No. 16-2415

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re Sierra Club,
Petitioner

Petition for Writ of Mandamus and Addendum
Pursuant to 28 U.S.C. § 1651 and
Clean Water Act, 33 U.S.C. § 1369(b)(1)(F)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT
OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire ("PSNH") submits this Corporate Disclosure Statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

The parent company of PSNH is Eversource Energy ("ES"). The stock of ES is publicly traded on the New York Stock Exchange.

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INTRODUCTION

The Court should deny Petitioner Sierra Club's second petition for the extraordinary and drastic writ of mandamus, seeking to compel the U.S. EPA to issue final National Pollutant Discharge Elimination System ("NPDES") permits for Merrimack and Schiller Stations on a timetable that EPA believes to be insufficient. To allow a special interest petitioner—whose mission is to shut down every coal-fired electric generating plant in the country—to set EPA's renewal application priorities directly subverts the will of Congress regarding one of the most basic aspects of the Clean Water Act ("CWA"): who administers it. Congress designated EPA, not Sierra Club, as the body responsible for implementation of the NPDES program. Sierra Club should not be allowed to use the judicial system to commandeer EPA's discretionary authority to determine the order in which NPDES permits are renewed simply because Sierra Club wants to eradicate coal as an energy source.

In its second effort to "re-queue" and expedite the NPDES permits for Merrimack and Schiller Stations in furtherance of its "Beyond Coal" agenda, Sierra Club presents a false pretext that nothing has happened with respect to these permits since this Court denied its first mandamus petition.[1] In truth, EPA issued a

[1] The first petition argued that EPA had unreasonably delayed reissuing a new draft and finalized NPDES permit for Schiller Station. *See* Pet. For Writ of Mandamus, *In re: Sierra Club*, No. 12-1860 (1st Cir. July 9, 2012). Sierra Club

revised draft NPDES permit for Merrimack on April 18, 2014, and issued a draft NPDES permit for Schiller on September 29, 2015. EPA continues its work finalizing both permits while also managing its ongoing, competing work on permit proceedings.

As the administrative record makes clear, the Merrimack permit proceeding is massive and complex.[2] In addition to the technical complexities inherent in NPDES permitting and EPA's admittedly limited resources, in 2014 EPA established new regulations setting technology requirements under the CWA for cooling water intake structures ("CWISs"), and in 2015 promulgated new Effluent Limitations Guidelines for the Steam-Electric Power Plant industrial category ("ELGs").[3] The new 316(b) Rule in particular has affected many pending NPDES renewal applications, including ones in the queue ahead of Schiller and Merrimack.

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did not request relief with respect to Merrimack. This Court denied Sierra Club's petition on May 8, 2013, finding it had not shown why Schiller's NPDES permit "should be moved ahead of the queue" of others, including the Merrimack permit—a draft of which had already been issued at that time—and noting the record provided "no reason to think that the EPA will not work diligently to complete its tasks." *See* Order (Doc. 00116526803), *In re Sierra Club*, No. 12-1860, 2013 WL 1955877 (1st Cir. May 8, 2013).

[2] *See* EPA, Merrimack Station Administrative Record, https://www3.epa.gov/region1/npdes/merrimackstation/adminrec.html (last visited Jan. 12, 2017).

[3] EPA's new regulations setting technology requirements under Section 316(b) of the CWA for CWISs ("new 316(b) Rule") became final in 2014 and directly impact the content of the NPDES permits and future compliance requirements. 79 Fed. Reg. 48,300 (Aug. 15, 2014). The new ELGs were promulgated on September 30, 2015. 80 Fed. Reg. 67,838 (Nov. 2015).

Specifically with respect to the Merrimack 2011 draft permit and its 2014 partial revision, and to some extent, the 2015 draft Schiller permit, these new rules have impacted EPA's original permit findings and requirements. EPA Region 1 confirmed this in its recent correspondence to Sierra Club, explaining the new 316(b) Rule and ELGs require EPA "to assess the ramifications of both" and "necessitate[] careful consideration, and in some cases *reconsideration*, of proposed permit conditions to ensure consistency" with the new requirements.[4] Indeed, the permit revisions required as a result of these core regulatory changes are so substantial that PSNH has requested EPA to issue a new draft permit for Merrimack Station, and to provide for the notice and comment period required by law. The final permit must address these directly relevant, landmark regulatory changes. Yet, Sierra Club seeks an order compelling EPA to issue final permits for both Merrimack and Schiller Stations within an arbitrary six-month timeframe (*i.e.*, by June 30, 2017), effectively rushing EPA's evaluation of the impact of the new regulations on the plants' operations and compliance options as well as preventing the agency from complying with its "notice and comment" requirements owed to PSNH and other interested stakeholders.

Mandamus is an extraordinary remedy, reserved in the administrative context only for compelling "*discrete* agency action that [the agency] is *required to*

[4] *See* Ex. 5, Doc. 00117084494 ("Pet."), Add. at 90 (emphasis in original).

take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphases in original). Nothing in the CWA provision upon which Sierra Club relies *requires* EPA to take *any action* on permit renewals within the five-year term. In fact, Congress itself expressly provided for an *automatic*, open-ended continuation of permits beyond the five years. *See* 5 U.S.C. § 558(c). This automatic extension completely undermines Petitioner's contention that Congress commanded EPA action within a specified time. (*See* Pet. 28.) PSNH continues to operate in full compliance with the terms of valid NPDES permits that EPA has concluded satisfy existing CWA requirements. In the absence of a non-discretionary duty to act, Sierra Club's Petition must be denied.

