UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Conservation Law Foundation, Inc., Plaintiff, v. Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, Motiva Enterprises LLC, Triton Terminaling LLC, and Equilon Enterprises LLC, Defendants.	)	C.A. No. 1:17-cv-00396-WES-LDA

BRIEF OF STATE OF RHODE ISLAND AS AMICI CURIAE BY INVITATION TO ADDRESS QUESTIONS POSED IN THE COURT'S JUNE 30, 2020 TEXT ORDER

By the Court's June 30, 2020 text order, the Rhode Island Attorney General was informed that the Court intends to hear oral argument with respect to the above-named Defendants' Motion to Dismiss Conservation Law Foundation's ("Plaintiff") Third Amended Complaint ("TAC"). The Court invited the State of Rhode Island, by and through its Attorney General, Peter F. Neronha, and the Rhode Island Department of Environmental Management ("RIDEM") by and through its Director, Janet Coit (together referred to as "the State") to file *amicus curiae* briefs in this matter, particularly with respect to whether either of the doctrines of abstention or primary jurisdiction warrant a stay of the case or otherwise bar Plaintiff's citizen suit. The State maintains that neither the doctrines of primary jurisdiction or abstention are appropriate in citizen suits generally, and

that neither provide appropriate bases for the Court to stay the case or to decline to adjudicate the claims.

I. BACKGROUND

Plaintiff filed a civil suit under the citizen suit enforcement provisions of Section 505 of the Clean Water Act, 33 U.S.C. § 1365, and Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. Plaintiff's TAC alleges that with respect to requirements set forth in its Rhode Island Pollution Discharge Elimination System ("RIPDES") program permit ("Permit"), the Clean Water Act, and RCRA, Defendants have failed to consider necessary data regarding the effects of increased precipitation, and significant storm events, including, but not limited to storm surge, flooding, and hurricanes, in the design, construction, and ongoing operation and maintenance of its facility located in the Port of Providence at 520 Allens Avenue ("Providence Terminal"). The pertinent information, Plaintiff asserts, is well-known to Defendants and is routinely used in parallel contexts by "[e]ngineers exercising skill and judgment reasonably expected of similarly situated professionals." *TAC* at ¶263. Plaintiff argues that (1) Defendants' failure to employ industry-standard engineering practices in the design of its Providence Terminal violates the RIPDES Permit requirement for a Stormwater Pollution Prevention Plan ("SWPPP") that is prepared in accordance with "good engineering practices," *TAC* at ¶¶83, 84; and (2) Defendants failed to comply with RCRA's requirement to engineer and manage the Providence Terminal in a manner that minimizes any unplanned sudden or non-sudden release of hazardous waste from predictable weather-related events that may threaten "an imminent and substantial endangerment to health or the environment". *TAC* at ¶¶413-417, 434.

On June 27, 2018, the Court held a hearing on Defendants' Motion to Dismiss several claims in Plaintiff's Second Amended Complaint. At the time of the hearing, RIDEM was in the

process of reissuing the Providence Terminal's RIPDES Permit. Upon reissuance of the RIPDES Permit (No. RI0001481), effective on March 1, 2019, Plaintiff amended its complaint for a third time and added the RCRA claims.[1] At the June 27, 2018 hearing, Defendants argued that because there is no specific condition in the RIPDES Permit that relates to sea level rise and storm surge, a decision by the Court on whether these factors must be considered in developing the SWPPP would amount to the Court dictating the terms of the SWPPP and the RIPDES Permit.

With respect to the recently added RCRA claims, Defendants contend that because RIDEM is presently overseeing a Site Characterization Report and Remedial Action Plan ("RAP") addressing remediation of contamination at the Providence Terminal, Plaintiff's imminent endangerment claim is barred because Plaintiff has not alleged that the RAP is insufficient to address the contamination at the Areas of Concern ("AOCs"). Defendants also argue that a decision by the Court about the adequate and proper design of the Providence Terminal in light of the RCRA requirements to prevent unplanned releases of hazardous waste in a coastal region would be tantamount to dictating the State's policies with respect to coastal resiliency and climate change.

II. SUMMARY OF THE *AMICUS'* POSITION

Defendants have raised the doctrines of primary jurisdiction and abstention as bases for the Court to dismiss some of Plaintiff's Clean Water Act claims and its RCRA claims. The Court has asked whether primary jurisdiction requires a stay of the citizen suit or if abstention is otherwise warranted. The State maintains that neither the doctrines of primary jurisdiction or abstention are appropriate in citizen suits generally, and that for the following reasons, neither provide appropriate bases for the Court to decline to adjudicate this case.

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[1] The TAC states that the Permit was materially unchanged from the prior, expired RIPDES permit.

Congress considered the roles of federal and state agencies and conferred exclusive jurisdiction to the district courts once certain requirements of the governing citizen suit provisions are satisfied. Next, neither the United States Environmental Protection Agency ("EPA") nor RIDEM have primary jurisdiction because Plaintiff's claims allege violations of final permit conditions that would be determined within the meaning of applicable statutory provisions. While the *permitting* function lies exclusively with the agencies, *enforcement* of the permit terms is shared by the agency and the citizen through the district courts. The Court can conduct the key inquiry in this case – whether Defendants have complied with the permit condition that the industry-standard "good engineering practices" be employed in the design and management of the Providence Terminal – *without* invoking primary jurisdiction. Finally, abstention is extraordinary. It is not justified here because federal court jurisdiction over the claims that Defendants have not met the industry standard in their engineering or management of the Providence Terminal will not interfere with state administrative policymaking. For these reasons, as discussed more fully below, the Court should not stay the case or abstain from exercising jurisdiction.

