UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. EXXONMOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, and EXXONMOBIL PIPELINE COMPANY, Defendants.	§	Case No. 1:16-cv-11950-MLW

DEFENDANTS' RESPONSE TO DECEMBER 3, 2018 ORDER

Pursuant to the Court's Order of December 3, 2018 (ECF No. 56), Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company ("ExxonMobil"), respectfully submit the following report concerning (i) ExxonMobil's communications with the Environmental Protection Agency ("EPA") regarding the status of ExxonMobil's pending permit renewal application for Everett Terminal ("the Terminal"), and (ii) ExxonMobil's position on seeking EPA's involvement in this suit.

I. Communications with EPA on Permit Renewal Application

On December 3, 2018, the Court ordered the parties to "discuss with [EPA] the status of defendants' application to renew the National Pollutant Discharges Elimination System Permit ["NPDES"] for the Everett Terminal, and report . . . whether and when the EPA is expected to act on defendants' application." (ECF No. 56 at 1.) After attempting to contact EPA by telephone on December 4, 2018, counsel for ExxonMobil conveyed the Court's Order along with a copy of the transcript of the November 30, 2018 hearing to EPA Region 1 via email on December 5, 2018. Counsel for ExxonMobil spoke with EPA

Region 1 attorneys, Jeff Kopf and Samir Bukhari, on December 7 and with Mr. Kopf on December 10 regarding arranging a meeting or a conference call with both EPA and Plaintiff Conservation Law Foundation ("CLF") to discuss the status of ExxonMobil's pending permit application. Messrs. Kopf and Bukhari advised that EPA would provide a response regarding the status of the permit application promptly after a scheduled meeting of EPA Region 1 leadership.

On December 17, 2018, counsel for ExxonMobil, counsel for CLF, and EPA Region 1 attorney Samir Bukhari participated in a conference call to discuss the status of the permit application. EPA informed the parties that it would provide them with a letter explaining the position of EPA Region 1 on the status of the Terminal's permit renewal application. A copy of that letter, which EPA sent to counsel for ExxonMobil and counsel for CLF on December 17, 2018, is attached as Exhibit A.

As set forth in EPA's letter, EPA recognizes the "importance" of the Terminal's Permit and EPA plans to release a "draft permit for public notice and comment" in the coming years. (Ex. A at 2.) EPA indicated that it may do so within the next two fiscal years, and no later than "2022," by which time it is "committed to eliminating" the Region's back log. (*Id.*) EPA explains that "the Region committed substantial technical and legal resources toward the 2008 reissuance of the Permit, and subsequent appeal, settlement and modification, which resulted in a major upgrade to the facility." (*Id.*) Thus, the Region states it has given precedence to addressing "a number of pressing environmental [problems] and other priorities critical to EPA's mission" before releasing Everett Terminal's permit. (*Id.*)

II. ExxonMobil Does Not Plan to Sue EPA under 5 U.S.C. § 702

The Court also ordered the parties to "report whether they plan to file suit against the EPA—either in this action or a separate action—pursuant to 5 U.S.C. § 702 for 'fail[ure] to act in an official capacity,' and if they believe that such an action would be futile or undesirable, explain the reasons for their position(s)." (ECF No. 56 at 1.) Having considered the Court's proposal and researched the applicable law, ExxonMobil does not plan to sue EPA under 5 U.S.C. § 702 because it appears such a suit would be futile under the circumstances.[1]

A. The Permit Renewal Application

EPA issued a modified version of ExxonMobil's most recent permit (the "Permit") on October 12, 2011, and it became effective January 1, 2012. The Permit is the product of careful agency review by EPA and approval by the Massachusetts Department of Environmental Protection, following extensive discussions between ExxonMobil and EPA concerning "major" upgrades to the very systems at the facility that CLF challenges here. (Ex. A at 2.) Prior to issuing the Permit, EPA required ExxonMobil to "extensively redesign its effluent treatment system" and to provide "storage capacity to contain significant flows generated by most storm events," in accordance with "detailed design" plans that EPA approved. (ECF No. 34-1 at 78–80; ECF No. 38-2 at 21–22.) Upon ExxonMobil's completion of the required upgrades, which demanded substantial capital investment and infrastructure changes at the Terminal, EPA issued the Permit with provisions that reflected the new design. (ECF No. 38-2 at 4–5, 7, 22.) Throughout the

