IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, Inc.,	)	
Plaintiff,	)	
v.	)	Case 1:16-cv-11950 (MLW)
EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, and EXXONMOBIL PIPELINE COMPANY,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION

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Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company (collectively, "ExxonMobil") respectfully submit this memorandum of law in support of their motion to stay the case brought by Plaintiff Conservation Law Foundation, Inc. ("CLF") pursuant to the doctrine of primary jurisdiction.

PRELIMINARY STATEMENT

In this citizen suit, CLF asks this Court to determine whether ExxonMobil should be required to redesign its facilities to protect against allegedly increased risks of flooding and extreme precipitation during the past seven years and into the near future. That alone would be entirely without precedent, and contrary to the operative National Pollutant Discharge Elimination System ("NPDES") permit (the "Permit"). But because CLF's argument relies on stock phrases common in NPDES permits and their state equivalents, it effectively and improperly seeks a legislative decision, implicating numerous facilities subject to these same conditions. Whether, when, and to what extent permit holders must address such risks are questions properly addressed by EPA.

In accordance with the primary jurisdiction doctrine, this Court should defer to EPA to determine in the first instance (i) the impact of climate change on risks of flooding and extreme precipitation, (ii) the extent to which such risks implicate the Everett Terminal (the "Terminal"), (iii) whether and when permittees should respond to any such risks, (iv) whether the terms of the Terminal's current Permit are sufficient to address any such risks, and (v) what, if any, limits or conditions should be imposed to respond to these risks. Evaluating environmental risks and dictating when and to what extent permittees should address them is precisely the role Congress committed to EPA. Answering these questions—which are both highly technical and value-laden—falls squarely within the special competency and expertise of that agency. Any decision by this Court on the merits of CLF's claims thus would risk interfering with EPA's carefully

considered permitting program.[1] By contrast, deference to the agency would promote uniformity, a core goal of the Clean Water Act ("CWA").

A stay is particularly appropriate here because ExxonMobil's pending permit renewal application is likely to resolve most, if not all, of the disputed issues in this case. When deciding whether to renew the Permit, EPA will be called upon to decide whether any changes in environmental conditions warrant corresponding modifications to the terms and conditions of the Terminal's currently operative Permit. EPA will also be required to explain the grounds for its decision.

Staying this case will aid the Court without unduly prejudicing CLF. Critically, CLF will be afforded an opportunity to participate in the permitting process, where it may advance the same concerns raised here. Moreover, as several experts attest, throughout the duration of the stay—which is expected to be modest—CLF's members will remain protected by the current Permit, which is the product of extensive agency review and major upgrades to the facility pursuant to EPA-approved designs. The recent substantial investment in renovating the facility reflected long-term environmental planning, which was intended to sufficiently protect the environment for the foreseeable future, and certainly well beyond the remaining life of the Permit. EPA and the Massachusetts Department of Environmental Planning ("MassDEP") satisfied themselves that the Terminal's current Permit, and the newly designed and constructed stormwater treatment system, are appropriately protective of the environment. CLF has not even alleged, let alone established, any material change in environmental conditions since the Permit went into effect that would cause CLF to suffer prejudice or harm while the proper agency addresses its concerns through permitting proceedings, precisely as Congress envisioned.

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[1] In Massachusetts, EPA "directly administers" NPDES permits, *CLF* v. *EPA*, 964 F. Supp. 2d 175, 180 (D. Mass. 2013) (Wolf, J.), whereas "EPA has authorized forty-six states to administer their own NPDES permit programs," *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 14 (1st Cir. 2012). States are authorized to issue permits only if EPA approves the state program, 33 U.S.C. § 1342(b), the program is at least as protective as EPA's, and the program adheres to both the Clean Water Act and EPA guidelines promulgated thereunder. *See* 40 C.F.R. § 123.25(a). Even then, EPA "retains authority . . . to block the issuance of any permit to which [it] objects." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 479 (1987) (citing 33 U.S.C. § 1342(d)).

BACKGROUND

A. CLF's Lawsuit Is the "First of Its Kind."

As CLF itself has conceded, this case is not a typical CWA citizen suit. CLF conceived of this action as a test case that, if successful, would dramatically expand the scope of the CWA to encompass climate change preparedness. Indeed, on multiple occasions, CLF has boasted that this is a "first-of-its-kind lawsuit addressing extreme weather risks." (Ex. 10 at 1; Ex. 6 at 1.)[2] CLF President Bradley Campbell has publicly stated his belief that there should be a general duty under the CWA, applicable to "any industrial or commercial facility that has [an NPDES] permit," to consider climate impacts. (Ex. 7 at 1.) According to Campbell, this lawsuit "could serve as a model for other litigation" that could be duplicated "up and down the Eastern Seaboard and along the Gulf Coast." (*Id.*)

