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 **Statement of Counsel and Report of Conservation Law Foundation**

STATEMENT OF COUNSEL AND REPORT OF CONSERVATION LAW FOUNDATION

Now comes Plaintiff Conservation Law Foundation ("CLF") and, pursuant to this Honorable Court's Order of December 3, 2018 (Doc. No. 56), respectfully reports on (1) whether the United States Environmental Protection Agency ("EPA") is expected to act on Defendant Exxon's[1] permit renewal application, (2) when the EPA is expected to act on the renewal application, and (3) whether CLF plans to file suit against EPA pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

As explained below, EPA is expected to act on Exxon's permit application in due course, but EPA's grant or denial of Exxon's application will take years before it becomes final. Under guidance from prior rulings by the First Circuit Court of Appeals, CLF does not intend to file suit

[1] As used herein, "Defendant" or "Exxon" refers to Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company, collectively.

against EPA pursuant to 5 U.S.C. § 702 for "fail[ure] to act in an official capacity[.]" Based upon feedback from EPA, prior experience and caselaw regarding such a claim, CLF believes pursuit under § 702 would be futile.

1. EPA will act on Exxon's application to renew the National Pollutant Discharges Elimination System ("NPDES") Permit for the Everett Terminal.

CLF has discussed the status of Exxon's application to renew the NPDES Permit for the Everett Terminal with EPA. CLF reached out to EPA in a letter dated December 6, 2018, to initiate a discussion of the (1) status of Exxon's application to renew NPDES Permit No. MA0000833 for the Everett Terminal and (2) whether and when EPA is expected to act on Defendant's application, pursuant to this Honorable Court's Order of December 3, 2018 (Doc. No. 56). CLF understands that Exxon also reached out to EPA. On December 13, 2018, EPA notified the parties that it had scheduled a joint conference call for Monday, December 17, 2018, at 10 a.m.

On December 17, 2018, at 10 a.m., counsel for the parties participated in the scheduled call. Through Assistant Regional Counsel Samir Bukhari, EPA Region 1 provided the parties with an oral update on the status of Exxon's application to renew NPDES Permit No. MA0000833 during the conference call and provided the parties with a letter responding to the Court's questions following the call. A copy of that letter, dated 12/17/18, from Ken Moraff, Director of the Office of Ecosystem Protection, EPA Region 1, is attached hereto as Exhibit A. In its oral and written communication to the parties, EPA stated, in short, that it could not give assurances as to the potential issuance of the draft revised permit for the Everett Terminal and that it would likely not issue until, at the earliest, 2020, after which it would be the subject of notice and comment and potential appeal(s).

2. EPA's next step on Exxon's application is issuance of a draft renewal permit, but it will likely take years for that draft permit to become final and take effect.

As discussed by CLF Attorney Christopher Kilian during the December 4, 2018 hearing, the issuance or reissuance of a NPDES permit can be, and often is, a lengthy process. Mr. Kilian mentioned the Deer Island Waste Water Treatment Plant, City of Worcester storm water system, and Upper Blackstone Water Pollution Abatement District permits as examples. Some of these examples are specifically referred to in EPA's letter to the parties. Exhibit A, p. 1. CLF provides below a short synopsis of those permit proceedings, and of the City of Taunton permit proceedings.

a. Deer Island Wastewater Treatment Plant

In response to lawsuits filed in the early 1980s that led to the completion of a multibillion-dollar sewage treatment facility on Deer Island in Boston Harbor, EPA and the Massachusetts Department of Environmental Protection ("MassDEP") issued a NPDES permit to the Deer Island Wastewater Treatment Plant. Following a public comment period and hearings—to which CLF was a party—the original permit was issued on May 20, 1999. EPA then issued a permit modification that become effective on August 10, 2000 and expired by its terms in 2005. On January 13, 2003, EPA proposed a second modification to the Permit that would revise and add to the permit's reporting and monitoring requirements and numeric effluent limitations but, following the close of the public comment period, EPA has yet to release a final permit decision. *See* EPA, *EPA's Permit for the MWRA Outfall*, https://www.epa.gov/npdes-permits/epas-permit-massachusetts-water-resources-authority-mwra-outfall (last visited Dec. 7, 2018). The current permit in effect at Deer Island is still the 1999 permit, originally released for public comment nearly twenty years ago, as modified in 2000.

