No. 20-1456

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CONSERVATION LAW FOUNDATION, INC.

Plaintiff - Appellant

v.

EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, and EXXONMOBIL PIPELINE COMPANY

Defendants – Appellees

On Appeal from the United States District Court for the District of Massachusetts in Case No. 1:16-cv-11950-MLW

BRIEF OF PLAINTIFF-APPELLANT CONSERVATION LAW FOUNDATION, INC. IN SUPPORT OF APPELLATE JURISDICTION

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CONSERVATION LAW FOUNDATION'S
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Conservation Law Foundation, Inc. ("CLF"), a nongovernmental corporate party, makes the following disclosure:

1. CLF has no parent corporation.

2. No publicly held corporation owns 10% or more of CLF's stock.

(s) s/ Ian David Coghill

Attorney for Conservation Law Foundation, Inc.

Dated: July 10, 2020

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Plaintiff-Appellant Conservation Law Foundation, Inc. ("CLF") submits this brief in response to the June 26, 2020 Order for CLF to "show cause, in writing, why this appeal should not be dismissed for lack of jurisdiction" ("Show Cause Order"). The District Court's March 21, 2020 order ("Stay Order") is appealable under (i) the effectively-out-of-court rule, (ii) the collateral order doctrine, and/or (iii) mandamus because the court utilized the primary jurisdiction doctrine to indefinitely stay all of CLF's claims, for violations of both Exxon's Clean Water Act ("CWA") NPDES[1] permit ("Permit") and the Resource Conservation and Recovery Act ("RCRA"), in favor of an EPA permit reissuance proceeding that is irrelevant to the merits of CLF's claims.

Before the Stay Order, the District Court had ruled that CLF adequately pled that: (1) Exxon[2] is continually violating the Permit by discharging pollutants in excess of Permit limits, (2) it violated the Permit by failing to analyze and address the risk of further discharges caused by climate-change-induced severe weather and storm surge, and (3) its failure also presented "an imminent and substantial endangerment to human health and the environment" under RCRA. CLF's CWA claims are based exclusively on the express terms of the in-force Permit.

[1] "NPDES" refers to the National Pollution Discharge Elimination System permitting program under the CWA that EPA administers.

[2] "Exxon" refers to Defendants-Appellees Exxon Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company collectively.

The terms of any new permit, regardless of its content, cannot (i) change the current Permit's terms requiring consideration of climate-change risks, (ii) absolve Exxon of liability for past and continuing violations of the current Permit's pollution discharge limits, or (iii) impact CLF's RCRA claims in any way. Therefore, the District Court's invocation of primary jurisdiction to stay the case is collateral to the merits of CLF's claims, undermines the citizen suit provisions of the CWA and RCRA, leaves CLF effectively out of court, and is a clearly erroneous application of the primary jurisdiction doctrine.

I. BACKGROUND

A. Procedural History

On October 20, 2017, CLF filed the Amended Complaint asserting claims under the CWA and RCRA. For present purposes, the claims fall into two broad categories: (i) CWA claims alleging Exxon has and continues to discharge pollutants in excess of pollution discharge limits in the Permit, Counts 1-5, (the "Effluent Violation Counts"), and (ii) claims alleging that Exxon failed to address climate-change-related impacts to the Terminal, Counts 6-15, in violation of both the CWA and RCRA (the "Climate Change Counts"). On December 20, 2017, Exxon moved to dismiss. ECF No. 36.[3] On November 30, 2018, and March 13, 2019, the District

[3] Citations to "ECF No. _" refer to documents filed in the underlying action, 1:16-cv-11950-MLW (D. Mass).

Court held hearings on Exxon's motion to dismiss. *See* ECF Nos. 58 and 73. The Court denied the Motion to Dismiss as to (i) two Effluent Violation Counts concerning discharges of polycyclic aromatic hydrocarbons ("PAHs") in violation of Permit limits (Counts 2 and 3), and (ii) all the Climate Change Counts. ECF No. 71.

