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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re SIERRA CLUB, Petitioners.	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)

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Sierra Club respectfully submit this disclosure statement. The Sierra Club is a non-profit environmental organization incorporated in the State of California. The Sierra Club has no parent corporation nor is there any publicly held corporation that owns stock or other interest in the Sierra Club.

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I. INTRODUCTION

A. Relief Sought

On May 8, 2013, this Court denied Sierra Club's request for mandamus relief against the United States Environmental Protection Agency ("EPA") to force action on long-delayed National Permit Discharge Elimination System ("NPDES") permits for two coal-fired power plants – the Schiller Station in New Hampshire, and Mt. Tom Station in Massachusetts. *In Re: Sierra Club, Inc.*, No. 12-1860 (1st Cir. May 8, 2013) ("*Sierra Club I*"). There was no dispute that the permits were long overdue – at that time, nearly 15 and 17 years overdue, respectively – and, particularly given the plants' adverse environmental impacts, the Court found these delays both "concerning and extensive." *Id.* at 2.

Nonetheless, the Court denied relief based on EPA's representations that "it is working on the permits," and expected to issue "final permits by June 2016." *Id.* (emphasis added). The Court also relied on EPA's promises to take action on other permits with "greater environmental impact" during this time period, *id.*— including the Merrimack Station in New Hampshire, which EPA claimed was a "high priority." EPA Opp. to Pet. for a Writ of Mandamus ("EPA Opp.") , Decl. of David M. Webster (Mar. 14, 2013) ("Webster Decl."), ¶ 76(a) (Add. 65).

Unfortunately, more than three years later EPA has *still not issued new NPDES permits for either the Merrimack or Schiller Stations*. Instead, in response

to Sierra Club's letter raising concerns with this ongoing delay, EPA has recently suggested *new* timelines to complete the permits in 2017. *See* Sierra Club letter of Aug. 19, 2016 (Add. 86); EPA Letter of Sept. 21, 2016 ("EPA Letter") (Add. 89).

Although Sierra Club suggested incorporating EPA's new proposed deadlines into a Court Order, EPA has thus far refused to enter into a straightforward proposed consent order—as it did just last year on another matter—that would bind the agency to these new deadlines. *See In re Idaho Conservation League* , No. 14-1149, Joint Motion For An Order on Consent (D.C. Cir. Aug. 31, 2015) (Add. 98) and 811 F.3d 502 (D.C. Cir. 2016) (accepting Proposed Order putting EPA on a binding schedule).

In urging this Court to deny any relief in *Sierra Club I*, EPA emphasized that "Petitioners can always renew the petition should EPA" miss its promised deadline. EPA Opp. at 30. Following that invitation, and given EPA's insistence that it remain free to ignore even its newest deadlines, Sierra Club hereby respectfully renews its Petition, requesting that this Court take the same step other courts have taken under similar circumstances—issue a Writ of Mandamus requiring EPA to finally take action, and to issue final permits by June, 2017. *See, e.g., In re Pesticide Action Network N.A.*, 798 F.3d 809 (9th Cir. 2015) (granting second mandamus request against EPA after relying on EPA's promised deadlines to deny initial request); *In re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir.

2016) (setting Court ordered schedule for EPA to act in accordance with new deadlines to which the parties had agreed).

B. Issues Presented

The Merrimack and Schiller Stations' (hereafter "Coal Plants") NPDES permits expired long ago—19 years and 21 years ago, respectively. Although Congress directed EPA to reconsider and update these permits *every five years* to ensure continued and improved protection of the environment, EPA has thwarted this directive, permitting these plants to continue operating under enormously outdated standards set *decades ago*. This inaction constitutes unreasonable agency delay under 5 U.S.C. § 706(1), and warrants a Writ of Mandamus ordering EPA to take action finalizing these permits.

EPA's prolonged failure to update these expired permits has impaired and will continue to impair Sierra Club and its members' use and enjoyment of the Piscataqua River, Estuary and downstream waters, and the Merrimack River. *See* Declarations of Randolph Bryan and Benjamin MacBride (Add. 210-16). Sierra Club therefore seeks a Court Order that these permits be finalized by June, 2017.

II. STATUTORY AND REGULATORY BACKGROUND

In 1972, Congress found that "the Federal water pollution control program . . . has been inadequate in every vital aspect" and that a "complete rewriting" of federal water pollution law was imperative. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976); *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). As this Court has explained, the resulting federal Clean Water Act ("CWA") was the result, "a bold and sweeping legislative initiative" with broad and ambitious goals. *Dubois v. U.S.D.A.*, 102 F.3d 1273, 1294 (1st Cir. 1996).