CLF asks this Court to determine what new obligations should be imposed on the Terminal to address purportedly increased risks of climate-induced severe precipitation and flooding since 2012. (Mar. 13, 2019 Hr'g Tr. 90:2–11.) Relying on a general NPDES permit requirement dictating solely that the Terminal's Stormwater Pollution Prevention Plan ("SWPPP") "be prepared in accordance with good engineering practices," (ECF No. 34-1 at 14), CLF asks this Court to conduct its own vulnerability assessment of all the facilities at the Terminal. Throughout this case, however, CLF has repeatedly made clear its inability to explain what good engineering practices would require the Terminal to do differently. (Sept. 12, 2017 Hr'g Tr. 89:8–17.) Rather, CLF seeks to compel ExxonMobil to "do an investigation" to determine whether any changes to the facility are actually required. (*Id.* at 12:20–22.) CLF also asks the Court to impose new reporting and monitoring obligations under which the Terminal would "have an information collection and analysis protocol within [the] company that assures that the information being developed is . . . up-to-date." (Mar. 13, 2019 Hr'g Tr. 64:8–18.) For example, CLF asserts that ExxonMobil should "calculat[e] and recalculat[e] on an annual basis the 10-year 24-hour storm event," and reevaluate "the sizing, operation, design, and compliance of the effluent treatment

[2] "Ex. __" refers to exhibits to the Declaration of Daniel J. Toal in Support of ExxonMobil's Motion to Stay Pursuant to the Doctrine of Primary Jurisdiction.

system" in light of any changes to this number. (*Id.* at 60:9–22.) But by CLF's own admission, "with regard to precipitation . . . the analysis doesn't stop there because, unfortunately, the 10-year 24-hour storm event," is only calculated "historically." (*Id.* at 65:3–18).[3] Accordingly, CLF asks the Court to fashion new formulas for computing the necessary capacity for the facility. CLF further requests that the Court compel ExxonMobil to continually reengineer the Terminal in some heretofore unspecified manner to achieve this increased capacity and to fortify against various distant climate change impacts, including "committed sea level rise." (*Id.* at 70:22.)[4]

The exceptional nature of this suit is confirmed in the injunctive relief CLF seeks. As the Court recognized, "injunctive relief . . . is the heart of the case." (*Id.* at 117:8.) Here, CLF does not merely seek an injunction compelling compliance with the Terminal's Permit, even though that is all the CWA authorizes a citizen to do. Through its declarations, CLF proposes that the Court "require cooperation from ExxonMobil to undertake and support (financially and otherwise) a suitable investigation conducted by qualified and independent engineering professionals skilled at applying current practices on similar facilities in settings with related vulnerabilities." (ECF No. 40-1 at 26.) According to CLF's purported expert, such injunctive relief would "address[ ] ExxonMobil's apparent deficits in design criteria, assumptions about trends and combined effects contributing to failure, and other factors resulting in lack of climate change preparedness at its Everett Terminal." (*Id.*) However, it is far beyond the legitimate purview of a citizen suit to assess environmental risks or impose new obligations on permittees. These are the determinations EPA

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[3] Significantly, and contrary to its claim that "good engineering practices" require consideration of potential climate change effects, CLF has elsewhere acknowledged that "prevailing practice . . . is to design and build according to the climate patterns of the past." Ex. 8 at 5.

[4] As argued extensively in ExxonMobil's prior briefing, CLF's attack on the Permit's definition of—and method for calculating—a 10-year 24-hour storm event is barred by the permit shield and constitutes an impermissible collateral attack on the Permit. *See S. Appalachian Mountain Stewards* v. *A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014); *Chesapeake Bay Found.* v. *Bethlehem Steel Corp.*, 608 F. Supp. 440, 443 (D. Md. 1985) ("The obligations and limitations of NPDES permits are binding unless timely challenged, and may not be reexamined in an enforcement proceeding." (citing 33 U.S.C. § 1369(b)(2))). Nor does the fact that the Permit has been administratively continued lessen the full force and effect of the permit shield or diminish the collateral attack doctrine. *See Nat. Res. Def. Council, Inc.* v. *County of Los Angeles*, 725 F.3d 1194, 1199 & n.7, 1201, 1204–10 (9th Cir. 2013) (analyzing language of a continued NPDES permit in assessing permit shield argument).

makes when *issuing* a permit. And, in fact, EPA engaged in precisely this analysis prior to issuing the current Permit for the Terminal. (ECF No. 34-1 at 78–80.)

B. The Terminal Operates Pursuant to a Valid NPDES Permit Issued and Approved by EPA and MassDEP Following Extensive Agency Review.

EPA issued the Terminal's Permit on October 12, 2011, and it became effective January 1, 2012. (ECF 34-1 at 2.) The Permit is the product of careful agency review by both EPA and MassDEP. Those federal and state agency reviews encompassed both the Permit's terms and the design of the stormwater treatment system CLF challenges here.

Those were not perfunctory agency reviews. As EPA recounts, it "committed substantial technical and legal resources toward the 2008 reissuance of the permit," which in connection with the later "modification . . . resulted in a major upgrades to the facility." (ECF No. 64-1 at 3.) After EPA issued the 2008 permit, ExxonMobil petitioned the U.S. Environmental Appeals Board for review. (ECF No. 34-1 at 78.) EPA and ExxonMobil thereafter entered into a formal agreement, pursuant to which EPA agreed to issue the modified Permit now in effect, if ExxonMobil made certain "material and substantial alterations or additions to the permitted facility," (ECF No. 38-2 at 21–23), to upgrade its effluent treatment system. (ECF No. 34 ¶ 96.) ExxonMobil thus was required to "extensively redesign its effluent treatment system in order to improve effluent quality under all flow conditions." (ECF No. 34-1 at 78–79.) These upgrades, which demanded substantial investment and extensive infrastructure changes, enabled the facility to store and subsequently treat more than two million gallons of stormwater, and ensured that the Terminal would be able to treat effluents in weather at least as severe as a 10-year, 24-hour storm event, as deliberately and precisely defined in the Permit. (ECF No. 34-1 at 3, 80; ECF No. 38-2 at 4–5.) Upon ExxonMobil's completion of the required upgrades, EPA issued the Permit with provisions that reflected the new design. (ECF No. 34-1 at 78–79; ECF 38-2 at 4–5, 7, 21–23.)

