UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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| CONSERVATION LAW FOUNDATION, INC., | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 16-11950-MLW |
| EXXONMOBIL CORPORATION, et al., | ) | |
| Defendants. | ) | |

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

MOTION HEARING

and

RULING

March 13, 2019

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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treatment system that is expressly described in the permit. Thank you, Your Honor.

THE COURT: All right. It's 10 of four. I'm going to see whether I can decide this matter for you today. I'll probably need about 30 minutes. Don't go too far away. Court is in recess. I might need less, so don't go too far.

(Recess taken 3:50 p.m. - 4:31 p.m.)

THE COURT: Well, the argument today has been excellent. Some things have been clarified. Some things have been complicated further. But I think -- well, I know how I'm going to decide this matter. If I took it under advisement to try to write something, that would be time-consuming and delay the progress of this case, so I'm going to decide the matter orally.

The transcript will be the record of the decision. Although I assume it's unnecessary, I'm ordering you to order the transcript of this decision at least. I know I didn't hear any argument on Count 15, the RCRA count, but it's not necessary.

For the reasons I'll describe in detail, I'm denying the motion to dismiss Counts Six through 14 and also Count 15 of the Amended Complaint. I find the plaintiff has adequately alleged standing. The Amended Complaint has allegations that weren't in the original complaint that are adequate to allege or to establish, if proven, imminent harm.

As I'll note, they're largely or some of them are in paragraphs 144, 153 and 168. Essentially, it's adequately alleged that there is substantial risk of harm that will occur soon, which includes during the life of the permit, which is uncertain. It is uncertain how long that will be. I also find that the plaintiff has alleged sufficient facts to state a claim and that that claim -- to state a claim on which relief could be granted and that claim is plausible with regard to Counts Six and 14. For related but different reasons, I reach the same conclusion with regard to Count 15.

It will take me a while to explain this reasoning, but essentially the parties agree that Counts Six to 14 would rise and fall together, except for one aspect of Count 11. So I'm going to explain my reasoning concerning them largely together but also address some aspects of the particular counts.

Counts Six to 14, which the parties and the court refer to as the climate change counts, allege that defendant Exxon is violating its permit for the Everett terminal by failing to consider climate change-induced weather events, which I interpret to also include or to be a subset of foreseeable severe weather events, in maintaining the terminal's Storm Water Pollution Prevention Plan, the SWPPP, or SWPPP.

Exxon moves to dismiss for lack of standing, lack of jurisdiction, and failure to state a claim upon which relief

can be granted. Standing requires an injury that is: (a) concrete, particularized, and actual or imminent; (b) traceable to the defendant; and (c) redressable by the court, as the Supreme Court wrote in Lujan, 504 U.S. 555 at 560-61.

With respect to imminence, an allegation of a future injury suffices if the threatened injury is "certainly impending," or if there is a "substantial risk" that the harm will occur soon, as the Supreme Court held with regard to "certainly impending" and indicated with regard to "substantial risk" in Clapper, 568 U.S. 398 at 401, 409, 410, 414, note 5.

On September 12, 2017, in dismissing the original complaint I interpreted soon to be harm that would occur during the life of the permit. The permit for the Everett terminal expired in 2014. By operation of law, it remains in effect. And it's uncertain how long it will be before EPA reviews the application for a new permit and grants one, but it appears that it will be several years at least.

The plaintiff, the party seeking to invoke federal jurisdiction, CLF, the Conservation Law Foundation, bears the burden of establishing the elements of standing for each claim that it asserts, as the Supreme Court said in Lujan at 561 and the First Circuit held in Katz, 672 F.3d 64, 71. The plaintiff must establish each of the elements of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required

at the successive stages of the litigation," which is again Lujan at 561. Accordingly, to decide a pre-discovery motion to dismiss for lack of standing, the court "accepts all of the well-pleaded factual averments in the complaint and indulges all reasonable inferences therefrom in the plaintiff's favor," as the First Circuit also said in Katz at 71-72.

As I held in September 2017, CLF has standing for "near term harms" from climate change or I infer other severe foreseeable weather events but lacks standing for harms "in the far future." Consistent with this finding, Exxon argues that the climate change counts in the Amended Complaint "still expressly rely on speculative impacts that CLF acknowledges will not occur in the near term." More specifically, Exxon points out that "the Amended Complaint repeats verbatim allegations this court has previously deemed improper," or I would say insufficient.

