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

CONSERVATION LAW FOUNDATION'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION

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Plaintiff Conservation Law Foundation ("CLF") respectfully requests that this Court deny Defendant Exxon's[1] Motion to Stay (ECF No. 80) ("Motion") for the reasons that follow:

PRELIMINARY STATEMENT

Deferral to the United States Environmental Protection Agency ("EPA") under the doctrine of primary jurisdiction is improper in this case for two straightforward reasons.

First and foremost, the citizen suit provisions of the Clean Water Act and the Resource Conservation and Recovery Act ("RCRA") and this Court's authority would be circumvented by deferring to EPA under the primary jurisdiction doctrine. As courts have uniformly held, invoking primary jurisdiction in the context of citizen enforcement actions is inappropriate in light of the detailed procedural structure carefully designed by Congress for bringing these suits.

Clean Water Act and RCRA citizen suits are proper where there has been no enforcement action, or if there is a lack of diligent prosecution of an enforcement action, by EPA. Both the Clean Water Act and RCRA expressly set a pre-suit waiting period during which, after receiving a substantively adequate notice of a citizen's intent to sue, EPA can decide whether to insert itself into the action to address issues intended to be raised in that citizen suit. 33 U.S.C. § 1365(b); 42 U.S.C. § 6972(b). Once that notice period has expired, if EPA has not commenced and diligently prosecuted an enforcement action, the citizen steps into EPA's shoes to enforce regulatory requirements; further deferral in favor of potential EPA action would be an end-run around the statutory scheme. Indeed, courts have consistently found that procedural escape valves like the primary jurisdiction doctrine have extremely little, if any, role in citizen enforcement suits because the Clean Water Act and RCRA enumerate the specific circumstances where, to avoid interference with administrative oversite and inconsistent rulings, citizen suits are precluded. *See*

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

Pennenvironment v. Genon Ne. Mgmt. Co., No. 07-475, 2011 WL 1085885, at *5 (W.D. Pa. Mar. 21, 2011); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (citing *Ca. Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 807 n. 21 (E.D. Cal. 1995)); *Craig Lyle Limited P'ship v. Land O' Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995). The present challenge does not fall within any such exception.

Second, the primary task in this case—interpretation of the terms that EPA has written into the Permit for the Everett Terminal—falls squarely within the Court's area of expertise and is not reserved to the special technical expertise of EPA. The parties agree that EPA, when issuing permits, "assess[es] environmental risks [and] impose[s] new obligations on permittees . . . . And, in fact, EPA engaged in precisely this analysis prior to issuing the current Permit for the Terminal." Motion to Stay Mem. (ECF No. 82) ("Mot.") at 4-5. The parties also agree that the current terms of the existing Permit are sufficient. *See id.* at 6 (noting that an application for a renewal permit is pending that "seeks issuance of a permit that is similar to the current Permit in all material respects"). Contrary to Exxon's rhetoric, the dispute between the parties centers on what Exxon's obligations and duties under the Permit *currently are*, not what they *should or might be under a new permit*.

The Permit sets forth both numeric and narrative standards for the Everett Terminal. The numeric requirements limit discharges of pollutants into the Island End and Mystic Rivers. The narrative requirements are intended, in part, to prevent the occurrence of unpermitted discharges. These provisions require Exxon to consider and protect against potential sources of discharges resulting from impacts of climate change.

Exxon's Motion to Stay is merely a delaying tactic, and it does nothing to support staying this case.

First, Exxon ignores the overwhelming precedent holding that deferral under primary jurisdiction is inappropriate in citizen enforcement cases.

Second, Exxon merely repeats the same arguments that the Court already rejected in its ruling on Exxon's Motion to Dismiss the Amended Complaint ("Motion to Dismiss"). For example, it claims that CLF is seeking to "divest EPA of the discretion Congress gave it and to re-define the Permit's terms." Mot. at 10; *see also* Mot. to Dismiss Mem. (ECF No. 42) ("MTD") at 1-2 (accusing CLF of attempting to "usurp EPA's permitting authority"). Contrary to Exxon's assertions, CLF brings this citizen suit to enforce the provisions of the operative Permit for the Terminal as written, as well as under RCRA to alleviate the imminent and substantial dangers presented by the current conditions at the Everett Terminal.

Third, Exxon does not convincingly explain how the pending Permit renewal process will, as it claims, "resolve most, if not all, of the disputed issues in this case." Mot. at 2. Even if a new permit were issued quickly, there is little reason to conclude that it would resolve the issues regarding the legal interpretation of the current Permit's terms.

As such, this Court has proper jurisdiction to move forward with this litigation without delay, and Exxon's Motion to Stay should be denied.

BACKGROUND

Exxon operates the Everett Terminal pursuant to an individual permit issued by EPA under the Clean Water Act, 33 U.S.C. § 1342 *et seq*. *See* ECF No. 34-1 (the "Permit"). The Permit was issued in 2009. By its terms, the Permit expired in 2014 and has since been administratively continued. Exxon has submitted a permit renewal application, but EPA has not yet acted on that application and may not for years. *See* EPA Letter (ECF No. 63-1).

