important role in the Act's enforcement scheme."); *Baughman v.*

In this lawsuit, CLF alleges that PSNH repeatedly failed to comply with the CAA and New Hampshire's federally enforceable air regulations, including one fundamental permitting requirement on at least five separate occasions, at Merrimack Station, PSNH's coal-fired power plant in Bow, New Hampshire. Merrimack Station is an outdated, inefficient facility that ranks among the top polluters in New Hampshire. PSNH's violations increased air pollutant emissions from the facility, including pollutants like particulate matter for which there is no level of exposure that regulators recognize as safe for human health.[2] As a result, PSNH illegally polluted the air throughout New England and in New Hampshire in particular, harming CLF members and damaging public health and the environment. Most of the alleged violations are continuing today; as to the other violations, PSNH's track record of repeatedly ignoring applicable regulatory requirements suggests there is substantial risk that PSNH will commit the same violations in the future.[3]

Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979) (citizen suits "both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remain[] inert, . . . provide an alternate enforcement mechanism"); *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976) ("In enacting [section 304], Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests . . . . [T]he very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals."); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 193 (1992) ("With a number of devices, including the citizen suit, Congress hoped to overcome administrative laxity and unenthusiasm, and also to counteract the relatively weak political influence of beneficiaries.").

[2] *See, e.g.*, EPA, Integrated Science Assessment for Particulate Matter, § 2.3.4, at 2-24 to -25 (2009), *available at* http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=494959.

[3] Counts I, III, and V of the Complaint allege continuing violations of PSNH's federally enforceable obligation to hold state operating permits reflecting the turbine-related and activated carbon and sorbent injection projects undertaken at Merrimack Station between 2006 and 2009. These violations repeat each day PSNH operates Merrimack Station without the required permits. The first six counts of the Complaint also allege repeated violations of preconstruction permitting requirements applicable to those projects, and the seventh count of the Complaint

Our lawsuit seeks primarily to prevent PSNH from evading the required regulatory review of projects it has constructed—replacing a turbine and related work in 2008, making further modifications to that turbine over the course of a multi-month shut down in 2009, and installing and operating activated carbon and sorbent injection equipment—all without the required preconstruction permits. Indeed, PSNH has ignored and violated the very same preconstruction permitting requirement repeatedly, and as a result, avoided the obligation to implement the comprehensive emission controls required by federal law to protect public health and the environment. The regulatory process that PSNH has sidestepped—preconstruction review, including New Source Review ("NSR")—lies at the very heart of the CAA.[4]

CLF is a member-supported environmental advocacy organization dedicated to protecting New England's environment, with a substantial number of members in New Hampshire and elsewhere that are affected by pollution from Merrimack Station. We have a long history of bringing citizen suits to remedy environmental degradation through enforcement of the CAA and other environmental statutes.[5]

---

alleges repeated violations of permit requirements applicable to pollution control equipment at Merrimack Station known as electrostatic precipitators.

[4] *See* CLF's Memorandum of Law in Opposition to PSNH's Motion to Dismiss Pursuant to Rule 12(b)(6) ("CLF Rule 12(b)(6) Memo.") at 1-2, 4-6, 14-15. *See, e.g.*, *United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) (CAA grandfathers older facilities on expectation of major retrofit with new pollution controls imposed through New Source Review or retirement) (citing *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909-10 (7th Cir. 1990)); *see also Ala. Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979); *Sierra Club v. Dairyland Power Coop.*, No. 10-cv-303, 2010 WL 4294622, *14 (W.D. Wis. Oct. 22, 2010); *United States v. Westvaco Corp.*, 675 F. Supp. 2d 524, 526 (D. Md. 2009) (same).

[5] *See, e.g.*, *Conservation Law Found. v. Franklin*, 989 F.2d 54 (1st Cir. 1993); *Conservation Law Found. v. Sec'y of Interior*, 790 F.2d 965 (1st Cir. 1986); *Conservation Law Found. v. Teiner*, No. 1:10-cv-11654 (D. Mass. Sept. 12, 2011) (unreported default judgment); *Conservation Law Found. v. Patrick*, 767 F. Supp. 2d 244 (D. Mass. 2011); *Conservation Law Found. v. Reilly*, 755 F. Supp. 475 (D. Mass. 1991); *Conservation Law Found. v. Fall River*, No. 87-3067N, 1990 WL 106751 (D. Mass. July 24, 1990); *United States v. Metro. Dist. Comm'n*, No. 85-0498-MA, 1985 WL 9071 (D. Mass. Sept. 5, 1985), *aff'd* 930 F.2d 132 (1st Cir. 1991);

Contrary to PSNH's claims, CLF's standing to bring this case is not a close question. As the facts and law set forth here show, CLF has standing to sue to seek redress of PSNH's violations of the CAA. CLF has more than satisfied the standing requirements of Article III by demonstrating that its members have been injured by PSNH's unlawful acts, and that those injuries would likely be redressed by the injunctive relief and penalties that CLF seeks and this Court can grant.

PSNH's motion is merely the latest in a series of meritless efforts to insulate its noncompliance from scrutiny. Indeed, there is no better argument for this Court's essential role in enforcing the CAA than PSNH's success in avoiding responsibility for its violations of the CAA to date. The Court should deny PSNH's motion.