b. Worcester Municipal Separate Storm Sewer System

The City of Worcester is authorized to discharge stormwater from its municipal separate storm sewer system ("MS4") to receiving waters under an administratively continued NPDES permit originally issued on September 30, 1998. The 1998 permit expired over fifteen years ago on October 30, 2003. In 2008, EPA and MassDEP released a draft NPDES permit to update the existing 1998 permit, on which CLF provided comments. *See Worcester Municipal Separate Storm Sewer System (MS4) (NPDES Permit Number MAS010002)*, https://www.epa.gov/npdes-permits/worcester-municipal-separate-storm-sewer-system-ms4-npdes-permit-number-mas010002 (last visited Dec. 7, 2018). The public comment period closed in November 2008, but EPA has not yet issued a final permit decision, leaving the twenty-year-old administratively continued permit in effect.

c. The Upper Blackstone Water Pollution Abatement District

The Upper Blackstone Water Pollution Abatement District owns and operates a sewage and wastewater treatment plant for several communities that is authorized to discharge into the Blackstone River, which ultimately flows to Narragansett Bay, under a NPDES permit originally issued on August 22, 2008. The 2008 Permit was modified to include an additional effluent limit for aluminum in 2009. The Permit (including permit modification) expired in 2013 and is now administratively continued. CLF filed comments on the draft 2008 Permit, and, following the issuance of the final 2008 Permit, filed a petition for review to the Environmental Appeals Board ("EAB") of the Permit's limits for total nitrogen, phosphorous, fecal coliform, and aluminum. The permit holder and six other parties also filed petitions of review. After three years of briefing and argument before the EAB, the Board issued a decision that upheld the permit, with the exception of a provision relating to "co-permittees," that both the permit holder and CLF appealed to the First Circuit, which denied both petitions. *See Upper Blackstone Water Pollution Abatement Dist.*

v. U.S. E.P.A., 690 F.3d 9 (1st Cir. 2012). The 2008 NPDES permit, as modified, has been administratively extended and continues to be in effect, subject to a May 1, 2014 Administrative Order on Consent. *See* Upper Blackstone Water Pollution Abatement District, *Upper Blackstone and EPA Settle on Administrative Order Terms* (Jun 20, 2014), http://www.ubwpad.org/2014%20AOC%20062014.pdf.

d. Taunton Municipal Separate Storm Sewer System

In 2015 the City of Taunton received a revised NPDES permit, authorizing discharge from its MS4 into the Taunton River, after operating on an outdated permit for fourteen years. The revised permit became effective on July 1, 2015, and it will expire in 2020. *See The City of Taunton Department of Public Works NPDES Permit No. MA0100897* (Apr. 10, 2015), https://www3.epa.gov/region1/npdes/permits/2015/finalma0100897permit.pdf. The City of Taunton unsuccessfully petitioned for review of certain conditions in the revised permit, resulting in the City of Taunton's appeal of the EAB's decision to the First Circuit, which also denied the petition. *See City of Taunton, Massachusetts v. United States Environmental Protection Agency*, 895 F.3d 120 (1st Cir. 2018). The City of Taunton has now filed a Petition for a Writ of Certiorari to the United States Supreme Court.

As the above examples illustrate, EPA's issuance of a draft permit is not an end, but often the beginning of a lengthy process. EPA's letter to the parties acknowledges this fact, stating that:

> [m]any of the permits slated for issuance in fiscal year 2019 will present complex suites of issues, and all will be subject to potentially resource-intensive, and lengthy, administrative and judicial appeals. Two previously issued general permits covering numerous municipal separate storm sewer systems in New Hampshire and Massachusetts are currently before the D.C. Circuit Court of Appeals and the Region expects these matters will continue to consume substantial resources in the coming fiscal year.