Even if Sierra Club could clear its first mandamus hurdle—showing a mandatory duty by EPA to act—it cannot demonstrate EPA's delay in this case is unreasonable under the *TRAC* factors this Court has adopted from the D.C. Circuit. Each factor weighs in favor of reasonableness here (or is neutral at worst), including the most important factor—the effect of the Petitioner's requested relief on competing or higher priorities at the agency.

Since the early days of the NPDES program, there has been a backlog of permits awaiting renewal decisions—at one time, in fact, a *majority* of permits were expired. EPA developed a "High Priority NPDES Permit" initiative, and, along with states, has greatly reduced that backlog. According to the most recent

statistics PSNH could find, EPA has primary responsibility for over 12,500 NPDES permits, and over 900 are expired and awaiting renewal decisions. EPA has set the priorities for addressing these 900+ permits, yet Sierra Club is once again improperly asking this Court to require the agency to give certain permits a "super-priority." Given the progress EPA has made on the Merrimack and Schiller draft permits, and the complex issues still before the agency, this Court should not allow Sierra Club to dictate EPA priorities or second-guess EPA's prioritization, particularly considering Sierra Club's claims and accusations that are untrue.

First, contrary to Petitioner's assertions, Merrimack and Schiller Stations' capacity factors—and hence, emissions of pollutants and thermal discharges—have been falling for years. As EPA advised Sierra Club before this litigation, Merrimack Station's "actual environmental effects have been reduced in recent years because of the power plant's reduced operations," and because "Schiller Station's coal-burning units now operate at a very low capacity factor and, thus, have relatively lesser actual effects on the marine environment."[5] Second, PSNH has spent hundreds of millions of dollars on pollution control and other innovative technologies to reduce air and water emissions at these facilities during the last six years.[6] Nevertheless, Sierra Club would have this Court believe that toxic

[5] *See* Ex. 5, Pet. Add. at 92, 95.

emissions at these plants are increasing—citing six-year-old data (Pet. 9 n.2.)—when in fact the most recent information demonstrates emissions have fallen precipitously.[7]

At bottom, Sierra Club's Petition is intended to advance permits involving coal-fired facilities ahead of other facilities whose permits are similarly backlogged.[8] If this Court were to grant the relief Petitioner requests, it would, in effect, improperly reallocate EPA's resources and set the executive branch's priorities for it at the whims of special interest groups with a known agenda.[9]

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[6] Cumulatively, PSNH has invested more than $500 million in environmental initiatives at Merrimack Station since 1989, and over $80 million in environmental initiatives at Schiller Station since 2006, significantly reducing the Stations' environmental footprints. Both Stations currently meet all state and federal water requirements.

[7] The 2010 data cited by Sierra Club shows Merrimack Station with releases of 2,762,957 pounds. The most recent data—conveniently ignored by Petitioner—demonstrates Merrimack's emissions are *dramatically* lower (at 299,528 pounds). EPA, *EPA Analysis Shows 2014 Decrease of Toxic Chemical Releases in New Hampshire* (Jan. 25, 2016), *available at* https://www.epa.gov/newsreleases/epa-analysis-shows-2014-decrease-toxic-chemical-releases-new-hampshire ("In New Hampshire, the reporting data show that overall releases of pollutants to the environment decreased since the previous reporting year (2013).").

[8] This explains why Sierra Club refers to the Merrimack and Schiller NPDES permits as "Coal Permits." Pet. at 27.

[9] Sierra Club does not hide that its main objective is to eradicate coal as an energy source. *See, e.g.*, Sierra Club, Beyond Coal, *About Us*, http://content.sierraclub.org/coal/about-the-campaign (last visited Jan. 11, 2017) (stating, "the Beyond Coal campaign's main objective is to replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built.").

"Equitable relief, particularly mandamus, does not necessarily follow a finding of a violation: respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). Sierra Club should not be allowed to use the judicial system to commandeer EPA's discretionary authority to determine the order in which NPDES permits are renewed.

The Court should be particularly reluctant to interfere with EPA's priorities here. Rushed agencies make mistakes, and it is the permittee and its customers who suffer from them or are forced to file suit. The NPDES permitting process is extraordinarily complex, and the analysis required between draft and final NPDES permits is significant. In all, EPA received in excess of thirty-five sets of comments comprising thousands of pages of technical material in the Schiller and Merrimack permit renewal proceedings, not including corrections, technical and engineering updates, and monitoring and modeling data submitted since the draft permits were issued for Merrimack and Schiller. Not only did the draft Merrimack permit contain errors, but new technology has become available since 2011, and significant new regulations came into effect in 2014 and 2015, all of which need reconsideration before issuance of final permits. These processes and the

substance of final permits will suffer if courts impose arbitrary, litigation-defined deadlines.

ARGUMENT

I. Sierra Club's petition does not justify the extraordinary writ of mandamus.

A. NPDES permit renewal is not a mandatory duty for which mandamus relief is appropriate.

"[C]onsideration of any and all mandamus actions starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network & Ocean Advocates*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Thus, "a claim under [APA] §706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphases in original).