STANDARD OF REVIEW

When reviewing a Rule 12(b)(1) motion to dismiss on standing grounds, a court must accept all material facts asserted in the complaint as true and construe them in the light most favorable to the plaintiff. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir. 1996) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Moreover, the court "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 104 (1998) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)); *see also Citizens for Squirrel Point v. Squirrel Point Assocs.*, No. 03-193-P-H, 2003 WL 22867620, *2 (D. Me. Dec. 4, 2003) ("While defendants may prefer highly detailed factual allegations, a generalized statement of facts is adequate so long as it gives the defendant sufficient notice to file a responsive pleading"

Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass. 1983), *aff'd sub nom Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983); *see also Conservation Law Found. v. Fed. Highway Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007) (challenge to government environmental review of highway project).

(quoting *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 72 (1st Cir. 2000)).). To respond to a standing challenge, the court may allow the plaintiff "to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Warth*, 422 U.S. at 501.

ARGUMENT

Under Article III of the United States Constitution, a plaintiff has standing if it "has suffered or is threatened by injury in fact to a cognizable interest, that the injury is causally connected to the defendant's action, and that it can be abated by a remedy the court is competent to give." *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 55 (1st Cir. 2001). *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) ("*Laidlaw*"). Even "[a] reasonable claim of minimal impact is enough for standing." *Save Our Heritage, Inc.*, 269 F.3d at 56. For CLF to bring a suit on behalf of its members, it must show: "(i) that individual members would have standing to sue in their own right; (ii) that the interests at stake are related to the organization's core purposes; and (iii) that both the asserted claim and the requested relief can be adjudicated without the participation of individual members as named plaintiffs." *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (citing *Laidlaw*, 528 U.S. at 181).

It is beyond dispute that the latter two requirements of organizational standing are satisfied. The interests CLF seeks to vindicate in this litigation are central to CLF's mission as an environmental advocacy organization that seeks to protect public health and New England's environment. *See* Declaration of Timothy Harwood, dated Nov. 9, 2011, at ¶¶ 1, 3, 6-7, attached hereto as **Exhibit 1** (hereinafter, "Harwood Decl."). The requested relief—injunctive relief and civil penalties to redress our members' health-related, recreational, aesthetic, and procedural

injuries from PSNH's unlawful conduct—does not require the participation of individual members as named parties because CLF is seeking remedies that apply to all of its affected members rather than remedies that are uniquely applicable to particular members. *See St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., LLC*, 354 F. Supp. 2d 697, 701 (E.D. La. 2005) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977)).[6]

The first requirement of organizational standing—that certain of our members would have standing to sue PSNH as individuals under Article III—is satisfied as well. As the constitutional test requires, (i) certain CLF members have experienced or been threatened with concrete, specific injuries, (ii) those injuries are traceable to each of the alleged unlawful acts set forth in CLF's complaint against PSNH, and (iii) the relief CLF seeks would redress members' injuries.

I. CLF HAS ALLEGED THAT ITS MEMBERS HAVE BEEN AND WILL CONTINUE TO BE INJURED BY PSNH'S VIOLATIONS OF THE CAA AND NEW HAMPSHIRE REGULATIONS.

CLF's allegations of injury are clear:

- PSNH violated the CAA and federally enforceable New Hampshire regulations by (1) constructing unpermitted modifications to Merrimack Station Unit 2 in 2008 and 2009, including replacement and repair of a turbine and related work (Counts I-IV of the Complaint); (2) constructing and operating, without permits, activated carbon and sorbent injection equipment (the "ACI Equipment") (Counts V and VI of the

[6] *See also Citizens for Squirrel Point*, 2003 WL 22867620, at *4 (absence of individual members from suit would only be called into question if individual monetary relief was requested); *contrast Police Officers' Fed'n of Minneapolis v. City of Minneapolis*, No. Civ. 99-1048DWF/AJB, 2001 WL 856021, *3 (D. Minn. July 27, 2001) ("severe conflict of interest" between minority and non-minority federation members precluded organizational standing).

Complaint); and (3) violating the terms of its air permits for Merrimack Station's electrostatic precipitators ("ESPs") (Count VII of the Complaint).

- Each set of these violations resulted or will result in increased emissions of pollutants from Merrimack Station, including but not limited to nitrogen oxides, sulfur dioxide, and particulate matter. *See* Compl. at ¶ 6 (describing pollutants emitted from Merrimack Station operations). For example, it is well understood that modifications such as PSNH's replacement of Unit 2's turbine increase efficiency and lower PSNH's costs of production (and PSNH has admitted as much, *see* Compl., Ex. A-9, at 17, lines 1-22), with the result that PSNH will more frequently operate Unit 2 to sell power into the wholesale market. *See* Compl., Ex. A-14 (New Hampshire Department of Environmental Services staff email) ("[S]ome facilities have made changes that increase plant efficiency, extend boiler life, or reduce the amount of outages needed. While this may result in decreases (or at least no increase) in the hourly emission rate, these changes often allow the plant to run many more hours per year, ultimately increasing emissions on an annual basis, sometimes by hundreds or thousands of tons per year."); Declaration of Mr. Kenneth E. Traum, dated November 7, 2011, at ¶¶ 14-15, attached hereto as **Exhibit 2**.[7]

- The increased pollutant emissions resulting from PSNH's unlawful actions degrade air quality and have well-established adverse impacts on public health and the environment. *See* Compl. at ¶ 7; *see also* Compl., Ex. A, at 2 n.1 (quoting *United*

[7] Mr. Traum is an energy consultant who recently concluded 21 years of service at the New Hampshire Office of Consumer Advocate representing the interests of residential ratepayers in ratemaking cases before the New Hampshire Public Utilities Commission. We offer Mr. Traum's declaration as a supplement to this memorandum to explain how PSNH's lowered costs results in additional utilization of, and increased emissions from, Merrimack Station, causing harm to CLF members. *See also* CLF 12(b)(6) Memo. at Section I.B.