C. An Application to Renew the Permit Is Already Pending Before EPA.

ExxonMobil submitted its permit renewal application on May 31, 2013, ahead of the Permit's January 1, 2014 expiration date.[5] The application seeks issuance of a permit that is similar to the current Permit in all material respects. By operation of law, the Permit has been administratively continued pending EPA's final decision 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 administrative continuance of permits).

On December 17, 2018, EPA wrote to the parties about the status of the Terminal's permit renewal application. (ECF No. 64-1 at 2.) EPA's letter confirmed the "importance" of the Terminal's Permit and indicated that EPA would be releasing a "draft permit for public notice and comment." (*Id.* at 3.) While EPA indicated it plans to act on the renewal application in the near term, perhaps as early as fiscal year 2020, it advised that it would renew or reissue the permit no later than "2022," by which time it is "committed to eliminating" the Region's back log of permit renewal applications. (*Id.*) EPA explained that it has given precedence to "a number of pressing environmental [problems] and other priorities critical to EPA's mission" because, among other things, it had already committed significant resources to reissuing the Terminal's Permit and upgrading the facility as recently as 2012. (*Id.*) Prioritizing certain renewal applications that demand immediate attention, while assigning lower priority to renewal applications concerning facilities fully compliant with the CWA, falls squarely within the ambit of EPA's discretion. (ECF No. 64 at 6–7.)

LEGAL STANDARD

The doctrine of primary jurisdiction is "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). The Supreme Court has stated that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction," *United States* v. *W. Pac. R. Co.*, 352 U.S. 59,

[5] Although NPDES permits have five-year terms, 33 U.S.C. § 1342(a)(3), (b)(1)(B), the Permit retained the term of the appealed 2008 permit, which it modified—and this would have ended, absent administrative continuance, only two years after going into effect. (ECF No. 34-1 at 2, 78; ECF No. 38-2 at 4.)

64 (1956), which is "intended to 'serve[ ] as a means of coordinating administrative and judicial machinery' and to 'promote uniformity and take advantage of agencies' special expertise." *Pejepscot Indus. Park, Inc.* v. *Me. Cent. R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (quoting *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979)). Nevertheless, when deciding whether deference to the agency is warranted under the doctrine, the First Circuit considers at least three factors:

> (1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.

Massachusetts v. *Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995). In keeping with the purpose of the doctrine, the First Circuit further considers whether application of the doctrine would promote "uniformity." *Id.* at 992–93.

ARGUMENT

Staying this case pending EPA's decision on the Terminal's permit renewal application will allow EPA to properly exercise its expertise and discretion to decide questions that could have sweeping effects on countless permit holders and the NPDES permitting regime generally. It is beyond dispute that issuing permits that impose standards and limitations is precisely the task Congress assigned EPA to perform either directly, as it does in Massachusetts, or through delegation to the states. CLF's suit nonetheless asks this Court to decide, in a case without precedent, what obligations should be imposed on ExxonMobil to address alleged environmental risks, which EPA purportedly has not yet evaluated. Specifically, CLF's climate change claims (as currently formulated) ask the Court determine, at a minimum:

- Whether changes in climate since 2012 have materially increased the risk of extreme precipitation or flooding at the Terminal;
- The likelihood that extreme precipitation or flooding will impact the Terminal in the near future;
- The Terminal's vulnerability to unpermitted discharges as a result of any such events;
- The appropriate remedy to address any such vulnerabilities;

- Whether the Permit's SWPPP provisions require (or authorize) a permittee to reengineer its facility during the life of a permit; and
- Whether requiring the Terminal and similar facilities to undertake such measures would undermine any of the objectives of the CWA or impermissibly interfere with EPA's authority to determine appropriate standards and limitations for NPDES permits.

These technical and policy-laden questions should be resolved by EPA in the first instance through its administrative permit renewal proceedings. A stay will not only allow EPA to unravel the intricate and technical facts that bear on such determinations. It also will afford EPA the opportunity to exercise its considered discretion after soliciting public comments and to consider how the Terminal fits in with permits being issued in surrounding areas and regions. That is how Congress intended for such decisions to be made. And adhering to such procedures will promote the statutory interest in uniformity. Staying the case in deference to EPA will also aid the Court in efficiently disposing of this lawsuit, which is likely to be largely, if not entirely, resolved during the administrative proceedings.

I. The *Blackstone* Factors Support Invoking the Primary Jurisdiction Doctrine.

A. Congress Delegated EPA Responsibility for Establishing Permittees' Obligations.

Deference to EPA is warranted by the purpose and structure of the CWA, in which Congress delegated EPA authority and discretion to (i) issue NPDES permits, and (ii) establish in those permits conditions for discharging pollutants through clear standards and limitations. As this Court has already recognized, it is EPA's responsibility "to make a decision as to whether a permit should be issued and on what terms." (Nov. 30, 2018 Hr'g Tr. 11:1–2.) The CWA established the NPDES program, 33 U.S.C. § 1342, and assigned EPA, as "the Administrator" for Massachusetts, the "discretion . . . to issue a permit" for discharges that would otherwise be illegal under the Act, subject to specified conditions. *See Nat. Res. Def. Council, Inc.* v. *Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (citing 33 U.S.C. § 1342). It is well settled that, in establishing the permitting regime, "Congress has vested in [EPA] broad discretion to establish conditions for NPDES permits." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 105 (1992) (citing 33 U.S.C. § 1342(a)(2)).