III. FEDERAL COURT JURISDICTION IS EXCLUSIVE UNDER THE CLEAN WATER ACT AND RCRA CITIZEN SUIT PROVISIONS

As a general principle, Congress defines the scope of federal jurisdiction. The Constitution merely gives to lower courts "the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Accordingly, the near-categorical rule is that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989) ("NOPSI"). *See also Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) ("'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction

extends.'") (internal citation omitted); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

Through the Clean Water Act and RCRA, Congress conferred to federal courts exclusive jurisdiction to adjudicate citizen suits under specified circumstances. *See* 33 U.S.C. § 1365; 42 U.S.C. § 6972; *see also Sierra Club v. Jackson*, 813 F.Supp.2d 149, 156 (D.C. Cir. 2011). Congress intended these citizen suit provisions to provide more comprehensive and effective enforcement regimes in order to attain full compliance with environmental statutes, reasoning that multiple enforcers are better than one or two enforcers. *See generally*, H.R. Rep. No. 92-911, at 132 (1972), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, at 819 (1973) [hereinafter 1972 Legislative History]. To guarantee this statutorily defined enforcement scheme, the district courts are assured exclusive jurisdiction when the prerequisites for initiating a citizen suit have been satisfied. Therefore, applying the primary jurisdiction doctrine or abstaining from exercising jurisdiction in a context where that jurisdiction has been exclusively conferred to the district court by Congress would undermine the citizen suit provisions. Congress acknowledged the unique roles of EPA and the states and guarded against the potential for conflicts between the agency permitting and rulemaking roles and the jurisdiction conferred to the district courts by clearly delineating the steps a citizen must take before a citizen suit could proceed in federal court.

First, both the Clean Water Act and RCRA contain robust notice requirements. The notice requirements in each ensure that both the potential defendant(s) and the pertinent regulatory authorities are made aware of the citizen's intention to seek judicial review of specified alleged violations and to enforce specified statutory and/or permitted requirements through the federal

court. The required notice must be mailed via certified mail to the alleged violator and the regulatory agency with enforcement authority, as well as to numerous state and federal authorities. The citizen must wait a prescribed number of days after notice before commencing the action. 33 U.S.C. § 1365(b); 42 U.S.C. § 6972(b), (c). The United States' interests are even further protected by the requirement that any action brought "under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator." 33 U.S.C. § 1365(c)(3); 42 U.S.C. §6972(b)(2)(F).

Furthermore, both the Clean Water Act and RCRA bar citizen suits where a federal or state regulatory agency "has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order . . . ." 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B). It is a distinction worth noting that Section 505 of the Clean Water Act and Section 7002 of RCRA contain the "diligently prosecuting" requirement, not an "administrative exhaustion" requirement, which applies in the context of an appeal of a final agency decision and is reviewed in accordance with the Administrative Procedures Act ("APA"). See *Benham v. Ozark Materials River Rock, LLC.*, 885 F.3d 1267, 1278 (10th Cir. 2018). The "diligently prosecuting" condition protects the primary jurisdiction of the states and EPA in their respective enforcement actions. A citizen suit may not be commenced if EPA or a state is already diligently prosecuting a civil action in a court to enforce compliance. The citizen suit is barred if EPA or a state commences enforcement action within that 60-day period, "presumably because governmental action has rendered it unnecessary." *Gwaltney of Smithfield Ltd v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59-60 (1987). If plaintiffs meet these prerequisites, they may file a citizen suit "only in the judicial district in which such alleged violation occurs." 42 U.S.C. § 6972(c); 33 U.S.C. § 1365(c)(1).

Together, the notice and venue requirements, the mandatory waiting period, and the prohibition against citizen suits where a state or the federal government are "diligently prosecuting" ensures that both citizen suits and the jurisdiction expressly conferred to the district courts augment rather than supplant governmental enforcement action that may be underway. Because these safeguards are already written into the citizen suit provisions, primary jurisdiction and abstention considerations are inapposite in the citizen suit context. *Id.*

Though framed as a primary jurisdiction and abstention issue, the essence of Defendants' argument is that Plaintiff should be prohibited from bringing its citizen suit because RIDEM is primarily responsible for the enforcement of the RIPDES Permit conditions and the RCRA requirements. Defendants seem to suggest that if RIDEM does not find the design of the Providence Terminal to be in violation of Clean Water Act and RCRA standards, then it is not within the purview of the district court to find that such violations exist. The citizen suit provisions are designed precisely to prevent this result. If RIDEM were "diligently prosecuting" an enforcement action within the meaning of either statute, or if there was evidence that proceeding with the suit "would disrupt a formal administrative proceeding," the citizen suit would be barred by both the Clean Water Act and RCRA and the primary jurisdiction doctrine. See *Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691–695 (3d Cir. 2011). (reversing dismissal of RCRA and Clean Water Act citizen suit claims on primary jurisdiction and *Burford* abstention grounds where matter was not "particularly within the discretion of the [New Jersey state] agency," risk of inconsistent judgments was low, and district court was competent to hear the case). This is not the case here.