States v. Cinergy Corp., 618 F. Supp. 2d 942, 949-51 (S.D. Ind. 2009), *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010)) As another district court has explained:

> There is no dispute that SO_2 and NO_x emissions contribute to the formation in the atmosphere of secondary particulate matter that is 2.5 microns in diameter or smaller ("PM2.5"), which is called secondary PM2.5. Specifically, once emitted, SO_2 can form sulfates, which is a constituent of secondary PM2.5. Once emitted, NO_x can form nitrates, which is another constituent of secondary PM2.5 . . . . Secondary PM2.5 represents the majority of PM2.5 in the United States. Secondary PM2.5 can form over hundreds of miles, and it can travel thousands of miles downwind from where it forms. Because of its size, PM2.5 is "considered respirable." Once inhaled, PM2.5 lodges deep in the human lung. Because the sulfate particles tend to combine with metals in the atmosphere, the PM2.5 that contains sulfates are particularly toxic. [T]he scientific consensus is that PM2.5 is harmful to human health. Particulate matter, like PM2.5, cause the following health impacts: decreased lung function, increased prevalence of respiratory symptoms, worsened respiratory infections, heart attacks, and the risk of early death. The effect on life expectancy and heart attack rates is both acute and chronic. These views are held by the following groups in the scientific community: the American Medical Association; EPA's Clean Air Science Advisory Committee ("CASAC"); the American Academy of Pediatrics; the American College of Cardiology; the American Heart Association; the American Thoracic Society; the American Cancer Society; the American Public Health Association; and the National Association of Local Boards of Health . . . .

United States v. Cinergy Corp., 618 F. Supp. 2d at 949-51 (citations omitted). *See also* EPA, Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards, at 2-17 to -24, 2-27 to -31, Table 2-1 (Apr. 2011) *available at* http://www.epa.gov/ttnnaaqs/standards/pm/data/20110419pmpafinal.pdf (showing direct causal relationship between short-term and long-term exposure to PM and mortality, cardiovascular effects, asthma, bronchitis, low birth weights, and decreased lung development and function); Declaration of Kenneth Colburn, dated Nov. 8, 2011, at ¶¶ 5, 7, attached hereto as **Exhibit 3** (hereinafter, "Colburn Decl.").

- Merrimack Station's emissions are dispersed widely throughout New England, exposing a large population to increased risk, with air quality modeling predicting maximum pollutant concentrations as far away as 20 kilometers of Merrimack Station and presumptively significant impacts within a 50 kilometer radius of the facility. *Id.* at ¶ 8.
- Thus, PSNH's violations have harmed and will continue to harm CLF members, including our approximately 363 members living in New Hampshire, 132 members living within the area of presumptively significant impacts from Merrimack Station, and thirty-nine members living within the area in which air quality modeling predicted maximum pollutant concentration impacts, by subjecting them to adverse health effects and risks and by interfering with their use and enjoyment of their property and the surrounding areas.[8] *See* Harwood Decl. at ¶¶ 3-5; Colburn Decl. at ¶¶ 7-8.

---

[8] Specifically, the Complaint states:

> CLF sues on behalf of itself, its individual members who live in the vicinity of and downwind of the plant, and on behalf of its membership generally. CLF members have suffered, and will continue to suffer, actual and threatened injury to their health and welfare due to the violations . . . . CLF members are exposed to, and threatened with exposure to, particles and other pollution from Merrimack Station. As a result, CLF members suffer from, and are at increased risk of, a variety of adverse health effects from air pollution, including particulate matter, that are attributable to Merrimack Station. . . . *The acts and omissions alleged herein expose CLF members to harmful pollution that threatens their health and welfare, interferes with their use and enjoyment of property and the surrounding areas, denies them protection of their health and well-being guaranteed by the CAA, [New Hampshire air quality regulations], and permits issued under these authorities, and negatively impacts their aesthetic and recreational interests*.

CLF's members' injuries are cognizable injuries-in-fact for standing purposes because they are "actual," "concrete," and "particularized." *See Laidlaw*, 528 U.S. at 180. The First Circuit has specifically recognized that the increased risk of adverse health effects from pollution is a sufficient injury for standing purposes. *See Me. People's Alliance*, 471 F.3d at 283-84 ("probabilistic harms are legally cognizable, and . . . a sufficient probability of harm exists to satisfy the Article III standing inquiry"). Courts uniformly hold that exposure to pollution resulting from a defendant's actions, even diffuse air pollution that is additive of emissions from other sources, constitutes a concrete and particularized injury. *See, e.g.*, *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) (likelihood of exposure to additional emissions with adverse, uncertain health effects, even if not violative of air quality standards, qualifies as injury-in-fact for standing purposes); *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (same); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("[E]vidence of a credible threat to the plaintiff's physical well being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing."); *Nw. Envtl. Def. Ctr. v. Owens Corning Corp*., 434 F. Supp. 2d 957, 965 (D. Or. 2006) ("The challenged emissions source is local. . . . Members of the Plaintiff organizations reside, work, and recreate near the . . . facility. Assuming the truth of the allegations in the Complaint, as I must on a motion to