As established at length in ExxonMobil's prior briefing (ECF No. 42 at 17–25, 34–37), the permit shield and collateral attack doctrines bar CLF from challenging the terms of the Permit as written or the design of the recently constructed stormwater drainage and treatment system, which EPA and MassDEP approved as a condition of issuing the Permit. CLF instead asks this Court to alter ExxonMobil's obligations under the Permit by requiring unspecified changes to the Terminal to address alleged and unspecified changes in climatic conditions since the Permit issued just over seven years ago. For at least four reasons, that request directly implicates and impermissibly intrudes upon "the heart of the task assigned the agency by Congress." *Blackstone Valley*, 67 F.3d at 992 (citation omitted).

First, it is the responsibility of EPA, "[t]he permitting authority," to "analyze[] *the environmental risk* posed by the discharge[s]" and to establish effluent limitations for pollutants EPA "'reasonably anticipates' could damage[] the environmental integrity of the affected waterway." *Sierra Club* v. *ICG Hazard, LLC*, 781 F.3d 281, 285 (6th Cir. 2015) (emphasis added); *Piney Run Pres. Ass'n* v. *Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 268 (4th Cir. 2001). Accordingly, EPA—not the permittee, the citizen, or even the court—bears responsibility for evaluating the threat posed by any climate-induced increases in the risk of flooding or extreme precipitation. Courts thus have recognized that invoking the doctrine of primary jurisdiction is appropriate where, as here, the court is "called upon to itself delve into the complex questions of what quantities of pollutants are safe, or what various industries can be expected to accomplish in reducing pollution." *Student Pub. Interest Research Grp. of N.J., Inc.* v. *Monsanto Co.*, 600 F. Supp. 1479, 1483 (D.N.J. 1985). Accordingly, "EPA should, as Congress intended, address th[ese] question[s] in the first instance." *Blackstone Valley Elec. Co.*, 67 F.3d at 983.

Second, Congress assigned EPA to clearly define a permittee's obligations. As the First Circuit has observed, "[a] complicated regulatory regime like . . . the CWA cannot function effectively unless citizens are given fair notice of their obligations." *Blackstone Valley Elec.*, 67 F.3d at 991. For this reason, EPA is obligated to draft permits that "contain *specific* terms and conditions." *Rybachek* v. *EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990) (emphasis added); *see also*

Menzel v. *Cty. Utilities Corp.*, 712 F.2d 91, 95 (4th Cir. 1983) (the NPDES permit program "enables specification of discharge limitations.") And citizens may only bring an enforcement action against a permittee who "discharges pollutants in excess of the levels *specified in the permit*," or otherwise fails to comply with the permit's terms. *Nat. Res. Def. Council, Inc.* v. *County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) (emphasis added). By contrast, "allowing" parties other than the Administrator "to use civil litigation" to "require more stringent effluent limitations than the NPDES permits" would "frustrat[e] the Act's purpose of developing '*clear and identifiable* requirements' through standardized NPDES permits." *Pennsylvania* v. *Consol Energy, Inc.*, No. 1:11-CV-161, 2012 WL 3834878, at *4 (N.D.W. Va. Sept. 4, 2012) (citing *Ouellette*, 479 U.S. at 494, and S. Rep. No. 94-414, at 81 (1971)) (emphasis added).

CLF nonetheless asks the Court to divest EPA of the discretion Congress gave it and to re-define the Permit's terms, including the Permit's express definition of a "10-year 24-hour precipitation event." (ECF No. 34-1 at 3.) While CLF contends external estimates for such an event have changed, CLF does not claim either that EPA is unaware of this alleged change or that it failed to recognize the potential for change when it issued the Permit. Absent such a showing, CLF offers no basis to doubt that EPA exercised its considered judgment and discretion, based upon its scientific and engineering expertise and its knowledge of the system ExxonMobil had just constructed, when it chose to expressly define the 10-year 24-hour precipitation in concrete, numeric terms.

Similarly, rather than specifying concrete design defects at the Terminal or any supposed departure from good engineering practices, CLF asks the Court to install "qualified and independent engineering professionals" to assess the Terminal's purported vulnerabilities and to propose engineering solutions. (ECF No. 40-1 at 26.) But Congress delegated authority to promulgate standards for such practice to EPA, not an entity of CLF's choosing. For instance, EPA is already obligated to define robust and practical standards for best management practices ("BMPs"), and to publish these standards in the federal register. 40 C.F.R. § 122.2. CLF notably has never alleged that ExxonMobil failed to employ BMPs despite the Permit's express language

requiring their inclusion in the SWPPP. (ECF No. 34-1 at 14–15.) In any event, as the declaration of BCS Group, Inc. expert Michael Clark confirms, "[G]ood engineering practices and the industry standard of care [do] not require either the SPCC Plan or the SWPPP to be revised to accommodate anticipated weather impacts on the Terminal." (Ex. 1 ¶ 13.)