Sierra Club seeks the extraordinary writ to compel EPA to finalize two NPDES permits—an action it contends is mandated by Section 402(b)(1)(B) of the CWA, 33 U.S.C. § 1342(b)(1)(B). (*See* Pet. 7-8.) But no part of Section 402(b)(1)(B), which simply states that NPDES permits expire within five years of issuance, requires EPA to take any action within that timeframe or within any specified period thereafter. In fact, rather than mandating that EPA take any action on permit renewals within the five-year period, Congress expressly included

in the APA a provision that tolls expiration of permits while renewal applications are pending:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c).[10] EPA explicitly incorporated this provision into the NPDES program by regulation. *See* 40 C.F.R. § 122.6(a).

"[T]he extension follows automatically from operation of Section 558(c), and not from action of the agency." *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 215 (D.C. Cir. 1988) ("*NRDC*") (rejecting a challenge that the regulation is inconsistent with the "basic scheme of the [Clean Water] Act"). Thus, under the statute, EPA is not "required to take" any action on a permit renewal application within five years, as Sierra Club suggests. To the contrary, Congress unambiguously has provided *by statute* that if EPA does not reissue the permit before expiration, that existing permit is automatically continued. In the absence of a discrete, mandatory duty in the statute, mandamus relief should be denied. *See, e.g.*, *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir. 2008) (concluding that regulations did not set forth discrete actions that EPA was required to take).

[10] This provision of the APA pre-dated the CWA amendments that created the NPDES program by six years. This Court must "assume that Congress is aware of existing law when it passes legislation." *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 202 (1st Cir. 1994) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)).

B. Even if EPA had a mandatory duty to act on permit renewal applications within a discrete timeframe, Sierra Club has not shown that its delay in this case is unreasonable.

This Circuit, like most, has adopted a test from *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (known as "*TRAC*") to determine whether agency action has been unreasonably delayed. *See Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987). The factors of the *TRAC* test in this Circuit are:

(1) "a 'rule of reason' governs the time agencies take to make decisions;"

(2) "delays where human health and welfare are at stake are less tolerable than delays in the economic sphere;"

(3) "consideration should be given to the effect of ordering agency action on agency activities of a competing or higher priority;"

(4) "the court should consider the nature of the interests prejudiced by delay;" and

(5) "the agency need not act improperly to hold that agency action has been unreasonably delayed."

Id. (citing *TRAC*, 750 F.2d at 80); *see also Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 82 n.9 (1st Cir. 1998) (noting that the *TRAC* "six-part test for determining whether agency action has been unreasonably delayed . . . is very deferential to administrative agencies").

1. EPA has acted reasonably considering the statutory context and particular facts of the case.

The first factor is a "rule of reason." The "question of reasonableness is closely tied to the particular facts of the case," and "[e]ach case must be analyzed according to its own unique circumstances." *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984). Where Congress has provided a statutory timetable or deadline, "that statutory scheme may supply content for this rule of reason." *TRAC*, 750 F.2d at 80.

Sierra Club suggests Congress has provided such a statutory signpost here (*See* Pet. 7-8, 20.), but its suggestion that 33 U.S.C. § 1342(b)(1)(B) mandates that "these permits should be revisited every five years" is simply wrong. (Pet. 20.) Nowhere in the CWA did Congress mandate *renewal* within a certain timeframe; the statute speaks only to initial expiration dates. To the contrary, Congress specifically provided in the APA an *automatic* tolling of that expiration. Thus, it is illogical to conclude that EPA *must* act within five years when Congress specifically provided for the situation where the EPA does *not* act within five years. Moreover, the EPA has in fact "revisited" these two permits since Sierra Club's first petition was denied in 2013—by issuing a revised draft permit for Merrimack in 2014 and a draft permit for Schiller in 2015.

Perhaps recognizing the statute itself gives it little or no assistance, Petitioner contends "the rule of reason for agency delay cannot support a delay of

'several years or a decade'" and cites *In re Pesticide Action Network N. Am.*, 798 F.3d 809 (9th Cir. 2015) ("*PANNA*") and *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016), claiming that any delay of "years" is *per se* unreasonable. (*Pet.* 19, 21-22.) Sierra Club's bald assertions fly in the face of the accepted notion that no two alleged "delays" are the same and that the unique circumstances of each must be taken into consideration. *See Air Line Pilots*, 750 F.2d at 86. Furthermore, the cases Sierra Club cites—most of which do not even involve EPA whose entire agenda is dedicated to health and welfare—are inapposite or factually distinguishable from the case at hand.

PANNA and *Prometheus* both involved a clear statutory duty for the agency to act that, as explained above, is absent here. *In re Pesticide Action Network N. Am.*, 532 Fed. Appx. 649, 650 (9th Cir. 2013) (the first *PANNA* mandamus proceeding) ("EPA has a statutory duty . . . ."); *Prometheus*, 824 F.3d at 40 ("The Commission has a statutory obligation . . . ."). Furthermore, *Prometheus* is irrelevant to this case because the Third Circuit did not utilize the *TRAC* factors to assess whether delay by the Federal Communications Commission ("FCC") was unreasonable. Instead, the court employed its own test established in *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998); *see also Mocanu v. Mueller*, 2008 WL 372459 at *14, n.13 (E.D. Penn. Feb 8, 2008) (specifically recognizing the *TRAC* factors as a "different

test" from the analysis employed in the Third Circuit). Setting aside the different standards for assessing delay, the *Prometheus* case is also distinguishable because it related to the FCC's obligation to promote media broadcast ownership by minorities and women, an initiative the court dubbed an "important aspect of the overall media ownership regulatory framework." *Prometheus*, 824 F.3d at 48 (citation omitted). It is easy to understand how a court could conclude such an initiative had a higher priority with little competition from other FCC obligations. Conversely, in this case, all of EPA's obligations relate to human health, and it would be challenging and improper for a court to second-guess EPA and its determinations regarding human health issues.