By determining that "citizen suits 'complement, rather than conflict with' agency enforcement of the law" Congress insulated the citizen suit from primary jurisdiction and

abstention discretion. C*hico Service Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 27-28 (1st Cir. 2011). Abstention is "a prudential mechanism that allows federal courts to … weigh significant and potentially conflicting interests that were not—or could not have been—foreseen by Congress at the time that it granted jurisdiction…" *Id.* at 31. We know that Congress did weigh the potential conflicts at the time it granted jurisdiction to the district courts under the citizen suit provisions. Even if federal jurisdiction is not exclusive, the statutes ""plainly reflect[] an emphasis by Congress on the availability of a federal forum for consistent and timely review", which, together with "Congress's careful delineation of the limited situations in which federal courts must refrain from hearing citizen suits . . . counsels federal courts to exercise great caution in considering abstention." *Id.*; *see also Raritan Baykeeper*, 660 F.3d at 691–92 (Federal courts are "competent to decide cases such as the one before us. Congress decided as much when it wrote the RCRA and CWA to authorize citizen suits in federal courts. . . . Accordingly, this matter is not *particularly* within the discretion of" state agencies.).

Here, Plaintiff satisfied the notice and venue requirements prescribed by statute and neither RIDEM nor EPA has notified the Court that any enforcement action or formal administrative proceeding is underway with respect to either the Clean Water Act or the RCRA claims. Accordingly, this Court has jurisdiction to hear the citizen suit claims brought by Plaintiff and the Court should not defer its judgment pursuant to primary jurisdiction, nor should it abstain from exercising the expressly conferred jurisdiction provided by Congress.

IV. NEITHER EPA NOR RIDEM HAVE PRIMARY JURISDICTION WITH RESPECT TO THE CLEAN WATER ACT OR RCRA CLAIMS IN PLAINTIFF'S TAC

Primary jurisdiction is a doctrine of deference to administrative agencies. "It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268

(1993). Unlike abstention, primary jurisdiction does not permit a court to decline to resolve a case properly before it; at most, the doctrine allows a court to stay its proceedings while the relevant state agency resolves a technical question falling within its area of expertise. *See Ass'n of Intern. Auto. Mfrs., Inc. v. Commissioner, Mass. Dept. of Environmental Protection*, 196 F.3d 302, 304 (1999) ("AIAM 1999"). There is no set formula for deciding when primary jurisdiction is proper. The inquiry is conducted on a case-by-case basis by determining "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *U.S. v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956).

As discussed in Section III, *supra*, the doctrine of primary jurisdiction does not apply in the context of the Clean Water Act and RCRA citizen suit provisions because Congress has expressly delegated jurisdiction to the district courts once all of the notice requirements have been satisfied, and so long as neither EPA nor the states have initiated enforcement activities to bar the claims alleged by the citizen. Here, Plaintiff only asks for this Court's interpretation of the Permit conditions as written by RIDEM and of the statutory requirements of RCRA as they relate to appropriate considerations for facility design and preparedness, which interpretation is well within the Court's purview. Even assuming *arguendo* that the primary jurisdiction doctrine is even relevant to claims under RCRA and the Clean Water Act, the facts of this case do not satisfy the test for applying the doctrine of primary jurisdiction enacted by the United States Supreme Court and adopted by the First Circuit in *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979) applying the doctrine of primary jurisdiction in individual cases. Accordingly, the Court should not stay or dismiss the proceedings pursuant to the doctrine of primary jurisdiction.

A. A Stay Pursuant to the Doctrine of Primary Jurisdiction is Not Warranted Under the *Mashpee Tribe* Test

The First Circuit has concluded that there is a "rare set of circumstances where deferring to the primary jurisdiction of [the agency] is justified and appropriate." *Conservation Law Found., Inc. v. ExxonMobil Corp.,* No. CV 16-11950-MLW, 2020 WL 1332949, at *1 (D. Mass. Mar. 21, 2020), *appeal filed*, *Conservation Law Found., Inc., v. ExxonMobil Corp.*, Case No. 1:16-cv-11950-MLW (1st Cir. 2020). Specifically, in *Mashpee Tribe*, the First Circuit recognized three factors to consider when asking whether primary jurisdiction is proper:

> (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.

592 F.2d at 580-81 (citing *Ricci v. Chicago Mercantile Exchange*, 409 US 289, 302, 93 S.C.t 573, 580, 34 L.Ed 2d 525 (U.S. 1973); *see also Com. of Mass. v. Blackstone Valley Electric Co.*, 67 F.3d 981, 992 (1st Cir. 1995)). The First Circuit also recognized that "[t]hese factors, however, 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. Massachusetts Dep't of Envtl. Prot.,* 163 F.3d 74, 81 (1st Cir. 1998)("*AAMA*").