Third, even if—contrary to fact and law—it were appropriate for the Court to evaluate potential environmental risks and possible counter-measures, the Court should still refrain from usurping EPA's discretion by imposing particular obligations on the permittee. When "[r]ead as a whole, the [CWA] shows not only Congress's determined effort to clean up our polluted lakes and rivers, but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982). Indeed, the congressional conference report for the CWA states:

> In the administration of the [CWA], EPA will be required to establish numerous guidelines, standards and limitations . . . . Virtually every action required of the Administrator by the Act . . . involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others.

S. Conf. Rep. No. 92-1236, at 149 (1972). Courts thus recognize that in "promulgating effluent standards," EPA is required to undertake the "'complex balancing' of biological, technological and economic factors." *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 567 (5th Cir. 1996). For example, the Supreme Court ruled that "the Court of Appeals made a policy choice that it was not authorized to make" when it sought to "prohibit any discharge into the Illinois River," contrary to EPA's conclusion that "allowing the discharge would be even wiser" given the "benefits achieved in Arkansas by allowing the new plant to operate as designed." *Arkansas*, 503 U.S. at 113–14. It is not the role of the courts "to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency." *Id*.

Finally, Congress assigned EPA to periodically revisit permits and determine whether grounds exist for imposing new or more stringent obligations. As recounted in the legislative history of the CWA, "[a]n alleged violation of an effluent control limitation or standard would not require reanalysis of technological or other considerations at the enforcement stage. These matters

will have been settled in the administrative procedure leading to the establishment of such effluent control provision." S. Rep. No. 92-414, at 78–79 (1972). The NPDES permitting regime thus "requires reevaluation of the relevant factors, and allows for the tightening of discharge conditions" by EPA when a permit "is renewed." *Upper Blackstone*, 690 F.3d at 22. The CWA similarly "directs EPA to institute progressively more stringent effluent discharge guidelines *in stages*." *BP Expl. & Oil, Inc.* v. *EPA*, 66 F.3d 784, 789 (6th Cir. 1995) (emphasis added); *Rybachek*, 904 F.2d at 1283. Accordingly, EPA has the "discretion" to "determine when 'the latest scientific knowledge' compels a revision of criteria." *Nat. Res. Def. Council, Inc.* v. *EPA*, 770 F. Supp. 1093, 1107 (E.D. Va. 1991).

B. EPA's Expertise Is Required to Assess Any Risks of Climate Change and How Facilities Should Protect Against Them.

For much the same reason, "agency expertise [i]s required to unravel [the] intricate, technical facts" presented in this case. *See Blackstone Valley*, 67 F.3d at 992. This Court is not alone in its recognition that judges are "not expert" on the technical questions CLF has raised here, and that a court would "need somebody to interpret" the technical jargon at issue in this suit. (Nov. 30, 2018 Hr'g Tr. 11:14–15, 30:21.) *See Am. Petrol. Inst.* v. *EPA*, 540 F.2d 1023, 1027 (10th Cir. 1976) ("The [CWA] is difficult to understand, construe and apply.").

As confirmed by the numerous sources selectively quoted in CLF's Amended Complaint (*see* ECF No. 34 ¶¶ 142–45, 165–68, 176, 180, 202, 220–24), the merits of CLF's claims would entail analysis of complex, evolving, and highly technical data regarding alleged climate-induced risks. When confronted—as this Court likely will be—with a battle of the experts on interpretive questions broadly implicating the CWA, courts should invoke the primary jurisdiction doctrine to allow EPA, in its expertise, to "sift through and properly weigh all of the arguments." *Blackstone Valley*, 67 F.3d at 992. The doctrine is particularly appropriate where, as here, a claim "raises a question of first impression" with implications for "the agency's development of a uniform regulatory framework." *Clark* v. *Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008)

(applying primary jurisdiction to determine "whether a federal statute applies to a new technology").

While garden-variety CWA citizen suits do not require EPA intervention, this novel suit raises intricate questions of first impression, such as asking the court to choose among different models for projecting climate-related impacts in a particular location. The First Circuit has held that "the choice of statistical methods is a matter best left to the sound discretion of the Administrator." *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 655 (1st Cir. 1979) (quoting *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976)). Indeed, in the typical citizen suit, EPA might well have already detailed the appropriate methods for calculating relevant values in the permit or associated regulations or guidance documents. *See, e.g.*, *Arkansas*, 503 U.S. at 111 ("[U]nless there is some method for measuring compliance, there is no way to ensure compliance."). By contrast, where EPA has not yet opined on the issue and could "bring its expertise to bear" in a "NPDES proceeding," it is appropriate to "yield[ ] primary jurisdiction to the expert agency." *Montgomery Envtl. Coal. Citizens Coordinating Comm. on Friendship Heights* v. *Wash. Suburban Sanitary Comm'n*, 607 F.2d 378, 381 (D.C. Cir. 1979).