PANNA is likewise distinguishable from this case. Both involve EPA and a renewed petition for writ of mandamus, but that is where the similarities end. In *PANNA*, EPA repeatedly failed to adhere to self-imposed deadlines or to adequately respond to an administrative petition seeking a ban of a certain pesticide. 798 F.3d at 811-12. The Ninth Circuit denied the claimant's first petition despite the agency's many unfulfilled promises to respond to the administrative petition because of the complexity of the issue, because EPA had a concrete timeline for issuing a final response, and because the agency had many competing priorities consuming its resources, all of which pertained to human health. *Id.* at 814. In granting the second mandamus petition, the court noted the "needle"

moved in favor of the claimant for three reasons. *Id.* First, the court noted that the "'rule of reason' . . . tipped sharply in favor of" the claimant because, when asked for an updated "concrete timeline" by which it would issue a final ruling, EPA balked and provided only "a roadmap for further delay." *Id.* Second, although the court acknowledged in the initial mandamus petition the entirety of EPA's obligations pertain to human health, the court was concerned by EPA's recent statements the pesticide at issue posed a significant threat to water supplies, causing the court to state: "[w]e do not take this representation lightly." *Id.* Lastly, the court noted EPA's significant history of missing deadlines it set in the administrative petition proceedings resulting in three lawsuits being filed against the agency; and, the court intended to avoid a fourth lawsuit. *Id.* at 814-15.

None of these concerns exists in the present case. First, less than four months ago, EPA communicated to Petitioner that it intends to finalize permits for these facilities by June 30 (Merrimack) and September 30, 2017 (Schiller).[11] This is hardly a roadmap for further delay. Second, there is no immediate and/or "significant threat" to human health posed by PSNH's facilities. Current discharges from these facilities comply with the CWA and have fallen significantly over time. And, third, EPA has not repeatedly missed deadlines for the NPDES permits for Schiller and Merrimack Stations. There has never been a concrete

[11] Ex. 5, Pet. Add. at 95.

deadline for either permit. While EPA did state in its response to the first mandamus petition that it *hoped* to complete the Schiller Station permit by June 2016, that can hardly be considered an established deadline (in fact, this Court explicitly declined to establish it as a "concrete timeline" in its Order[12]). Even if one did interpret it as such, the intervening rulemakings in 2014 and 2015 provide ample justification for the additional time the agency needs to finalize these permits.

Sierra Club's contentions, thus, violate the courts' admonition that the reasonableness of delays must be judged by the specific circumstances at issue. To hear Sierra Club tell it, EPA is twiddling its thumbs while PSNH continues to pollute and operate under outdated permits. Putting aside that the permits are still the law, Sierra Club turns a blind eye to the overwhelming responsibilities of administering the behemoth NPDES program.

Because the NPDES program is a nearly comprehensive, nationwide system for permitting wastewater discharges, the state and federal agencies responsible for its administration have issued over a hundred thousand NPDES permits (excluding general stormwater permits). "Backlogged" permits—those that have expired but await renewal or first-time permits whose application has been pending longer than 365 days—almost immediately began accumulating upon the first round of

[12] *See* Judgment, *In re Sierra Club, Inc.*, 2013 WL 1955877, at *2.

expirations.[13] Less than ten years after creation of the NPDES program, approximately sixty-seven percent of major industrial permits had been continued beyond their expiration dates.[14] In 1988, the D.C. Circuit noted that "forty percent of the 60,000 outstanding permits . . . expired without reissuance, including more than 5,000 since June 30, 1984." *NRDC*, 859 F.2d at 212. By June 2005, the backlog had dropped below twenty percent.[15]

Although EPA and the states have made progress, the backlog still exists over four decades after creation of the NPDES program. According to 2016 year-end statistics on EPA's official website, nationwide, close to 7,000 of the 93,164 major individual NPDES permits were backlogged.[16] In EPA Region 1, where

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[13] Memorandum from J. Charles Fox, EPA Assistant Adm'r. to Regional Adm'rs (May 4, 1999), *available at* http://www.epa.gov/npdes/pubs/reducing_backlog_memo.pdf ("Permit backlogs have increased for a number of reasons. Many major permits have become more complex as more are based on water quality standards or new [Total Maximum Daily Loads ("TMDLs")] which require significant additional environmental, economic, and engineering analysis. . . . In addition, the number of facilities subject to permitting has increased significantly with the first phase of the NPDES storm water program and a number of State-specific initiatives. In many cases, permit programs have not received sufficient resources to keep pace with these changes, in part because of the need to address other water quality priorities. . . .").