As to the Climate Change Counts, the District Court ruled that "CLF plausibly alleges both standing and entitlement to relief with respect to potential harms from flooding and severe storms in the near future." ECF No. 106 at 2 (summarizing MTD Order). Specifically, it held, "CLF plausibly alleges that foreseeable severe weather events, including climate change-induced weather events, pose an imminent risk to the terminal . . . [and] an imminent threat of harm from the discharged pollutants." ECF No. 73 (Hr'ing Tr.) at 129. For the same reasons, the court ruled CLF had adequately alleged that Exxon presented "an imminent and substantial endangerment to health or the environment" under RCRA. *Id.* at 140-141. In addition, the court held that "the 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," ECF No. 73 at 137, and that the Permit's requirement to use "good engineering practices include[s] considerations of foreseeable severe weather events, including any caused by climate change," *id.* at 133.

B. Motion to Stay

1. Exxon's Permit

After ruling orally on the Motion to Dismiss, the District Court set a briefing schedule for Exxon's proposed motion to stay proceedings, pursuant to the primary jurisdiction doctrine, until EPA issues a new CWA permit for the Terminal. ECF No. 73 at 143-44. NPDES permits have a term of five years. 33 U.S.C. § 1311(a). Before expiration of a permit, the permittee must file an application for issuance of a new permit. This Court described the process in detail in *Adams v. U.S. E.P.A.*:

> The EPA then prepares and issues a draft permit and explanatory fact sheet. The EPA gives public notice, which initiates a 30–day public comment period. During the public comment period, all persons who believe any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of their positions. During this period, any interested person can request a public hearing. After the close of the public comment period, the Regional Administrator determines whether a final permit should be issued, based on the administrative record compiled during the public comment period.

38 F.3d 43, 47 (1st Cir. 1994).

Exxon's current Permit expired January 1, 2014. An expired permit "continue[s] in force until the effective date of a new permit and such 'continued' permits 'remain fully effective and enforceable.'" *Student Pub. Int. Res. Grp. of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.* 579 F. Supp. 1528, 1538 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (quoting 40 C.F.R. § 122.6). Exxon applied for a new permit in May 2013 seeking "issuance of a permit that is similar to the current Permit

in all material respects." ECF No. 82 at 6. Exxon's application has been pending for more than seven years. At the May 14, 2019 hearing on the Motion to Stay, EPA stated its agency-wide goal is to eliminate its permitting backlog by the end of October, 2021. ECF No. 102 at 34-37 (May 14, 2019 Hr'ing Tr.). However, EPA personnel have expressed skepticism of meeting that goal, *id.* at 37, and any new permit will then be subject to an extensive appeals process, *see e.g.,* ECF No. 63-1, Ex. A (EPA letter describing permit status).

2. Primary Jurisdiction Doctrine

Exxon's Motion to Stay asked the court to defer discovery and any other proceedings on all CLF's claims until EPA issues a new permit, based upon the primary jurisdiction doctrine. The primary jurisdiction doctrine allows a district court to stay a case and refer 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. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998) (citations omitted). "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, 2016WL 3561622, at *14 (D. Mass. Feb. 9, 2016) (citations and quotations omitted).

Application of the doctrine to a citizen enforcement suit, like CLF's, is highly disfavored. In the CWA and RCRA, Congress established specific jurisdictional prerequisites for a citizen suit, including a pre-suit waiting period during which, after receiving a citizen's notice of intent to sue, EPA decides whether to insert itself into the action to address issues intended to be raised in that citizen suit. 33 U.S.C. § 1365(b), (c)(1)-(c); 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. Applying primary jurisdiction to a citizen enforcement suit would "be an end run around RCRA [and the CWA]." *PMC, Inc. v. Sherwin–Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998). That is why "[t]he majority of courts to have considered it have found abstention, whether under Burford or related doctrines such as primary jurisdiction, to be improper." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 30 (1st Cir. 2011). "To abstain in situations other than those identified in the statute thus threatens an 'end run around RCRA,' and would substitute [a court's] 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." *Id.* at 30–31.

3. Stay Order

Despite acknowledging that "the doctrine of primary jurisdiction must be applied sparingly, especially in citizen suits authorized by Congress" (Stay Order at 3), the District Court issued the Stay Order on March 21, 2020. The Stay Order (i) imposed an indefinite stay on CLF's claims, and (ii) established a November 1, 2021 date to report "on the status of the permitting process and [the parties'] views on whether the stay should be lifted." Stay Order at 38. Importantly, the Stay Order did not:

- Refer interpretation of the current Permit's terms to EPA; it stayed the case in favor of an unrelated proceeding that will not address the merits of CLF claims;
- Address Exxon's current and continuing pollution discharges in violation of the Permit's limits that will continue throughout the stay;
- Address the prejudice to CLF's RCRA "imminent and substantial endangerment" claim that does not rely on any permit terms; or
- Consider the prejudice to CLF, and the very purpose of citizen environmental enforcement, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987), given that the stay means resolution of CLF's claims will be delayed by at least two or more years regardless of (i) EPA's decision on the new permit, or (ii) any appeal of that new permit.