---

Compl. at ¶¶ 17, 19 (emphasis added). CLF further alleges that, "where permitting requirements are not followed, CLF members have been deprived of the opportunity to review and comment publicly on the full range of project impacts that will affect their interests." Compl. at ¶ 18. CLF was under no obligation to identify injured members by name in the Complaint. *See Bldg. & Const. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("[T]he defendants cite to no authority—nor are we aware of any—that supports the proposition that an association must 'name names' in a complaint in order properly to allege injury in fact to its members."); *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 711 F. Supp. 2d 1152, 1164 (E.D. Cal. 2010) ("[I]t is not necessary to identify specific names of members at the pleading stage."); *cf. Steel Co.*, 523 U.S. at 104 (general allegations of fact in complaint presumed to encompass specific facts).

dismiss, those individuals would suffer some direct impact from emissions entering into the atmosphere from Defendant's facility, as would the local ecosystem with which these individuals constantly interact.").[9] Indeed, it would be irrational if harm from air pollution, which affects many people over a broad area, was an insufficient injury to establish the standing of an injured individual to seek redress of that harm. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("[A]lleging an injury-in-fact covering large areas within the state simply reflects the relatively broad nature of the potential harm."); *Citizens for Squirrel Point*, 2003 WL 22867620, at *3 (injury "must be personal to the plaintiff but may be shared by many others").

II. CLF MEMBERS' INJURIES WERE CAUSED BY PSNH'S ACTIONS.

CLF's Complaint alleges that each of PSNH's modifications and violations described above resulted in increased pollutant emissions and that CLF's members have been or are threatened with being exposed to those emissions. Where, as here, a defendant emits pollutants that cause or contribute to a plaintiff's alleged injuries, traceability is sufficiently established for standing. *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (requirement of traceability not one of scientific certainty that defendant's emissions caused plaintiff's precise harm, but that defendant discharges pollutant that causes or contributes to

---

[9] Likewise, as alleged in the Complaint, it is "entirely reasonable" that increased and inadequately controlled pollutant emissions from Merrimack Station would interfere with CLF members' recreational use and aesthetic experience of the outdoors, including through the pollution's contribution to ozone, smog, and acid rain. *Laidlaw*, 528 U.S. at 184-85. This interference is an additional, cognizable injury for standing purposes. *See id.* ("[W]e see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."); *Me. People's Alliance*, 471 F.3d at 284 (recreational and aesthetic injuries sufficient to establish standing) (citing *Laidlaw*, 528 U.S. at 184); *P.R. Campers' Ass'n v. P.R. Aqueduct & Sewer Auth.*, 219 F. Supp. 2d 201, 209-12 (D.P.R. 2002) (same); *U.S. Pub. Interest Research Group v. Heritage Salmon, Inc.*, No. Civ. 00-150-B-C, 2001 WL 987441, *7-*8 (D. Me. Aug. 28, 2001) (same).

kinds of injuries alleged in specific geographic area of concern); *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 672 (E.D. La. 2010) (plaintiff "may satisfy the traceability requirement by presenting only circumstantial evidence that a 'pollutant causes *or contributes* to the kinds of injuries alleged'" (emphasis in original)); *St. Bernard Citizens for Envtl. Quality, Inc.*, 354 F. Supp. 2d at 704 ("Plaintiffs need not show 'to a scientific certainty' that the injuries they suffer are caused by Chalmette's emissions, because such tort-like causation is not required by Article III" (quoting *Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 73 n.10 (3d Cir. 1990)).).

CLF member Elizabeth Kruse, a 66 year-old resident of Candia, New Hampshire, suffers from arrhythmia, a medical condition exacerbated by exposure to air pollution. *See* Affidavit of Elizabeth Kruse, dated June 14, 2011, at ¶¶ 1-2, 6, attached hereto as **Exhibit 4**. Ms. Kruse's home is approximately nine miles southeast of Merrimack Station. *Id.* at ¶ 3. Ms. Kruse states:

> In light of my proximity to Merrimack Station, I am concerned about the health impacts of Merrimack Station's emissions of particulate matter, sulfur dioxide, nitrogen oxide (and the resulting particulate matter and ozone pollution), including increased emissions of these pollutants that have been or are projected to be emitted as a result of recent modifications to Merrimack Station, and any emissions that were not controlled as required by Merrimack Station's air permits.

Id. at ¶ 7.

CLF member Robert Backus, a 72 year-old resident of Manchester, New Hampshire, lives 7.5 miles south of Merrimack Station. *See* Affidavit of Robert A. Backus, dated July 14, 2011, at ¶¶ 1-3, 6, attached hereto as **Exhibit 5**. Mr. Backus states that, "[i]n light of my proximity to Merrimack Station and also my age, I am concerned about the health effects of Merrimack Station's emissions," including increased emissions associated with recent

modifications to Merrimack Station and emissions that were not controlled in accordance with permit requirements. *Id.* at ¶ 7.

The affidavits of Mr. Backus and Ms. Kruse plainly demonstrate that the injuries alleged in CLF's Complaint are traceable to and caused by PSNH's actions and are therefore amply sufficient to establish CLF's standing before this Court. *See SURCCO v. PRASA*, 157 F. Supp. 2d 160, 165-66 (D.P.R. 2001) (plaintiff "refuted Defendants' attack as to Article III standing by alleging, and sustaining with exhibits, that its members are directly affected by Defendants' violations"). *See also McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 67 (1st Cir. 2003) (citing *Warth*, 422 U.S. at 501)*; Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995); *Citizens for Squirrel Point*, 2003 WL 22867620, at *2 (Article III standing affirmed based on affidavits).