[1] While a 5 U.S.C. § 702 suit against EPA does not appear to be viable option on the facts presented here, ExxonMobil expresses no view on the appropriateness of an APA action challenging agency inaction in different circumstances.

term of the Permit, the facility has been operated consistent with ExxonMobil and EPA's joint understanding of the Permit's legal requirements. (ECF No. 38-3.) ExxonMobil submitted its Permit renewal application on May 31, 2013, ahead of the Permit's January 1, 2014 expiration date.[2] The Permit has been administratively continued pending a final decision by EPA on the renewal application. *See* 40 C.F.R. § 122.6(a); *Nat. Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 165 (D.C. Cir. 1988) (upholding EPA's "regulation providing for continuances of out-of-date permits").

B. Suing EPA Under 5 U.S.C. § 702 Would Be Futile

A suit against EPA under 5 U.S.C. § 702 does not appear to be a viable option for compelling EPA to act on its pending permit renewal application. To challenge an agency action under the Administrative Procedure Act ("APA"), a plaintiff is required to establish: (i) standing, (ii) the existence of a final agency action, and (iii) a non-discretionary obligation for EPA to timely act on a permit renewal application. If ExxonMobil were inclined to file such an action, it appears that one or more of these requirements would bar its suit.

First, to establish standing, ExxonMobil would have to show an actual or imminent injury-in-fact. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As the Supreme Court held when addressing this very statute, a party seeking review under the APA must show that it is "suffering legal wrong" or is "adversely affected or aggrieved" by the challenged agency action. *Sierra Club* v. *Morton*, 405 U.S. 727, 732 (1972).

[2] Although NPDES permits have "fixed" five-year terms, 33 U.S.C. § 1342(a)(3), (b)(1)(B), the Permit was set to expire five years after the effective date of the prior version, which it modified. Namely, the 2012 Permit modified the permit EPA issued on September 29, 2008, effective January 1, 2009 (ECF No. 34-1 at 2, 78), and such modification followed a petition for review of provisions in the 2009 permit to the U.S. Environmental Protection Agency Environmental Board of Appeals (ECF No. 38-2 at 4).

ExxonMobil would have difficulty satisfying this standard given that the Permit has been administratively continued pending EPA's decision on the renewal application. The administrative continuance allows ExxonMobil to continue operating the Terminal subject to the Permit's legal requirements. Because the Clean Water Act dictates that a permit holder's obligations remain fixed for the duration of the Permit, the continuance effectively maintains the status quo. *See Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 22 (1st Cir. 2012). ExxonMobil cannot reasonably argue that it is aggrieved by continuation of the Permit since ExxonMobil has been fulfilling its legal requirements under the Permit for years. Moreover, the current Permit arose from a formal Memorandum of Understanding between ExxonMobil and EPA, pursuant to which EPA agreed to issue the Permit in exchange for ExxonMobil agreeing to make "material and substantial alterations" to its facility to upgrade its effluent treatment system and to equip the system to handle peak storm water flows. (ECF No. 38-2 at 8, 21–23.) In addition, ExxonMobil cannot plausibly allege an injury from administrative continuance of the Permit given that its renewal application seeks issuance of a permit substantially similar to the one currently in effect.

Second, EPA's delay in acting on the renewal application does not appear to qualify as a "final agency action," as required by 5 U.S.C. § 704. An agency action is deemed final when "it mark[s] the consummation of the agency's decision-making process . . . [and] obligations have been determined" or gives rise to "legal consequences." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (citing *Bennett* v. *Spear*, 520 U.S. 154, 177–78 (1997)). Here, EPA has not taken any action on the renewal application that would appear to satisfy this standard. Critically, EPA has not suggested