[14] *See, e.g.*, EPA, *NPDES Permit Regulations; Application Requirements; Duration of Certain Permit Applications*, 53 Fed. Reg. 33,004 (Aug. 29, 1988).

[15] *See* Office of Inspector General, *Evaluation Report: Efforts to Manage Backlog of Water Discharge Permits Need to Be Accompanied by Greater Program Integration* 20 (June 13, 2005).

[16] EPA, *Permit Status Report for Non-Tribal Major Individual, Minor Individual, and Non-Stormwater General Permit Covered Facilities - End of Year*

PSNH is located, only 38% of all NPDES permits are current, with an excess of 150 major individual permits backlogged.[17] In addition to its supervisory role over state programs, EPA issues over 12,500 permits in certain states and territories, and at the end of 2016, it had a backlog of 949 permit renewals:

STATUS OF PERMITS EITHER ISSUED BY EPA (IN AUTHORIZED STATES) OR IN AREAS WHERE EPA IS THE PERMITTING AUTHORITY[18]

EPA Region	State	Total Facilities	Current Facilities	Backlogged Facilities	Current %	Backlog %
1	Massachusetts	563	213	350	37.8%	62.2
	New Hampshire	160	63	97	39.4%	60.6%
2	Puerto Rico	232	147	85	63.4%	36.6%
3	Washington, D.C.	11	5	6	45.5%	54.5%
6	Gulf of Mexico	10,493	10,493	0	100%	0%
	New Mexico	128	116	12	90.6%	9.4%
9	American Samoa	6	0	6	0%	100%
	Guam	18	13	5	72.2%	27.8%
	Mariana Islands	5	3	2	60%	40%
10	Idaho	251	64	187	25.5%	74.5%

FY2016, *available at* https://www.epa.gov/sites/production/files/2016-12/documents/final_fy16_non-tribal_permits_detailed_percent_current_status.pdf. The NPDES permits for Schiller and Merrimack Stations are classified as major individual NPDES permits.

[17] This data was compiled utilizing information provided on EPA's NPDES website. *See* EPA, *NPDES Permit Status Reports*, https://www.epa.gov/npdes/npdes-permit-status-reports (last visited Jan. 10, 2017).

[18] *See id.*

N/A	Permits in authorized states that EPA issues	279	142	137	50.9%	49.1%
N/A	Tribal Permits	442	380	62	86.0%	14.0%
ALL EPA		**12,588**	**11,639**	**949**	**92.5%**	**7.5%**

Although 949 is a significant raw number, it is only 7.5% of the total number of facilities for which EPA is solely responsible. And EPA has implemented a program to address the permit backlog in a reasoned order of priority. Petitioner's myopic focus on delays associated with two individual permits is, therefore, misguided. Further, in the context of the entire NPDES backlog, that EPA has not finalized the Merrimack and Schiller permits since 2013—considering the landmark regulatory changes in 2014 and 2015—is not unreasonable.

Sierra Club's position completely ignores the complexity associated with, and the significant developments applicable to, the Merrimack and Schiller permits during the last several years. From its inception, the 2011 Draft Merrimack Permit was fatally flawed, which PSNH and other commenters pointed out to the agency. The new permit arbitrarily and capriciously imposed limits that jeopardized the continued operation of the units in question. For instance, the draft permit would require the plant to convert to extremely costly closed-cycle cooling, based on deep-rooted errors ranging from use of an improper baseline comparison of the current condition of the river to the 1960s (when the river was one of the most

polluted rivers in the country), to supposedly further reducing the already *de minimis* levels of impingement and entrainment in the CWISs.

The Merrimack draft permit, including EPA's supporting documentation, totaled in excess of 500 pages of technical materials as a basis for unprecedented permit limits and requirements. The agency initially allotted 60 days for public comment. However, a number of interested parties, including the New Hampshire Congressional delegation, requested an extension due to the complexities of the renewal process and the draft permit. In response, EPA agreed to extend the public comment period until February 28, 2012. EPA received 33 sets of comments comprised of thousands of pages of biological, technical and economic data and materials in response to the draft permit.

Following receipt of the extensive comments, on February 7, 2013 EPA issued a Section 308 information request to PSNH "because EPA require[d] additional information to support development of appropriate NPDES permit limits for Merrimack Station's pollutant discharges."[19]

On April 18, 2014, the agency issued a Revised Draft NPDES permit for Merrimack, altering the requirements for waste waters from the flue gas desulfurization ("FGD") or scrubber system, due to the extensive and technical

[19] EPA noted specifically that numerous parties had submitted a variety of conflicting comments in response to the draft NPDES permit for Merrimack Station related to its FGD wastewater treatment system.

documents it received from PSNH and others. The new 316(b) rule and ELGs in 2014 and 2015, respectively, further thwarted earlier efforts on the new draft permit.

In addition to these new rulemakings, in February 2016, PSNH submitted extensive temperature data to EPA demonstrating a foundational error in the agency's Section 316(a) analysis in the Merrimack Draft Permit—an error that contributed to EPA's denial of PSNH's 316(a) thermal variance. Further, CWIS engineering advances since the draft permits were issued provide environmentally beneficial, cost-effective options in reducing entrainment pursuant to CWA 316(b). PSNH provided two reports from Enercon Consulting in 2014 and 2016 that describe proposed engineering solutions to reduce entrainment that must be considered by the agency.