PSNH attempts to invent a new standard for establishing Article III standing in environmental cases such as this, arguing that plaintiffs must plead injuries with "heightened specificity." Standing Motion at ¶ 2; Standing Memo. at 12-14 (citing *United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992) ("*AVX*")). PSNH is wrong. As the First Circuit held in a case PSNH conveniently fails to cite in its brief to this Court, the standard articulated in *AVX* is applied only to *intervenors* in *appellate* cases. *See Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 55 n.3 (1st Cir. 1998) (explaining the limited reach of *AVX*'s heightened specificity test); *see also Citizens for Squirrel Point*, 2003 WL 22867620, at *1 n.2 (same); *Me. People's Alliance v. Holtrachem Mfg.*, No. 00-cv-69, 2001 WL 1704911, *5 n.6 (D. Me. Jan. 8, 2001) (same). As this Court itself has held, the *AVX* standard applies only in the "specific, narrow context[]" of appellate standing. *Martin v. Applied Cellular Tech., Inc.*, No. Civ. 99-214-JD, 1999 WL 814347, *1 n.1 (D.N.H. Sept. 21, 1999). The basic rule that this Court must apply in

determining CLF's standing is clear: this Court "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co.*, 523 U.S. at 104 (citing *Lujan*, 497 U.S. at 889). Consistent with the *Steel Co.* Court's teaching, *see id.*, CLF's allegations of injury apply to, and are incorporated by reference into, each of the Complaint's seven counts. *See* Compl. at ¶¶ 16-19, 48, 62, 66, 73, 77, 91, 94.[10]

PSNH also misapprehends the injuries to CLF's members' procedural rights appurtenant to its failure to comply with CAA and New Hampshire permitting requirements. *See* Standing Memo at 13-14. By evading preconstruction permitting requirements, PSNH has deprived CLF members of the opportunity to participate in permitting proceedings to vindicate their concrete interests in minimizing Merrimack Station's pollutant emissions and the risks those emissions pose to their health, well-being, and enjoyment of their homes and the surrounding area, through advocacy ensuring that the magnitude of pollution increases are accurately determined and that more stringent technology-based emissions controls are imposed.[11] These concrete interests form the "ultimate basis" for CLF's standing and make the procedural harm from PSNH's repeated unwillingness to submit to the required permitting proceedings a cognizable injury for standing purposes. *See Nw. Envtl. Def. Ctr.*, 434 F. Supp. 2d at 964 ("Congress established the Clean Air Act preconstruction review and permit requirements to protect the very kinds of interests asserted here by Plaintiffs."). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555,

---

[10] In any event, any alleged incompleteness of the Complaint is resolved by the member affidavits attached to this memorandum. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 65 (1987) ("[A] suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact'—not proof—in the complaint or supporting affidavits" (internal quotations omitted) (quoting *Warth*, 422 U.S. at 501).).

[11] *See* N.H. Code Admin. R. Env-A 621.03 & 621.04 (requiring public notice of: receipt of application for temporary permit; preliminary determination of NHDES to issue, amend or deny permit; emissions increase resulting from modification; determination of technology-based emission limits; and opportunity to submit comments and to request public hearing).

573 n.8 (1992) ("*Defenders of Wildlife*") (plaintiff "assuredly can [enforce] procedures . . . designed to protect some threatened concrete interest of his that is the ultimate basis of his standing").

III. CLF MEMBERS' INJURIES WILL BE REDRESSED BY THE REQUESTED RELIEF.

The allegations set forth in CLF's Complaint demonstrate the requisite "substantial likelihood that the requested relief will remedy the alleged injury in fact" or "redressability." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation omitted). Despite the fact that PSNH has moved to dismiss CLF's entire Complaint for lack of standing, PSNH implicitly admits that the injuries alleged by CLF in the first four counts of the Complaint are redressable by this Court, and limits its argument about redressability to the fifth, sixth, and seventh counts (regarding PSNH's unpermitted installation of the ACI Equipment and violations of its ESP permit). *See* Standing Motion at ¶ 4. Notwithstanding PSNH's parsing, each of the injuries alleged by CLF in its Complaint can and should be remedied by this Court.

A. Enforcing Preconstruction Permit Requirements Will Ensure Meaningful Public Review of PSNH's Merrimack Station Projects and the Implementation of More Stringent Pollution Controls Benefitting Public Health and the Environment.

The first six counts of CLF's Complaint allege that PSNH has violated, on *at least **five** occasions* between 2006 and 2009, the requirement of New Hampshire regulations that PSNH obtain a permit before making physical or operational changes to Merrimack Station that would increase emissions. Those occasions include: (i) the 2008 turbine-related modifications to Merrimack Station Unit 2, *see* Compl. at ¶¶ 49-55; (ii) the 2009 turbine-related modifications to Merrimack Station Unit 2, *see* Compl. at ¶¶ 67-68; (iii) installation of the "Pre-April 2007 Sorbent Injection Equipment" described in the Complaint, *see* Compl. at ¶¶ 79-80; (iv)

installation of the "June 2007 ACI Equipment" described in the Complaint, *see* Compl. at ¶ 84; and (v) installation of the 2009 ACI Equipment, *see* Compl. at ¶ 86.[12] As is well-recognized, PSNH's violations of operating permit requirements are repeated anew each day Merrimack Station is out of compliance. *See United States v. S. Ind. Gas & Elec. Co.*, No. IP 99-1692-CM/F, 2002 WL 1760752, *4 (S.D. Ind. July 26, 2002); *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 444 (D. Md. 2001).