On October 20, 2017, CLF filed the Amended Complaint asserting claims under the Clean

Water Act and RCRA. For present purposes, the claims fall into two broad categories: (i) claims alleging violations of express pollution discharge limits, Counts 1-5, (the "Effluent Violation Counts"), and (ii) claims alleging that Exxon failed to disclose, consider, and address climate-change related impacts, Counts 6-15 (the "Climate Change Counts"). On December 20, 2017, Exxon moved to dismiss the Amended Complaint in its entirety. ECF No. 36.[2] On November 30, 2018, and March 13, 2019, the Court held hearings on the Motion to Dismiss. *See* ECF Nos. 58 (Nov. 2018 Tr.) and 73 (Mar. 2019 Tr.). The Court denied the Motion to Dismiss as to two of the Effluent Violation Counts, Counts 2 and 3, and all of the Climate Change Counts. ECF No. 71.

A. Motion to Dismiss

A brief summary of the arguments and ruling on the Motion to Dismiss is necessary because the Motion to Stay largely ignores or reargues many of those issues.

Remaining Effluent Violation Counts

Counts 2 and 3 principally concern the discharge of PAH chemicals from the Everett Terminal in excess of Permit requirements. More specifically, Count 2 concerns discharges of PAHs in excess of the 0.031 μg/L compliance limit defined in the Permit (Am. Compl. ¶¶ 103-106), and Count 3 alleges that Exxon is violating the Permit requirement that discharges do not cause or contribute to the violation of state water quality standards. Am. Compl. ¶¶ 53-54. In response to these Counts, Exxon argued that the Permit retained a legacy footnote from the 1991 permit that referenced an EPA "[c]ompliance/non-compliance level" of 10 μg/L, or approximately 325 times in excess of the mandatory human health and aquatic life pollutant limit of .031 μg/L. MTD at 13-14, 17.[3] The Court rejected Exxon's interpretation of the Permit, concluding that

[2] Exxon filed a corrected version of its Motion to Dismiss on January 25, 2018 (ECF No. 42).

[3] Exxon also made two additional arguments regarding Count 3—(i) CLF was measuring PAH concentrations in the wrong place for evaluation of state Water Quality Standards, and (ii) the Island End River is not impaired for PAHs—which the Court rejected. Nov. 2018 Tr. at 122-24.

"Exxon's interpretation . . . would essentially read the [0.031 μg/L limit] out of the permit." Nov. 2018 Tr. at 113, 123-24. The Court also rejected Exxon's attempt to narrow the bounds of the Clean Water Act citizen suit provision, explaining that while EPA is permitted to choose when it will file an enforcement action, "[c]itizen suits are meant to fill enforcement gaps left open when EPA chooses not to prosecute a matter out of the permit." Nov. 2018 Tr. at 113.

Climate Change Counts

CLF's Climate Change Counts allege that "Exxon is violating its permit for the Everett terminal by failing to consider climate change-induced weather events, which . . . include . . . foreseeable severe weather events, in maintaining the terminal's Storm Water Pollution Prevention Plan, the SWPPP." Mar. 2019 Tr. at 125; *see also id.* at 118. Exxon's primary argument for dismissal of the Climate Change Counts was that Exxon has no continuing duty under the Permit to evaluate the Everett Terminal's preparedness for severe weather events. MTD at 26.[4] In particular, Exxon argued that its obligations (i) were fixed for the duration of the Permit, and (ii) required only that the Everett Terminal's stormwater management system be designed, at the time of permitting, to handle a maximum 10-year 24-hour precipitation event of 4.6 inches of rainfall. MTD at 26. According to Exxon, the Permit's obligations to use "good engineering practices" and to proactively identify potential sources of pollution in creating and annually certifying its SWPPP did not include an evolving standard that required Exxon to re-evaluate the Everett Terminal's preparedness for severe weather events as conditions changed. *See id.* at 26-27; Mar. 2019 Tr. at 118-19.

The Court denied Exxon's Motion to Dismiss the Climate Change Counts, finding that Exxon's interpretation of the Permit violated the principles of construction. The Court ruled that

[4] Exxon also moved to dismiss for lack of standing, which the Court likewise denied. Mar. 2019 Tr. at 124.

"the permit does not impose static or only static requirements. Rather, it requires Exxon to constantly review and update its practices in the terminal's SWPPP to reflect or address any material changing circumstances." Mar. 2019 Tr. at 135-36. As part of this obligation, "the permit requires Exxon to consider foreseeable severe weather events, including any climate change-induced weather events, in developing and maintaining its . . . SWPPP." *Id.* at 132. As examples of these continuing obligations, the Court explained that (i) "good engineering practices include considerations of foreseeable severe weather events, including any caused by climate change," *id.* at 133, and (ii) "[i]f . . . increasingly frequent and severe weather events threaten the terminal, then Exxon must consider such events in order to satisfy the permit's requirement that Exxon identify and proactively address potential discharges of pollutants," *id.* at 134; *see also id.* at 137 ("[T]he provisions of the permit that underlie CLF's climate change counts require Exxon to consider the kinds of climate-induced weather events that CLF alleges threaten the terminal.").