II. THE STAY ORDER IS AN APPEALABLE FINAL DECISION BECAUSE IT RENDERED CLF "EFFECTIVELY OUT OF COURT"

The Stay Order is an appealable "final decision" within 28 U.S.C. § 1291 because it renders CLF "effectively out of court." *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). The effectively-out-of-court rule is applicable in two circumstances: (1) if the parallel proceeding will have a *res judicata* effect on the federal action, *see, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983); and (2) as recognized by "the majority of circuits that have considered the question," when "stay orders [] impose lengthy or indefinite delays absent risk that another proceeding will have *res judicata* effect on the federal case," *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 723 (9th Cir. 2007) (collecting cases). As noted in the Show Cause Order, the Tenth Circuit has adopted the minority view that restricts the effectively-out-of-court rule to only the first circumstance. *See Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005); *see also Blue Cross*, 490 F.3d at 723-24 (noting that the Tenth and Third Circuits are in the minority).

Contrary to the holding in *Crystal Clear Communications*, the First Circuit applies the majority rule: it recognizes jurisdiction "if the appellant is effectively rendered out of federal court through the indefinite unnecessary delay inherent in the stay order." *Rojas-Hernandez v. Puerto Rico Elec. Power Auth.*, 925 F.2d 492, 494-

95 (1st Cir. 1991). In *Rojas-Hernandez*, the parents of an injured child each sued the defendant, the mother in state court and the father in federal court. *Id.* at 493. Both cases proceeded through discovery on parallel tracks, but the district court stayed the trial in the federal action until the state court proceedings were complete. *Id.* The plaintiff appealed. *Id*. The First Circuit held that the plaintiff was effectively out of court because "[t]he stay in this case has subjected and will subject the appellant to an indefinite delay in its federal proceeding," reasoning:

> [The] plaintiff's trial has already been delayed almost a year since the entry of the district court order on March 27, 1990, and further delays may arise while an opinion is awaited and an appeal taken. Moreover, should the superior court judgment for some reason not have preclusive effect on all issues in the federal court action, the delay will not even have served the goal of judicial economy. . .

Id. at 495.

The First Circuit has not considered the effectively-out-of-court rule in the primary jurisdiction context, but other circuits have applied it. For example, in *Hines v. D'Artois*, 531 F.2d 726, 731 (5th Cir. 1976), the plaintiffs sued a police department alleging racially discriminatory employment practices. The district court stayed the litigation and ordered plaintiffs to file a Title VII complaint with the Equal Employment Opportunity Commission. *Id.* at 728. The Fifth Circuit, on appeal, concluded that it had jurisdiction under the effectively-out-of-court rule because the average timeline for the EEOC to complete a discrimination investigation was 40 months, explaining:

> it seems beyond cavil that the effect of the stay order in this case was to put plaintiffs 'effectively out of court,' for a protracted and indefinite period—at least eighteen months, and possibly much longer.

Id. at 731 (citations omitted); *see also Occidental Chem. Corp. v. La. Pub. Serv. Comm'n*, 810 F.3d 299, 307 (5th Cir. 2016) (relying on *Hines* to review primary jurisdiction stay where "[the agency] has taken no action since the . . . stay order in this case, and there is no indication of when [it] might do so. Thus, it has already been nearly two years without [agency] action and might take substantially longer."). The Seventh Circuit has similarly applied the effectively out of court rule to find jurisdiction over a primary jurisdiction stay. *See Johnson & Johnson, Inc. v. Wallace A. Erickson & Co.*, 627 F.2d 57, 62 (7th Cir. 1980).

Here, the Stay Order has rendered CLF effectively out of court by imposing an indefinite and unnecessary delay to CLF's claims.

- This case has been pending for almost four years; it has been effectively stayed since March 14, 2019, when the District Court denied Exxon's second Motion to Dismiss;
- The Motion to Stay remained undecided for 11 months, increasing the delay of CLF's claims, with no discovery proceeding; and
- The March 21, 2020 Stay Order then (i) stayed CLF's case indefinitely pending issuance of a new permit by EPA which is subject to extreme and uncertain

delays, and (ii) set a report date for November 1, 2021—more than 2.5 years after the Motion to Dismiss was denied.