In enacting the CWA, Congress declared the Act's objective to restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992). To achieve this objective, Congress declared a national goal of totally eliminating discharge of pollutants into our waters by 1985, and an interim goal of making water fit for fish, wildlife, and recreation wherever possible by July 1, 1983. 33 U.S.C. § 1251(a); *EPA v. California*, 426 U.S. at 203; *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 574 (D.C. Cir. 1980). As the Fifth Circuit has explained, while "the CWA's ambitious goal has not been achieved . . . ," this "does not vitiate Congress's intent that it be achieved as soon as possible." *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1488-89 (5th Cir. 1988).

The measure of whether waters are sufficiently clean under the CWA is provided by standards set by the States known as "water quality standards." 33 U.S.C. § 1311(b)(1)(C). Congress mandated two central regulatory strategies for achieving these standards: (1) requiring those discharging water pollutants to install a common floor of treatment technology nationwide and (2) requiring *additional* measures when those treatment technologies alone proves insufficient.

The CWA requires EPA (or states under certain circumstances not relevant here) to set two types of "effluent limitations" to carry out these two strategies: (1) technology-based effluent limitations, which require limiting pollutant discharges to the level attainable with specified treatment technologies, and (2) water quality based effluent limitations—additional limits imposed when the technology-based limits are not sufficient. These limitations must be set at the level necessary to achieve water quality standards. 33 U.S.C. § 1311(b); *see, e.g.*, *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *judgment reinstated*, 853 F.2d 667 (9th Cir. 1988); *Trustees for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984).

The CWA requires EPA to set technology-based effluent limitations at ever more stringent levels according to a tight and ambitious schedule. For example, EPA was supposed to impose effluent limitations based on application of "best practicable control technology currently available" by "not later than July 1, 1977,"

and limitations based on "best available technology economically achievable" by March 31, 1989. 33 U.S.C. § 1311(b)(1)(A), (b)(2). As the D.C. Circuit has explained, these technology-based effluent limitations are supposed to be "technology-forcing," *i.e.*, force development of new treatment methods:

> [T]he most salient characteristic of [the CWA] statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing . . . . The essential purpose of this series of progressively more demanding technology based standards was not only to stimulate but to press development of new, more efficient and effective technologies.

NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987); *see also NRDC v. Train*, 510 F.2d 692, 695-97 (D.C. Cir. 1974).

Congress mandated that water quality based effluent limitations be set at levels necessary to ensure attainment regardless of economic and technological restraints. *Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999); *Oklahoma v. EPA*, 908 F.2d 595, 597-98 (10th Cir. 1990), *rev'd on other grounds Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *accord In the Matter of: NPDES for City of Fayetteville*, 1988 EPA App. LEXIS 35, *13; 2 E.A.D. 594 (June 28, 1988) ("The meaning of [the CWA] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility"). Congress further mandated a strict deadline of July 1, 1977, which has long since passed, for achieving water quality based effluent

limitations designed to assure attainment with water quality standards. 33 U.S.C. § 1311(b)(1)(C).

EPA must incorporate technology-based effluent limitations and water quality based effluent limitations into NPDES permits. The CWA prohibits the discharge of pollutant-laden wastewaters from point sources such as the Merrimack and Schiller Coal Plants without a NPDES permit and further makes it unlawful to discharge pollutants in violation of the effluent limitations set forth in an NPDES permit. 33 U.S.C. § 1311(a); *see generally NRDC v. Train*, 510 F.2d at 696.

The CWA authorizes EPA (or states with permit programs approved by EPA) to issue NPDES permits allowing for the discharge of pollutants. 33 U.S.C. § 1342. Because New Hampshire does not have an EPA approved NPDES permit program, EPA itself issues the NPDES permits to the Coal Plants.

Critical for this Petition, Clean Water Act Section § 402(b)(1)(B) specifies that NPDES permits are to be issued *for fixed terms not to exceed five years*. 33 U.S.C. § 1342(b)(1)(B). The five-year limit on an NPDES permit's maximum duration establishes a mandatory expiration date at which the permit must be reviewed and updated to reflect changes in the law, the conditions of receiving

waters, or the requirements applicable to the permittees. *See* S. Rep. 414, 92d Cong., 2d Sess., at 42-46 (1971).[1]

III. FACTUAL BACKGROUND

A. The Coal Plants at Issue

The two Coal Plants at issue are the Merrimack Station located at 97 River Road in Bow, New Hampshire, and the Schiller Station at 400 Gosling Road in Portsmouth, New Hampshire. Both are owned and operated by the Public Service Company of New Hampshire, d/b/a Eversource, a wholly owned subsidiary of Northeast Utilities.