Exhibit A, p. 2.

The administratively continued permit under which Exxon currently operates is also an example of this. After the issuance of a draft permit and completion of the public notice and comment process on that draft permit, EPA issued a final NPDES permit to Exxon for the Everett Terminal on September 29, 2008. On October 28, 2008, Exxon filed a petition of review of that final permit to EPA's EAB in Washington, D.C. While uncontested and severable portions of the permit went into effect on January 1, 2009, all other conditions of the permit were stayed for the pendency of the appeal. Exxon and EPA eventually settled their dispute through a Memorandum of Understanding, entered on or about August 5, 2009. Pursuant to that agreement, EPA withdrew the contested conditions and, in place of the contested conditions, proposed modified conditions for public review and comment. Those modified conditions, together with the previously uncontested and severable conditions, became EPA NPDES Permit No. MA0000833, as modified on October 12, 2011—the Permit currently in effect for the facility at issue in this case.[2]

Until such time as the contemplated draft renewal permit becomes final and takes effect, Exxon's administratively continued permit remains effective; its terms and conditions fully enforceable by this Honorable Court. In *Costle v. Pacific Legal Foundation*, the Supreme Court explicitly recognized that the APA mandates continuance of an NPDES permit past its stated term if a timely and sufficient application has been filed but final agency action on the application has yet to occur. 445 U.S. 198, 210-11 n.10 (1980) ("Because the EPA has not yet acted upon the city's application . . . for a new NPDES permit, the terms and conditions of the 1975 permit have remained in effect by operation of law, even though the permit expiration date has now passed. *See* 5 U.S.C. § 558(c) . . . .") (quotation from APA omitted).

[2] A timeline of Exxon's petition process before the EAB, with links to filings, is available online here: https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/0587a73771e0b024852574f10064af32!OpenDocument.

In the meantime, Exxon is operating under an administratively continued permit that is in effect and contains terms and conditions with which Exxon must comply. Noncompliance with any NPDES permit, including any condition of a NPDES permit, is a violation of an "effluent standard or limitation" pursuant to 33 U.S.C. § 1365(f)(6) for which any citizen may bring suit pursuant to 33 U.S.C. § 1365(a)(1)(A) for unlawful discharges under 33 U.S.C. § 1311(a). There is no Article III or prudential jurisdictional reason to set aside, delay or dismiss a citizen suit alleging violations of the terms and conditions of an effective NPDES permit on the grounds that another NPDES permit may someday, years after the suit was filed, take effect. To hold otherwise would undermine the structure and function of the Clean Water Act's citizen suit provision. As EPA further described to the parties:

> In its capacity as permitting authority, the Region issues wastewater and stormwater permits that cover hundreds of industrial and municipal dischargers. Region 1 permits can present complicated technical and legal issues and they are often voluminously commented upon, then vigorously contested. Still, they frequently lead to major facility upgrades and improvements in water quality.

Exhibit A, at 1-2. It is situations such as this one where EPA cannot or will not act, that a citizen suit can appropriately supplement EPA's jurisdiction. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987).

3. CLF does not plan to file suit against EPA because an action under 5 U.S.C. § 702 is futile and the alternative, a mandamus petition in the First Circuit, is ill-suited to the circumstances.