PSNH's failure to obtain required permits results in additional, inadequately controlled pollutant emissions that injure CLF members. CLF's Complaint seeks the following specific relief from this Court to cure the injuries now flowing from PSNH's unlawful activities at Merrimack Station and deter future violations: (i) enjoin further violations of the CAA and EPA-approved New Hampshire regulations by PSNH, (ii) order PSNH to apply for all required permits, (iii) order PSNH to implement required pollution controls, including those reflecting the Best Available Control Technology ("BACT") and/or Lowest Available Emissions Rate ("LAER") standards as applicable, (iv) order PSNH to conduct a compliance audit at all PSNH generating facilities to ensure that all modifications are appropriately permitted, (v) order PSNH to take "appropriate action to remedy, mitigate, and offset the impacts of its violations . . . on human health and the environment," and (vi) order PSNH to pay civil penalties. *See* Compl. at 22-23.

---

[12] These New Hampshire regulations include: (i) the federally enforceable New Hampshire requirement that PSNH obtain a temporary permit before making any physical or operational change that would increase emissions, (ii) the federally enforceable New Hampshire requirement that it obtain an operating permit reflecting the temporary permit requirements applicable to the changes, and (iii) the New Hampshire and CAA requirement that it obtain NSR permits for the significant emissions increases of pollutants caused by the changes. *See* Compl. at ¶¶ 60-61, 65, 71-72, 76, 89-90, 93; *see also* CLF 12(b)(6) Memo. at 6-7 and Sections I.B & I.C (citing applicable regulations).

It is plain that there is a substantial likelihood that this relief will redress our members' injuries. As was well explained by the Eastern District of California in a similar case alleging violations of preconstruction permitting requirements:

> [A] favorable order by this Court will redress the members' injuries from Vanderham's violations of the Clean Air Act. An order that compels Vanderham to obtain a permit, to reduce the dairy's air pollution by installing BACT, and to buy offsets will ensure a net reduction of VOC in the Valley. An order requiring Vanderham to obtain a permit will also redress [plaintiff's] procedural injury. An order that imposes civil penalties will deprive Vanderham of the benefit of its violations and deter future violations of the Clean Air Act, also redressing [plaintiff's] injuries.

Ass'n of Irritated Residents v. C & R Vanderham Dairy, No. 1:05-cv-01593, 2007 WL 2815038, *16 (E.D. Cal. Sept. 25, 2007). *See also Laidlaw,* 528 U.S. at 185-86 (affirming role of civil penalties in deterring future violations and redressing citizen plaintiffs' environmental injuries); *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993, 1004 (11th Cir. 2004) ("A favorable decision on the merits would adequately redress [the plaintiff's] injury because such a decision would require the defendants to obtain and comply with the required permit."). What is required to establish redressability is continuing adverse *effects or risks* from the violations that the requested relief will likely abate. *See Steel Co.* 523 U.S. at 109 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any *continuing, present adverse effects*" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974)) (emphasis added).); *accord Defenders of Wildlife*, 504 U.S. at 564; *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting same).[13]

---

[13] PSNH's argument that CLF members lack standing to challenge its failure to obtain required preconstruction permits for the ACI Equipment would effectively preclude post-construction enforcement of such permitting requirements, negating section 304(a)(3) of the CAA. *See* 42 U.S.C. § 7604(a)(3) (authorizing citizen suits against any person who "constructs"

Requiring PSNH to comply with the CAA's preconstruction permitting requirements will secure substantial air quality benefits. PSNH claims that its facility is a model of regulatory compliance, when in fact no PSNH emissions unit has been subject to the more protective technology-based standards of the CAA. *See* Colburn Decl. at ¶ 11. If compelled to comply with BACT/LAER standards, Merrimack Station's permitted emissions rates would be significantly reduced, leading to substantial air quality improvements. For example, Merrimack Station Unit 2's permitted emission rate for NO_x would be reduced by at least 50% to satisfy LAER, and PSNH would be obligated to reduce NO_x emissions from other sources to offset Unit 2's projected emissions increase. *Id.*

PSNH's failures to obtain preconstruction permits are not "wholly past" violations that the Court is powerless to address. *See Laidlaw*, 528 U.S. at 187-88; *Steel Co.*, 523 U.S. at 104-09 (discussing Article III bar on citizen suits regarding "wholly past" violations). While each discrete violation of the preconstruction permit requirements alleged in the Complaint occurred in the past, PSNH repeatedly has demonstrated that it is wholly unwilling, and therefore entirely unlikely, to comply in the future. Indeed, PSNH fails to correctly identify (or worse yet is willfully ignoring) the correct regulations that currently govern preconstruction permitting requirements applicable to its activities. CLF's Memorandum of Law in Opposition to PSNH's Motion to Dismiss Pursuant to Rule 12(b)(6) at Section I.A. In the face of PSNH's pattern of repeated violations and unwillingness to comply, the Court's enforcement of these requirements would redress CLF members' injuries. *See Ass'n of Irritated Residents*, 2007 WL 2815038, at *16 (failure to obtain CAA preconstruction permit and apply BACT is redressable despite completion of construction); *Anderson v. Farmland Indus., Inc.*, 70 F. Supp. 2d 1218, 1229-30

---

a modified major emitting facility without an NSR permit). This is an outcome that neither *Steel Co*. nor *Laidlaw* suggested.