In reaching this conclusion, the Court rejected Exxon's argument that "EPA accounted for foreseeable weather events, including climate change-induced weather events, through the permit requirement that the terminal will be capable of handling a '10-year 24-hour precipitation event,' which the permit in its literal language estimates to be 4.6 inches." *Id.* at 135. Instead, the Court held that Exxon's interpretation of these provisions was legally impermissible because then "many other provisions of the permit would be superfluous." *Id.* ("If all the permit requires of Exxon is that the terminal be capable of handling 4.6 inches of rain over 24 hours, then the permit would not have separately provided that Exxon use 'good engineering practices' or implement practices to reduce pollutants.").

B. Motion to Stay

On April 5, 2019, Exxon filed the present Motion. In its Motion, Exxon argues that the Court should, under the primary jurisdiction doctrine, defer to EPA to resolve questions that Exxon

avers could have "sweeping effects on countless permit holders and the NPDES permitting regime generally." Mot. at 7. Exxon's brief restates many of its same arguments from its Motion to Dismiss, namely that the permit shield and collateral attack doctrines bar CLF's claims and that CLF seeks to alter the terms of Exxon's obligations under its permit.

Exxon misconstrues CLF's claims as attacks on the pending permit, when in reality CLF seeks to enforce the terms of the current Permit, a determination that is well within the authority of this Court. None of the arguments Exxon presents support a stay. As explained below, Exxon's Motion should be denied.

ARGUMENT

A court should only defer resolution of a controversy to an administrative agency if "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). Even where factors favoring invocation of primary jurisdiction exist, "[t]hese factors . . . must be balanced against the potential for delay inherent in the decision to refer an issue to an administrative agency." *Am. Auto. Mfrs. Ass'n v. Comm'n, Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998) (citing *PHC, Inc. v. Pioneer Healthcare, Inc.*, 75 F.3d 75, 80-81 (1st Cir. 1996)). "Because of the added expense and delay attendant to invocation of the doctrine, it is to be invoked sparingly." *Nat'l Assoc. of the Deaf v. Harvard Univ.*, No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *14 (D. Mass. Feb. 9, 2016) (citations and quotations omitted).

"No fixed formula exists for applying the doctrine of primary jurisdiction." *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). The First Circuit has set forth three factors to guide the decision whether or not to invoke the doctrine: "(1) whether the agency determination lies at the heart of

the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *Id.* at 992 (citations and quotations omitted). The *Blackstone* decision also considered issues of national uniformity of regulatory interpretation. *Id.; see also Locust Cartgage Co. v. Transamerican Freight Lines., Inc.*, 430 F.2d 334, 340 n.5 (1st Cir. 1970) ("The doctrine . . . should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution.").

As explained below, Exxon's Motion to Stay should be denied for at least two reasons. *First*, courts have uniformly held that invoking primary jurisdiction to stay citizen enforcement suits interferes with the careful congressional scheme for these suits. *Second*, even if primary jurisdiction does apply to citizen suits, the factors for application of primary jurisdiction are not met here.

I. The Doctrine of Primary Jurisdiction is Generally Inapplicable to Citizen Enforcement Suits Under the Clean Water Act and RCRA

The Court should deny the Motion to Stay in accordance with extensive precedent holding that primary jurisdiction should be applied "sparingly, if at all," to citizen enforcement suits under the Clean Water Act and RCRA. *Maine People's All. v. Holtrachem Mfg.*, No. 00-CV-69, 2001 WL 1704911, at *7 (D. Me. Jan. 8, 2001).

Courts have consistently held that application of primary jurisdiction to citizen suits, under either RCRA or the Clean Water Act, would "frustrate the congressional intent of broadened enforcement that underlies the provision for citizen suits," *Ill. Pub. Interest Research Grp. v. PMC, Inc. Through PMC Specialties Grp.*, 835 F. Supp. 1070, 1076 (N.D. Ill. 1993) (citations omitted), and "be an end run around RCRA [and the Clean Water Act]." *PMC, Inc. v. Sherwin–Williams*

Co., 151 F.3d 610, 619 (7th Cir. 1998).[5] To reach this conclusion, these courts have relied upon the specific jurisdictional prerequisites for a citizen suit, noting that "Congress has expressly set forth those situations in which a citizen suit under section 6972(a)(1)(B) is precluded," e.g., where the agency is diligently pursuing an enforcement action on a permit. *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995); *see also Sierra Club v. U.S. Dep't of Energy*, 734 F. Supp. 946, 951 (D. Colo. 1990). As one court explained: "[i]n enacting RCRA's citizen suit provisions, Congress has chosen to allocate federal judicial resources to the oversight of this nation's waste disposal problem. The court is reluctant to reallocate those resources through the use of questionable escape valves and procedural devices." *Williams v. Ala. Dep't of Transp.*, 119 F. Supp. 2d 1249, 1255–58 (M.D. Ala. 2000).