The length of this delay fits squarely within the precedent applying the "effectively out of court" rule. *Rojas-Hernandez*, 925 F.2d at 495 (indefinite stay pending state-court trial); *Hines*, 531 F.2d at 731 (18-month delay too long); *Occidental Chem.*, 810 F.3d at [] (two years of agency inaction too long); *Johnson & Johnson*, 627 F.2d at 62 (potential for 2.5 to 3 year delay sufficient); *Am. Mfrs. Mut. Ins. Co. V. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1524 (11th Cir. 1984) (indefinite delay lasting 18 months sufficient).

Here, the delay is particularly unnecessary for three additional reasons.

First, EPA had the opportunity to opine on these issues during the pre-suit waiting period, but it declined to do so. It further refused to opine on the merits of CLF's case during the pendency of the litigation, even when asked directly. *See, e.g.,* ECF No. 45-1 at 1 (letter from EPA). In fact, in response to an Exxon subpoena for EPA testimony, EPA stated 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." ECF No. 86 at 14-15 (Mot. to Quash). As the Ninth Circuit has noted:

> Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation. Similarly, primary jurisdiction is not required when a referral

> to the agency would significantly postpone a ruling that a court is otherwise competent to make.

Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 761 (9th Cir. 2015).

Second, even if EPA issues a new permit, it would be irrelevant to CLF's CWA claims, which are based on violations of the current Permit. *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) ("[P]rimary jurisdiction . . . does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'"). Even assuming EPA makes changes to the material terms and conditions—despite Exxon's application for a substantively identical permit—those changes cannot retroactively exonerate Exxon from liability for violating the terms of the existing Permit. The EPA permitting proceeding is therefore very "unlikely to control or to narrow substantially the claims or unresolved issues in the stayed lawsuit." *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1197 (11th Cir. 2009). In fact, a new permit will have no bearing at all on CLF's duly pled violations of the existing Permit.

Third, the Stay Order ignores anything but CLF's CWA Climate Change Counts. For example, CLF alleged, and the court sustained, that Exxon has and is continuing to discharge toxic PAHs. But, the court concluded that the stay would

not prejudice CLF because its Climate Change Counts allege only "the risk of future harm rather than current, continuing injury." ECF No. 106 at 37. Exxon's illegal discharges of toxic PAHs are occurring now and will continue throughout the pendency of the stay. Similarly, CLF adequately alleged that Exxon's failure to address climate-change risks presents "an imminent and substantial endangerment to human health or the environment" under RCRA. The RCRA claim does not rely on any permit terms, but it is stranded pending issuance of an irrelevant CWA permit.

III. THE COURT HAS JURISDICTION OVER THE APPEAL UNDER THE COLLATERAL ORDER DOCTRINE

The collateral order doctrine, established by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is a practical construction of the final order rule prescribed in 28 U.S.C. § 1291. "[F]or the collateral order doctrine to apply, a district court order must '(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.'" *U.S. Fid. & Guar. Co. v. Arch Ins. Co.*, 578 F.3d 45, 55 (1st Cir. 2009) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)). Here, all three characteristics are met.

First, the order "conclusively determine[s] the disputed question" of the application of primary jurisdiction to this case. *Id.*; *see also Beach TV Cable Co.,*

Inc. v. Comcast of Florida/Georgia, LLC, 808 F.3d 1284, 1290 (11th Cir. 2015) (primary jurisdiction stay order conclusively determined the referral question). The order was clearly "made with the expectation that [it would] be the final word" on the topic, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 12 n.14, and no lifting of the stay is contemplated until at least fall 2021, *see* ECF No. 106, 36, over two and a half years since Exxon's motion to dismiss was denied and the motion to stay was filed.

Second, the issues resolved by the stay order are both important and separate from the merits of the case. "An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 12; *see also C. A. B. v. Aeromatic Travel Corp.*, 489 F.2d 251, 253 (2d Cir. 1973) ("The issue of whether the doctrine of primary jurisdiction should be invoked is collateral to the ultimate issues of this case, the issue is vital to CAB efforts to secure speedy enforcement of the Federal Aviation Act and the Board's regulations, and the issue is too important to be deferred until the entire case is decided."). Here, the order does not address CLF's claims that Exxon has failed to comply with the terms of its Permit and RCRA and instead (incorrectly) focuses on what might appear in a new permit.