1. Merrimack Coal Plant

The Merrimack Coal Plant is a 470 megawatt coal-fired power plant with two steam turbine units located along the Hooksett Pool section of the Merrimack River. *See* 2014 Draft Merrimack Permit Fact Sheet at 7 (Add. 145). The Coal Plant withdraws water for cooling from, and discharges various pollutants — including heat—to the River. *Id.* at 8 (Add. 146). That water is processed in a once-through cooling water system that withdraws water from the river through two cooling water intake structures. Heated and polluted water is then discharged back to the river through a cooling canal. *Id.*

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[1] Under EPA regulations, a permittee may continue to operate under an expired permit if a new permit application has been submitted and is pending before the agency. 40 C.F.R. § 122.6; *NRDC v. EPA*, 859 F.2d 156, 213-15 (D.C. Cir. 1988).

The Coal Plant's wastewater also contains numerous toxic pollutants, from equipment and floor drains, "chemical drains, polisher regeneration, demineralizer regeneration, miscellaneous tank drains), intake bay dewatering and deicing, ash landfill leachate, metal cleaning waste, and storm water." *Id.* These pollutants can include mercury, arsenic, selenium, chlorine, oil and grease, suspended solids, arsenic, cadmium, chromium, copper, iron, lead, manganese, mercury, selenium, and zinc. *See* 2011 Fact Sheet on Draft Permit at 18- 26 (Add. 166-74). As EPA has recognized, the Merrimack Coal Plant releases more toxic pollution to the environment than any other facility in New England.[2]

As EPA also recognizes, without the long overdue new permit, Merrimack's operations "seriously impair water quality which has resulted in adverse impacts to the aquatic habitat and fish community in this segment of the river." EPA Press Release, "Updated Clean Water Discharge Permit for Merrimack Station in Bow," at 1 (Sept. 29, 2011) ("EPA Press Release") (Add. 176). The Coal Plant's existing system's water intake system also "contains millions of aquatic organisms, including fish eggs and larvae [which] are killed"–called "entrainment"–while the

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[2] United States EPA, *EPA Analysis Shows Increase in 2010 Toxic Chemical Releases in New Hampshire* (Jan. 5, 2012), *available at* http://yosemite.epa.gov/opa/admpress.nsf/O/DB3B894071AC40278525797C007D8564 (last visited November 18, 2016).

intake pipes trap "many juvenile and mature fish against the intake screens, causing injury or death to these fish"–called "impingement." *Id.*[3]

The Merrimack River is listed as a CWA Section 303(d) impaired waterway.[4]

2. Schiller Coal Plant

The Schiller Coal Plant is a 163 megawatt coal and wood fired steam electric generating facility located on the western bank of the Piscataqua River. 2015 Schiller Station Fact Sheet at 5 (Add. 186). Like the Merrimack Coal Plant, Schiller utilizes a once-through cooling system that withdraws water from the river through a cooling water intake structure, and discharges heated water and accompanying plant pollutants to the River. *Id.* at 2. As EPA has recognized, the

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[3] *See also* EPA Webpage on Merrimack Station Draft NPDES Permit, *available at* https://www3.epa.gov/region1/npdes/merrimackstation/ (last visited November 18, 2016) (Add. 180) ("Merrimack Station's thermal discharges have, indeed, harmed fish in the Hooksett Pool [and] thermal discharges have contributed to the alteration and depletion of fish populations . . .. Making matters worse, fish are also killed and injured by the facility's withdrawals of river water for its cooling needs. The water taken from the river contains fish eggs and larvae and these tiny creatures are pulled through the facility's cooling system and killed by exposure to harsh physical impacts, extreme water temperatures and toxic chemicals.").

[4] *See* List Of Threatened Or Impaired Waters, *available at* https://ofmpub.epa.gov/tmdl_waters10/attains_impaired_waters.show_list_approval_document?p_list_approval_docs_id=141 (last visited November 18, 2016).

Schiller Coal Plant is the second most polluting plant in New England. *See supra* n. 2.

Like the Merrimack Coal Plant, the Schiller Coal Plant's wastewater contains toxic pollutants within "demineralized regeneration waste, effluent from the oil/water separator, ash handling runoffs and plant operation drains, dirty water sumps, boiler blowdowns, cooling water system drainage, and wood boiler drains." Schiller Fact Sheet at 18 (Add. 199). The once-through cooling system also poses similar threats to fish and other organisms through impingement and entrainment. *Id.* at 97 (Add. 209) ("Schiller Station entrains and impinges large numbers of fish and macro crustacean eggs, larvae, juveniles and adults"). The River Estuary is also listed as a CWA § 303(d) impaired waterway.