In 2013, the First Circuit held that it "has jurisdiction over petitioners' claims of unreasonable delay in the reissuance of the NPDES permits. *See* 33 U.S.C. § 1369(b)(1)(F) (vesting exclusive jurisdiction in courts of appeals to review 'the Administrator's action . . . in issuing or denying any permit under section 1342 of [the CWA]')[.]" *In re Sierra Club, Inc.*, No. 12-1860, 2013 WL 1955877, at *1 (1st Cir. May 8, 2013) (internal citation omitted) (unreported

decision attached for the Court's convenience as Exhibit B); *see also* Clean Water Act, 33 U.S.C. § 1369(b)(1)(F) (providing that review of EPA's actions in "issuing or denying" any NPDES permit is within the exclusive jurisdiction of the Courts of Appeals). As described by the First Circuit, again mirroring the language of the letter received from Ken Moraff, EPA to the parties here:

> The EPA states that it is working on the permits, but the process is complex and it must balance competing priorities with its limited resources, explaining that it has a significant backlog of expired permits in this region, and that it has prioritized permits that have greater environmental impact.

In re Sierra Club, supra, 2013 WL *1. In light of the Court's deference to the EPA's established priorities with a timeline akin to that which EPA has described here, a proceeding under the APA would not provide the relief sought by this citizen suit but would allow for additional delay in compelling compliance with permit conditions and would likely be unsuccessful.

The alternative to a suit against EPA pursuant to 5 U.S.C. § 702 would be a petition for mandamus lodged in the First Circuit. This avenue is ill-suited to the circumstances presented here in part because it would bypass this Honorable Court's determinations as to applicable permit violations and, potentially delay the pending proceeding. Such a result would allow Exxon to continue to violate the terms of its permit indefinitely. Moreover, it is uncertain whether the First Circuit would provide CLF with any meaningful relief. In unreasonable delay claims, an agency is entitled to substantial deference in establishing a timetable for completing administrative proceedings. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). The courts have recognized that they are generally "ill-suited to review the order in which an agency conducts its business" and are "hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." *Id.*

In *Telecommunications Research & Action Center v. F.C.C.,* 750 F.2d 70 (D.C.Cir.1984) ("*T.R.A.C.*"), the Court of Appeals for the District of Columbia Circuit set out factors to guide the determination of whether an agency's delay in issuing a final order is so "egregious" as to warrant mandamus:

> In pertinent part, they provide that 1) a "rule of reason" governs the time agencies take to make decisions; 2) delays where human health and welfare are at stake are less tolerable than delays in the economic sphere; 3) consideration should be given to the effect of ordering agency action on agency activities of a competing or higher priority; 4) the court should consider the nature of the interests prejudiced by delay; and 5) the agency need not act improperly to hold that agency action has been unreasonably delayed.

Towns of Wellesley, Concord & Norwood, Mass. V. Fed. Energy Regulatory Comm'n, 829 F.2d 275, 277 (1st Cir. 1987). While human health and welfare and the health of the environment are certainly at stake in CLF's case against Exxon, CLF believes that the existing administratively continued NPDES Permit will adequately protect human health and the environment if the terms and conditions of the Permit are enforced.[3] Enforcement of the terms and conditions of Exxon's existing Permit is precisely the relief that CLF seeks in the instant action before this Honorable Court.

[3] While the *T.R.A.C.* factors are not met in the instant case (because of Exxon's existing, enforceable NPDES permit), in other cases with different facts mandamus could be warranted. There could also be cases where the facts and procedural posture warrant review of agency inaction by the district courts pursuant to 5 U.S.C. § 702, and CLF does not intend its position on § 702 and mandamus under the facts in this case to foreclose CLF's arguments that review of agency inaction in the district courts or circuit courts is warranted in a different cases with different facts and circumstances.

Respectfully submitted,

Dated: December 18, 2018

CONSERVATION LAW FOUNDATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, the foregoing Statement of Counsel was filed through the ECF system, by which means a copy of the filing will be sent electronically to all parties registered with the ECF system.