Moreover, typical CWA citizen suits do not ask courts to make policy-laden decisions concerning how best to address alleged climate-related risks and when to do so. Such discretionary determinations amply demonstrate the need for, and appropriateness of, staying this case. *See Pejepscot Indus. Park*, 215 F.3d at 205–06 (agency expertise sought to determine reasonableness of refusal to provide rail service). The relief CLF seeks here—consideration of standards or conditions to address alleged risks of climate-related flooding and extreme precipitation—is already within the scope of EPA's authority as the agency overseeing the NPDES permitting program in Massachusetts. The Court was correct to note that litigation through a federal citizen suit is "not . . . the most appropriate way to be making some of the[se] decisions." (Nov. 30, 2018 Hr'g Tr. 13:2–4.) Congress delegated the task of establishing appropriate industry standards to EPA for a reason.

C. EPA's Permit Renewal Decision Will Aid the Court.

Allowing EPA to act on the permit renewal application will also "materially aid the court." *Blackstone Valley Elec.*, 67 F.3d at 992. The Court understandably would "like to know what [EPA] think[s]," (Nov. 30, 2018 Hr'g Tr. 13:21), as the agency has expertise in addressing the technical, scientific, and policy issues CLF improperly seeks to foist upon this Court. EPA's position will be definitively established in the administrative permit renewal proceedings, where EPA will determine, among other things, whether environmental conditions warrant any changes to the Permit. *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1151–52 (9th Cir. 2005) ("The NPDES program allows the EPA to 'issue permits . . . taking into account local environmental conditions'"). EPA also will detail its reasoning when it publishes the draft permit for public comment through its statement of basis and fact sheet, *see* 40 C.F.R. §§ 124.7, 124.8, and when it subsequently responds to any comments, *see* 40 C.F.R. § 124.17, which may seek clarification, object to the permit, or request more stringent conditions. *See* 40 C.F.R. §§ 124.11, 124.13.

Moreover, "the resolution of the [NPDES] proceeding may make unnecessary any decision in this case." *Montgomery*, 607 F.2d at 382. As the Court has recognized, "a lot of this work could become moot or all of it could become moot if EPA decides to issue or renew the permit." (Nov. 30, 2018 Hr'g Tr. 149:22–25; *see also* Mar. 13, 2019 Hr'g Tr. 117:4–8; Sept. 12, 2017 Hr'g Tr. 114:18–20.) The administrative proceedings concerning the permit renewal application will allow the parties to assert their respective positions regarding what, if anything, should be required of ExxonMobil to address the alleged increased risks of extreme precipitation and flooding, or to clarify the PAH effluent limits. *See* 40 C.F.R. §§ 124.10–124.13. After considering these issues and responding to public comments, *see* 40 C.F.R. § 124.17, EPA may then (i) renew the Permit in substantially similar form, with responses confirming ExxonMobil's compliance, or (ii) issue a different permit with terms that address the alleged increased risks, thereby "obviat[ing] the need for an injunction." *See Nat. Res. Council of Me.* v. *Int'l Paper Co.*, 424 F. Supp. 2d 235, 255 (D. Me. 2006). And, just as the CWA dictates "[p]rivate plaintiffs . . . may not sue to assess penalties for wholly past violations," CLF's request for civil penalties will not save its claims if there is "no prospect of future violations for civil penalties to deter." *Friends of the Earth, Inc.* v. *Laidlaw*

Envtl. Servs. (TOC), Inc., 528 U.S. 167, 188 (2000) (citing *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998).

II. Deferral to EPA Would Promote Uniformity While Avoiding Interference with Agency Discretion.

The doctrine of primary jurisdiction exists precisely "to avoid the possibility that a court's ruling might disturb or disrupt the regulatory regime of the agency in question." *Am. Auto. Mfrs. Ass'n* v. *Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998). Staying this case pending EPA's decision on the renewal application would also promote "uniformity" in how NPDES permit holders address the risk of severe precipitation and flooding, while avoiding interference with agency discretion and the carefully designed permitting regime. *Blackstone Valley Elec.*, 67 F.3d at 992–93. This consideration is of central importance given the "the [Clean Water] Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation." *Arkansas*, 503 U.S. at 110; *see, e.g.*, *Am. Iron & Steel Inst.* v. *EPA*, 526 F.2d 1027, 1044 (3d Cir. 1975), *amended,* 560 F.2d 589 (3d Cir. 1977) (noting that "uniformity was clearly a major congressional concern"); S. Conf. Rep. No. 92-1236, at 126 (1972) ("[T]he intent of the Conferees is that effluent limitations . . . be as uniform as possible.").

The standard permit provisions on which CLF relies are common across NPDES permits in Region 1, and may implicate state permits as well.[6] In fact, CLF has touted this suit as a model that will be replicated "up and down" the coast because its claims implicate "any industrial or commercial facility that has [an NPDES] permit." (Ex. 7.) CLF has already begun to execute that plan. One year after commencing this action, CLF filed nearly indistinguishable CWA and RCRA claims against Shell in the District of Rhode Island, relying on identical permit language—including the general obligation to prepare a SWPPP in accordance with good engineering practices.[7]

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[6] *See, e.g.*, Ex. 9 at 30 (requiring SWPPP be prepared "in accordance with good engineering practices"). The Multi-Sector General Permit for Stormwater Discharges is referenced in the Terminal's Permit. (ECF No. 34-1 at 14.)

[7] *See* ECF No. 20-1 at 14, *CLF* v. *Shell*, No. 1:17-cv-00396WED-LDA (D.R.I. Jan. 12, 2018) ("CLF's CWA Adaptation Claims . . . allege the Terminal's [SWPPP] and other permitting documents fail to address the risks of severe precipitation and flooding, but these causes of action include no factual allegations concerning what these documents say or how specifically they are insufficient.").