For example, CLF alleges in both the Complaint and the Amended Complaint that "by 2100 sea level rise in Massachusetts could range from 29 to 201 centimeters." That was in the original Complaint in paragraph 93(g). It's in the Amended Complaint in paragraph 180. For the purpose of standing, I'm not relying on these allegations. However, they are relevant for other purposes.

I find that the Amended Complaint adequately alleges facts establishing standing for present purposes, motion to

dismiss purposes, because it contains new allegations of foreseeable severe weather events allegedly induced by climate change that are allegedly already occurring or will occur in Massachusetts in the near future. For example, paragraph 144 alleges that "Extreme precipitation events, greater than 50 millimeters or two inches of rain, have increased during the period between 1949 and 2002 in eastern Massachusetts." That is a quote from a 2011 Commonwealth of Massachusetts Office of Energy and Environmental Affairs report on climate change -- well, Climate Change Adaptation Report.

Paragraph 152 quotes the same report to the effect that "Storms such as the Hurricane of 1938, which caused widespread coastal flooding and resulted in losses such as losses of life, property, and infrastructure, are now considered one in two-year events in Massachusetts." Paragraph 168 of the Amended Complaint alleges, "The Commonwealth has a six- to 30-percent chance of a tropical storm or hurricane affecting the area each year," citing a 2013 Commonwealth of Massachusetts State Hazard Mitigation Plan.

Paragraph 53 alleges, "The number of days with tidal flooding in Boston has more than quadrupled since 1970 to roughly nine events per year," quoting a 2013 Union of Concerned Scientists report, Encroaching Tides: How Sea Level Rise and Tidal Flooding Threaten U.S. East and Gulf Coast Communities Over the Next 30 Years.

Moreover, like the initial complaint, CLF points to the National Oceanographic and Atmospheric Administration models that show the terminal lies in an area vulnerable to inundation from storm surge, including from a Category 1 hurricane. That's paragraphs 171 to 72. Therefore, CLF plausibly alleges that foreseeable severe weather events, including climate change-induced weather events, pose an imminent risk to the terminal. For reasons I'll describe, Exxon also adequately alleges facts to establish a plausible claim that there's an imminent threat of harm from the discharged pollutants.

In addition to lack of standing, Exxon moves to dismiss the climate change counts for lack of jurisdiction and failure to state a claim upon which relief can be granted. More specifically, Exxon argues that the permit does not -- argues in its memorandum in support of its motion to dismiss that the permit does not require consideration of climate change. It also argues today that Exxon does take into account foreseeable or did take into account and continues to take into account foreseeable severe weather events.

The standards for a factual challenge to jurisdiction and the standards for a motion to dismiss for failure to state a claim are the same, as the parties recognize. Federal Rule of Civil Procedure 8(a)(2) requires that a complaint include a "short and plain statement of the claim showing that the

pleader is entitled to relief." This pleading standard does not require "detailed factual allegations," but it does require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," as the Supreme Court said in Iqbal, 550 U.S. at 55. Therefore the court may disregard "bald assertions, unsupportable conclusions, and opprobrious epithets," as the First Circuit has frequently written.

The court should deny a motion to dismiss under 12(b)(6) for failure to state a claim upon which relief can be granted if the plaintiff shows "a plausible entitlement to relief," which the Supreme Court said in Iqbal at 559. That is, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." In fact, the last two cites I mentioned were Twombly, not Iqbal. The statement that the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," is Iqbal, 556 U.S. at 678. A claim is facially plausible if the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." That's Iqbal at 683. "Where the 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," the

court said in Iqbal at 678.

In considering a motion to dismiss under Rule 12(b)(6), the court must "take all factual allegations as true and draw all reasonable inferences in favor of the plaintiff." The court "neither weighs the evidence nor rules on the merits because the issue is not whether the plaintiffs will ultimately prevail but whether they are entitled to offer evidence to support their claims."

In addition, the District Court may -- in addition to the Amended Complaint, "the court may properly consider only facts and documents that are part of or incorporated into that complaint," as the First Circuit said in Rivera, 575 F.3d at 15. There are "narrow exceptions for documents, the authenticity of which are not disputed by the parties; for official public records for documents central to the plaintiff's claim; or for documents sufficiently referred to in the complaint." That's Watterson, 987 F.2d at 3 to 4.