B. EPA's Failure to Issue Timely NPDES Permits To The Coal Plants

1. The Merrimack Coal Plant's Still-Operative 1992 Permit, And The New Draft Permit EPA Refuses To Finalize.

EPA issued the most recent Merrimack Station NPDES permit in June, 1992. Merrimack Station Authorization to Discharge (June 25, 1992) at 1 (Add. 5). The permit expired on July 21, 1997, over nineteen years ago. *Id.*

EPA issued an initial draft revised Merrimack Station Permit on September 30, 2011. EPA 2011 Merrimack Station Draft Fact Sheet at 1 (Add. 149). That draft permit required the Station to replace the cooling water intake structure with a

closed-cycle system, which, EPA has explained, "allows for cooling water to be recycled so that water withdrawals from the river, and the mortality to fish eggs and larvae, can be reduced by 95 percent or more." EPA Press Release at 1(Add. 176). It also provided for an intake system that "will allow many fish that would have been impinged on the intake screens to successfully avoid impingement." *Id.* Further, the system would "reduce the amount of heat that Merrimack Station discharges to the river by 99 percent"–thereby allowing "the aquatic habitat . . . to return to a more natural state, thus providing the opportunity for a more robust and balanced fish community to exist in Hooksett Pool." *Id.* The Draft permit would also reduce the levels of pollutant discharges permitted at the plant.

In sum, according to EPA itself, this permit, if it is ever issued, would "*dramatically improve protections for the Merrimack River.*" *Id.* (emphasis added). However, while EPA issued a revised Draft permit in 2014, the agency has still not finalized this permit, and thus the outdated 1992 permit remains in effect.

2. The Schiller Coal Plant's Still-Operative 1990 Permit, and The New Draft Permit EPA Refuses To Finalize.

EPA issued the most recent Schiller Station NPDES permit in September, 1990. Schiller Station Authorization to Discharge (Sept. 11, 1990) at 1 (Add. 29). The permit expired in 1995, over 21 years ago. *Id.*

EPA issued a draft revised Schiller Station Permit on September 30, 2015. Like the Draft Merrimack Station permit, the Draft Schiller Station permit requires

the Station to take concrete steps to reduce adverse impacts to fish and other organisms, and to reduce the pollution being discharged into the river. *See* 2015 Draft Schiller Coal Plant Permit Fact Sheet (Add. 182). However, this permit also has yet to be finalized.

C. The Petitioner Sierra Club

The Sierra Club is America's oldest and largest grassroots environmental organization, with over 645,000 members, including over 4,000 in New Hampshire joined together to protect and preserve natural ecosystems, including the Merrimack and Piscataqua Rivers, and to work against environmental degradation from a variety of causes. *See* Declaration of Mark Kresowik (Add. 220). Sierra Club members are greatly concerned about water quality, and the Club has a long history of involvement in water quality related activities on both the local and national levels. *Id.*

Sierra Club members in New Hampshire regularly visit and enjoy the Merrimack and Piscataqua Rivers and nearby waters for recreation and swimming, and to view the birds, fish and other wildlife found in these areas. These members are concerned about the plants' water intake structures, which EPA has recognized injure and kill millions of aquatic organisms through impingement and entrainment, and harm additional marine species through the discharge of heated water. They are also concerned about the Coal Plants' pollution discharges and

their adverse impacts on water quality and the health of the waterbodies, as well as fish and bird species. *See* Declaration of Randolph Bryan, ¶¶ 2-9 (Add. 211); Declaration of Benjamin MacBride, ¶¶ 6-11 (Add. 214).

D. Prior Proceedings

In July, 2012, Sierra Club filed a Petition for Writ of Mandamus requesting that this Court direct EPA to take action on the long overdue permits for the Mt. Tom and Schiller Coal Plant Permits. *In re Sierra Club*, No. 12-1860, Petition for a Writ of Mandamus (1st Cir. July 9, 2012) ("*2012 Petition*"). Since there was some uncertainty at that time whether this Court had original jurisdiction, Sierra Club also filed an action in the district court. *Id.*, Exs. 3 and 4 (copies of district court action).

In opposing the *2012 Petition* and seeking to justify its delay, EPA's principal argument was that the agency was hard at work on *other* permits for facilities that "threaten greater environmental harm." *See* EPA Opp. at 23. Critically for the present Petition, the very first facility on EPA's list of those posing such risks—and therefore warranting expedited treatment—was the Merrimack Coal Plant. *Id.* (claiming that affording the requested mandamus relief would have the adverse effect of "delay[ing] completion of new NPDES permits for Merrimack station" and other facilities); *see also* Webster Decl., ¶ 76(b)

(claiming completion of the Merrimack Station permit "is a high priority for the region.") (Add. 65).