that it is unwilling to act on the renewal application. To the contrary, EPA has reiterated the importance of the Terminal's Permit while confirming that it plans to release a "draft permit for public notice and comment." (Ex. A at 2.) EPA indicated that it may do so within the next two fiscal years, and stated that the agency is "committed to eliminating" the Region's back log no later than "2022." (*Id.*) This process can entail "complicated technical and legal issues," which "are often voluminously commented upon, then vigorously contested." (*Id.*) These statements confirm that EPA's "decision-making process" has not yet been completed. *Hawkes Co.*, 136 S. Ct. at 1813. Moreover, given the administrative continuance of the Permit, this is not a situation where an agency's decision not to take an action has "the same impact on the rights of the parties as an express denial of relief." *Cf. Her Majesty the Queen ex rel. Ontario* v. *EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990). In the absence of such a final agency action, it does not appear that ExxonMobil can successfully maintain an APA suit against EPA under 5 U.S.C § 704.

Third, it appears that the timing of EPA's decision is outside the scope of judicial review because it is an inherently discretionary agency action. Under 5 U.S.C § 706, an APA suit "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton* v. *S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). That condition does not appear to be met in this case, where no law dictates when EPA must act on a NPDES permit renewal application.

The Clean Water Act does not obligate EPA to timely issue permits, or even to issue permits at all. The text of the provision of the Clean Water Act concerning NPDES permits simply states that "the Administrator *may*, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C.

§ 1342 (emphasis added). Courts have interpreted this language to afford the agency discretion. *See Nat. Res. Def. Council, Inc.* v. *Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) ("The use of the word 'may' in [33 U.S.C. § 1342] means only that the Administrator *has discretion* either to issue a permit or to leave the discharger subject to the total proscription of" pollutant discharges in 33 U.S.C. § 1311. (emphasis added)). And just as EPA is not required to issue NPDES permits, nothing in the text of the Clean Water Act compels EPA to review permits or renewal applications within a prescribed timeframe.

Furthermore, it is reasonable for EPA to exercise its discretion by prioritizing certain renewal applications that demand immediate attention, while assigning lower priority to renewal applications concerning facilities that are in compliance with the Clean Water Act. EPA has stated that, while it recognizes the "importance" of the Terminal's Permit, it has developed plans to "deploy resources to address a number of pressing environmental [problems] and other priorities critical to EPA's mission," before releasing Everett Terminal's permit. (Ex. A at 2.) For a number of reasons, EPA could appropriately decide there is no exigency regarding the permit renewal application for Everett Terminal. First, as reflected on EPA's Enforcement Compliance History Online website—EPA deems ExxonMobil to be operating in legal compliance with its Permit. (*See* ECF No. 38-3.) Second, it was not long ago that EPA oversaw an extensive redesign of this very facility. Between 2008 and 2012, when the Permit became effective, ExxonMobil made a significant investment in upgrading its facility to meet precise design specifications that were required by EPA as a condition of issuing the current Permit. (ECF No. 38-2 at 7.) As confirmed in EPA's letter, "the Region committed substantial technical and legal resources toward the 2008 reissuance of the Permit, and subsequent appeal, settlement and

modification, which resulted in a major upgrade to the facility." (Ex. A at 2.) Throughout this same period, an external audit group performed inspections of the facility, and a court-appointed observer filed quarterly status reports on ExxonMobil's progress with Judge Saris.[3] That EPA was satisfied with the Terminal's "material and substantial" improvements is evidenced by the fact that it issued the Permit in 2011. (ECF No. 38-2 at 22–23.) Indeed, in EPA's Statement of Basis for the Permit, it characterized the facility upgrades as "possess[ing] significant environmental merit." (*Id.* at 7.) Finally, there is not a history of agency inattention at Everett Terminal. EPA has issued four NPDES permits to the Terminal since 1991, and none was in effect more than nine years without the EPA issuing a new or modified permit. (ECF No. 34-1 at 2; ECF No. 38-6.)

C. Primary Jurisdiction Affords a Viable Alternative Mechanism for Allowing EPA to Exercise Its Expertise

Should the Court conclude that this suit raises issues that implicate the special expertise and competence of EPA, the doctrine of primary jurisdiction provides an alternative mechanism for allowing EPA to substantially resolve the issues in this suit.