When "a complaint's factual allegations are expressly linked to -- and admittedly dependent upon -- a document, the authenticity of which is not challenged, that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)," as the First Circuit said in Beddall, 137 F.3d 12 at 17. When such documents contradict an allegation in the complaint, the document trumps the allegation, as the First Circuit said in

Clorox, 228 F.3d 24, 32. So those are the standards I'm applying.

Under the Clean Water Act, the CWA, a citizen suit must allege an ongoing violation of "an effluent standard or limitation," which includes an NPDES permit. That requirement is in 33 U.S.C. Section 1365(a)(1) and discussed in Gwaltney, 484 U.S. 49 at 57. Therefore, read in the context of Twombly, Gwaltney instructs that a CWA citizen suit -- or instructs that the CWA citizen suit provision confers jurisdiction when a citizen plaintiff plausibly alleges an ongoing violation of a permit with sufficient factual specificity.

It is undisputed in this case that the permit does not explicitly require Exxon to consider climate change. However, as I explained at the September 12, 2017 hearing, the appropriate inquiry is not whether the permit requires consideration of climate change alone but rather whether the permit requires consideration of current or imminent weather events that CLF alleges threaten the terminal, regardless of the cause of such events, although alleged climate change may be one of those causes or perhaps the only one.

Under this framework, the court holds that the permit requires Exxon to consider foreseeable severe weather events, including any climate change-induced weather events, in developing and maintaining its Storm Water Prevention Plan, SWPPP. First, the permit requires Exxon to develop an SWPPP

using "good engineering practices." That's at page 56. The permit does not define "good engineering practices." Accordingly, the court can "turn to extrinsic evidence" to derive its meaning, as the Ninth Circuit wrote in NRDC v. Los Angeles, 725 F.3d 1194 at 1205.

CLF alleges that engineers working on large-scale civil works projects routinely take climate change-induced weather events into consideration in designing, constructing, and maintaining projects. That's in paragraph 218 of the Amended Complaint. For example, CLF alleges that the Army Corps of Engineers by regulation incorporates the impact of sea level change in its civil works programs. That's paragraph 220 of the Amended Complaint, citing a particular Corps of Engineers regulation. Therefore, good engineering practices include considerations of foreseeable severe weather events, including any caused by climate change.

In addition, the permit requires Exxon to proactively address potential discharges of pollutants. For example, Count Six alleges a violation of the permit's requirement to develop a SWPPP designed to reduce or prevent the discharge of pollutants. That's paragraphs 264 to 69.

Count Eight alleges a violation of the permit's requirement to identify in the SWPPP potential sources of pollution reasonably expected to affect the quality of discharges.

Count Nine alleges a violation of the permit's requirement to ensure implementation of the SWPPP of practices to reduce the pollutants. That's paragraphs 282 to 85.

Count Ten alleges a violation of the permit's requirement to identify in the SWPPP sources of spills of pollutants. That's paragraphs 286 to 92.

Finally, Count 11 alleges a violation of the permit's requirement to develop spill prevention and response procedures. That's paragraphs 293 to 314.

If, as CLF alleges, increasingly frequent and severe weather events threaten the terminal, then Exxon must consider such events in order to satisfy the permit's requirement that Exxon identify and proactively address potential discharges of pollutants. Count 11 requires some additional analysis.

Exxon argues in its memorandum in support of its motion to dismiss that it was not required to take the effects of alleged climate change into account. Today it argues that it did take foreseeable severe weather events into account in its SWPPP and designs -- in designing the Everett terminal. The plaintiff alleges that there is no evidence that Exxon did this. It relies in part on the alleged facts that there have been no changes in the facility after the permit issued. This is a sufficient factual allegation for motion to dismiss purposes.

Exxon also argues that the permit shield doctrine bars

liability because the EPA was aware of climate change when it issued the permit. More specifically, Exxon suggests that the EPA accounted for foreseeable weather events, including climate change-induced weather events, through the permit requirement that the terminal will be capable of handling a "10-year 24-hour precipitation event," which the permit in its literal language estimates to be 4.6 inches.