Sierra Club's Petition erroneously assumes the next step in the permitting process is a final permit. However, given the substantial changes in law requiring reconsideration of the requirements of the original draft permits, EPA may be required by law to first publish for public notice and comment new, revised drafts incorporating and explaining the required changes made to account for the new information and regulatory changes. In fact, it is difficult to imagine how final permits could even be considered a "logical outgrowth" of the drafts that predated the two nationally-applicable rulemakings. *See, e.g.*, *NRDC v. EPA*, 279 F.3d

1180, 1186 (9th Cir.2002) (providing that in evaluating whether a final permit is the logical outgrowth of a draft, "one of the salient questions is 'whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its [permit]'") (quoting *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994)); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12, 2008 WL 782611, at *34 (EAB Mar. 19, 2008) ("[A] final permit that differs from a proposed permit and is not subject to public notice and comment must be a "logical outgrowth" of the proposed permit"). EPA admitted as much in its recent letter to Sierra Club.

All the above demonstrate it is reasonable for EPA to take the time necessary to get these permits right. Forcing EPA to arbitrarily issue final permits for Merrimack and Schiller on Sierra Club's timeline, given the significant developments since 2014, would be short-sighted and usurp the agency's allocation of its scarce resources, and, in turn, lead to arbitrary and capricious agency action.

2. EPA's entire docket affects health and safety, and it should be left to prioritize its actions.

Sierra Club argues EPA is placing "human health and welfare . . . at stake." (Pet. 22-24.) As discussed above, Petitioner cites 2010 data that is no longer accurate to support this contention. In fact, emissions and thermal discharges at

both plants have been decreasing sharply.[20] In an effort to articulate some harm, Sierra Club relies on declarations of its members that fail to identify any concrete harm caused by Schiller or Merrimack Stations. For example, the declaration of Randolph Bryan describes general, abstract concerns he experiences while sailing on the Piscataqua River past Schiller Station. (Bryan Decl., Pet. Add. 210-212.) Likewise, the Declaration of Benjamin MacBride fails to demonstrate any real injury caused by the timing of EPA's issuance of the Merrimack permit, but at best, complains of generalized "concerns" about Merrimack and its permitted discharges to the river (MacBride Decl., Pet. Add. 250-53.).

In fact, contrary to Sierra Club's accusations of harm to the environment as a result of EPA's efforts to finalize the Merrimack permit, currently PSNH is unable to discharge FGD waste water at all because its current permit does not include a limit for waste water from PSNH's scrubber system.

Thus, while PSNH is likewise interested in the timely issuance of a final permit, a mandate establishing when EPA must take action on some permits, as opposed to others, is unwise. The generalized concerns of a handful of members whose organization is aimed at shutting down Merrimack and Schiller Stations are

[20] *See supra, footnote 7*, discussing Sierra Club's reliance on outdated TRI data for Merrimack. Sierra Club's representation of TRI data for Schiller is likewise outdated and overstated. In the 2010 TRI data cited by Sierra Club, Schiller's emissions were listed as 202,786; by contrast, in the most recent (2014) data, the emissions had plummeted to 81,097.

insufficient to demonstrate the existing permits and operations are harming health and welfare.

But most important, it is EPA, and, respectfully, not this Court, that is in the best position to determine how to balance its docket of competing NPDES permits and its other responsibilities affecting health and safety. Sierra Club asks this Court to conclude some permits are more important than others, specifically, permits for plants Sierra Club wishes to shut down. Sierra Club's special interests should not be a determining factor in prioritizing permits despite the fact that Sierra Club cloaks its agenda in terms of health and welfare. Thus, Sierra Club's rationale for prioritizing these permits above all others has no merit since, after all, "the entire docket of the EPA involves" matters relating to health and welfare. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987), *superseded by statute on different grounds by* Pub. L. No. 101-549, § 707(f), 104 Stat. 2399, 2683. Thus, there are strong competing priorities at EPA that only the agency has the expertise to evaluate. This Court has

> no basis for reordering agency priorities. The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.

Barr Labs, 930 F.2d at 76. EPA has carefully prioritized the NPDES permit backlog, and those determinations are due deference.

3. EPA has established a priority plan for addressing the significant permit renewal backlog.

The next factor—"the effect of ordering agency action on agency activities of a competing or higher priority"—may be the most dispositive. In fact, based on "competing priorities," the D.C. Circuit has refused to find an unreasonable delay *even where all the other TRAC factors weighed against the agency*. *See id.* at 75. In *Barr Labs*, the court was faced with the FDA's inaction on generic drug applications even though the statute stated that the agency "shall approve or disapprove the application" within 180 days. *Id.* at 74 (quoting 21 U.S.C. § 355(j)(4)(A)). Even though the agency had violated an express, statutory command, the D.C. Circuit refused to compel action:

> Assuming constant resources for the generic drug program, a judicial order putting Barr at the head of the queue simply moves all others back one space and produces no net gain. Agency officials not working on Barr's matters presumably have not just been "twiddl[ing] their thumbs". Perhaps Congress should earmark more funds specifically to the generic drug program, . . . but that is a problem for the political branches to work out.

Id. at 75 (citations omitted).