(D. Kan. 1999) (risk that "same inadequately corrected source of trouble" would lead to future violations sufficient to support redressability under *Steel Co.*) (citing *Natural Res. Def. Council, Inc. v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 499 (3rd Cir. 1993)).[14] PSNH's pattern of repeated violations of the same preconstruction permitting requirement demonstrates that such violations are not only likely to be repeated absent intervention by this Court, but a near-certainty, and more than satisfy the redressability requirement for standing.[15]

The same is true for the violations identified in the fifth and sixth counts of the Complaint regarding the ACI Equipment. At a minimum, CLF's requested relief for these claims addresses two very real future risks: (i) that PSNH will undertake additional modifications at Merrimack Station without preconstruction and operating permits, and (ii) PSNH will rethink its "plans" and activate its permanently installed ACI Equipment, resulting in increased, illegal emissions from Merrimack Station.[16] PSNH's propensity for constructing modifications without obtaining the

---

[14] CLF need not address here the issue of whether the failure to obtain a CAA preconstruction permit is a one-time or ongoing violation with respect to the statute of limitations. *Compare, e.g.*, *Sierra Club v. Dairyland Power Coop.*, No. 10-cv-303, 2010 WL 4294622, *15 (W.D. Wis. Oct. 22, 2010) (failure to obtain NSR permit is ongoing violation within statute of limitations) *with Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018 (8th Cir. 2010) (construction without a NSR permit is discrete violation that does not continue for statute of limitations purposes). It is undisputed that all of PSNH's alleged violations occurred within the five-year statute of limitations applicable to CAA citizen suit claims. *See* 28 U.S.C. § 2462.

[15] To defeat CLF's standing here, PSNH cites a discussion of the redressability of past violations of an expired CAA permit in *Lead Envtl. Awareness Dev. Group v. Exide Corp.*, No. 96-3030, 1999 WL 124473, *15 (E.D. Pa. Feb. 19, 1999) ("*LEAD*"). *See* Standing Memo. at 17 n.15. *LEAD*'s holding with respect to the plaintiff's other claims—regarding violations of an effective Clean Water Act permit—is more on point. The court held that plaintiffs could plausibly demonstrate ongoing or imminent violations based on the same "generalized source of trouble" as earlier violations, *id.* at *34, the same standard applied in *Anderson*, *supra.*

[16] Of course, PSNH's intended "plans" could never moot CLF's claims or be dispositive of CLF members' standing. *See Laidlaw*, 528 U.S. at 189 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" (internal citation omitted).); *Am. Canoe Ass'n, Inc. v. City*

required permits indicates, as set forth above, that the very same violations are extremely likely to be repeated. *See Anderson*, 70 F. Supp. 2d at 1229-30.

Relying on an employee's declaration, PSNH states that it "discontinued sorbent injection years ago, disassembled much of the equipment, and has no plans to resume these operations in the future," concluding that the ACI Equipment violations are "wholly past violations that cannot recur." *See* Standing Memo. at 17 (citing Decl. of William Smagula, Ex. 1 thereto). To the extent Mr. Smagula's declaration may be considered by this Court—and CLF asserts that it may not[17]— it constitutes an unequivocal *admission* that PSNH did indeed, as CLF has alleged, install and operate permanent ACI Equipment without the required permits, and that permanent ACI Equipment still exists at Merrimack Station and could be brought back into service at any time. *See* Decl. of William Smagula, at ¶ 5.[18] This admission confirms that CLF's members

---

of Louisa Water & Sewer Comm'n, 389 F.3d 536, 543 (6th Cir. 2004) (same); *P.R. Campers' Ass'n. v. P.R. Aqueduct & Sewer Auth.*, 219 F. Supp. 2d at 220 (same).

[17] The standard of review requires this Court to accept CLF's allegations on the merits of its claims and in support of its standing as true for the purposes of PSNH's motion, including CLF's allegation that PSNH installed the ACI Equipment for use on an "ongoing basis," Compl. at ¶ 87. *See N.H. Right to Life Political Action Comm.*, 99 F.3d at 12. Moreover, the installation and future uses of the ACI Equipment are issues of fact that are central to the merits of CLF's claims, and this Court may not accord any weight to a factual declaration on such issues before CLF has had an opportunity for discovery to contest PSNH's statements. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 n.3 (1st Cir. 2001); *see also Fair Hous. in Huntington Comm. v. Town of Huntington,* 316 F.3d 357, 361-62 (2d Cir. 2003) (resolution of factual dispute pertinent to standing inappropriate before parties have "an opportunity either to fully develop or fully contest evidence relevant to the merits of the case").

