Case No. 16-2415

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re SIERRA CLUB,

Petitioner.

OPPOSITION TO PETITION FOR MANDAMUS BY RESPONDENTS THE U.S. ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY AND CURT SPALDING

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Respondents, the United States Environmental Protection Agency, Gina McCarthy in her official capacity as Administrator of the United States Environmental Protection Agency, and Curt Spalding in his official capacity as Regional Administrator of Region 1 of the United States Environmental Protection Agency[1] (collectively "EPA" or the "Agency"), offer the following response to the Petition for a Writ of Mandamus filed by Petitioner Sierra Club ("Petition"). For the reasons set forth below, the petition should be denied.

INTRODUCTION

In 2013, Sierra Club and others sought a writ of mandamus to compel EPA to take final action by the petitioners' preferred deadlines on renewed National Pollutant Discharge Elimination System ("NPDES") permits under the Clean Water Act for two steam electric power plants—Mt. Tom Station in Massachusetts and Schiller Station in New Hampshire. The Court denied that petition. *See In re Sierra Club*, Case No. 12-1860, 2013 WL 1955877 (1st Cir. May 8, 2013) (hereafter "*Sierra Club I*"). The present follow-on to *Sierra Club I* addresses one of the two permits at issue in the earlier case—the NPDES permit for Schiller Station ("Schiller")—and an NPDES permit for an entirely different power plant, Merrimack Station in New Hampshire ("Merrimack").

[1] EPA Region 1 encompasses the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont, as well as ten Tribal Nations.

Contrary to the Sierra Club's arguments, the factual record, fairly viewed, indicates that EPA has proceeded responsibly, expeditiously, and entirely consistently with *Sierra Club I*. First, and most obviously, one of the two final NPDES permits at issue in *Sierra Club I*—the Mt. Tom permit—was in fact issued in September 2015. Decl. of David M. Webster, EPA Region 1, Chief, Water Permits Branch, dated Jan. 12, 2016, ¶¶8, 14, 79, 86 (hereafter "Decl."). Although a final decision on the second permit at issue in *Sierra Club I*—the Schiller Station permit—is taking somewhat longer than anticipated, as described below, this modest schedule adjustment is entirely understandable and reasonable in light of significant unanticipated challenges and competing resource demands. For example, subsequent to *Sierra Club I*, significant changes were made to two different sets of nationally-applicable NPDES permit regulations, which required comprehensive re-examinations of many non-final permits on the Agency's docket. Despite these and other challenges, however, EPA has already issued the proposed renewal permit for Schiller Station and collected voluminous public comments thereon, and presently expects to take final action on that permit by the end of this year.

While the higher-priority and exceptionally-complicated Merrimack permit was not at issue in *Sierra Club I,* since that time, EPA has also comprehensively re-examined the earlier-proposed Merrimack permit, developed and published a revised proposed permit, and collected voluminous public comments. Moreover, EPA is working diligently to respond as expeditiously as possible to the public comments for

both the Schiller and Merrimack permits and finalize them during the 2017calendar year.

In contrast, Sierra Club's current Petition seeks a wholly unnecessary mandamus order requiring final action on both permits by June 2017, a deadline that would jeopardize the substantive quality of these permit decisions, their underlying administrative records, and EPA Region 1's ability to address higher-priority issues on its docket.

Finally, it is worth noting that the Sierra Club's petition focuses almost entirely on the alleged "delay" that has occurred regarding backlogged permit decisions from the early 1990s until the present, rather than the "delay," if any, that has occurred with regard to the particular permits at issue here since the 2013 *Sierra Club I* decision. However, in *Sierra Club I*, the Court already fully considered and appropriately rejected these broader, historical programmatic allegations, crediting EPA's explanation that "the process is complex and [EPA] must balance competing priorities with its limited resources, . . . that it has a significant backlog of expired permits in this region, and that it has prioritized permits that have greater environmental impact." 2013 WL 1955877, at *1. While EPighlA recognizes that the Court certainly did not provide the Agency with unfettered discretion with respect to the timing of these decisions, the Court did expressly decline to impose a timetable for further administrative action, observing that "[t]he EPA recognizes the importance of completing its review and reissuance of these NPDES permits, and the present record provides no reason to

think that the EPA will not work diligently to complete its tasks." *Sierra Club I*, 2013 WL 1955877, at *1. As will be discussed below, the Court's earlier conclusion is, if anything, reinforced, not contradicted, by the present record.