Here, as in *Barr Labs*, Congress "did not choose a super-priority for [Petitioner's desired permit renewals], and it did not address the trade-off between strict compliance with the . . . deadline and the [agency]'s disposition of its other projects with enough clarity to guide judicial intervention." *Id.* at 76. And EPA

has itself developed a "Priority Permits Initiative."[21] That initiative identifies the most "environmentally significant" permits and prioritizes them for reissuance.[22] The criteria used for prioritization include impacts on impaired waters, drinking water sources, endangered species, and integration of new water quality standards into permits.[23] Sierra Club should not be permitted to second-guess the agency's prioritization.

4. Sierra Club's "interests" have not been prejudiced, but PSNH's and many others' certainly will be if Sierra Club is allowed to vault PSNH's permit renewal to the head of the queue and rush EPA's consideration.

Sierra Club has no legitimate interest in the order in which EPA issues a renewed permit to PSNH when EPA recently has issued draft permits for Merrimack and Schiller Stations, and PSNH is legally operating under EPA-approved permits. Even if Sierra Club is correct that more stringent requirements could be implemented, EPA already has determined the current permit limitations adequately protect the environment. As EPA explains: "While the permit is continued, all permit conditions remain in effect, and all violations of the permit's terms and conditions are fully enforceable. Thus, if the continued permit contains

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[21] *See* EPA, *Priority Permits Initiative*, EPA.gov, https://www.epa.gov/npdes/npdes-program-management-and-oversight#priority (last visited Jan. 12, 2017).

[22] *See id.*

[23] *See id.*

all appropriate terms and conditions, *no consequence to public health or the environment should occur due to the extension*."[24]

On the other hand, the interests of a myriad of others—PSNH, other citizens, and other permittees—will be greatly prejudiced at the expense of allowing Sierra Club to dictate the timing of EPA's consideration of the permit renewals at issue. PSNH's permits are essential to operations at Merrimack and Schiller, as they are the vehicles by which the facilities are lawfully allowed to discharge certain regulated effluents into the Merrimack and Piscataqua Rivers. PSNH and other interested stakeholders will be prejudiced by an Order compelling issuance of *final* permits by June 30, 2017, when EPA may be required to issue new draft permits that account for the changes in requirements resulting from changes in the law.

In response to the 2013 Sierra Club Petition, EPA indicated the NPDES permits for three plants were of higher priority than the Schiller permit: General Electric Aviation; Merrimack Station; and Pilgrim Nuclear Power Station. As discussed in EPA's September 21, 2016 letter to Sierra Club, EPA has made substantial progress on each. The GE Aviation permit went into effect in September 2015 (with additional modifications in July 2016), and Pilgrim was issued a draft permit in May 2016. And while a Revised Draft Permit was issued

[24] EPA, FACT SHEET – NPDES Permit Backlog Reduction 1, *available at* http://www.epa.gov/npdes/pubs/factsht.pdf (last visited Jan 12, 2017) (emphasis added).

for Merrimack in 2014, the fact remains that the un-finalized Merrimack and Pilgrim permits remain Region 1 priorities ahead of the Schiller permit.

Other citizens also will be prejudiced if the permit renewals at issue are given priority simply because the citizen with the deepest pocket has resources to bring a lawsuit while others do not. First, citizens interested in the permits of other sources that are in front of PSNH for consideration—many of whom have been waiting patiently—would be affected. *See Barr Labs*, 930 F.2d at 73 ("[W]hile prompt disposition of Barr's applications would benefit users of generic drugs, so would the disposition of other companies' applications, which relief for Barr would further delay."). Likewise, other permittees would be affected by Sierra Club's preferred reorganization of EPA's docket: "While judicial intervention could assist Barr [the petitioning generic drug applicant], it would likely impose offsetting burdens on equally worthy generic drug producers, equally wronged by the agency's delay." *Id.* And while those permittees are at least continuing to lawfully operate pursuant to continued permits, "facilities awaiting their first NPDES permits are also considered part of the NPDES permit backlog,"[25] meaning they cannot operate at all and would be greatly prejudiced.

[25] EPA, FACT SHEET – NPDES Permit Backlog Reduction 1, *available at* http://www.epa.gov/npdes/pubs/factsht.pdf (last visited Jan. 12, 2017).

5. There is no agency impropriety.

Sierra Club does not discuss this final factor at all in its Petition; nor does it suggest impropriety by EPA. There is a perfectly reasonable explanation for the delays in permit renewals: "[t]he universe of facilities requiring NPDES permit coverage is expanding at the same time that previously issued permits are expiring," yet "resources dedicated to permit issuance have been static or declining."[26] EPA has been working to process permit renewal applications within the statutory goals, and its actions evidencing diligence weigh in favor of a reasonableness finding.

II. Granting Sierra Club's Petition Would Re-Write the CWA and Set Untenable Precedent.

A. Congress, not EPA, is ultimately responsible for the NPDES backlog.

A massive permitting backlog was inevitable when Congress implemented a comprehensive, national permitting scheme covering every point source discharging pollutants into the nation's waters. *See* 33 U.S.C. § 1311(a). Because new sources are constantly emerging and old sources must continually renew their permits, the backlog is not an issue that will easily go away. The logistical and administrative challenges inherent in managing the massive NPDES permitting program require an on-going and constantly adapting plan of attack, involving

[26] *Id.* at 2.

evaluation, prioritization, resource allocation, and periodic re-evaluations. It is up to Congress to provide the resources to enable these efforts.