When balancing the *Mashpee Tribe* factors against the potential for delay that might come with the referral of a specific question to an administrative agency, it may be useful to consider that staying a case due to primary jurisdiction in similar contexts has resulted in more delay, confusion, and litigation for the courts. Specifically, in *Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envtl. Prot.,* the First Circuit acknowledged that its stay pending referral of several questions to the EPA under the doctrine of primary jurisdiction resulted only in agency opinions,

not final and determinative agency action. 208 F.3d 1, 4–5 (1st Cir. 2000)("*AIAM 2000*"). Once EPA issued its opinion in response to the First Circuit's questions, the automobile manufacturers argued "that the EPA opinion is entitled to no deference from this Court because the EPA lacked jurisdiction over the issues, because the opinion was only advisory and nonbinding, because it is inconsistent with the plain language of the CAA, and because it is simply wrong as a matter of law." *Id.* at 6. As the facts in *AIAM 2000* demonstrate, relying on primary jurisdiction as a basis to stay a district court decision where the agency can only offer an opinion or guidance outside of a formal agency decision-making context may well result in a cascading series of disputes that must later be resolved by the district court anyway. Waiting for an agency opinion in this case would unnecessarily delay adjudication of issues by this Court, and as will be further discussed below, would not materially aid the Court in deciding this case.

Moreover, it is not impossible to imagine such an outcome here given the arguments advanced by this Defendant in both *Rhode Island v. Chevron Corp., et al.*, 393 F. Supp. 3d 142 (D.R.I. 2019) and *State of Rhode Island v. Chevron Corp., et al.*, C.A. No.: PC-2018-4716 (R.I. Sup. Ct. 2018). Defendants have advanced arguments that the State's claims concerning Defendants '"failure to warn" about the effects of fossil fuel combustion on climate are beyond the purview of the State's authority. Furthermore, if RIDEM had stepped into the place of the citizen here and pursued this enforcement action or another under theories similar to those advanced by Plaintiff in this case, it is just as likely these Defendants would argue that RIDEM is not authorized to make such policy determinations for the State, and that the State as a whole is preempted by federal law. Staying Plaintiff's citizen suit for direction from RIDEM about whether consideration of predictable future weather and storm events is required within the meaning of

"good engineering practices," is a red herring and will not necessarily result in clarity for the Court but will likely cause delay of the case.

Furthermore, as the Court considers whether the referral of a specific question to RIDEM would assist the Court in making a determination, it should ask also if that aid will be material, if the task is reserved to the agency exclusively, and if some specific agency expertise is necessary to evaluate the Plaintiff's claims. The State contends that the Mashpee Test factors aren't satisfied here. Even if they were, a stay pending referral to the agency may not materially advance a resolution of the dispute and would create substantial delay. The Mashpee Test and the applicability of each prong to the facts of this case are discussed below.

1. *Analysis of the Clean Water Act Claims Under Mashpee Tribe*

The Court can conduct its inquiry into industry-standard "good engineering practices" without invoking primary jurisdiction under the first factor in the *Mashpee Tribe* analysis. In fact, the only agency determination that "lies at the heart" of the permitting task assigned to RIDEM by Congress was its decision about the standards that must be incorporated into the Permit. How those standards are interpreted and enforced once written down is not at the heart of the permitting agency's task.

In this case, RIDEM has already determined that "good engineering practices" is the standard that applies to the development of the SWPPP. As a delegated state under the Clean Water Act, Rhode Island manages its water pollution permitting through the RIPDES program. In addition to imposing numerical standards for various effluents, the Permit requires the Defendants to develop a SWPPP that "shall be prepared in accordance with good engineering practices and . . . shall describe the implementation of Best Management Practices (BMPs) which are to be used to reduce or eliminate the pollutants in storm water discharges. . . ." *RIPDES Permit* at 16. The

Permit stipulates that Defendants must develop BMPs "appropriate for this specific facility", which "should include processes, procedures, schedule of activities, prohibitions on practices, and other management practices that prevent or reduce the discharge of pollutants in storm water runoff." *Id.* at 33.

Plaintiff grounds its Clean Water Act claims in the express language of the Permit. Plaintiff argues that Defendants failed to design the Providence Terminal's infrastructure in accordance with "good engineering practices" because its engineers neglected to consider reliable data that illustrates how changing weather patterns will affect its pollution controls. *TAC* at §V. Defendants' failure to account for this information, which Plaintiff alleges is known both to Defendants internally and to "reasonably prudent engineers," constitutes a Permit violation because "the SWPPP was not based on information consistent with the duty of care applicable to engineers." *TAC* at ¶¶ 289-90. The district court's interpretation and enforcement of this Permit standard is exactly the type of enforcement envisioned by Congress and contemplated by the citizen suit provision.

Therefore, the question before the Court here is not whether *permitting* lies within "the heart of the agency's powers," but whether *enforcement* of the permit terms lies solely with RIDEM. As previously discussed, Congress intended to extend that enforcement power to private citizens by conferring jurisdiction to the district courts. Since RIDEM has issued the Permit and Plaintiff has satisfied the requirements for initiating a citizen enforcement action, the Court can and should interpret and enforce the Permit terms as required by law.