In the accompanying declaration explaining why EPA put such a high priority on completing the Merrimack Coal Plant, Mr. Webster—the Chief of the Water Permits Branch of the Office of Ecosystem Protection within EPA Region 1, *id.* ¶ 2—explained that the existing cooling system operation at Merrimack was causing "serious adverse effects on aquatic life" in the Merrimack River, necessitating "strict thermal discharge limits" in a new permit. *Id.* ¶ 76(b). He also explained that the agency had concluded that the facility discharges "a number of toxic pollutants (*e.g.*, mercury, arsenic and selenium)." *Id.* ¶ 76(c); *see also id.* ¶ 76(b) (discussing the need to impose "closed-cycle cooling" requirements to control thermal discharges and "to reduce entrainment"); *id.* ¶ 94 (noting that "Region 1's analysis for the Merrimack Draft Permit identified *significant adverse environmental effects*" from Merrimack's operations) (emphasis added).

Nonetheless, even taking its competing priorities into account, at that time EPA represented to this Court that it anticipated final updated NPDES permits for the Mt. Tom and Schiller Coal Plants *by no later than June 30, 2016*. EPA Opp. at 29; *see also* Webster Decl. ¶ 88 ("Region 1 estimates that it can take final action with regard to both permits [Mt. Tom and Shiller Station] by June 30, 2016"). Moreover, in urging that the Court deny the *2012 Petition*, the agency also

emphasized that "Petitioners can always renew the petition should EPA take significantly longer than anticipated to complete its work," EPA Opp. at 30—inviting the present mandamus Petition.

On May 8, 2013, this Court denied the Petition. The Court began by finding Petitioners have standing and original jurisdiction lies in this Court. *Sierra Club I* at 1. Turning to the merits, the Court emphasized that EPA's delays were "concerning and extensive," *id.* at 2, but denied relief on two grounds.

First, the Court found that EPA "has prioritized permits that have greater environmental impact." *Id.* Thus, the Court relied on EPA's representations that it was working on finalizing NPDES permits for other plants, and in particular for the Merrimack Coal Plant, as a basis to deny relief.

Second, the Court relied on EPA's representation that it would issue "final permits by June 2016" for Mt. Tom and Schiller Coal Plants. *Id.* Finding "the present record provides no reason to think that EPA will not work diligently to complete its tasks," *id.*, the Court accepted those representations as adequate, and declined to enforce EPA's timetable or otherwise take action to hold EPA accountable .

E. EPA's Continuing Delay, And Sierra Club's Efforts to Resolve These Issues Without Further Litigation

June 2016 has come and gone, and EPA has still not issued final permits for either the Schiller or Merrimack Coal Fired Power Plants. Rather, in response to

Sierra Club's recent letter reiterating concerns about these ongoing delays (App. 86), EPA provided a long list of new reasons these permits remain so long overdue, and made yet more entirely tentative and uncertain promises to finish them by a date certain. EPA Letter (Add. 89-96). Thus, while EPA now suggests the permits can be completed in 2017, the agency also states that, for various reasons, it "is impossible to be certain when Region 1 will issue final permits for these two facilities," including the "competing demands" facing the agency and the uncertainty of "staffing resources." *Id.* at 7.

Although not satisfied with these new deadlines, to avoid further litigation Sierra Club proposed that the parties enter into a Consent Order embodying EPA's proposed new dates, like the one the parties agreed to last year in *In re Idaho Conservation League*, 811 F.3d 502. *See* Oct. 26, 2016 email exchange (Add. 107-08). Under that approach, EPA would be under a Court Order to meet the new deadlines it proposes, but could obtain a further extension if that becomes necessary. *See In re Idaho Conservation* League, No. 14-1149, Motion For Order on Consent (Aug. 31, 2015) ¶ 7 (Add. 102) (providing that EPA can seek further extensions).

Unfortunately, EPA has not agreed to enter into such a Consent Order, necessitating the present Mandamus Petition.

IV. ARGUMENT

A. Sierra Club Is Entitled To Mandamus Relief Requiring EPA To Issue Final Revised NPDES Permits For The Merrimack And Schiller Coal Plants.

The Administrative Procedure Act ("APA") provides that a reviewing Court "shall [ ] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As this Court recognized in considering the earlier Petition, the First Circuit has adopted the test originally set forth in the D.C. Circuit to evaluate claims of unreasonable agency delay. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"); *see also Towns of Wellesley, Concord and Norwood, Mass. v. F.E.R.C.*, 829 F.2d 275, 276-77 (1st Cir. 1987) (adopting *TRAC*).

Under what is referred to as the *TRAC* factors, in considering requests for relief due to unreasonable agency delay a reviewing Court is called upon to consider the following:

> (1) the time agencies take to make decisions must be governed by a 'rule of reason,' (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any

> impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

750 F.2d at 80 (internal quotations and citations omitted); *Kokajko v. F.E.R.C.*, 837 F.2d 524, 526 (1st Cir. 1988) (applying the *TRAC* test).