However, if the inquiry ended there, as Exxon argues, many other provisions of the permit would be superfluous. This is impermissible because "A court must give effect to every word or term in an NPDES permit and reject none as meaningless or surplusage," as the Ninth Circuit said in NRDC v. Los Angeles, 725 F.3d 1194 at 1206.

If all the permit requires of Exxon is that the terminal be capable of handling 4.6 inches of rain over 24 hours, then the permit would not have separately provided that Exxon use "good engineering practices" or implement practices to reduce pollutants. In fact, the permit requires Exxon to amend and update the terminal's SWPPP, which is part of the permit, to account for any change "which has significant effect on the potential for the discharge of pollutants." That's in the Permit and Fact Sheet at 15. It's docket number 34-1. Thus, the permit does not impose static or only static requirements. Rather it requires Exxon to constantly review and update its practices in the terminal's SWPPP to reflect or

address any material changing circumstances.

The claim that Exxon is not doing so I find is plausible. As I said, it is undisputed -- well -- plausible. It is undisputed, as I said, that the permit does not explicitly require Exxon to consider climate change in developing and maintaining the terminal. However, as I stated at the September 12, 2017 hearing, the appropriate inquiry is not whether the permit requires consideration of climate change but whether the permit requires consideration of weather events that CLF alleges threaten the terminal, including but not limited to those that might be caused by alleged climate change.

Under this framework, the provisions of the permit that underlie CLF's climate change counts require Exxon to consider the kinds of climate-induced weather events that CLF alleges threaten the terminal. For example, Count Seven alleges a violation of the permit's condition to develop an SWPPP using "good engineering practices." The permit does not define "good engineering practices." Accordingly, as I said earlier, the court can "turn to extrinsic evidence to interpret that term."

CLF alleges that engineers working on large-scale civil works projects routinely take climate change-induced weather events into consideration in designing, constructing and maintaining projects. For example, the Army Corps of

Engineers incorporates the impact of sea level change in civil works programs, it is alleged in paragraph 220, as I said earlier, citing Army Corps of Engineers regulation.

Moreover, it's alleged in paragraph 224 that "the Deer Island, Massachusetts sewage treatment plant in Boston was designed and built taking future sea level rise into consideration."

I'm not certain whether this is referenced in the complaint, but it is a public record that I find can properly be taken into account on the motion to dismiss. EPA guidance also -- or certain EPA guidance suggests that NPDES permittees should consider foreseeable weather events, which would include climate change-induced weather events, with respect to SWPPPs.

One SWPPP guidance document notes that "the frequency, intensity, and duration of rainfall are the principal factors influencing erosion" and instructs permittees to know the weather patterns in your area. That is from the EPA's Developing Your Storm-Water Pollution Prevention Plan 3, published in May 2007. The EPA's framework for protecting public and private investment in Clean Water Act enforcement remedies states that, "Increased frequency and severity of weather events are already affecting the ability of regulated entities to maintain compliance with CWA NPDES permit requirements, including heavy downpours that can overwhelm treatment systems, leading to overflows of sewage systems and

waste storage structures, which can cause CWA violations." That is in EPA's framework for protecting public and private investment in the Clean Water Act enforcement remedies, which I believe was published in 2016.

Therefore, EPA guidance and practices of engineers in the field as alleged are sufficient to state a plausible claim that "good engineering practices" include consideration of foreseeable severe weather events, including any caused by alleged climate change.

Accordingly, CLF's allegation in Count Seven that Exxon failed to consider such events in developing and maintaining the SWPPP states a plausible entitlement of relief. As I said earlier -- well, Counts Six, Eight, Nine and Ten and also 11 allege violations of the permit's requirement to identify and proactively address potential discharges of pollutions. As I said earlier, more specifically, Count Six alleges a violation of the permit's requirement to develop an SWPPP "designed to reduce, or prevent, the discharge of pollutants." Count Eight alleges a violation of the permit's requirement to identify in the SWPPP "potential sources of pollution reasonably expected to affect the quality of discharges."

Count Nine alleges a violation of the permit's requirement to ensure implementation in the SWPPP, "practices to reduce the pollutants." Count Ten alleges a violation of

the permit's requirement to identify in the SWPPP sources of spills of pollutants. Finally, Count 11 alleges a violation of the permit's requirement to develop "spill prevention and response procedures."

