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 SUR-REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS OPPOSITION TO DEFENDANTS' MOTION TO STAY PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION

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Plaintiff Conservation Law Foundation ("CLF") respectfully submits this sur-reply memorandum in response to Exxon's Reply in Support of Defendants' Motion to Stay Pursuant to the Doctrine of Primary Jurisdiction (ECF No. 92) (hereinafter "Reply") and in further opposition to Exxon's[1] Motion to Stay (ECF No. 80) ("Motion").

I. The Court Should Not Diverge from Precedent Holding Primary Jurisdiction Inapplicable in Citizen Enforcement Suits

In its Opposition, CLF described in detail that courts highly disfavor application of the primary jurisdiction doctrine to citizen enforcement suits because it interferes with the congressional intent to broaden enforcement through citizen suit and the balance established through the pre-suit notice requirements to EPA. Opp. at 8-11. Also, CLF established that primary jurisdiction is particularly inappropriate to stay permit enforcement actions, such as this one. *See* Opp. at 10. Nothing in Exxon's Reply favors diverging from this precedent.

While the Clean Water Act and RCRA do not *expressly* displace the primary jurisdiction doctrine, that silence is immaterial. On the question of applying primary jurisdiction to citizen enforcement suits, a multitude of courts have either (i) held that the doctrine is inapplicable in all cases, *see, e.g., PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (applying primary jurisdiction to citizen suit "would be an end run around RCRA" where suit does not fit within categories that "Congress has *specified*"); *Maine People's All. v. Holtrachem Mfg.*, No. 00-CV-69, 2001 WL 1704911, at *6 (D. Me. Jan. 8, 2001) (discussing cases),[2] or (ii) expressed doubt about its applicability, *see, e.g., Illinois Public Interest Research Group v. PMC, Inc. Through*

[1] Unless otherwise stated, all capitalized terms used herein have the same meaning as used in CLF's Opposition to Defendants' Motion to Stay (ECF No. 88) (hereinafter, "Opposition" or "Opp").

[2] *See also Apalachicola River v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 (E.D. La. 2013); *Sierra Club v. U.S. Dep't of Energy*, 734 F. Supp. 946, 951 (D. Colo. 1990); *Trident Inv. Mgmt., Inc.-Meyer Inv. Properties, Inc. v. Bhambra*, No. 95 C 4260, 1995 WL 736940, at *2 (N.D. Ill. Dec. 11, 1995) (collecting cases); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (collecting cases).

PMC Specialties Group, 835 F. Supp. 1070 (N.D. Ill. Oct. 14, 1993). The First Circuit has not addressed the question; the closest it has come is to state, in the context of *Burford* abstention: "While we are not prepared to rule out categorically the possibility of abstention in a RCRA citizen suit, we believe that the circumstances justifying abstention will be exceedingly rare." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31–32 (1st Cir. 2011). Meanwhile, in keeping with the First Circuit's stated reluctance to halt citizen enforcement suits, *id.* at 31, CLF has not identified any opinion from a court in the First Circuit staying a citizen enforcement suit under the doctrine of primary jurisdiction (or *Burford* abstention).

Even assuming that primary jurisdiction can apply to a citizen enforcement suit under a "particularly conducive fact pattern[]," as Exxon advocates (Reply at 2), Exxon has not satisfied that standard here. Exxon's argument reiterates the same theme from its Motion to Dismiss: that CLF's theory is too novel and potentially far reaching that it amounts to an usurpation of EPA's authority. *See* Reply at 3. As CLF has explained, this argument contradicts the nature of CLF's claims—enforcement of the terms of the Permit as written by EPA. In addition, Exxon cites little support to assert its conclusion that this case fits within any narrow exception to the general rule disallowing primary jurisdiction in citizen suit cases.

Indeed, the sole case that Exxon tries to analogize to, *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194 (W.D. Okla. 2017), is readily distinguishable because the government agency to which the court deferred was actively addressing the *exact issue raised and relief sought* in the litigation. The plaintiffs had sued a group of energy extraction companies under RCRA (i) alleging that their injection of wastewater into the ground was causing earthquakes, and (ii) seeking an injunction ordering a reduction in the volume of wastewater injected into the ground. *Id.* at 1194. The court invoked the primary jurisdiction doctrine and deferred to the state agency tasked

with overseeing wastewater injections. *Id.* at 1206. The court based this decision on the fact that the agency was "diligently" addressing the issue of increased earthquakes caused by wastewater injections, including recently imposing mandatory wastewater reduction requirements. *Id.* at 1208. Here, by contrast, (i) the pending permit-renewal does not directly address the issues raised in CLF's suit, and (ii) unlike CLF's Permit-enforcement claims, the plaintiffs in *Sierra Club* were not seeking to enforce rules pre-established by the relevant agency.