Applying primary jurisdiction to citizen enforcement suits like this one amounts to "an end run around RCRA" and the CWA because "Congress has

specified the conditions under which the pendency of other proceedings bars suit under RCRA" and the CWA, none of which applies here. *PMC, Inc.*, 151 F.3d at 619; *see also Chico Serv. Station*, 633 F.3d at 31. Accordingly, the question of whether the primary jurisdiction doctrine improperly obstructs the citizen enforcement provisions of the CWA and RCRA is a distinct legal question "too important to be denied review." *Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010) (quoting *Cohen*, 337 U.S. at 546); *Awuah v. Coverall N. Am., Inc.*, 585 F.3d 479, 482 (1st Cir. 2009).

Beach TV is not to the contrary. Although *Beach TV* and the instant case both deal with primary jurisdiction, *Beach TV* was not a citizen enforcement suit and presented different circumstances. In *Beach TV*, the plaintiff alleged Comcast violated the Cable Communications Policy Act's "provision forbidding consideration of a program's content" and raised breach of contract claims that Comcast charged it rates that exceeded the maximum amount set by the Federal Communications Commission ("FCC"). *Id.* at 1287–88. The district court determined those issues were best addressed by the FCC in the first instance and referred the case to the FCC under the primary jurisdiction doctrine. *Id.* at 1290.[4]

[4] Similarly, neither *Crystal Clear Communications*, nor the cases cited within it, involved citizen enforcement suits with similarly narrow and specific pre-filing requirements. *Crystal Clear Commc'ns*, 415 F.3d at 1179–80.

However, here, the District Court found CLF's claims to be justiciable by denying Exxon's motion to dismiss and then stayed the case with no referral of any kind to the EPA. EPA is not examining whether Exxon violated its Permit or RCRA—the heart of CLF's allegations. Instead, the EPA will, at some point, consider whether to renew Exxon's permit and with what terms, an analysis completely divorced from the merits of CLF's claims. As the District of New Hampshire explained while rejecting a similar motion during the pendency of the Motion to Stay:

> At its core, the EPA's current permit adjudication concerns the content and scope of [the defendant's] future permit conditions. This is a very different determination than whether [the defendant] is operating in compliance with its current permit conditions.

Sierra Club, Inc. v. Granite Shore Power LLC, No. 19-CV-216-JL, 2019 WL 8407255, at *13 (D.N.H. Sept. 13, 2019) (citations omitted).

Here, notably, EPA chose not to engage in this lawsuit despite more than usual opportunity, and as discussed above, the detailed and specific statutory framework of the citizen enforcement suit provisions of CWA and RCRA would be contravened if immediate appeal were not available.

Finally, review of the order prior to judgment is necessary because refusal to consider the question now would render it immune from review. *See Municipality of San Juan v. Puerto Rico*, 919 F.3d 565, 574 (1st Cir. 2019) (concluding district court order that Commonwealth was subject to statutory automatic stay was

"effectively unreviewable on appeal from a final judgment" (citation omitted)). CLF's efforts to fulfill "the central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance," *Gwaltney*, 484 U.S. at 62, would be thwarted in contravention of the statute if interlocutory review were not allowed. Additionally, the issue of whether a stay is appropriate on the basis of primary jurisdiction could be irrelevant if the case proceeds to final judgment, since the stay will already have elapsed and the harm—delay in resolution of alleged environmental harms—already have taken place. This is the opposite of the reasoning in cases where a referral and stay pursuant to primary jurisdiction was *denied* and could therefore be reviewed on appeal and later referred. *See, e.g., Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n, Inc.*, 849 F.2d 1389, 1392 (11th Cir. 1988); *Delta Traffic Serv., Inc. v. Occidental Chem. Corp.*, 846 F.2d 911, 914 (3d Cir. 1988); *Thill Sec. Corp. v. New York Stock Exch.*, 469 F.2d 14, 16 (7th Cir. 1972).

Because the three factors for application of the collateral order doctrine are satisfied, this Court has jurisdiction to consider this appeal.