The First Circuit, in a case analyzing the related doctrine of *Burford* abstention, explained the reasoning as follows:

> When it enacted RCRA, however, Congress recognized and addressed the specific clash of interests at issue here, by carefully delineating (via the diligent prosecution bar) the situations in which a state or federal agency's enforcement efforts will foreclose review of a citizen suit in federal court. To abstain in situations other than those identified in the statute thus threatens an "end run around RCRA," and would substitute our judgment for that of Congress about the correct balance between respect for state administrative processes and the need for consistent and timely enforcement of RCRA.

Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd., 633 F.3d 20, 30–31 (1st Cir. 2011) (citations omitted). The court in *Apalachicola River v. Taylor Energy Co., LLC* reached a similar conclusion:

> The primary jurisdiction doctrine is not listed among the specifically delineated circumstances under which Clean Water Act and RCRA may be barred. Where Congress creates specific exceptions to a broadly applicable provision, the proper

[5] "[T]he majority of courts to address the [primary jurisdiction] doctrine in the context of a RCRA citizen suit have concluded either that application of the doctrine is inappropriate except in truly extraordinary circumstances or that it is wholly inapplicable in light of RCRA's express delineation of what agency action will preclude a citizen suit." *Stewart–Sterling One LLC v. Tricon Global Rests., Inc.*, No. 00–477, 2002 WL 1837844, at *5 (E.D. La. Aug. 9, 2002); *see also La. Envtl. Action Network v. LWC Mgmt. Co., Inc.*, No. 07–595, 2007 WL 2491360, at *7 (W.D. La. Aug. 14, 2007) ("[N]umerous courts have held that the doctrine of primary jurisdiction is inapplicable to environmental citizen suits under statutes such as the Clean Water Act").

> inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth. If Congress had intended for the primary jurisdiction doctrine to bar citizen suits, it would have included the doctrine among the specifically delineated circumstances under which citizen suits are barred. That Congress did not do so means the doctrine is not included among the bars to a citizen suit. The doctrine does not bar this citizen suit.

954 F. Supp. 2d 448, 460 (E.D. La. 2013) (internal quotations and citations omitted).

Primary jurisdiction is particularly inappropriate in permit enforcement actions (as opposed to suits challenging agency inaction in adopting rules by a specified time or standard setting). *Ill. Pub. Interest Research Grp.*, 835 F. Supp. at 1076 ("The concept of primary jurisdiction is also inapplicable where the question before the court is the enforcement of existing discharge standards. There is no encroachment on administrative expertise if the court is not being called upon to set effluent standards." (citation omitted)). In *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, cited by Exxon in its Motion (Mot. at 9), the court explained that common reasons for utilizing the primary jurisdiction were inapplicable in a permit enforcement action:

> Uniformity is not at issue here: whatever uniformity the EPA hoped to achieve presumably was expressed through the issuance of permits. Moreover, the agency's special skill went into the setting of pollution limits. This court in this suit is not called upon itself to delve into the complex questions of what quantities of pollutants are safe, or what various industries can be expected to accomplish in reducing pollution. All the court here is called upon to do is compare the allowable quantities of pollution listed in the permits with the available statistics on actual pollution. This comparison seems no more complicated than much other work the court does.

600 F. Supp. 1479, 1483 (D. N.J. 1985).

Nothing in Exxon's Motion to Stay contradicts these court rulings. *First*, Exxon's Motion does not acknowledge the overwhelming precedent disfavoring primary jurisdiction in citizen enforcement actions, and tellingly, none of the cases cited in Exxon's Motion applied the primary

jurisdiction doctrine to a citizen suit enforcing the terms of an existing permit.[6] In fact, the sole citizen suit case cited in the Motion, *Montgomery Environmental Coalition Citizens Coordinating Committee on Friendship Heights v. Washington Suburban Sanitary Commission*, 607 F.2d 378 (D.C. Cir. 1979), is easily distinguishable on the grounds that: it (i) challenged discharges from a facility that had no permit at the time suit was commenced, (ii) EPA issued a discharge permit for the first time during the pendency of the suit, and (iii) EPA scheduled an adjudicatory hearing to specifically address the plaintiff's objections to the discharge limitations in that permit. While the setting of specific effluent limits is a technical question that may be best left to EPA, *see Monsanto*, 600 F. Supp. at 1484; *La. Envtl. Action Network v. LWC Management Co., Inc.*, No. 07-0595, 2007 WL2491360 (W.D. La. Aug. 14, 2007), here, EPA has already set limits for the Terminal; the issue before the Court is the appropriate legal interpretation of the Permit as written by EPA.