Accordingly, absent EPA guidance, a "ruling from this court . . . could generate inconsistency and disrupt ongoing commercial practices" by creating conflicting obligations for any facility with a permit containing the ubiquitous phrases on which CLF relies. *See Palmer Foundry, Inc.* v. *Delta-HA, Inc.*, 319 F. Supp. 2d 110, 114 (D. Mass. 2004). CLF's parallel suits create a considerable risk that courts within the First Circuit (and beyond) will adopt inconsistent interpretations of the phrase "good engineering practices"—none of which may align with EPA's considered judgment about how NPDES permit holders should address any increased risk of severe precipitation or flooding. Similarly, any award of injunctive relief may interfere with the permit renewal process, during which EPA has the authority to impose new conditions or to offer guidance in response to public comments on why requested measures are not warranted. 40 C.F.R. §§ 124.7, 124.8, 124.17. The consequences of the Court entering an order that creates conflicting obligations for permit holders is compounded by the remedies sought here, which would require an extraordinary investment of time, capital, and judicial resources. (*See* ECF No. 34 ¶ 347 ("fortified or, if necessary, relocated"), ¶ 90 ("undersized pipes").)

When presented with a similar lack of agency guidance on a question of broad application, the First Circuit has held it is "better to have the EPA resolve the issue nationwide" than "leave this matter to the risk of inconsistent outcomes before particular courts in different parts of the country." *Blackstone Valley Elec.*, 67 F.3d at 992–93. Accordingly, staying this case in deference to EPA "will promote uniformity in the standards governing" SWPPPs and any obligations of permittees to make structural changes to their facilities during the terms of their permits. *Pejepscot Indus. Park*, 215 F.3d at 206. The Court therefore should reject CLF's invitation to usurp EPA's administrative process for revisiting the obligations of a permit holder.

III. Staying this Case Would Not Prejudice CLF or Its Members.

Where, as here, the agency has primary jurisdiction, the court has discretion to either stay the case pending an agency determination or dismiss it without prejudice. *See Rymes Heating Oils, Inc.* v. *Springfield Terminal R. Co.*, 358 F.3d 82, 91 n.9 (1st Cir. 2004). In determining the appropriate remedy, courts consider whether the parties would be "unfairly disadvantaged." *Id.*

A district court's "inherent power to manage its docket" further affords it discretion "to stay an action pending the resolution of a related matter" before another government agency. *Aplix IP Holdings Corp.* v. *Sony Computer Entm't, Inc.*, 137 F. Supp. 3d 3, 4–5 (D. Mass. 2015) (Wolf., J.) (quoting *In re SDI Techs., Inc.*, 456 Fed. App'x 909, 911 (Fed. Cir. 2012)). In exercising this discretion, district courts routinely consider:

> (1) the stage of the litigation, including whether discovery is complete and a trial date has been set; (2) whether a stay will simplify the issues in question and the trial of the case; and (3) whether a stay will unduly prejudice or present a clear tactical disadvantage to the nonmoving party.

Id. at 5. Each of these considerations favors a stay. For the reasons detailed above, a stay will simplify the disputed issues by resolving—if not mooting—CLF's climate change claims (Counts 6–15). This would leave only Counts 2 and 3, which turn on discrete questions of Permit interpretation that may be similarly clarified through the permit renewal proceeding, or otherwise may be resolved expeditiously through consideration of limited "extrinsic evidence to determine the intent of the permitting authority." *See Piney Run Preservation Ass'n* v. *Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 269–70 (4th Cir. 2001).[8] The present stage of the proceedings likewise supports a stay given that the parties have not yet begun—much less completed—discovery. Furthermore, for at least four reasons, staying this case will not unduly prejudice CLF.

First, a stay will not unduly delay the resolution of CLF's claims. ExxonMobil's permit renewal application is already pending before EPA, and EPA has confirmed that it plans to act on that application by releasing a "draft permit for public notice and comment." (ECF. No. 63-1 at 3.) While EPA stated in December 2018 that public notice and comment may not commence until the following fiscal year, EPA has also assured the parties that it is "committed to eliminating" the Region's backlog no later than "2022." (*Id.*) The history of EPA's administration of the Terminal's permits offers no basis to doubt this assurance. Since 1991, EPA has issued four NPDES permits to the Terminal, and none were in effect more than nine years without EPA issuing

[8] The principal disagreement between the parties on Counts 2 and 3 are whether (i) the Permit expressly modified the PAH effluent limits—which EPA has acknowledged are too low to be reliably measured—with a compliance limit, and (ii) whether state Water Quality Standards are measured in the receiving waters, after dilution—as required by regulation—or "at the end of the pipe," as CLF has unsuccessfully argued to EPA in the past.

a new or modified permit. (ECF No. 34-1 at 2; ECF No. 38-6 at 2.) Moreover, the ultimate resolution of CLF's claims may be resolved more efficiently through EPA's administrative proceedings, which provide the proper forum for addressing CLF's concerns. *See* 40 C.F.R. §§ 124.7, 124.8, 124.17.

Second, staying the present proceedings does not leave CLF or its members subject to unchecked pollution. Far from it. EPA regulations clearly dictate that ExxonMobil remains subject to the terms of the current Permit during the period it is administratively continued. *Nat. Res. Def. Council*, 859 F.2d at 212 & n.140.