Applying these factors here, it is evident that it is both necessary and appropriate for this Court to order EPA to finalize these two permits at this time. Indeed, as discussed in more detail below, this case is on all fours with other recent decisions where Circuit Courts have awarded Mandamus relief in light of EPA's extensive delays. *In re Pesticide Action Network N.A.*, 798 F.3d 809 (granting mandamus relief against EPA); *In re Idaho Conservation League*, 811 F.3d 502 (ordering binding timeline for EPA action on delayed rulemaking); *see also Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (awarding Mandamus relief for long-delayed federal agency action).

1. EPA's Delays Are Well Beyond the "Rule of Reason."

As the D.C. Circuit explained in a seminal case concerning unreasonable agency delay, while "a reasonable time for an agency decision could encompass 'months, [or even] occasionally a year or two," the rule of reason for agency delay cannot support a delay of "several years or a decade." *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987). Accordingly, in this and other Circuits, courts have routinely found agency delay that extends beyond a few years to be unreasonable. *See, e.g., Oxfam America v. SEC*, 126 F. Supp. 2d 168 (D. Mass.

2015) (four year delay found unreasonable); *Tang v. Chertoff*, 493 F. Supp. 2d 148, 157-8 (D. Mass. 2007) (four year delay unreasonable); *In re Core Comm., Inc.*, 531 F.3d 849, 857 and n.8 (D.C. Cir. 2008) (noting that the D.C. Circuit has found delays of four years, three years, and even nine months to be unreasonable); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (six years delay unreasonable); *Public Citizen Health Research Group (PCHRG) v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (finding three-year delay unreasonable).[5]

As the second *TRAC* factor provides, "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason." 750 F.2d at 80. Here, Congress made clear these permits should be revisited every five years. 33 U.S.C. § 1342(b)(1)(B). Given that these permits are now *24 years (for Merrimack) and 26 years (for Schiller)* old, it could not be more clear that EPA has violated the rule of reason.

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[5] *See also, e.g.*, *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009) (finding 2-1/2 year delay unreasonable); *Hong Wang v. Chertoff*, 550 F. Supp. 2d 1253 (W.D. Wash. 2008) (three-year delay unreasonable); *Sharadanant v. USCIS*, 543 F. Supp. 2d 1071 (D.N.D. 2008) (finding two-year delay unreasonable); *Liu v. Novak*, 509 F. Supp. 2d 1 (D.D.C. 2007) (finding four-year delay unreasonable); *Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29 (D.D.C. 2006) (almost three year delay unreasonable); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 114 (D.D.C. 2003) (finding that a five-year delay "smacks of unreasonableness on its face").

Both the Third and Ninth Circuits recently found Mandamus relief appropriate for far shorter delays than those at issue here. *In re Pesticide Action Network N.A.*, 798 F.3d 809; *Prometheus Radio Project*, 824 F.3d 33. In *Pesticide Action Network N.A.*, which concerned another Mandamus Petition against EPA, Petitioners had filed a 2012 Mandamus Petition seeking long overdue agency action, and—as in this case—the Court had denied the 2012 Petition in light of EPA's representations that it would act by a specific date. *Id.* at 812. When "EPA's timeline provided not to be 'concrete,'" Petitioners renewed their Petition. *Id.*

Granting the request for Mandamus relief, the Ninth Court found that "the 'rule of reason' has tipped sharply in" Petitioners' favor, relying not only on the passage of time, but on the agency's "significant history of missing the deadlines it has set in these proceedings." *Id.* at 814 (citing *Public Citizen Health Research Group v. Brock*, 83 F.2d 626, 629 (D.C. Cir. 1987)) ("In light of the fact that (the agency's) timetable representations have suffered over the years from a persistent excess of optimism, we share petitioners' concerns as to the probable completion date"). That same reasoning applies with full force here.

Similarly, in *Prometheus Radio Project*, 824 F.3d 33, after the agency had convinced the Court to deny relief over a prior Petition in light of promises for prompt action, the Third Circuit explained that, "at some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough

is enough." *Id.* at 37 (citations omitted). Thus, finding the ongoing delays intolerable and the agency's continued promises to act unconvincing, the Court ordered the parties to negotiate a schedule for the Court to impose, *id.* at 50—precisely the approach Sierra Club seeks here. *See also In re Idaho Conservation League*, 811 F.3d 502 (entering Court Order on negotiated schedule for EPA to act).