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EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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VIA ELECTRONIC MAIL

December 17, 2018

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Re: Reissuance Status of ExxonMobil Everett Terminal NPDES Permit

Dear Ms. Phillips and Mr. Kilian:

I am writing to respond to your joint request for information relating to the status of the National Pollutant Discharge Elimination System ("NPDES") permit for ExxonMobil's Everett Terminal, made in connection with an Order issued in *Conservation Law Foundation v. ExxonMobil*, 1:16-cv-11950-MLW. That Order directs the parties to, "discuss with the Environmental Protection Agency ('EPA') the status of defendants' application to renew the [NPDES] Permit for the Everett Terminal, and report, jointly if possible but individually if necessary, whether and when the EPA is expected to act on defendants' application." Officials in EPA Region 1 were contacted by counsel for Conservation Law Foundation and ExxonMobil Corporation shortly after the Order issued to solicit the Region's position, and the Region has since given the matter careful and extended consideration. We explain our position below.

As you both are aware, EPA Region 1 has a long history of defending the Nation's waters through the issuance of protective NPDES permits necessitated by the Clean Water Act, as well as through enforcement actions. *See, e.g., City of Taunton v. U.S. Envtl. Prot. Agency,* 895 F.3d 120 (1st Cir. 2018), cert. pending, No. 18-446; *Upper Blackstone Water Pollution Abatement Dist. v. U.S. Envtl. Prot. Agency*, 690 F.3d 9 (1st Cir. 2012), cert. denied, 133 S. Ct. 2382 (2013); *United States v. Metropolitan Dist. Comm'n*, 761 F. Supp. 209 (D. Mass 1991). The Region administers one of the most active and consequential Clean Water Act permitting programs in the country. The Region directly implements the NPDES program in both Massachusetts and New Hampshire, two of only three states in the country that have not obtained authorization to administer the NPDES program. In its capacity as permitting

authority, the Region issues wastewater and stormwater permits that cover hundreds of industrial and municipal dischargers. Region 1 permits can present complicated technical and legal issues, and they are often voluminously commented upon, then vigorously contested. Still, they frequently lead to major facility upgrades and improvements in water quality.

For the current fiscal year, which began October 1, 2018, the Region has developed plans and will deploy resources to address a number of pressing environmental and other priorities critical to EPA's mission. These initiatives involve Great Bay in New Hampshire, Lake Champlain in Vermont, the Merrimack River and its tributaries in Massachusetts and New Hampshire, and significant cross-border water pollution problems affecting Rhode Island and Connecticut. The Region's industrial priorities include permitting several large power plants, and addressing major facilities related to the transportation (airports, rail) and sand and gravel sectors. Issuing and implementing important general permits is another area the Region will focus on in the coming year, including but not limited to those relating to cooling water withdrawals, groundwater remediation, potable water treatment facility discharges, small publicly owned treatment works, and hydroelectric facilities. Many of the permits slated for issuance in fiscal year 2019 will present complex suites of issues, and all will be subject to potentially resource-intensive, and lengthy, administrative and judicial appeals. Two previously issued general permits covering numerous municipal separate storm sewer systems in New Hampshire and Massachusetts are currently before the D.C. Circuit Court of Appeals and the Region expects these matters will continue to consume substantial resources in the coming fiscal year.

The scope of the Region's plans, when set against the Region's resources, makes release of the facility's draft permit for public notice and comment highly unlikely in the current fiscal year. Depending on the number and type of controversies generated by the Region's contemplated permitting activity, it is, indeed, possible that public notice and comment may not commence until the following fiscal year. The Region's priorities should *not* be construed as diminishing the environmental significance of the Everett Terminal or the importance of its Permit; to the contrary, 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. Given the agency's permitting backlog, the commitment of resources to this Permit necessarily came at the expense of other important permits. The Region and EPA, as a whole, are acutely aware of the backlog. EPA is committed to eliminating it, and indeed the agency's senior leaders have set a goal of doing so by 2022.

If you require further information relating to issuance of the draft permit for the Everett Terminal, please contact Samir Bukhari of the Office of Regional Counsel (bukhari.samir@epa.gov) or Jeff Kopf of the Office of Environmental Stewardship (kopf.jeff@epa.gov).

Sincerely,

Ken Moraff
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