II. The *Blackstone* Factors Are Not Met

A. The Motion to Stay Rests on a Fundamental Misunderstanding Between the Permitting Function and the Enforcement Function

As described in CLF's Opposition, the Motion to Stay is based on a fundamental confusion in EPA's role and authority. *See* Opp. at 13-15. By statute, EPA has two opportunities to opine on the terms of a Clean Water Act Permit: (1) drafting the permit (the Permitting Function), and (2) enforcing the terms of the permit (the Enforcement Function). EPA has already spoken through the *Permitting Function* by issuing the current Permit. EPA evaluated the Everett Terminal, set pollution discharge limits and conditions, and issued the Permit. The terms of that Permit impose enforceable obligations on Exxon *now*—not at some undefined point in the future.

As for the *Enforcement Function*, EPA has refused to opine on the issues in this case.[3] CLF notified EPA of this litigation, as required by statute, and EPA exercised its discretion not to get involved in this case. *See* Opp. at 14.[4] Now, CLF stands in EPA's shoes for the Enforcement

[3] Contrary to Exxon's assertion that EPA has made a determination regarding the risks at the Terminal or regarding Exxon's compliance with the Permit (*see* Reply at 12), EPA has made no such determination. Rather, EPA has described EPA's permitting priorities and constraints (*see* ECF No. 86-2 at 2), which cannot be interpreted to mean that it agrees with Exxon's positions in this matter.

[4] In fact, EPA has recently reinforced this decision in its Motion to Quash Exxon's subpoena, finding that "the risk that rulings in this litigation could impact EPA's interests . . . is present in much private environmental litigation and

Function, and EPA has no further role vis-à-vis the terms of this Permit. Interpretation of the Permit is now solely the Court's role. Opp. at 5.[5]

Exxon's Reply arguments (Reply at 6) confuse the primary jurisdiction inquiry with the unrelated question of whether extrinsic evidence of EPA's intent when drafting the Permit is relevant to the Court when interpreting the Permit. This confusion is clear from the cases Exxon cites (*id.*), which do not address the primary jurisdiction inquiry at all. *See Nat. Res. Def. Council v. County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013); *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). Whether the Court may consider evidence of EPA's contemporaneous understanding of terms when it drafted the Permit has no bearing on Exxon's present request that the Court not interpret the terms of the Permit at all, or at least for some indefinite period of time. There is no need to impose substantial delay to investigate the intent of EPA, especially where Exxon's proposed terminus for the stay (EPA's decision on the pending permit renewal application) would not bring finality to the instant matter.

For these reasons, neither the first or second *Blackstone* factors are met.

B. Exxon's Papers Do Not Establish That the Pending Permit Process Will Materially Impact This Litigation

In its Opposition, CLF explained that the pending permit-renewal will be of little aid to the Court because many of the same questions of permit interpretation will likely remain. Opp. at 17-18. Indeed, the Permitting Function is fundamentally different from the Enforcement Function.

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is not by itself a persuasive justification" for authorizing EPA personnel to testify at the hearing on the Motion to stay. ECF No. 86-1 at 22 of 28.

[5] Describing as a "tautology" the proposition 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." *Id.*; *see also* Reply at 7 ("ExxonMobil has never suggested that this Court is incapable of addressing the technical matters here.").

Permitting is not an adjudication on the legal interpretation for the terms of a permit. Exxon's Reply does nothing to bolster its assertion that "a stay will simplify the disputed issues by resolving—if not mooting—CLF's climate change claims." Mot. at 17.

First, after the pending permit process is complete, the Court will mostly likely still need to interpret the same evolving narrative standards cited by CLF (e.g., "good engineering practices") because any new permit will likely retain these standards. Exxon notes in its briefing that EPA Region 1 often includes narrative standards such as "good engineering practices," but it dismisses these terms as "boilerplate." Reply at 1. This characterization is wrong because it both (i) violates the rule that all permit terms be given meaning, *see* Mar. 2019 Tr. at 135, and (ii) is contradicted by EPA's established use of these terms. Far from throwaway boilerplate, EPA chooses to use evolving terms like "good engineering practices" and "industry custom," instead of incorporating specific standards, because "[s]uch incorporation freezes standards into rules, which may swiftly become outdated or obsolete." 67 Fed. Reg. 47042, 47070 (Jul. 17, 2002) (EPA responding to comments on proposed rule for Spill Prevention, Control, and Countermeasures Plans). Instead, EPA refers parties to extrinsic industry standards, *see id.*, like those reviewed by the Court on the Motion to Dismiss, *see* Opp. at 6 (discussing ruling).

Second, Exxon's argument rests entirely on the unsupported assumption that the pending permit renewal will address the issues in this case. Exxon does not argue that these issues are *currently* before EPA. Instead, it argues that the issues will be resolved through a vague, multi-step process: (i) EPA issues a new draft permit, likely not addressing the issues in this case directly; (ii) CLF and members of the public provide comments somehow raising all of the issues in this case; and (iii) EPA responds by either "renew[ing] the Permit in substantially similar form, with responses confirming ExxonMobil's interpretation and compliance" or "issu[ing] 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." Reply at 8.