2. EPA's Intolerable Delay Plainly Risks Human Health and Welfare, Prejudicing Sierra Club and Its' Members Interests.

There can also be no legitimate dispute that "human health and welfare are at stake" here, thereby prejudicing Sierra Club and its members' interests, *TRAC*, 750 F.2d at 80—thus satisfying the third and fifth *TRAC* factors. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and timely implementation of the technology-forcing measures Congress directed be incorporated into NPDES permits every five years is vital to achieving this objective.

Indeed, EPA's *own* characterization of the concrete environmental improvements that will occur only when these permits are finalized itself demonstrates satisfaction of these factors. As noted, EPA has explained how, at under present conditions, the plants, *inter alia*, "seriously impair water quality," and cause "injury or death" to countless organisms through impingement and entrainment, and how the new Draft permits, once finalized, will dramatically

improve conditions in the waterbodies near both Plants. *See supra* at 8-11. Taken together with Petitioners' declarants, who explains how their enjoyment of the Merrimack and Piscataqua Rivers are compromised by the Plants' operations, it is evident both that human health and welfare are at stake, and that the agency's continued delays concretely prejudices Sierra Club and its members' interests—as well as those of others who rely on the health of these waterbodies.

The recent Rule EPA issued for Cooling Water Intake Structures at plants like the Merrimack and Schiller Coal Plants further highlight the urgency of finalizing these two permits. *See* Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014). As EPA explained, "withdrawal of cooling water by existing facilities removes and kills hundreds of billions of aquatic organisms," which are "either impinged (I) on components of the intake structure or entrained (E) in the cooling water system itself," while "thermal discharges may substantially alter the structure of the aquatic community," and "alter the location and timing of fish behaviors including spawning, aggregation, and migration . . . ." *Id.* at 48,303 and 48,320. However, critically for this Petition, the Rule's new requirements addressing these concerns

do not go into effect until new permits are finalized at plants like the Merrimack and Schiller Coal Plants. Id. at 48,358.[6]

Accordingly, these TRAC factors also weighs heavily in favor of granting Mandamus relief at this time. *See TRAC*, 750 F.2d at 80 (providing that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake").

3. EPA's New Rationales For Its Continuing Delays Ring Hollow.

The Fourth TRAC factors calls on the Court to consider the effect of the requested relief "on agency activities of a higher or competing priority." 750 F.2d at 80. As with the original Mandamus Petition over the Schiller Coal Plant, EPA seeks to defend its continued delays here by relying on other agency obligations it claims should take precedence. *Compare* Webster Decl., ¶¶ 65-79 (Add. 62-69)

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[6] EPA also issued new nationwide effluent guidelines for coal fired power plants like the Merrimack and Schiller Coal Plants. *See* Final Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015) ("Effluent Standards"). As EPA explained there, "the pollutants in steam electric power plan wastewater discharges present a "serious public health concern and cause severe ecological damage." *Id.* at 67,840 (emphasis added); *see also id.* (explaining that discharges of "toxic metals such as mercury, arsenic, lead, and selenium accumulate in fish or contaminate drinking water, [and] can cause adverse effects in people who consume the fish or water," including "cancer, cardiovascular disease, neurological disorders, kidney and liver damage, and lowered IQs in children."). As EPA also explained, there are "affordable technologies that are widely available" to reduce these discharge. *Id.* However, as with the Intake Structures rule, new requirements to address these problems are also not required at existing plants until renewed Permits are issued. *See id.* at 67,882.

(reciting long list of agency priorities delaying the Schiller Coal Plan permit until June 2016, including the "high priority" Merrimack Coal Plant Permit) *with* EPA Letter of Sept. 21, 2016 (Add. 89-96) at 2-7 (providing a new list of priorities in seeking to justify further delays).

As regards the Merrimack Coal Plant, in response to Sierra Club's *2012 Petition*, as noted, EPA relied on the serious environmental problems at that Plant as precisely the kind of higher priority that must be completed expeditiously. Thus, in his March, 2013 Declaration—*more than three-and-a-half years ago*—Mr. Webster explained how the Merrimack Coal Plant was causing "serious adverse effects on aquatic life," and how it has a "wastewater discharge stream including a number of toxic pollutants (*e.g.*, mercury, arsenic and selenium)." Webster Decl. ¶ 76(b) and (c). He further explained that addressing these problems is a "*is a high priority for the region*." *Id.*, ¶ 76(a) (emphasis in original).

Having precluded relief on the Schiller Coal Plant more than three years ago on the grounds the agency needed to more immediately address the "significant adverse environmental effects" from Merrimack's Coal Plant, *id.* ¶ 94, EPA should not now be heard to rely on yet other activities to justify its continuing delay at Merrimack.