CLF has fully complied with the notice requirements predicate to filing a citizen suit and EPA did not commence an enforcement action during the notice period. As a result, no circumstances here would allow for EPA preclusion of the citizen suit as prescribed in the Clean Water Act and RCRA. As such, this Court should adopt the reasoning of the long line of courts deciding this issue and find that primary jurisdiction is inappropriate in this Clean Water Act and RCRA citizen enforcement suit.

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[6] *Reiter v. Cooper*, 507 U.S. 258 (1993) (non-citizen suit addressing freight undercharges); *United States v. W. Pac. R. Co.*, 352 U.S. 59 (1956) (non-citizen suit discussing railroad tariffs); *Pejepscot Indus. Park, Inc. v. Me. Cent. R. Co.*, 215 F.3d 195 (1st Cir. 2000) (non-citizen suit discussing the Surface Transportation Board's authority over rail carriers); *Massachusetts v. Blackstone Valley Elec., Co.*, 67 F.3d 981 (1st Cir. 1995) (the State's CERCLA enforcement action); *Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74 (1st Cir. 1998) (non-citizen suit seeking to enjoin enforcement of regulations for production of zero emission vehicles); *Student Pub. Interest Research Grp. Of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985) (declining to apply primary jurisdiction to a citizen suit brought under the CWA); *Clark v. Time Warner Cable*, 523 F.3d 1110 (9th Cir. 2008) (non-citizen suit discussing Voice over Internet Protocol); *Palmer Foundry, Inc. v. Delta-HA, Inc.*, 319 F.Supp.2d 110 (D. Mass. 2004) (non-citizen suit referred to agency for identifying chemicals for the purpose of OSHA); *Rymes Heating Oils, Inc. v. Springfield Terminal R. Co.*, 358 F.3d 82 (1st Cir. 2004) (non-citizen suit discussing Interstate Commerce Commission Termination Act); *Piney Run Preservation Ass'n v. County Com'rs of Carroll County, MD*, 268 F.3d 255 (4th Cir. 2001) (declining to address or apply primary jurisdiction to a CWA citizen suit).

II. None of the Factors for Favoring Primary Jurisdiction Apply to This Case

Even if the primary jurisdiction doctrine *has some limited potential applicability* in the citizen suit context, none of the factors for invoking the doctrine are met here.

At the outset, contrary to Exxon's arguments, the First Circuit's decision in *Blackstone* confirms that primary jurisdiction is inapplicable in this case. In *Blackstone*, the Commonwealth of Massachusetts filed suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to recover the costs of cleaning up a particular chemical, ferric ferrocyanide ("FFC"), from an energy company. *See* 67 F.3d at 983. The primary disputed issue was whether FFC fell within EPA's definition of "cyanides" on its toxic pollutants' list, 30 C.F.R. § 401.15, and therefore qualified as a "hazardous pollutant" subject to CERCLA, *id.* at 986.

The First Circuit invoked the primary jurisdiction doctrine to stay the case and referred to EPA the question of whether FFC fell within the regulatory definition of "cyanides." The court's decision turned on the specific legislative and regulatory history of EPA's toxic pollutants list. It reasoned that Congress had directed EPA to produce a list of toxic pollutants to be subject to the Clean Water Act, 33 U.S.C. § 1317(a)(1), and CERCLA, 42 U.S.C. § 9602(a), and thus, the issue to be decided was within the scope of EPA's delegated authority. *Id.* at 984. Further, the court found that the "EPA's expertise [was] required to sift through and properly weigh all arguments for and against including FFC within the category of 'cyanides,'" and that a determination by EPA on whether FFC is a "hazardous substance" within the meaning of CERCLA would "indisputably assist the court" in determining defendant's liability under CERCLA. *Id.* at 992.

The present case presents no analogous questions of the regulatory intent behind complex scientific categorizations that Congress expressly tasked to EPA. Rather, the Court needs only determine the scope of Exxon's duties under the terms of the Permit as written. Indeed, as explained more fully below, none of the factors for primary jurisdiction are met here.

A. Interpretation of In-Force Permits is Not A *Permitting Function* Assigned to EPA By Congress, It Is An *Enforcement Function* Shared With the Public and the Courts

The first primary jurisdiction factor identified in *Blackstone* is "whether the agency determination l[ies] at the heart of the task assigned the agency by Congress." 67 F.3d at 992. This factor "reflects the doctrine's goals of avoiding disruption of an agency's regulatory regime and promoting uniformity in regulatory interpretation." *Nat'l Assoc. of the Deaf*, 2016 WL 3561622, at *14 (citations omitted). Here, where the action seeks *enforcement* of the terms of the Permit as written, the issue is specifically given to the Court, and deferral to EPA's *permitting* process is improper.

Pursuant to the Clean Water Act, EPA has two primary, separate functions vis-a-vis pollutant discharges: (i) to issue permits with conditions necessary to restore and maintain the quality of the nation's waters (the "Permitting Function"), 33 U.S.C. § 1342(a), and (ii) to enforce the terms of permits as written (the "Enforcement Function"), *id.* § 1319(b). Congress has tasked EPA, and its designees, with sole authority over the Permitting Function. EPA performed its Permitting Function by issuing the operative Permit for the Everett Terminal and developing the terms and limits therein. The terms of the Permit clearly set forth the quantities of pollutants that EPA has deemed safe to discharge from the Terminal and what is expected of Exxon to prevent and protect against discharges beyond those levels. By contrast, Congress has shared the Enforcement Function, under both the Clean Water Act and RCRA, between EPA and the public. Where EPA does not act to enforce a permit, a citizen enforcement suit is expressly permitted. 33 U.S.C. § 1365(a)(2); *see also No Spray Coal., Inc. v. City of New York*, 351 F.3d 602, 605 (2d Cir. 2003) ("Congress expressly provided in CWA that its provisions might be enforced through a citizen enforcement suit.").

Here, it makes no sense to defer to EPA because courts do not defer to EPA interpretation

in matters of enforcement, even where EPA has expressly opined on the issue before the court. *See, e.g., San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) ("[A] court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit." (citing *Ass'n to Prot. Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1012-13 (9th Cir. 2002)); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 566 (5th Cir. 1996) ("[A] citizen may . . . bring an action against a person that is [acting] without a permit even where EPA has failed to issue a permit or promulgate an effluent limitation to cover the discharge."). CLF duly notified EPA of its intent to sue in this matter pursuant to the jurisdictional prerequisites for bringing a citizen enforcement suit. *See* ECF No. 34-3. EPA chose not to act, so CLF now "stand[s] in the shoes of [EPA]" acting as a "private attorney general." *Riggs v. Curran*, 863 F.3d 6, 10-11 (1st Cir. 2017) (contrasting case with citizen suit cases); *see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-17 & n.23 (1981); *Conservation Law Found. of New England, Inc. v. Browner*, 840 F. Supp. 171, 174-75 (D. Mass. 1993). Presumably, had EPA chosen to take the reins of the litigation, Exxon would not now be advocating that the Court defer to any EPA-alleged interpretation of the Permit terms.

In judicial enforcement cases, it is the sole responsibility of the courts to interpret Clean Water Act permits and address the resultant liability. *See, e.g., Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 450 (M.D.N.C. 2015) ("Agency expertise is not needed, however, 'to adjudicate ultimate liability . . . since this responsibility rests solely on the court." (quoting *C.F. Indus., Inc. v. Transcon. Gas Pipeline Corp.*, 614 F.2d 33, 35-36 (4th Cir. 1980)). Contrary to Exxon's assertion in the Motion, Congress has already determined that

"[e]nforcement of pollution regulations is not a technical matter beyond the competence of the courts." *Id.* (quoting S. Rep. No. 92-414, at 81); *see also Wilson v. Amoco Corp.*, 989 F. Supp. 1159 (D. Wyo. 1998) (holding that "questions posed by RCRA and the Clean Water Act are not so esoteric or complex as to foreclose their consideration by the judiciary"). Exxon apparently concedes this point in its brief, attaching an expert opinion going to the ultimate merits question of whether the Terminal satisfies "good engineering practices." *See* Mot. at 11 (citing Ex. 1).

Indeed, the First Circuit has rejected the same argument that Exxon is making now.[7] In *Maine People's Alliance & Natural Resource Defense Council v. Mallinckrodt, Inc.*, the defendant argued that federal courts should avoid any form of "judicial policymaking in the environmental sphere . . . because judges lack special competence to interpret complex scientific, technical, and medical data." 471 F.3d 277, 293 (1st Cir. 2006). The First Circuit brushed this argument aside, holding:

> This view sells the federal judiciary short: federal courts have proven, over time, that they are equipped to adjudicate individual cases, regardless of the complexity of the issues involved. Federal courts are often called upon to make evaluative judgments in highly technical areas (patent litigation is an excellent example). Performing that quintessentially judicial function in the environmental sphere is not tantamount to rewriting environmental policy. To the contrary, what the lower court did here—listening to the testimony of expert witnesses, assessing their credibility, and determining whether or not a litigant has carried the devoir of persuasion—is very much within the core competency of a federal district court.

Id. at 293-94.[8] No law places interpretation of the terms of a Clean Water Act permit specially

[7] Tellingly, all of Exxon's citations (Mot. at 12) are suits *against EPA* challenging specific effluent limits established by the agency. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9 (1st Cir. 2012); *BP Expl. & Oil, Inc. v. EPA*, 66 F.3d 784 (6th Cir. 1995); *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276 (9th Cir. 1990); *Nat. Res. Def. Council, Inc. v. EPA*, 770 F. Supp. 1093, 1107 (E.D. Va. 1991).

[8] Courts are regularly called upon to interpret complex terms and the requirements of industry custom. *See, e.g., Rosario v. United States*, 824 F. Supp. 268, 277 (D. Mass. 1993) (interpreting whether a practitioner "exercised the degree of care and skill of the average qualified practitioner"); *Amazin' Raisins Int'l, Inc. v. Ocean Spray Cranberries, Inc.*, No. CV. 04-12679-MLW, 2007 WL 2386360, at *7 (D. Mass. Aug. 20, 2007), *aff'd*, 306 F. App'x 553 (Fed. Cir. 2008) (explaining courts construe patent claim language by giving it the "ordinary and customary meaning, as construed by a person of ordinary skill in the art in question at the time of invention.").

outside of the Court's purview.[9]

B. Interpretation of the Permit Terms Does Not Require Special EPA Expertise

The second primary jurisdiction factor cited in *Blackstone* is "whether agency expertise [i]s required to unravel intricate, technical facts." 67 F.3d at 992.

First, as explained above, and for the reasons already stated, EPA has no independent role in interpreting the terms of an in-force permit. Congress has already spoken and concluded that enforcement of environmental laws is not too technical for courts to manage.

Second, many of the facts are not in dispute for purposes of considering the doctrine of primary jurisdiction (although full discovery will be critical to deciding the merits). The overarching purpose of the primary jurisdiction doctrine is to give effect "to the eminently sensible notion that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion agencies . . . regulating the subject matter should not be passed over." *Blackstone*, 67 F.3d at 992 (citations and quotations omitted). Exxon's own monitoring reports confirm that the Everett Terminal's discharges exceed the limits set forth in the Permit. Exxon has also admitted that it has not considered impacts related to climate change in developing or implementing the Terminal's SWPPP and SPCC plan. *See, e.g.*, MTD at 29-31; Mar. 2019 Tr. at 113. Instead, the primary dispute in this case centers around the appropriate *legal* interpretation of the terms of the Permit, such as what duties are imposed by the "good engineering practices" requirement. These issues lie at the heart of the Court's competency and are not the task

[9] The Court was appropriately skeptical when Exxon raised the prospect that discovery from EPA would be necessary to interpret the Permit terms. *See* Mar. 13, 2019 Lobby Tr. at 4 ("Are there cases, is there precedent for getting discovery from EPA on the meaning of a permit? Have you looked?"); *id.* at 5-6 ("And what I'm thinking is, if they had a regulation and discussed the permit, it would deserve some Chevron deference. If they had guidance that they published for all permits, that would deserve some Chevron deference but less. I don't know about, you know, taking -- it's not a rhetorical question. I just don't know about taking testimony about a legal -- if it's interpreting a legal document, usually you don't get expert testimony on the law. And I don't know how that principle applies in this case.").

delegated to EPA by Congress.

None of Exxon's arguments about the novelty of this suit alter this conclusion. Mot. at 13. CLF is not suing EPA; CLF is not attacking EPA-set discharge limits or its use of a particular statistical model for those limits, *see BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637 (1st Cir. 1979), or EPA's interpretation of water quality standards, *see Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Nor is CLF seeking an adjudication where EPA has not yet spoken. *See Montgomery Envtl.*, 607 F.2d at 381 (deferring to EPA where plaintiff was challenging discharges from an unpermitted facility where EPA later issued a permit with specific discharge limits); *Pejepscot Indus. Park*, 215 F.3d at 205–06 (referring question to agency specially tasked with adjudicating disputes over rail rates and services); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (referring to FCC question of whether new VOIP-technology qualifies as a "telecommunications carrier"). Instead, CLF is merely seeking to enforce the terms that EPA, in its considered judgment, already included in the Permit.

C. EPA's Resolution of Exxon's Permit Application Will Be of Little, if Any, Material Aid to the Court

The third factor identified in *Blackstone* is "whether, though perhaps not determinative, the agency determination would materially aid the court." 67 F.3d at 992. Here, any decision on the pending permit renewal application will be of little aid to the Court in deciding the material issues in this case. At the outset, a decision on the Permit may have no impact on the current litigation because EPA could issue the same Permit language again. As explained above, Exxon has submitted an application that "seeks issuance of a permit that is similar to the current Permit in all material respects." Mot. at 6. CLF also maintains that the Permit terms, though they might be improved, are enforceable as written (e.g., requiring stormwater system to be capable of handling evolving 10-year, 24-hour storm rainfall metric; imposing continuing obligation to use "good

engineering practices"). If EPA agrees with CLF's interpretation, it may not change the Permit conditions at all. Moreover, any change in Permit language says little, if anything, about current violations of the Permit. For example, if EPA (i) changes the 10-year, 24-hour storm estimate from 4.6 to 5.12, [10] or (ii) mandates Exxon to upgrade its stormwater management system, the parties' dispute is unchanged. CLF will maintain that this estimate is a living number throughout the life of the Permit that Exxon has been violating for years. Exxon will, meanwhile, maintain that 5.12 is the only requirement until the next Permit renewal.

Exxon's arguments to the contrary reveal the highly speculative nature of its proposed solution to this case. *First*, Exxon apparently recognizes that the permit-renewal process would not require EPA to address any of the issues in this case directly. Instead, it hinges its argument on the public comment process where it notes that comments "*may seek* clarification, object to the permit, or request more stringent conditions." Mot. at 14 (emphasis added). It then assumes that either (i) Exxon will be vindicated by issuance of a substantially similar permit, or (ii) a new Permit will "address the alleged increased risks, thereby 'obviating the need for an injunction.'" *Id.* *Second*, Exxon also incorrectly asserts that CLF's case would be mooted by issuance of a new permit. *See U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23, 33 (1st Cir. 2003) (holding that actions which allege violations existing "*at the time suit is brought are cognizable*" and "it make[s no] policy sense to allow such a suit or remedy, if legitimate when brought, to be defeated by having the offender cease the violation as soon as the suit is filed while leaving the past harm unremedied") (citations omitted)). As such, this Court should not stay this case pending a determination from EPA that would have no material impact on the litigation moving forward.

[10] *See* Mar. 2019 Tr. at 64-65.

D. This Case Does Not Implicate National Uniformity of Regulatory Interpretation Because CLF Is Not Challenging the Text of A Regulation

In addition to the three itemized factors above, the *Blackstone* court also considered whether "[r]eferral to the EPA under the doctrine of primary jurisdiction will also serve the interest of national uniformity in regulation." 67 F.3d at 992. Unlike in *Blackstone*, no nationwide regulatory definition is implicated here. Exxon's position—that any case seeking to interpret narrative terms should be stayed—would render any narrative permit terms a nullity, incapable of being enforced. Moreover, imposition of an injunction by this Court could not interfere with EPA's permitting process. *See* Mot. at 16. If a new permit is issued, Exxon is welcome to raise the terms of the permit with the Court to consider in issuing any injunction. *See Atl. Salmon of Maine, LLC*, 339 F.3d at 28-29. Indeed, in *Atlantic Salmon*, the First Circuit rejected the same argument that Exxon posits here. *See id.* at 34 ("[B]ecause the district court's injunction does no more than impose additional constraints, it cannot undermine the central thrust of the Maine general permit regime."). This Court should do the same.[11]

III. A Stay Would Prejudice CLF and Cause Undue Delay

Finally, contrary to Exxon's assertions, a stay in this case would both prejudice CLF and cause undue delay. In determining whether to invoke the doctrine of primary jurisdiction, the Court should consider the potential for delay inherent in referring an issue to EPA. *See Nat'l Assoc. of the Deaf*, 2016 WL 3561622, at *14. The Court has already held that CLF has sufficiently alleged that its members are at imminent risk of exposure to discharges resulting from Exxon's failure to protect against climate change impacts. Mar. 2019 Tr. at 124:22-25. Climate change impacts

[11] EPA made clear in its Motion to Quash that it does not share Exxon's purported concern about the dire threat of this litigation to EPA's discretion or authority. ECF No. 86 at 14-15. Indeed, EPA apparently considers that the threat that "rulings in this case could be contrary to EPA's programs" is no greater than that "present in most private environmental litigation." *Id.* ("[T]he Regional Counsel did not find a clear interest as a result of conjecture about future litigation usurping EPA's discretion.").

including severe weather events, storm surge, increased precipitation, and sea level rise are serious and well-recognized, both generally and for the Boston area specifically. The Terminal, because of its location, is at risk of discharging oil and other pollutants as a result. That the injuries have not yet been suffered, and have not been suffered during the pendency of the lawsuit, has no bearing on whether they may be felt in the near future.[12] Because there is a "'strong public interest in the prompt resolution' of the case," this Court should "not defer to administrative action of uncertain aid and uncertain speed." *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979).

Furthermore, CLF's RCRA claim is not being considered by the Court against the backdrop of a regulatory approval or permit. Rather, that claim has been brought pursuant to the imminent and substantial endangerment citizen suit provision of the statute and would effectively be held hostage by a stay. Similarly, resolution of CLF's Effluent Violation Counts dealing with on-going, regular excessive discharges of highly toxic PAHs would be substantially and prejudicially delayed by issuance of a stay even though no EPA action is commenced or contemplated.

CONCLUSION

For these reasons, this Court should (i) not stray from the long line of cases finding that the application of the primary jurisdiction doctrine is inappropriate in a citizen suit and (ii) deny Exxon's request to stay CLF's claims in this matter.

DATED: April 19, 2019

[12] Notwithstanding Exxon's improper submission of evidence on merits-issues before the start of discovery. Mot. at 19 (proffering alleged expert affidavits and a report on another issue, Exs. 1, 3-4).

Respectfully submitted,

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