Exxon's argument is far too threadbare to meet its burden of overcoming the presumption against applying primary jurisdiction to this citizen enforcement action. For example, Exxon places the burden on CLF to raise the case issues in public comment, ignoring CLF's repeated position that the current Permit, as written, already imposes the required duties on Exxon; no further comment is necessary. Additionally, Exxon does not describe what questions should be raised in the comments that, when answered, would resolve each of the disputes in this case or how EPA's responses would definitively address such questions to reach that resolution. Finally, Exxon's argument about EPA's theoretical response relies on the assumption that EPA agrees with Exxon's interpretation of the Permit structure. Exxon's argument ignores the real possibility that EPA issues a very similar Permit while disagreeing with Exxon's position about the Permit's terms.

Exxon's remaining arguments in the Reply do not save its Motion. *First*, Exxon's argument that CLF should have publicly commented when the current Permit was being drafted (Reply at 8-9) is a rehashing of the collateral attack arguments that the Court rejected on the Motion to Dismiss. *Second*, Exxon argues in one sentence that "CLF's non-climate change claims would [] require the Court to delve into highly technical questions related to the lowest levels allowable for reliable quantitative measurements." Reply at 6. Exxon waived this argument both by (i) not making it in its opening brief, *see Napert v. Gov't Employees Ins. Co.*, No. CIV.A. 13-10530-FDS, 2013 WL 3989645, at *2 n.4 (D. Mass. Aug. 1, 2013), and (ii) not developing it, *see United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Moreover, to the extent Exxon is arguing that the Permit's PAH effluent limit is unenforceable, it is Exxon that is engaging in an improper collateral attack on the Permit.

C. National Uniformity of Regulatory Interpretation Is Not Implicated Here

CLF explained in its Opposition that (i) the *Blackstone* court's concern about national uniformity of regulatory is not implicated here because CLF is not challenging an EPA regulation, and (ii) the impact of Exxon's argument for stay would effectively render narrative permit terms unenforceable. *See* Opp. at 19. Nothing in Exxon's Reply alters these conclusions. Exxon argues that its "position is only that *this* case should be stayed because the *specific term*" implicated—presumably "good engineering practices"—has not previously been interpreted. Reply at 10. Exxon provides no support for its assertion that this term is insufficiently defined or that the pending permit process will strictly define this term, providing instead only a blanket statement, unsupported by any citations, that other "narrative terms are generally further articulated through a developed body of regulations and guidance." *Id.* Thus Exxon's argument as to uniformity is both underdeveloped and fails for these reasons and as described in Section II.B, above.

III. The Only Likely Impact of A Stay Is Prejudice and Undue Delay

CLF explained in its Opposition that a stay would prejudice CLF and impose an undue delay because (i) the risk of dangerous pollution from severe weather events is imminent, (ii) CLF members are being harmed by Exxon's regular, on-going discharges of toxic PAHs, and (iii) a stay would effectively hold CLF's RCRA and Effluent Violation Counts hostage. *See* Opp. at 19-20. Exxon's Reply does not alter this analysis.

First, Exxon takes CLF to task for not responding to its purported expert analysis of changes in severe weather risks (Reply at 11-12), but no response is necessary. The Court has already found that the Amended Complaint adequately alleged increased severe weather risks. CLF anticipates that the parties will continue to litigate this issue through discovery, summary judgment, and trial, but Exxon's attempts to have a mini-trial on these issues before discovery has begun are improper and contrary to its assertion that the Motion to Stay will conserve judicial

resources.

Second, Exxon dismisses the delay in resolution of CLF's Effluent Violation claims by (i) rearguing the position that the Court already rejected in its ruling on the motion to dismiss, Reply at 12-13 (arguing that CLF disregards a footnote on a compliance limit and the end-of-pipe water quality testing); Nov. 2018 Tr. at 113, 123-24, and (ii) making the conclusory assertion that EPA "may [] clarify" these issues during the permit renewal and the court is able to review extrinsic evidence when interpreting a permit, Reply at 12-13. But, nothing in the jurisprudence allowing review of extrinsic evidence suggests that relief should be left on hold in favor of the *possibility* that currently non-existent extrinsic evidence *might be created*.

The only result from a stay is undue delay in resolving CLF's claims about current discharges of toxic chemicals from the Everett Terminal and the significant risk of major discharges from severe weather events. The timeline for resolution of the pending permit renewal is uncertain. Even Exxon recognizes that any permit renewal will take at least two years to complete and that is assuming both that EPA Region 1 meet its goal *and* that Exxon does not sue EPA over the terms of any new permit (as it has done in the past). Meanwhile, as explained above and in CLF's Opposition, Exxon has not met its burden of establishing that the permit renewal process will resolve any of the material issues in this case. Instead, the most likely result from a stay is that the parties and the Court will be in the same place at the end of a stay as they were at the beginning.

CONCLUSION

For these reasons, this Court should deny Exxon's Motion to Stay.

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Respectfully submitted,

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