As for the Schiller Coal Plant, in response to the *2012 Petition*, EPA claimed that, taking its other priorities into account, it would take three years to finalize the

permit, and assured the Court the permit process would be *completed* by June, 2016—more than four months ago. The Court similarly should not tolerate further delays on the Schiller Coal Plant Permit on the basis of *other* priorities now, when the Court already allowed EPA to take those priorities into account in resolving the *2012 Petition.*

As discussed above, *see supra* at 20-22, in several recent cases Courts have granted Mandamus relief under similar circumstances. In each case, the Court had earlier denied relief based on EPA (and other agency) promises for prompt action, and, in the face of a subsequent Mandamus Petition, faced new agency promises to act. In each case, the Court concluded that "enough is enough," and ordered Mandamus relief, leading to a Court ordered schedule to act. *See Prometheus Radio Project*, 824 F.3d at 49 (finding that having previously "put our faith in the Commission, we will not do so again"); *In re Pesticide Action Network N.A.*, 798 F.3d at 814 ("[i]ssuing a writ of mandamus is necessary to end this cycle of incomplete responses, missed deadlines, and unreasonable delay"); *In re Idaho Conservation League*, 811 F.3d 502 ; *see also, e.g.*, *In re Core Communications, Inc.*, 531 F.2d 849 (rejecting agency's renewed promise to act, explaining "(w)e have heard this refrain before").

Applying these recent decisions here, the Court should not defer to EPA's latest assurances that it has other priorities it must attend to before completing the Merrimack and Schiller Coal Permits.

B. This Court Should Grant Mandamus Relief.

EPA has recently represented that it now anticipates issuing final permits sometime in 2017. *See* EPA letter of Sept. 21, 2016 at 7-8 (Add. 95-96). Although the Court denied relief over the *2012 Petition* based on similar promises, at that time the Court stressed that "the present record provides no reason to think that the EPA will not work diligently to complete its tasks." *Sierra Club I* at 2.

The Court now faces a starkly different record. More than *three years* have passed and EPA has still not finalized these Coal Permits. The Merrimack Coal Plant is operating under an almost 25 year old permit, even though it was the very "high priority" permit EPA relied upon to preclude Sierra Club from obtaining relief in 2013. The Schiller Plant is operating under a more than 25 year old permit, and EPA has missed the June 2016 deadline by which it previously promised this Court would act.

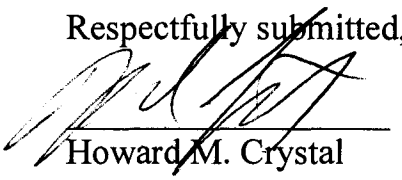
Accordingly, rather than once again defer to EPA's proposed schedule, Sierra Club urges the Court to Order EPA to finalize both permits by June, 2017. Given EPA's failure to act, it is time for the Court to finally Order into compliance. *See, e.g., United States v. Oakland Cannibis Buyers' Coop.,* 532 U.S. 483, 497

(2001) ("a court sitting in equity cannot ignore the judgment of Congress deliberately expressed in legislation"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (explaining courts must provide relief "necessary to secure prompt compliance with the Act" being violated).

V. CONCLUSION

In light of EPA's delays in issuing the Merrimack and Schiller Coal Plant Permits, which are vital to protect nationally important resources, Sierra Club respectfully urges the Court to grant their Mandamus Petition and direct EPA to finalize the Merrimack and Schiller Permits no later than June 30, 2017.

Respectfully submitted,



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Dated: November 23, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re SIERRA CLUB, Petitioners

CERTIFICATE OF SERVICE

I, Howard M. Crystal, hereby certify that on November 23, 2016 I served the foregoing Petition for a Writ of Mandamus, Addendum, and accompanying materials on the EPA and the United States Attorney General by mailing copies, certified mail, postage prepaid to:

Regina McCarthy, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
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Washington, D.C. 20460

Curt Spalding,
Regional Administrator U.S. EPA Region 1
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Boston, MA 02109- 3912

Loretta Lynch, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

I certify that the foregoing is true and correct.

Howard M. Crystal

Hampshire, including issues raised in proposed National Pollutant Discharge Elimination System ("NPDES") permitting for the Merrimack Station and Schiller Station coal-fired power plants. Sierra Club has fought to inform the public about the water quality and ecosystem harms accompanying effluent discharges associated with coal plants, as well as the harms caused by the cooling water systems for such facilities. We regularly advocate for effective implementation and strong enforcement of the Clean Water Act in New Hampshire.

6. Seeing action on the administratively continued NPDES permits for coal plants in New Hampshire is a priority for the Sierra Club. The Sierra Club had previously brought litigation pressing for action on the administratively continued Schiller Station NPDES permit in 2012, for example, before the United States Court of Appeals for the First Circuit.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed on [redacted]. 11/17/16

Mark Kresowik