The second *Mashpee Tribe* factor encourages referral to the agency where agency expertise is necessary to "unravel intricate, technical facts." The interpretation and enforcement of the Permit terms will not involve "assessing complex, evolving, and highly technical data regarding

climate-related storm risks." *MISO MTD* at 59. Instead, the Court need only decide whether the SWPPP standard—"good engineering practice"—means that "[e]ngineers exercising skill and judgment reasonably expected of similarly situated professionals make engineering decisions based on information regarding the factors discussed in [TAC] Section IV.A." *TAC* at ¶263. *See Student Public Interest Research Group of New Jersey v. Monsanto Co.,* 579 F. Supp. 1528, 1537 (D.N.J.1984); *Pennenvironment v. Genon N.E. Mgmt. Co.,* 2011 WL 1085885, *4-5 (W.D. Pa. Mar. 21, 2011) (characterizing the issue as "whether [defendant] [was] in violation of its NPDES Permit limits," which did "not require the Court to make any determinations involving technical or policy considerations"). Answering this question does not require RIDEM's expertise since courts have often sought to elucidate the ambiguous term "good engineering practices" by evaluating extrinsic evidence, usually with testimony by qualified experts. *See NRDC v. Los Angeles*, 725 F.3d 1194, 1205 (9th Cir. 2013) ("If . . . the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms."); *O'Connor v. Boeing North American, Inc.*, 2005 WL 6035255 at *25 (C.D. Cal. 2005)(soliciting expert testimony to determine whether waste disposal activities "were conducted in a manner contrary to good engineering practice"); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 908 (S.D.N.Y. 1995) (concluding that Anglebrook's SWPPP "is a carefully conceived plan that falls well within the boundaries of good engineering design judgment"); *Arkansas River Power Authority v. Babcock & Wilcox Power Co.*, 2016 WL 9734684 at *5 (D. Colo. 2016)(admitting expert testimony that "B&W followed good engineering practice" because "it is industry standard to take an incremental approach to designing boilers."). Moreover, Defendants 'suggestion that primary jurisdiction applies to Plaintiff's Clean Water Act claims is misleading because it blurs the decision point for the claims. The Court's inquiry is a descriptive one, namely to identify how contemporary professionals presently define

"good engineering practices" in this context, which does not require the detailed technical expertise of the agency. The Court need not—and should not—form a prescriptive judgment about whether accounting for the effects of climate change ought to be a benchmark of "good engineering practices." Consideration of the second factor does not support a stay of the case, or a referral to RIDEM for technical decision or evaluation, pursuant to primary jurisdiction.

The final *Mashpee Tribe* factor evaluates whether the agency determination would *materially* aid the Court. For example, agency determination would assist the court if it were to "generate a fuller administrative record" or "could render most of the case moot." *ExxonMobil Corp.*, 2020 WL 1332949, at *11. Here, the administrative record is complete because RIDEM has already issued the Permit. The Permit was not appealed or challenged. There is no agency determination in this contest therefore that would generate a more complete record or render the case before the Court moot.

The guidance from the *ExxonMobil Corp.* decision on this point is helpful in evaluating the third *Mashpee Tribe* factor. There, the court invoked primary jurisdiction to stay adjudication until EPA acted on the facility's *permit renewal*, finding that EPA is likely to issue a new permit within the same timeframe it would take to litigate the case. *Id. at* *1 (emphasis added). In this case, the Permit has been reissued and neither party is disputing the terms of the Permit itself—a dispute that would require an APA appeal. [2]

[2] In an APA action to challenge permit terms, the court examines "whether the [agency] engaged in the proper decision-making [sic] process, and whether its decision finds support in the record." *Upper Blackstone Water Pollution Abatement Dist. v. E.P.A.*, 690 F.3d 9, 26 (1st Cir. 2012). The court will defer to agency determinations unless the agency's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). APA actions review whether the respective agency acted in accordance with law with respect to the content of a permit or rule making or whether the agency has the authority to take a particular action. Whereas the present citizen suit aims to enforce the existing law and permitting conditions already imposed on the regulated entity; it is not challenging an agency decision. Here, Plaintiff explicitly accepts the 2019 Permit terms as valid. It is precisely Defendants' failure to comply with valid permit terms—the "good engineering practice" and "BMP" requirements—that gives rise to Plaintiff's claims.

Further, in granting the stay in *ExxonMobil Corp.*, Judge Wolf accepted the defendants' framing that CLF's claims "raise[] scientific and policy issues that the EPA is better equipped to decide than the court". *Id*. at 1. The State disagrees with the defendants' framing in *ExxonMobil Corp.* just as it disagrees with Defendants' framing here. Neither *ExxonMobil Corp.* nor the present action requires the Court to sift through technical data to analyze the adequacy of the Providence Terminal's pollution control infrastructure. The Court need only evaluate whether accounting for the TAC Section IV.A. factors constitutes an industry-standard engineering practice, and if so, whether Defendants' engineers complied with that standard. RIDEM has already exercised its regulatory powers to decide on the Providence Terminal's Permit terms, and Plaintiff seeks to enforce those terms as written. Thus, invoking primary jurisdiction is inappropriate because the Court does not need RIDEM's technical expertise to conduct the proper inquiry—namely, discerning the meaning of "good engineering practices" in this context.

2. Analysis of the RCRA Claims Under Mashpee Tribe

The *Mashpee Tribe* analysis under RCRA yields the same results as the analysis with respect to the Clean Water Act claims. First, determining whether Defendants' failure to consider the specific circumstances that Plaintiff asserts constitute "an imminent and substantial endangerment to health or the environment", 42 U.S.C. §6972(a)(1)(B) (hereinafter, "Endangerment Determination") is not at the heart of the tasks assigned to RIDEM by statute in this context. Next, RIDEM's technical expertise is not required to evaluate whether the Providence Terminal design conforms to industry standards or otherwise creates the potential for imminent endangerment of public health or the environment. Finally, a determination by RIDEM would not *materially* aid the Court.