EPA, in coordination with many state agencies, has worked diligently to maintain the backlog at a manageable level. To reduce the backlog much further appears to be beyond EPA's current resources. Despite knowledge of this reality,[27] Congress has neither required EPA to change course nor allocated the funds necessary to materially alter the situation. Thus, the backlog is here to stay for the foreseeable future.

While Petitioner may desire a statutory scheme that requires EPA to prioritize the review of permits for coal-fired facilities over other backlogged, administratively continued permits, Congress did not provide one in the CWA. In the absence of a clear Congressional mandate, the Court should not presume that Congress intends EPA to manage the backlog any differently than it has been for the last 40+ years.

[27] As discussed above, the NPDES permit backlog is a well-known fact; EPA even declared it a material weakness under the Federal Managers Financial Integrity Act in the late 1990s. *See* Memorandum from J. Charles Fox, EPA Assistant Adm'r, to Regional Adm'rs (May 4, 1999), *available at* http://www.epa.gov/npdes/pubs/reducing_backlog_memo.pdf; *see also* 31 U.S.C. § 3512(d).

B. Congress intended for EPA, not special interest groups, to administer the NPDES program.

To allow special interest petitioners to set renewal application priorities directly subverts the will of Congress regarding one of the most basic aspects of the CWA: who administers it. Congress designated EPA, not Sierra Club, as the body responsible for the implementation of the NPDES program.[28] It follows that EPA is the appropriate body to determine which permits warrant immediate attention in relation to national health and welfare priorities and which can wait, given the availability of current resources.

While the CWA specifically allows citizens to: 1) enforce specific effluent standards; or 2) compel EPA to perform its non-discretionary duties, this suit does not fit under either of those categories. Given the massive number of NPDES permits nationwide and the limited resources EPA has at its disposal, the determination of how to prioritize backlogged permits is at the heart of EPA's discretion as administrator of the NPDES program. EPA's role requires it to make tough choices; whether older permit renewal applications must give way to more

[28] *Cf., Commonwealth of Mass. v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995) ("Congress delegated to the EPA, not to the courts, the authority to administer the CWA toxic pollutant list and the CERCLA list of hazardous substances."); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (holding that "FERC's interpretation of § 401, or any other provision of the CWA, receives no judicial deference under the doctrine of *Chevron* . . . because the Commission is not Congressionally authorized to administer the CWA. . . . Congress delegated administration of the CWA to the EPA alone." (internal quotations omitted)).

pressing priorities is one of those. Sierra Club should not be allowed to use the judicial system to commandeer EPA's discretionary authority to determine the order in which NPDES permits are renewed (much less assist in drafting permits for sources it has overtly identified as ones it hopes to eradicate).

If the Court allows Sierra Club to succeed in this lawsuit, it will set a precedent enabling special interest groups to take advantage of the NPDES backlog by cherry-picking individual permits and moving them to the front of the line based on their own priorities. Such a precedent is particularly troubling because it would enable groups with sufficient resources to target certain industries or companies, creating a situation where the law is applied unevenly. This conceivably could include actions by competitors of permit holders seeking a competitive advantage. Moreover, it would unfairly prejudice those citizens without sufficient resources or organizational fortitude to file such lawsuits.[29]

It is well-known that Sierra Club is waging a campaign to eradicate coal. Neither Sierra Club nor any other non-governmental organization should be able to enlist EPA to fight this "war" for it. If EPA makes a scientific determination that

[29] This imbalanced effect would assuredly be at odds with EPA's increased focus on environmental justice. *See, e.g.*, EPA, *Environmental Justice*, http://www.epa.gov/environmentaljustice/ (last visited Jan. 12, 2017) ("Environmental Justice . . . will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.").

discharges from coal-fired plants warrant top priority, it can change its permit prioritization policy accordingly. In the meantime, EPA must treat those permits fairly according to the rules it has laid down.

Giving validity to mandamus petitions like the one before this Court will also make EPA and other agencies more apt to settle these cases with environmental groups. Agencies will be more likely to relinquish their discretionary powers to such groups, rather than allocating their already limited resources to defending uncertain lawsuits. The Court should not allow a third-party, like Petitioner, a seat at EPA's decision-making table, much less provide additional leverage for its negotiations.

C. This case will create precedent that greatly expands use of the extraordinary writ of mandamus.

Finally, if the Court validates the use of the extraordinary writ of mandamus as a vehicle for compelling an agency to take a specific, discretionary action, *despite* the agency's best efforts to carry out its regulatory responsibilities with the resources actually available, the Court should expect to see a flood of new mandamus petitions testing similar theories in different contexts. To compel an executive branch agency to take a specific action, when there is no direct mandate from Congress to do so, is an extreme measure that the Court should undertake only in the rarest cases.

CONCLUSION

For these reasons, Public Service Company of New Hampshire respectfully requests that the petition for a writ of mandamus be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this Response complies with the 7,800 word limit of Fed. R. App. P. 21(d)(1), because this document contains 7,712 total words, exclusive of those parts exempted by Rule 32(f). This motion also complies with the typeface and type-style requirements of Fed. R. App. P. 32(c)(2), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 13, 2017

/s/ Spencer M. Taylor
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2017, I electronically filed the foregoing with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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