The primary jurisdiction doctrine is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter* v. *Cooper*, 507 U.S. 258, 268 (1993). Courts may invoke the doctrine where, as here, agency expertise is required to "unravel intricate, technical facts" and "agency determination would materially aid the court." *Massachusetts* v. *Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995) (quoting *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979)).

[3] *United States* v. *ExxonMobil Pipeline Co.*, No. 1:08-cr-10404-PBS (D. Mass. May 1, 2012), ECF No. 69-1.

ExxonMobil believes it would be appropriate in this case for the Court to exercise its discretion to stay this action while EPA determines whether the current Permit is sufficient to ensure compliance with the Clean Water Act, or whether any change in permit conditions is warranted. The NPDES permitting regime authorized by the Clean Water Act "requires reevaluation of the relevant factors, and allows for the tightening of discharge conditions" by the permitting agency at "regular intervals," *i.e.*, "whenever a permit expires and is renewed" to "re-ensure compliance with the Act." *See Upper Blackstone*, 690 F.3d at 22. As stated in EPA's letter, this process frequently entails "complicated technical" questions, which are "voluminously commented upon," and "frequently lead to major facility upgrades and improvements in water quality." (Ex. A at 2.) Under similar circumstances, courts have ruled that "EPA should, as Congress intended, address the question[s] in the first instance." *Blackstone Valley Elec. Co.*, 67 F.3d at 983; *see also Jamison* v. *Longview Power, LLC*, 493 F. Supp. 2d 786, 790–91 (N.D. W. Va. 2007) (abstaining to avoid interfering with agency "permitting decision" under Clean Air Act).

The primary jurisdiction doctrine is particularly appropriate here because any ruling contrary to EPA's understanding of the Permit would risk interference with agency discretion and its carefully constructed permitting regime. *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) ("Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result."); *see also Ellis* v. *Gallatin Steel Co.*, 390 F.3d 461, 480-81 (6th Cir. 2004) (abstaining from Clean Air Act citizen suit that interfered with state permitting program). As recounted in EPA's letter, Region 1 "issues wastewater and stormwater permits that cover hundreds of

industrial and municipal dischargers." (Ex. A at 2.) Reinterpreting conditions common across these permits—and the various "general permits" that Region 1 issues and implements—to impose new obligations on permit holders could severely disrupt this permitting regime. (*See id.*) Accordingly, ExxonMobil submits that invoking the doctrine of primary jurisdiction would be an appropriate mechanism for allowing EPA to adjudicate issues uniquely within its expertise.

D. As an Alternative, ExxonMobil Intends to Seek EPA Deposition Testimony

If the Court declines to invoke the doctrine of primary jurisdiction, ExxonMobil anticipates seeking EPA's testimony as a witness in this action. EPA's participation as a witness would afford many of the same benefits as adding EPA as a party to this suit, without implicating the legal hurdles and potential delay of bringing an APA challenge.

EPA has promulgated regulations pursuant to 5 U.S.C. § 301 governing when EPA will provide testimony at the request of parties in collateral litigation. These regulations provide that EPA employees may testify in civil actions where the agency is not a party if the General Counsel for EPA determines that doing so is "in the interests of EPA." 40 C.F.R. §§ 2.402(a), 2.405. As the Court observed, if the Court is to hear arguments on "what EPA thinks the permit means, they've got to be in court subject to being cross-examined in some fashion." (Nov. 30, 2018 Hr'g Tr. 150:2–4.) By participating as a witness, EPA could make unmistakably clear the meaning of disputed terms in the Permit, which are common in permits across Region 1. EPA could also provide testimony regarding the rationale for adopting certain Permit conditions, especially those concerning ExxonMobil's "major upgrade [of] the facility." (Ex. A at 2.) Such testimony would ensure the Permit is not interpreted in a manner that would nullify or contradict the

agreement EPA and ExxonMobil executed, thereby curtailing agency discretion and "undermin[ing] the supplementary role envisioned for the citizen suit." *See Gwaltney*, 484 U.S. at 60.

We therefore submit that, in lieu of suing EPA, ExxonMobil and CLF should agree to seek EPA's participation as a witness in this suit.

Dated: December 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I, Deborah E. Barnard, hereby certify that this document filed through the ECF system on December 18, 2018 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
Deborah E. Barnard