The first *Mashpee Tribe* factor, while similar to the analysis in the Clean Water Act context, differs under the RCRA in that there is no operative permit issued by RIDEM under RCRA. The question for the trier of fact, however, remains the same: Is Defendants' engineering and management of the Providence Terminal consistent with "good engineering practices" and "best management practices," so as to minimize the potential for imminent endangerment of public health and the environment?

RCRA requires both small and large quantity generators to "maintain and operate its facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment." *Id.* at ¶¶ 433, 434. To comply with RCRA, the Providence Terminal must be designed appropriately to prepare for and prevent imminent endangerment in all likely and possible scenarios, whether or not they are caused by climate change. The question posed to this Court is not a policy question, nor is it necessarily an exclusively agency decision. The question is only whether the Providence Terminal has been properly engineered and managed consistent with the RCRA's requirements.

Investigation and site remediation planning and implementation, plan review, etc., lie at the heart of the RIDEM's tasks as assigned by statute. Whether the Defendants are complying with the requirements of RCRA generally is a question an agency *may* take up, but also one that Congress explicitly allowed private citizens to ask and adjudicate through the citizen suit provision.

Again, the Court need not form a prescriptive judgment about whether "good engineering practices" require accounting for the effects of climate change. Regardless of whether Defendants are a small quantity generator or large quantity generator, they must adhere to good engineering

practices and industry standards as required by 40 C.F.R. § 262.16(b)(8)(i) and 40 C.F.R. § 262.251. Because this is a determination that is not reserved primarily or exclusively to RIDEM, a stay pursuant to the first *Mashpee Tribe* factor is not warranted.

With regard to the second factor, RIDEM's expertise is not required to unravel intricate, technical facts because Congress has expressly allowed citizen suits to address these issues and because an Endangerment Determination can be achieved with the aid of extrinsic evidence and expert testimony. There is no doubt that RIDEM possesses the expertise to assess whether the Providence Terminal is designed to minimize the risk of any "unplanned sudden or non-sudden release of hazardous waste," which "could threaten human health or the environment," but the fact that the agency has expertise is not the deciding point. The Court can, without RIDEM's expertise, evaluate extrinsic evidence, solicit expert testimony, and interpret the statutory text to further its understanding of the meaning of "good engineering practices" in the RCRA design standard context. For example, as Plaintiff alleges in the TAC, the Army Corps of Engineers by regulation incorporates the impact of sea level change in its civil works programs. *TAC* at ¶ 220. Because RIDEM's expertise is not required to understand what the standard "good engineering practices" means within the engineering field, this prong of the *Mashpee Tribe* Test is not met and does not warrant a stay pursuant to the primary jurisdiction doctrine.

Finally, there is no formal agency action that RIDEM is taking or plans to take that would materially aid the Court. The question the Court must evaluate in this context is the same one it must evaluate with respect to the Clean Water Act claims: What is the industry-based standard for "good engineering practices" for facilities regulated under RCRA? The Court can answer this question through the normal adjudicative process, namely by weighing the evidence presented by the parties, interpreting the statutory language, and considering extrinsic evidence and expert

testimony where necessary. An agency opinion from RIDEM with respect to this question is not necessary to materially aid the Court, and could lead to additional unwarranted delay, and so the last factor of the *Mashpee Tribe* test is not satisfied.

Congress intended that citizens be able to bring these types of enforcement actions in the district courts. RIDEM and RCRA have already established the technical standards for compliance, and the Court has the necessary jurisdiction and competence to interpret both the Permit terms and RCRA's statutory requirements as written.

V. THE REASONING IN THE *BURFORD* AND *CHICO* DECISIONS DOES NOT SUPPORT THE COURT'S ABSTENTION WITH RESPECT TO PLAINTIFF'S CLEAN WATER ACT AND RCRA CLAIMS

As discussed above, Congress expressly delineated in the Clean Water Act and RCRA the prerequisites that citizens must satisfy in order to confer federal jurisdiction to adjudicate the claims alleged in a citizen suit—notice of intent, the prescribed waiting period, and the 'diligent prosecution' bar. *See supra* § II. Still, Defendants have argued that the variety of abstention originating in *Burford v. Sun Oil Co*., 319 U.S. 315, 334 (1943), applies here. Defendants assert that, should the Court adjudicate the Plaintiff's Clean Water Act and RCRA claims, it will become the "regulatory decision-making center" that the First Circuit warned of in *Chico*, 633 F.3d at 30 (internal citations omitted). The State disagrees with this characterization, and for the reasons discussed below, abstention is not warranted in this case pursuant to either the *Burford* or *Chico* decisions.

A. The Burford Abstention is "An Extraordinary and Narrow Exception" That Does Not Apply to the Clean Water Act or RCRC Claims in the TAC

The doctrine of abstention is "an extraordinary and narrow exception" to the general rule that federal courts must adjudicate claims within their conferred jurisdiction. *Colorado Water*, 424

U.S. at 813. This exception applies where refusing to adjudicate the controversy "would clearly serve an important countervailing interest." *Id*. (internal citations and quotations omitted). The *Burford* abstention doctrine authorizes federal courts to decline to review the orders or proceedings of a state administrative agency if "respect for the independence of state action requires the federal equity court to stay its hand." *Burford*, 319 U.S. at 334. The countervailing interests at stake in the *Burford* context are federalism and comity concerns. Thus, in *Burford* itself, the Supreme Court permitted a federal district court to abstain from resolving a case around oil drilling rights where the state of Texas had implemented a complex administrative-judicial process for adjudicating such controversies. *Burford*, U.S. at 334.