[18] The declaration also confirms that installation and operation of the ACI Equipment increased particulate matter emissions from Merrimack Station Unit 2. *See* Decl. of William Smagula, at ¶ 3 (stating that PSNH injected particles into flue gas from Unit 2). Thus, the required preconstruction review will impose new emissions limits for particulate matter that will apply for the life of the facility irrespective of whether the ACI Equipment is used in the future. *See, e.g.*, *Otter Tail Power Co.*, 615 F.3d at 1016 (CAA "obliges a facility to obtain a permit before commencing construction and requires that, having done so, the facility operate in accordance with the permit application and approval"). PSNH may not avoid its statutory obligations merely by promising not to operate the equipment it illegally installed or by dismantling some of it after-the-fact. *See* EPA, Guidance on the Appropriate Injunctive Relief

continue to be injured by PSNH's failure to obtain permits for the ACI Equipment imposing new emissions limits for particulate matter and the associated additional and inadequately controlled pollutant emissions from Merrimack Station.[19]

B. The ESP Violations Are Not "Wholly Past."

As with PSNH's failure to obtain preconstruction and operating permits for its modifications to Merrimack Station, PSNH's violations of temporary permit requirements for operation of Merrimack Station's ESPs also reflect a pattern of noncompliance. *See* Compl. ¶¶ 94-106 (describing more than one hundred violations of operating and reporting requirements). Because PSNH has repeatedly violated the terms of the permits governing its ESPs, there is a substantial risk that those violations will be repeated in the future.

In a gambit to avoid responsibility for its violations, PSNH seeks to rely on a technical change to its permitting requirements that became effective *after* CLF's Complaint was filed. *See* Standing Memo. at 17-18. The Court should reject this sleight-of-hand. The standing of CLF members is evaluated at the time of the Complaint. *Defenders of Wildlife*, 504 U.S. at 571, n.4. *See also Laidlaw*, 528 U.S. at 185-88 (focusing on requirements "at the time of suit"); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (stating that relevant inquiry for standing is whether it existed at time of suit and distinguishing standing from mootness). Moreover, Merrimack Station continues to operate ESPs subject to materially similar provisions and reporting requirements, presenting an ongoing risk of noncompliance.[20]

---

for Violations of Major New Source Review Requirements, 3 (1998), *available at* http://www.epa.gov/compliance/resources/policies/ civil/caa/stationary/nsrinjrelief.pdf (facility cannot "'correct' an NSR violation" simply by reversing the modification).

[19] *See also* Compl., Ex. A-8, at Ex. G (PSNH stipulation that ACI Equipment was permanently installed as of 2008).

[20] Certain of these requirements are now listed as "state-enforceable only" in Merrimack Station's CAA Title V operating permit. This categorization does nothing to change PSNH's liability for violations of federally enforceable requirements of its previously effective temporary

Importantly, CLF has alleged and the NHDES records cited in support reflect that the ESP permit conditions PSNH violated included its obligations to report certain violations to NHDES. This failure to report pursuant to the specific term of the ESP permits, coupled with PSNH's repeated decision not to comport with applicable preconstruction permitting requirements, evidences a troubling disregard for the regulatory framework that governs its operations. Accordingly, the requested relief will serve to prevent and deter future violations of the requirements applicable to PSNH's pollution control equipment, providing an effective means of redressing CLF members' injuries. *See, e.g.*, *Laidlaw*, 528 U.S. at 185-86.

CONCLUSION

For the foregoing reasons, the Court should reject PSNH's effort to shield its repeated, unlawful activities from scrutiny by attacking CLF's standing. Under the case law, individual CLF members who are affected by air pollution from Merrimack Station have standing to sue PSNH for its violations of the CAA and New Hampshire regulations in accordance with Article III of the Constitution. CLF members' standing entitles CLF to bring this citizen suit to hold PSNH accountable for its violations and to compel both regulatory compliance and air quality improvements. The Court should deny PSNH's motion.

---

permits or the fact that the ESPs are integral pollution control equipment that is operated pursuant to federally enforceable permit provisions. *See, e.g.*, Standing Memo., Ex. 2, at Condition VIII(I), Table 7 (Monitoring/Testing Requirements), Items 40-41; *id.* at Condition VIII(J), Table 8 (Recordkeeping Requirements), Items 16(E) & 23; *id.* at Condition VIII(K), Table 9 (Reporting Requirements), Items 17-18; *see also* Standing Memo. at 5 n.8 (touting pollution control of Merrimack Station ESPs). Moreover, there is no dispute that the violated ESP requirements were federally enforceable when the Complaint was filed, the time when, as discussed above, CLF's standing is judged.

Respectfully submitted,

CONSERVATION LAW FOUNDATION, INC.

By its attorneys,

/s/ Christophe G. Courchesne
Christophe G. Courchesne
N.H. Bar No. 20431
ccourchesne@clf.org

/s/ N. Jonathan Peress
N. Jonathan Peress
N.H. Bar No. 16950
njperess@clf.org
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
(603) 225-3060
Fax (603) 225-3059

/s/ Melissa A. Hoffer
Melissa A. Hoffer*
N.H. Bar No. 17849
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1700
Fax (617) 350-4030
mhoffer@clf.org

* *petition pending for admission to D.N.H. bar*

Dated: November 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2011, a copy of the foregoing memorandum with attachments was served electronically via ECF on the following counsel of record: Wilbur A. Glahn, III, Esq. (wilbur.glahn@mclane.com), Barry Needleman, Esq. (bneedleman@mclane.com), Jarrett B. Duncan, Esq. (jarrett.duncan@mclane.com), Linda T. Landis, Esq. (landilt@nu.com), Michael D. Freeman, Esq. (mfreeman@balch.com), Spencer M. Taylor, Esq. (staylor@balch.com), and Elias L. Quinn, Esq. (elias.quinn@usdoj.gov).

/s/ Christophe G. Courchesne
Christophe G. Courchesne, Esq.
Attorney for Conservation Law Foundation, Inc.

Dated: November 10, 2011