IV. IN THE ALTERNATIVE, THE COURT SHOULD CONSTRUE THE APPEAL AS A PETITION FOR MANDAMUS AND EXERCISE ITS DISCRETION TO REVIEW THE STAY ORDER

As an alternative basis for jurisdiction, CLF requests the Court treat this appeal as a petition for a writ of mandamus. *See United States v. Horn*, 29 F.3d 754,

769 (1st Cir. 1994) (appellate court can "treat an attempted appeal from an unappealable (*or possibly unappealable*) order as a petition for a writ of mandamus or prohibition under the All–Writs Act, 28 U.S.C. § 1651." (emphasis added)). "Mandamus is appropriate to correct the improper assumption of judicial power by a district court or to correct a clear abuse of discretion." *Robbins v. George W. Prescott Pub. Co.*, 614 F.2d 3, 5 (1st Cir. 1980) (citations and quotations omitted). While CLF recognizes the bar for issuance of mandamus is high, it is satisfied here.

"[T]hree conditions must be satisfied before [the writ] may issue." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). "First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Id*. (internal quotations and citations omitted). "[T]hat is, he must show 'irreparable harm.'" *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (citations omitted). "Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is 'clear and indisputable.'" *Cheney*, 542 U.S. at 381 (quotations and citations omitted). "Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id*. CLF has met these requirements.

First, CLF will be irreparably harmed if this appeal is not allowed. CLF's lawsuit aims to hold Exxon accountable for its current and ongoing violations of its

Permit based on excessive pollutant discharges, as well as its failure to comply with other narrative terms of the Permit and its creation of an imminent and substantial danger under RCRA. The Stay Order keeps CLF and its members at risk and in harm's way despite finding that the claims are valid. In addition, if the Court did not consider CLF's claims, CLF would not obtain appellate review on the issue of whether a stay is appropriate on the basis of primary jurisdiction; the harm from the stay will already have occurred and will therefore be moot once the case reaches judgment.

Second, CLF's right to issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. As discussed repeatedly above, the district court's application of the primary jurisdiction doctrine is indisputably contrary to the statutory framework of the citizen suit provisions. *See Chico Serv. Station*, 633 F.3d at 30-31; *PMC, Inc.*, 151 F.3d at 619.

Even if the primary jurisdiction doctrine did apply to citizen enforcement suits—which it does not—the District Court also clearly erred in its primary jurisdiction analysis. Courts apply three factors when determining whether primary jurisdiction is applicable:

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

Com. of Mass. v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 (1st Cir. 1995) (quotation omitted). None of these factors are satisfied in this case. The citizen suit provisions make clear Congress did not assign EPA sole enforcement of either CWA or RCRA, meaning the issues at the heart of this suit are not solely relegated to EPA for resolution. This is another reason courts find primary jurisdiction inappropriate in citizen suits. *See Chico Serv. Station*, 633 F.3d at 30 n.14, 31 ("The majority of courts to have considered it have found abstention, whether under Burford or related doctrines such as primary jurisdiction, to be improper."). Moreover, the issue EPA is actually determining here is whether and how to renew Exxon's NPDES Permit. While this determination may lie at the heart of EPA's congressionally assigned tasks, that is not the determination at issue *in this case*. As for agency expertise, interpretation of terms written in permits is necessarily a task within a court's competence or Congress would not have provided federal courts as venues to pursue permit enforcement. Regarding whether the agency's determination would materially aid the court, EPA's decision to issue a new NPDES permit, likely with substantially similar language, ECF No. 82 at 6, will provide no meaningful insight into EPA's intent in drafting the current Permit, and will therefore not assist the court. Simply put, primary jurisdiction clearly and indisputably does not apply in this case.

Finally, the equities favor issuance of the writ because the "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance" is lost if the suit is referred to the very agency that chooses not to—or cannot—enforce the environmental laws. *Gwaltney*, 484 U.S. at 62. Moreover, as explained above, the district court has already found that CLF's citizen enforcement suit adequately alleged that Exxon is currently polluting the waters around the terminal in violation of its Permit, and endangering the health and welfare of the people and environment in and around the City of Everett by failing to prepare its facility for the ongoing and foreseeable effects of climate change. Under these circumstances, a writ of mandamus is appropriate. *Cheney*, 542 U.S. at 381.

CONCLUSION

For the foregoing reasons, the Court should hold that it has jurisdiction over CLF's appeal.

DATED: July 10, 2020

Respectfully Submitted,

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