The Supreme Court further refined the *Burford* doctrine in *New Orleans Public Service, Inc.*, 491 U.S. 350 (1989) (referred to herein as *NOPSI*) and *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 728 (1996). In *NOPSI*, the Court established a formula to determine when abstention is proper:

> *Where timely and adequate state-court review is available*, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814) (*Emphasis added*). The Court noted that, because abstention must "remain [] the exception, not the rule," *Id.* at 359, the doctrine "does not require abstention whenever there exists such a [complex state administrative] process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *Id.* at 362 (internal quotations omitted).

Seven years later, the *Quackenbush* Court reaffirmed that *Burford* abstention represents "an extraordinary and narrow exception" to a federal court's duty to resolve cases properly before it. *Quackenbush,* 517 U.S. at 728 (internal quotations and citations omitted). In evaluating whether to abstain, a federal court must "balance [] the strong federal interest in having certain . . . federal rights [] adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem. . . ." *Id.* (internal quotations and citations omitted). This balancing act "only rarely favors abstention" because abstention requires the court to decide "that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Id.*

Where Congress has deliberately outlined the circumstances that restrict federal jurisdiction over a class of cases, abstention becomes "an end run around" Congressional intent because it "substitut[es] [the court's] judgment for that of Congress about the correct balance between respect for state administrative processes and the need for timely and consistent enforcement." *Id.*; *see also, U.S. v. Johnson*, 529 U.S. 53 (2000) ("When Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). Congress has expressly authorized the types of Clean Water Act and RCRA claims at issue here to proceed in federal court, and this court should adjudicate them.

B. Analysis of *Burford* Abstention under the First Circuit's *Chico* Factors

As discussed above, Congress has expressly delineated in the Clean Water Act and RCRA the circumstances that confer to federal district courts the jurisdiction to adjudicate citizen suits. *See supra* § III. Even assuming *arguendo* that the Court determines that abstention is appropriate

in citizen suit contexts generally, a separate analysis of the *Chico* factors confirms that the Court should not abstain in this particular case.

The First Circuit considers three factors in determining whether *Burford* abstention is warranted:

> (1) the availability of timely and adequate state-court review, (2) the potential that federal court jurisdiction over the suit will interfere with state administrative policymaking, and (3) whether conflict with state proceedings can be avoided by careful management of the federal case.

Chico, 633 F.3d at 32.

The first factor, availability of timely and adequate state-court review, weighs against abstention because there is no state-level review, whether administrative or judicial, for resolving Plaintiff's claims regarding the Providence Terminal's design. If Plaintiff's claims challenged the content of the Permit and Plaintiff failed to appeal the Permit under the APA, it is plausible that Plaintiff's failure to avail itself of its APA appeal rights and procedures would weigh in favor of abstention. *See Interfaith Community Organization, Inc. v. PPG Industries, Inc.*, 702 F.Supp.2d 295, 310 (D.N.J. 2010)(distinguishing previous cases where abstention was warranted because "[u]nlike the plaintiffs in those cases, Plaintiffs here are not circumventing a prescribed appeals process for permits that have been issued through a regulatory process."); *Morton College Board of Trustees of Illinois Community College Dist. No. 527 v. Town of Cicero*, 18 F.Supp.2d 921, 928 (N.D. IL, 1998)(abstention unwarranted where "disposition of plaintiff's claims would not require the court to review or interfere with Illinois' process of issuing permits, to review a previous decision made by the Illinois Pollution Control Board, or to interfere with a state enforcement proceeding."). But here, the content or adequacy of the Permit is not in dispute. Plaintiff merely alleges that Defendants are not complying with the Permit's valid terms. Plaintiff is barred by statute from bringing a state court action to enforce the Permit terms; it may only proceed in this

Court in accordance with the citizen suit provisions. *See Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 693 (3d Cir. 2011)("… this action could not have been brought in state court because federal courts have exclusive jurisdiction over RCRA and CWA citizen suits … This view accords with that of most other courts to have considered the question.").

Similarly, if Plaintiff opposed a RIDEM-issued remedial plan to address hazardous waste storage at the Providence Terminal but failed to comment on or challenge the plan pursuant to the APA in state court, those facts too would weigh in favor of abstention. Here, however, Plaintiff agrees with the RAP requirements for the Providence Terminal but argues that Defendants' adherence to the RAP does not relieve them of the separate obligations under RCRA with respect to the engineering and management of the Providence Terminal. Ultimately, Defendants' reference to the ongoing efforts of multiple state agencies, like the Rhode Island Executive Climate Change Coordinating Council ("EC4") and the Rhode Island Comprehensive Climate Preparedness Strategy ("Resilient Rhody"), is a red herring in the context of this case because RIDEM's Permit and the RCRA requirements will always demand that permittees follow "good engineering practices" and implement BMPs. The "industry standard" is an objective metric that is separate and distinct from the State's and RIDEM's considerations of climate resiliency as a general policy matter. The ongoing climate resiliency conversations cited in Defendants' Motion to Dismiss, therefore, will not establish or impact the industry standard for what constitutes "good engineering practices" with respect to the terminal or anything else.