Like "good engineering practices," the permit provisions that underlie Counts Six, Eight, Nine, Ten, and 11 also require consideration of foreseeable imminent severe weather events, including any alleged climate change-induced weather events. Indeed, if increasingly frequent and severe weather events threaten the terminal as CLF alleges, then Exxon must consider such events in order to satisfy the permit requirement that Exxon identify and proactively address potential discharges of pollutants. Accordingly, I find that Counts Six, Eight, Nine, Ten and 11 allege plausible entitlements to relief.

Count 11 relates to the Storm Prevention, Control, and Countermeasures Plan, or the SPCC. Exxon is correct that an SPCC -- the SPCC alone or in isolation is not a basis for a citizen suit. However, in this case, it is incorporated in the SWPPP. The permit, as indicated earlier -- I hope I said it -- expressly requires that Exxon comply with the SWPPP. Therefore, failure to comply with the SPCC would be a failure to comply with the SWPPP and a failure to comply with the permit.

As I said, a hearing on Count 15 is not necessary.

Count 15 alleges that Exxon is violating the Resource Conservation Recovery Act. RCRA authorizes citizen suits against "any person who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." That's 42 U.S.C. Section 6972(a)(1).

CLF alleges that "there is a substantial and imminent risk of the terminal discharging and/or releasing pollutants because the terminal has not been properly engineered, managed, and fortified, or if necessary, relocated to protect against" climate change-induced weather events. That's paragraph 347 of the Amended Complaint.

Exxon argues that the court should dismiss the RCRA count because, like the climate change count, CLF fails to plead an imminent threat of harm and therefore lacks standing. However, for the reasons discussed earlier with regard to the climate change counts, CLF plausibly alleges an imminent threat of harm.

Exxon also argues that the court should dismiss the RCRA count because the threatened discharges on which that count rely fall outside of RCRA's jurisdiction. It is correct that industrial discharges from point sources subject to NPDES permits are expressly exempted from RCRA's definition of "hazardous" waste. That's 42 United States Code Section

6903(27). However, EPA's regulations provide that RCRA's exclusion of point sources subject to NPDES permits "applies only to the actual point source discharge" and "does not exclude industrial wastewaters while they're being collected, stored, or treated before discharge." That's 40 CFR Section 261.4(a)(2) in the comment.

CLF argues that, "It is the cumulative impact of Exxon's CWA violations alleged in Counts 1 to 14 and Exxon's disregard of known risks impacting its terminal that create a risk of imminent and substantial endangerment." While nearly all of CLF's allegations in Counts One to 14 rely on violations of the permit, they do not all rely on discharges from outfalls 01A, 01B, and 01C, which are the only point sources identified in the permit. The SWPPP, for example, addresses facilities and practices across the entire terminal, such as storage tanks, tank-to-tank transfers, tank-to-truck loading and procedures for spill prevention and responses to any such problems.

Accordingly, the court is dismissing the RCRA count only to the extent it relies on allegations of discharges from the three point sources covered by the permit, outfalls 01A, 01B, and 01C. This is similar to what the District Court in Puerto Rico did in Water Keeper All, 152 F. Supp. 2d 163 at 170. Such allegations include those in Counts Two and Three which concern discharges of pollutants from the outfalls in

excess of the permit's allowances.

So that concludes my reasoning based on my present informed but not final understanding of the law. As in any case, I'll continue to consider the complex law in this case, and if I'm persuaded that I used the incorrect legal standard to decide whether a claim had been stated, I'll revise my view of the law on a motion for summary judgment or in my instructions to a jury, should we get that far.

THE COURT: So we need to move to scheduling. Does Exxon expect that it will move for a stay under the doctrine of primary jurisdiction?

MR. TOAL: We would, Your Honor.

THE COURT: I of course anticipated that. And would you request a hearing on any such motion, do you expect?

MR. TOAL: I think it likely would be helpful to the court.

THE COURT: Yes. It's possible that -- all right. So I have to build a schedule for that. But I may not stay the case, and I'd also like to develop a schedule where you start collecting your documents and information that will need to be disclosed in your initial disclosures if I deny the stay.

What would be sort of the minimum reasonable time to file and brief the motion for a stay under the doctrine of primary jurisdiction? As I said many hours ago, I thought there was a good discussion of primary jurisdiction in

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 16th day of March, 2019.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter