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.	)	

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This Court may be the first to confront claims that "good engineering practices" require climate change preparedness. But if CLF attains its goals, it will not be the last. Under the guise of a citizen-enforcement suit, CLF seeks to advance a political agenda in disregard of EPA policy and the agency's interpretation of the NPDES permit CLF ostensibly seeks to enforce. Because EPA should determine in the first instance questions of whether, when, and to what extent NPDES permit holders like ExxonMobil should address alleged increased risks of extreme weather during the life of a permit, the doctrine of primary jurisdiction supports deference to the agency.

CLF's opposition rests heavily on the premise that the primary jurisdiction doctrine is more often than not unnecessary in run-of-the-mill citizen suits under the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"). But CLF fails to tackle two crucial facts in this case that compel the entry of a stay. First, by the time this case has been fully litigated on the merits (and potentially appealed), EPA says that it will have addressed ExxonMobil's pending permit-renewal application for the Terminal. That proceeding could moot or resolve CLF's claims, rendering for naught this Court's efforts to progress the litigation. Second, this is not remotely a typical citizen suit. In CLF's own words, it is a "first-of-its-kind lawsuit" attempting to use boilerplate NPDES permit language as a foothold to legislate alleged climate change preparedness. Given the novelty of CLF's theory, the technical and policy-laden issues it implicates, and the impact its adoption could have beyond this case, knowing EPA's views before proceeding is all the more crucial.

Attempting to draw attention away from the unique features of this case, CLF argues that the primary jurisdiction doctrine "[g]enerally" does not apply in citizen suits under the CWA and RCRA. (Opp'n 8.) But CLF does not—because it cannot—say that the doctrine is *categorically* inapplicable. And in light of this suit's anomalous nature, it is unsurprising that each of the First Circuit's factors for assessing whether to invoke the primary jurisdiction doctrine favors a stay. CLF's responses each fail for the reasons explained herein, as does its assertion of prejudice.

The Court therefore should grant ExxonMobil's motion to stay and allow EPA to determine in the first instance whether purportedly increased risks of extreme weather warrant changes to the Terminal's permit, facility, or practices.[1]

ARGUMENT

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

As explained in ExxonMobil's opening brief, each of the three *Blackstone* factors governing whether a court should stay an action under the primary jurisdiction doctrine supports a stay here. (*See* ExxonMobil Opening Br. at 8–15.) Apparently recognizing the weakness of its position, CLF relegates these factors to secondary importance. Instead, CLF focuses its efforts on arguing that the primary jurisdiction doctrine does not apply at all. That effort fails, as do CLF's responses on the *Blackstone* factors when CLF finally addresses them.

A. The Clean Water Act and RCRA Do Not Preclude Application of the Primary Jurisdiction Doctrine.

While CLF argues that the primary jurisdiction doctrine "is generally inapplicable" to citizen suits under the CWA and RCRA (Opp'n 8), it does not—and cannot—argue that those statutes *categorically* displace the doctrine. The doctrine, after all, is "specifically applicable to claims *properly cognizable in court* that contain some issue within the special competence of an administrative agency." *Reiter* v. *Cooper*, 507 U.S. 258, 268 (1993) (emphasis added). When faced with CLF's precise statutory argument in the related context of *Burford* abstention, the First Circuit refused "to rule out categorically the possibility of abstention in a RCRA citizen suit." *Chico Serv. Station, Inc.* v. *Sol Puerto Rico Ltd.*, 633 F.3d 20, 31–32 (1st Cir. 2011). At a minimum, then, the primary jurisdiction doctrine applies in cases with "particularly conducive fact patterns." *Me. People's All.* v. *Holtrachem Mfg.*, No. 00-cv-69, 2001 WL 1704911, at *9 (D. Me. Jan. 8, 2001).

---

[1] As in the opening brief, "ExxonMobil" refers to defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company; "CLF" refers to plaintiff Conservation Law Foundation, Inc.; "Terminal" refers to the Everett Terminal, and "Permit" refers to the Terminal's operative National Pollutant Discharge Elimination System ("NPDES") permit.

This case presents just such a fact pattern. Unlike a traditional citizen suit, CLF is not merely asserting that ExxonMobil has violated EPA-established effluent-discharge limitations in its Permit. CLF instead seeks to have ExxonMobil's obligations reevaluated during the life of the Permit and to challenge ExxonMobil's alleged failure to deviate from the practices or designs EPA approved when issuing the Permit. CLF asks the Court to assess alleged changes in climate, the likelihood that extreme precipitation or flooding will affect the Terminal, and the Terminal's vulnerability to unpermitted discharges if such an event arose. CLF even asks the Court to develop the specific steps ExxonMobil must take to account for alleged climate-related risks, including physical modifications to the Terminal. (*See* Mar. 13, 2019 Hr'g Tr. 60:9–22.) The primary jurisdiction doctrine was designed for cases like this one.

Case law reinforces the point. Where, as here, a CWA or RCRA citizen suit requires more than the mere enforcement of standards already developed by the relevant agency, courts have applied the primary jurisdiction doctrine. *See Montgomery Envtl. Coal.* v. *Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 381–82 (D.C. Cir. 1979); *Sierra Club* v. *Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1206–07 (W.D. Okla. 2017); *Davies* v. *Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990, 997–998 (D. Kan. 1997); *Friends of Santa Fe Cty.* v. *LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349–1350 (D.N.M. 1995).

The decision in *Sierra Club* v. *Chesapeake Operating, LLC* is illustrative. 248 F. Supp. 3d 1194. There, the plaintiffs sought to enjoin the defendant under RCRA from injecting liquid waste into the ground, which allegedly contributed to earthquakes. *Id.* at 1198. "The relief sought by [the] plaintiff," however, "would [have] require[d] the court to operate (and this would amount more to regulation than adjudication) at the confluence of several areas of expertise, including geology, geophysics, hydraulics and petroleum engineering, to say nothing of seismology." *Id.* at 1206. The court accordingly dismissed the case under the primary jurisdiction doctrine, allowing the relevant state environmental agency to address the issue. *Id.* at 1209.

The authorities cited by CLF that decline to apply the primary jurisdiction doctrine, by contrast, all involve citizens seeking either to enforce compliance with established standards unambiguously articulated by the agency or to enjoin unpermitted discharges violating the CWA itself. *See, e.g., Pennenvironment* v. *Genon Ne. Mgmt. Co.*, No. 07-cv-475, 2011 WL 1085885, at *1 (W.D. Pa. Mar. 21, 2011) (violation of specific discharge limit); *Ill. Pub. Interest Research Grp.* v. *PMC, Inc.*, 835 F. Supp. 1070, 1072 (N.D. Ill. 1993) (violation of specific discharge limit and pretreatment standards); *Apalachicola Riverkeeper* v. *Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 457 (E.D. La. 2013) (unpermitted discharge).

This distinction makes sense. When the question is simply whether a permit holder is "in violation of its NPDES Permit limits" or lacks the necessary permit altogether, "the [c]ourt [need not] make any determinations involving technical or policy considerations." *Pennenvironment*, 2011 WL 1085885, at *5. Cases that go beyond those areas, however, can require and benefit from EPA's technical and policy expertise.

CLF's only response is to suggest incorrectly that its interpretation of the Permit already prevailed at the motion-to-dismiss stage. (*See* Opp'n 5–6, 16–17.) But the Court explained that its ruling was "based on [its] present informed but not final understanding of the law" and that it would "continue to consider the complex law in this case." (Mar. 13, 2019 Hr'g Tr. 142:2–8.) The Court was correct to cabin its decision in that way: it deemed the term "good engineering practices" ambiguous. And issuing a definitive ruling on the meaning of an ambiguous contract (or permit) term based on the pleadings is "inappropriate" if "[t]he pleadings do not establish the facts necessary to resolve the ambiguity." *C.A. Acquisition Newco, LLC* v. *DHL Express (USA), Inc.*, 696 F.3d 109, 113 (1st Cir. 2012); *see also Nat. Res. Def. Council, Inc.* v. *Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("NPDES permits are treated like any other contract.").

B. The *Blackstone* Factors Are Satisfied.

In the alternative, CLF argues that, even if the primary jurisdiction doctrine could apply here, "none of the factors for invoking the doctrine are met." (Opp'n 12.) That is incorrect.

1. The first *Blackstone* factor—"whether the agency determination l[ies] at the heart of the task assigned the agency by Congress," 67 F.3d at 992—is satisfied here. CLF does not dispute that Congress delegated to EPA the authority and discretion to issue NPDES permits and to establish conditions for discharging pollutants through clear standards and limitations. (*See* Opp'n 13.) That factor implicates CLF's lawsuit, which seeks to "reevaluate" the conditions in the Permit—a task reserved for EPA—through the guise of "interpreting" it.

CLF disagrees. It argues that the issues in this case, nominally a permit enforcement action, do not fall within EPA's discretion because "Congress has shared" enforcement of CWA permits "between EPA and the public" by providing for citizen suits. *Id.* But that is just a repackaging of CLF's first argument, which fails for the same reason as before. Congress gave citizens only an "interstitial" role in enforcing the CWA, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60–61 (1987), and CLF's lawsuit goes well beyond a typical citizen suit seeking to enforce clear standards in an NPDES permit. ExxonMobil explained in its opening brief why the unique relief CLF seeks here would tread on EPA's discretion in administering NPDES permits. (ExxonMobil Opening Br. 10.) CLF offers little direct response.

CLF instead argues that, "[i]n *judicial* enforcement cases, it is the sole responsibility of the courts to interpret Clean Water Act permits and address the resultant liability." (Opp'n 14 (emphasis added).) But that tautology is beside the point. That courts have jurisdiction to adjudicate garden-variety citizen-enforcement suits does not require courts to ignore the permitting agency's interpretation of permit terms when an interpretive dispute arises. Quite the opposite. "[O]ne of [a court's] obligations in interpreting an NPDES permit is to determine the intent of the permitting authority." *Nat. Res. Def. Council*, 725 F.3d at 1207 (internal quotation marks and citation omitted). Indeed, the permitting authority's "reasonable interpretation of the NPDES permit" is entitled to "substantial deference." *Russian River Watershed Prot. Comm.* v. *City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *see, e.g.*, *S. Appalachian Mountain Stewards* v. *Red River Coal Co.*, No. 14-cv-24, 2015 WL 1647965, at *4 (W.D. Va. Apr. 14,

2015) (giving deference to agency's interpretation of permit term stated in declarations of agency's employees); *see also Nat. Res. Def. Council*, 725 F.3d at 1208 (holding "the Regional Board's interpretation of the Permit [stated in an amicus brief] . . . is clearly instructive." (citation omitted)). Nor do the decisions in *San Francisco Baykeeper* v. *Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007), and *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 561 (5th Cir. 1996), say otherwise. Those cases held only that a citizen suit may proceed in the *absence* of a permit, where permit interpretation plainly was not at issue.[2]

2. The second *Blackstone* factor—"whether agency expertise [i]s required to unravel intricate, technical facts," 67 F.3d at 992—is also satisfied. As ExxonMobil explained in its opening brief, this Court would need to analyze complex, evolving, and highly technical data regarding alleged climate-induced risks to grant CLF the relief it seeks. CLF's non-climate change claims would likewise require the Court to delve into highly technical questions related to the lowest levels allowable for reliable quantitative measurements.

CLF contests this straightforward conclusion because it now claims "the primary dispute . . . centers around the appropriate *legal* interpretation of the terms of the [p]ermit." (Opp'n 16. *But see* ECF No. 50 at 2 ("Interpretation of the Permit is not a 'central issue' in this case.").) To be sure, ExxonMobil believes CLF's claims could be dismissed based on an interpretation of the Permit that reflects relevant extrinsic evidence bearing on EPA's intent. *See Piney Run Pres. Ass'n* v. *Cty. Comm'rs of Carroll Cty., MD*, 268 F.3d 255, 269–71 (4th Cir. 2001); *Red River Coal Co.*, No. 14-cv-24, 2015 WL 1647965, at *4 (W.D. Va. Apr. 14, 2015) (granting defendant's motion for summary judgment in deference to agency's permit interpretation). But for CLF to prevail on claims premised on its erroneous and misguided permit interpretation would embroil the Court in highly technical facts. The numerous sources CLF quotes in its

[2] CLF suggests that, by submitting an expert affidavit regarding "good engineering practices," ExxonMobil has conceded that EPA's expertise is not necessary here. (Opp'n 15.) But ExxonMobil nowhere conceded that an expert opinion is an equal substitute for official agency action. In the current absence of EPA testimony, ExxonMobil's experts merely speak to their extensive experience conducting projects under the NPDES regulatory framework, the existing data on possible near-future weather conditions at the Terminal, and the Terminal's capacity to address those weather conditions adequately.

Amended Complaint demonstrate that the merits of its claims inevitably would entail consideration and evaluation of complex and highly technical data regarding alleged climate-induced risks, the timing of those risks, and the appropriate steps to address them. (*See* Am. Compl. ¶¶ 142–45, 165–68, 176, 180, 202, 220–24.) Determining these facts would raise intricate questions of first impression, such as asking the Court to select among different models for projecting climate-related impacts in a particular location. The Court thus was correct to note that "EPA ought to be making that decision in the first instance." (Nov. 30, 2018 Hr'g Tr. 17:11–17.)[3]

Nor is CLF correct that ExxonMobil "admitted that it has not considered impacts related to climate change in developing or implementing the Terminal's SWPP and SPCC plan." (Opp'n 16.) To the contrary, ExxonMobil merely presumed that CLF's allegations were true for purposes of the motion to dismiss—as is required, *see Guilfoile* v. *Shields*, 913 F.3d 178, 186 (1st Cir. 2019)—and argued that CLF failed to state a claim in any event. Yet as CLF well knows, ExxonMobil's regular practice is to engineer its facilities—including the Terminal—"robustly with extreme weather considerations in mind." (Am. Compl. ¶¶ 225–26; *see also* Sept. 12, 2017 Hr'g Tr. 4:20–25; ECF No. 38-1 at 13–14.)

CLF's last-ditch effort is to argue that ExxonMobil is "sell[ing] the federal judiciary short" by suggesting that courts cannot resolve cases involving "highly technical areas." (Opp'n 15 (quoting *Me. People's All.* v. *Mallinckrodt, Inc.*, 471 F.3d 277, 293 (1st Cir. 2006)).) But that is a strawman. ExxonMobil has never suggested that this Court is incapable of addressing the technical matters here. ExxonMobil has argued only that this case is a perfect candidate for the primary jurisdiction doctrine given (i) the novelty of CLF's theory of liability, (ii) the centrality of the proper interpretation of a permit term that the Court has deemed ambiguous (and that EPA itself drafted), (iii) the technical facts this case inevitably will involve, (iv) the policy-laden

[3] Similarly, CLF's argument that the effluent limits for PAHs must be enforced at a concentration below the Minimum Level as defined in the Permit, which is the lowest level that can be reliably quantified under current analytical standards, requires an understanding of water chemistry and analytical methods. (ECF No. 34-1 at 3.)

issues CLF's claims implicate, and (v) the likelihood that EPA will decide each of these issues in the upcoming permit-renewal proceedings.

3. The third and final *Blackstone* factor—"whether . . . the agency determination would materially aid the court," 67 F.3d at 992—is satisfied too. As the Court explained, EPA's decision on the permit renewal will provide the Court with "the expert view of what's appropriate now," as decided by "the people with the responsibility and expertise . . . to make decisions that are committed to the executive branch primarily." (Nov. 30, 2018 Hr'g Tr. 11:20–12:1.)

CLF contends that a decision from EPA on ExxonMobil's permit-renewal application "may have no impact on the current litigation." (Opp'n 17.) But CLF does not dispute that EPA will be obliged to respond to any comments submitted by CLF or any other member of the public raising the issues identified by this lawsuit during the comment period. *See* 40 C.F.R. § 124.17. EPA may then renew the Permit in substantially similar form, with responses confirming ExxonMobil's interpretation and compliance. *See Congaree Riverkeeper, Inc.* v. *Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 754–55 (D.S.C. 2017) (relying on agency's permit interpretation expressed through its denial of permit-renewal application). Or, EPA may issue a different permit with terms that address the alleged increased risks or the alleged duty to treat the permit as a "living" document, "obviat[ing] the need for an injunction." *Nat. Res. Council of Me.* v. *Int'l Paper Co.*, 424 F. Supp. 2d 235, 255 (D. Me. 2006). CLF does not deny that EPA's position—as articulated in either the Terminal's permit or EPA's response to comments—could definitely resolve this issue. Instead, CLF labels such resolution "speculative," suggesting that no one will file comments regarding the issues in this lawsuit during the notice-and-comment period. (Opp'n 18.) But "EPA anticipates both parties' . . . active involvement in the administrative proceeding addressing the reissuance of the Everett Terminal's NPDES permit." (ECF No. 86-1 at 21). By calling an action that rests within CLF's own power "speculative," CLF merely confirms that it is urging a position it knows to be contrary to EPA's.

Indeed, this lawsuit stems directly from CLF's failure to comment during the approval process for the current Permit. Had CLF raised the issues here with EPA then, EPA would have addressed them and a citizen suit would have been unnecessary. Instead, CLF chose litigation over the administrative process—which is precisely why this lawsuit triggers the "permit shield" and the collateral-attack doctrines. *See* 33 U.S.C. § 1342(k); *Amigos Bravos* v. *Molycorp, Inc.*, 166 F.3d 1220, 1998 WL 792159, at *4 (10th Cir. 1998); *Chesapeake Bay Found.* v. *Bethlehem Steel Corp.*, 608 F. Supp. 440, 443 (D. Md. 1985).

CLF also resists this Court's repeated recognition that "a lot of [its] work could become moot or all of it could become moot if EPA decides to issue or renew the permit" for the Terminal. (Nov. 30, 2018 Hr'g Tr. 149:22–25; Opp'n 18; *see also* Mar. 13, 2019 Hr'g Tr. 117:4–8; Sept. 12, 2017 Hr'g Tr. 114:18–20.) But the Court is correct. "[I]njunctive relief . . . is the heart of the case," (Mar. 13, 2019 Hr'g Tr. 117:8.), and CLF can seek only *prospective* injunctive relief on its climate change counts, which allege only a *risk of future harm*. If EPA issues a new permit that addresses climate change in a different way than CLF proposes, the permit will govern. *See* 33 U.S.C. § 1342(k). On the effluent-violation counts, CLF primarily seeks "declaratory and injunctive relief to prevent *further* violations of the Clean Water Act." (Am. Compl. ¶ 357(b) (emphasis added).) But once a new permit issues, there is no possibility of further violations of the superseded permit.[4]

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

When assessing whether to apply the primary jurisdiction doctrine, courts also consider issues of "uniformity." *Blackstone*, 67 F.3d at 992. Staying this case pending EPA's decision on the renewal application would promote uniformity in how NPDES permit holders address the risk of severe precipitation and flooding. The standard permit provisions on which CLF relies

[4] The ECHO Database, of course, already lists ExxonMobil as in compliance with the Permit's effluent limitations. To the extent that CLF is arguing that the Permit's "legacy footnote" applies to EPA's but not citizens' enforcement of the Permit (Opp'n 4–5), EPA likely will clarify during the permit-renewal process that the footnote governs compliance in *all* enforcement actions. (*See* ECF No. 45-1 at 1–2.)

are common in NPDES permits throughout EPA Region 1 and nationwide general permits where EPA is the permitting authority. That is precisely why CLF has touted this suit as a model that will be replicated "up and down" the coast. (ECF No. 81-7 at 2.) By staying the case now, the Court will avoid "leav[ing] this matter to the risk of inconsistent outcomes before particular courts in different parts of the country." *Blackstone*, 67 F.3d 992–93. [5]

CLF claims that ExxonMobil's position is that "any case seeking to interpret narrative terms should be stayed." (Opp'n 19.) That is not ExxonMobil's position. To be sure, narrative permit terms are enforceable. But narrative terms are generally further articulated through a developed body of regulations and guidance. ExxonMobil's position is only that *this* case should be stayed because the *specific term* that forms the basis of many of CLF's claims runs throughout NPDES permits, has never been interpreted in the manner CLF suggests, and EPA can be expected to address the meaning of that term in the upcoming permit-renewal proceedings. In EPA's recent motion to quash, moreover, the agency recognized a risk that a ruling in this case endorsing CLF's position could conflict with agency positions and interfere with agency programs. (*See* ECF No. 86 at 14.) To be sure, EPA concluded that, "[a]t this early stage of the case, risks to EPA's priorities to eliminate the backlog of expired permits overshadow any risk associated with CLF's claims." (*Id.* at 14–15.) But at no point did EPA dispute that this risk is present and real. (*Cf.* Opp'n 19 n.11.)

United States Pub. Interest Research Grp. v. *Atlantic Salmon of Me., LLC*, 339 F.3d 23 (1st Cir. 2003), is not to the contrary. The First Circuit there upheld an injunction that imposed greater obligations than a later-issued permit, the permit-shield doctrine notwithstanding, because the injunction's terms were designed to remedy "ongoing harm . . . caused by past violations." *Id.* at 32. But there is no ongoing harm for an injunction to remedy with respect to CLF's climate change claims because CLF is suing based only on a *risk of future injury*. And

[5] "EPA issues all NPDES permits for New Hampshire, Massachusetts, and New Mexico; Washington, D.C.; Puerto Rico; Guam; American Samoa; Indian country; Johnston Atoll; Midway Island; Northern Mariana Islands; and Wake Island. EPA also issues NPDES permits for certain offshore facilities and some NPDES permits for Idaho, Washington, Colorado, Delaware, Maine and Vermont." (ECF No. 86-1 at 21.)

even with respect to CLF's effluent-violation claims, the Amended Complaint solely seeks injunctive relief in the form of "prevent[ing] *further* violations," not remedying ongoing harm from past violations. (*See* Am. Compl. ¶ 357(b) (emphasis added).)

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

As ExxonMobil explained in its opening brief, an order staying this case under the primary jurisdiction doctrine would not prejudice CLF. While CLF claims a stay would cause "undue delay" (Opp'n 19), it fails to argue that the permit proceedings are likely to require significantly more time than would litigation to address its concerns. EPA has reconfirmed that it plans to issue a draft permit as early as the end of this year and to renew or reissue a final permit no later than 2022. Even under CLF's unrealistically brief proposed discovery plan, discovery would not be completed until mid-2020. And even assuming that this Court granted summary judgment in full for one party on an expedited basis, proceedings in the inevitable appeal likely would not end until the turn of 2022. *See* Admin. Office of U.S. Courts, *U.S. Court of Appeals—Federal Court Management Statistics—Profiles* 6 (Dec. 31, 2018) (noting median time to resolve appeal in the First Circuit is 13.4 months), http://tinyurl.com/yxuucohx. In the meantime, the current Permit, SWPPP, SPCC Plan, and stormwater treatment system will adequately protect CLF from the alleged risk of flooding or extreme precipitation—as ExxonMobil's unrebutted expert affidavits establish. Once the renewal process begins, CLF will be able to raise the same concerns it voices here to EPA itself.

CLF's responses utterly fail. Indeed, CLF concedes that injuries arising out of its climate change claims "have not yet been suffered, and have not been suffered during the pendency of [this] lawsuit" that has, in fact, been pending longer than the likely duration of the requested stay. (Opp'n 20.) And CLF offers no substantive response to the expert affidavits stating that the risks of complications from extreme weather at the Terminal "have not materially changed" since the operative Permit issued in 2012 (ECF No. 81-3, Hegemann Aff. ¶ 11) and that the Terminal's stormwater system "is equally protective of the environment now . . . and will remain

so for the next decade" (ECF No. 81-2, Heineman Aff. ¶ 12; ECF No. 81-3, Hegemann Aff. ¶ 13).[6] Nor does CLF even contest that EPA's decision to assign precedence to other permit applications over the Terminal's Permit reflects a considered determination regarding any immediate environmental risks at the Terminal—a fact CLF has recognized. (*See* ECF No. 86-2 at 4, Dec. 6, 2018 Letter from C. Kilian.) *Cf. In re Sierra Club, Inc.*, No. 12-1860, 2013 WL 1955877, at *1 (1st Cir. May 8, 2013) ("EPA states that . . . it has prioritized permits that have greater environmental impact.").

Rather than substantiating its claim of prejudice, CLF falls back on the Court's ruling in its favor on the issue of imminence. (Opp'n 19.) But at the March 13, 2019 hearing, this Court merely held that CLF had plausibly alleged that "foreseeable severe weather events" present an imminent risk of harm for *standing* purposes. (Mar. 13, 2019 Hr'g Tr. 124:22–25, 129:5–8.) Allegations of imminence that are sufficient to survive a motion to dismiss are by no means sufficient to definitely establish that CLF will be harmed prior to 2022, by which time the proper body will determine these issues. *See Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

CLF finally asserts that invoking the primary jurisdiction doctrine here will mean that its remaining effluent-violation counts (Counts 2 & 3) and its RCRA claim "would effectively be held hostage." (Opp'n 20.) Not so. This Court dismissed CLF's RCRA claim to the extent it overlapped with the effluent-violation counts, and the claim remains only to the extent it is based on the Terminal's alleged lack of climate change preparedness. (Mar. 13, 2019 Hr'g Tr. 140:1–142:1). EPA's guidance on climate change issues thus would help this Court resolve the RCRA claim too. Counts 2 and 3, for their part, turn on discrete questions of permit interpretation that EPA similarly may clarify during the permit-renewal proceeding. On Count 2, CLF's arguments about PAH limits disregard the footnote in which EPA modified PAH limits. (ECF No. 39 at 3, 19.) *Cf. Piney Run*, 268 F.3d at 269–71 (4th Cir. 2001) (looking to extrinsic evidence to clarify

[6] Courts may consider expert affidavits when deciding whether to stay a case under the primary jurisdiction doctrine. *See, e.g., Palmer Foundry, Inc.* v. *Delta-HA, Inc.*, 319 F. Supp. 2d 110, 112 (D. Mass. 2004). These experts will also be present and available to testify at the May 14, 2019 hearing.

ambiguous footnote in permit). On Count 3, EPA already expressly rejected the end-of-pipe interpretation underlying CLF's State Water Quality Standards claims in response to CLF's comments on the 2007 draft permit. (*Compare* ECF No. 38-5 at 69, *with* ECF No. 39 at 21.) The Court thus would benefit from EPA's input on both of these Counts as well.

CONCLUSION

CLF's claims under the CWA and RCRA involve novel theories of liability, implicate technical and policy-laden issues, and could result in wide-ranging impacts outside of this case. For these reasons, the case should be stayed under the doctrine of primary jurisdiction until EPA can resolve the outstanding permit-renewal application for ExxonMobil's Everett Terminal.

Respectfully submitted this 26th 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 26, 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