The second factor also weighs against *Burford* abstention. *Burford* abstention does not bar jurisdiction in "all cases where there is a potential for conflict with state regulatory law or policy." *NOPSI*, 491. U.S. at 362 (internal quotations omitted). Instead, it is intended to "only apply in 'unusual circumstances', when federal review risks having the district court become the

'regulatory decision-making center.'" *Chico*, 633 F.3d at 30(quoting *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 473 (1st Cir. 2009)).

There is no risk that exercising jurisdiction here will convert the Court into the "regulatory decision-making center" for the State's climate resilience policies. The responsibility to create and implement those state-wide standards will remain with the pertinent administrative agencies regardless of the Court's determination of violations in the context of Plaintiff's claims. Plaintiff is only seeking to enforce the language of the RIPDES Permit and of RCRA *as written*. RIDEM's ability to maintain desired uniformity at regulated facilities is secured through the standard language requiring that "good engineering practices" be used in developing the SWPPP. See *NOPSI*, 491. U.S. at 363.

Plaintiff's core Clean Water Act claim is that "[u]nlike others involved in large-scale engineering projects, Defendant has not taken information known to it regarding the factors discussed in [TAC] Section IV.A . . . into account in designing, constructing, and operating the Providence Terminal." *TAC* at ¶272. As discussed above in Section III-B, resolving this claim does not require the Court to decide how the Providence Terminal's pollution control infrastructure should be upgraded to withstand the effects of climate change. Instead, it only must assess whether the "good engineering practices" or "BMP" language in the RIPDES Permit requires Defendants' engineers to consider how the trends described in Section IV.A of the TAC will affect the Providence Terminal's infrastructure and modify the designs with those trends in mind. *See id.* at ¶18, 40. For example, ¶¶191-198 of the Complaint reference several federal, state, and scientific studies that discuss the trend toward increasing wave heights and the intensity, duration and frequency of storms. Is this kind of information generally considered and accounted for by engineers exercising "good engineering practices" when developing stormwater management

plans for a client? If, based on its evaluations of extrinsic evidence, the Court concludes that "good engineering practices" require consideration of this information and that Defendants' designs have ignored it, the Court may decide that the Defendants are in violation of the Permit condition.

This same analysis applies to the RCRA Endangerment Determination. If the Court were to look at the type of information routinely evaluated by engineers asked to design and manage a facility that stores material, which if released, could harm the environment or the public, such evaluation does not make the Court a "regulatory decision-making center." Rather, the Court would objectively determine the industry standard for similarly situated facilities. Federal courts routinely elicit expert scientific testimony to decide whether a set of circumstances constitutes "an imminent and substantial endangerment to health or the environment" without interfering with regulatory policymaking. 42 U.S.C. §6972(a)(1)(B). *See generally, Mozzetti v. City of Brisbane,* 67 Cal. App. 3d 565, 575 (Ct. App. 1977); *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig*., 345 F. Supp. 3d 897, 904 (S.D. Ohio 2015); *O'Connor,* 2005 WL 6035255, at *11. The risk of interfering with agency prerogatives is miniscule. RIDEM will remain the "regulatory decision-making center" for all tasks that RCRA assigns to administrative agencies, while the Court limits its inquiry to the narrow scope that the citizen suit claims relegate to its purview.

Finally, the third factor counsels against abstention because the "legitimate objectives of the litigation can be pursued without treading on . . . state interests and internal affairs." *Planned Parenthood League of Mass. v. Belotti*, 868 F.2d 459, 464 (1st Cir. 1989). As noted above, RIDEM's discretionary decision not to prosecute the alleged violations is strong evidence that federal adjudication will not "tread[]on" its regulatory prerogatives. RIDEM's "internal affairs" have already unfolded here—the agency did not assume the citizen's position in this lawsuit within the statutory waiting period. Moreover, this action does not depend on or interfere with any future

RIDEM decision-making because Plaintiff seeks to enforce RCRA and the Permit as currently written. *Contrast ExxonMobil Corp.*, 2020 WL 1332949, at *11 (declining to adjudicate Clean Water Act and RCRA claims until EPA renews an administratively continued permit because "EPA's determination on Exxon's Permit application could render most of this case moot"). Making an Endangerment Determination would not siphon away any of RIDEM's authority to order and/or oversee the remediation of the identified AOCs at the Providence Terminal. Even if the Court decides not to make an Endangerment Determination based on the facts presented, it will remain RIDEM's exclusive role to continue to oversee the remediation of the AOCs. The Court can conduct its inquiry by weighing expert testimony and other evidence, independent of RIDEM's opinion of the hazards posed by the Providence Terminal's condition. Thus, abstention would thwart the "legitimate objectives of the litigation" – namely, Plaintiff's vindication of its statutory rights under federal law—in a situation where there is little, if any, conflict to manage between judicial and administrative proceedings. *Belotti*, 868 F.2d at 464.

VI. CONCLUSION

Given Congress's clear intent to allow citizen suits, the Court should not stay the proceedings pursuant to primary jurisdiction, nor should it abstain according to the *Burford* abstention doctrine. Neither doctrine is applicable to this case. Congress' intent is clear and explicit. Private citizens may step into the shoes of the states or EPA to enforce standards as defined by the respective statutes, so long as all the prerequisite notice criteria are met and the agencies are not 'diligently prosecuting' the action within the notice timeframe. Finally, independent analyses under the applicable standards for both primary jurisdiction and abstention indicate that neither are applicable to the facts of this case.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, the foregoing was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Ellen Ullucci