Third, CLF has offered no reason to believe that the current Permit—or the facilities and practices it authorized—will not adequately protect CLF from alleged risks of flooding or extreme precipitation pending EPA's decision on the permit renewal application. It is notable, of course, that this case has been pending for nearly three years, during which time none of the supposedly imminent risks CLF alleges have materialized. This observation is further validated by Mitchell Heineman, Senior Technical Specialist at CDM Smith, the expert who prepared the Stormwater Drainage Model that informed the redesign of the Terminal's stormwater treatment system. He confirms that the system "as designed and constructed has enough capacity to accommodate both . . . increased total volume of precipitation as well as . . . increased peak instantaneous flow" associated with even current estimates of a 10-year, 24-hour storm event. (Ex. 2 ¶ 11.)

In assigning the Terminal's Permit lower priority than "a number of pressing environmental [problems] and other priorities critical to EPA's mission," EPA also indicated it remains comfortable that the current Permit and practices at the Terminal are sufficiently protective of the surrounding environment pending its decision on ExxonMobil's renewal application. (ECF No. 64-1 at 3.) EPA could appropriately determine there is no exigency regarding the Terminal's Permit for a number of reasons. First, as reflected on EPA's Enforcement Compliance History Online website—EPA deems ExxonMobil to be operating in 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, "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." (ECF No. 64-1 at 3.) EPA's issuance of the Permit in 2011 evidenced its satisfaction with the Terminal's "material and substantial" alterations or additions. (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.)

EPA also likely draws comfort from the external audit group that inspected the facility, and the court-appointed observer who filed quarterly status reports with Judge Saris on ExxonMobil's progress during this same period. After visiting the facility on numerous occasions over the course of more than two years, both of these outside experts concluded that "the facility is operated to comply with applicable environmental laws and regulations." (Ex. 4, Report at 1; Ex. 5 at 29 ("The current physical plant appears to be designed, operated, and maintained in accordance with industry standard practices and applicable CWA regulations.").) The external audit group remarked that ExxonMobil "had essentially committed to establishing the Everett Terminal as a benchmark facility within the bulk oil storage terminal industry for oil pollution prevention." (ECF No. 38-1 at 13–14.) The court-appointed observer, Ingeborg Hegemann, similarly reported that the Terminal had implemented institutional programs that fostered an enduring "culture of compliance." (Ex. 4, Report at 1.) In reaching these conclusions, both experts noted that they had reviewed the Terminal's SWPPP. (ECF No. 38-1, 18; Ex. 1 ¶ 12.) And both experts commented on the Terminal's rigorous schedule of monitoring and evaluation as ensuring continuous compliance. (ECF No. 38-1 at 25–26; Ex. 4, Report at 6.)

The "major upgrades" completed by 2012 were the result of long-term environmental planning (ECF No. 38-2 at 7), and were designed to protect the surrounding waters for the foreseeable future, and certainly beyond the life of the Permit. (*See* Ex. 3 ¶ 13.) These designs reflected considerations of rainfall capacity and flooding. (ECF No. 38-2 at 8.) Because the "risks of flooding or inundation at the Everett Terminal whether caused by extreme precipitation, storm surge" or other weather events "have not materially changed since 2012" when the Terminal was

renovated, CLF will not be harmed by ExxonMobil's continued use of this EPA-approved design for the next few years while the Terminal's permit renewal application is pending. (Ex. 3 ¶ 11.)

Finally, CLF will have the opportunity to participate in the permit renewal process and raise the same concerns it voices here. EPA's permitting process ensures that CLF can obtain agency and judicial review concerning the issues underpinning its climate change claims in the appropriate forum, a process CLF bypassed in bringing this suit. *See* 33 U.S.C. §§ 1342(a)(3), 1342(b), 1369(b); 40 C.F.R. § 124.19(a).

The Court therefore should reject CLF's invitation to displace EPA's administrative process for addressing CLF's alleged—albeit misplaced—concerns regarding the adequacy of the Terminal's Permit or ExxonMobil's performance under it.

CONCLUSION

This case amply demonstrates the need for, and appropriateness of, a stay pursuant to the primary jurisdiction doctrine to allow EPA to decide, in the first instance, whether changes to the Everett Terminal or its practices are warranted by environmental changes since the Permit issued.

Respectfully submitted this 5th day of April, 2019,

EXXON MOBIL CORPORATION,
EXXONMOBIL OIL CORPORATION,
EXXONMOBIL PIPELINE COMPANY

By their attorneys,

/s/ *Daniel J. Toal*

Theodore V. Wells, Jr. (*pro hac vice*)
twells@paulweiss.com
Daniel J. Toal (*pro hac vice*)
dtoal@paulweiss.com
Jamie D. Brooks
jbrooks@paulweiss.com (*pro hac vice pending*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

and

/s/ *Deborah E. Barnard*

Deborah E. Barnard (BBO# 550654)
deborah.barnard@hklaw.com
Jessica R. Early (BBO# 672878)
jessica.early@hklaw.com
HOLLAND & KNIGHT LLP
10 St. James Avenue, 11th Floor
Boston, MA 02116
(617) 523-2700
Fax: (617) 523-6850

Counsel for Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company

CERTIFICATE OF SERVICE

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), this memorandum was filed through the ECF system on April 5, 2019 and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Deborah E. Barnard
Deborah E. Barnard