Sierra Club's Petition therefore lacks merit and should be denied.

BACKGROUND

I. NPDES PERMITS UNDER THE CLEAN WATER ACT

Congress enacted the Clean Water Act ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of pollutant discharges to these waters. 33 U.S.C. § 1251(a). To accomplish this end, the CWA establishes a comprehensive regulatory program, key elements of which are: (1) a prohibition on the discharge of pollutants from point sources to waters of the United States, except as authorized by the CWA; and (2) authority for EPA or authorized States or Tribes to issue NPDES permits that regulate the discharge of pollutants through technology-based effluent limitations and, as necessary to meet state water quality standards, more stringent water quality-based effluent limitations. *Id.* §§ 1311, 1342.[2] *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976).

[2] NPDES permits also mandate pollutant discharge monitoring, reporting requirements, best management practices, and other steps to control and reduce water pollution. *See* 40 C.F.R. §§ 122.41-50. The permit-writing process must also account for, *e.g.*, whether discharges in one state may cause water quality standard violations in

The NPDES permit program may be administered by EPA or by states that have sought and obtained authorization to do so from EPA. *See* 33 U.S.C. § 1342(a), (b); 40 C.F.R. pt. 123. Within EPA Region 1, EPA issues NPDES permits to facilities located in Massachusetts and New Hampshire, and oversees and assists with the NPDES programs administered by Connecticut, Maine, Rhode Island, and Vermont. Decl. ¶20. EPA Region 1 is responsible for issuing more major NPDES permits than any other EPA Regional office. *Id.* ¶38.

A. The Administrative Process for NPDES Permitting

NPDES permits have fixed terms up to five years. 33 U.S.C. § 1342(b)(1)(B). If they are not renewed before that time, they are administratively continued while a timely and sufficient renewal application is pending before the Agency. 5 U.S.C. §§ 551(8), 558(c), 559. Consequently, facilities that submit timely and sufficient renewal applications continue to be regulated under their old NPDES permits until a final decision on their renewal applications, while facilities that do not are prohibited from discharging to navigable waters after their permit's expiration date. *See id.*; 33 U.S.C. § 1311(a); 40 C.F.R. § 122.6; *Costle v. Pacific Legal Found.,* 445 U.S. 198, 210-11 n.10 (1980).

The NPDES permit renewal process is initiated when the discharger files a renewal application no later than 180 days before the permit expires. 40 C.F.R. §

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a downstream state, and whether permits satisfy other federal laws such as the Endangered Species Act. *Id.* §§ 122.4(d), 122.49.

122.21(d). EPA reviews the application and notifies the applicant whether the application is complete. *Id.* § 124.3(c). Neither the CWA nor EPA's implementing regulations specify a timeframe for issuing or renewing an NPDES permit. *See id.* § 124.6.

The Agency is required to provide public notice of its proposed action on the renewal application, and receive public comment for a minimum of 30 days. *Id.* §§ 124.6(e), 124.20(b). EPA-prepared draft permits are supported by an administrative record and accompanied by a "Fact Sheet" setting forth "the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit," *id.* §§ 124.8(a), 124.9. EPA must consider all significant public comments, and together with a final permit, issue written responses to them. *Id.* §124.17.

Final NPDES permits issued by EPA to individual facilities may be administratively appealed to EPA's Environmental Appeals Board, and thereafter judicially appealed to the appropriate U.S. Circuit Court of Appeals. 33 U.S.C. § 1369(b); 40 C.F.R. § 124.19. Contested permit provisions do not become final, and therefore are not effective, until proceedings before the Environmental Appeals Board are concluded. 40 C.F.R. §§ 124.16, 124.60. They also cannot be judicially reviewed until after they become final. *Id.* § 124.19(*l*).

B. Setting the Effluent Limitations in NPDES Permits

The term "effluent" refers to materials that are discharged from a point source (*e.g.,* a discharge pipe). Effluent limitations in NPDES permits are limits on the levels of particular contaminants (*e.g.,* metals, solvents, heat) that may be present in such discharges. *See* 33 U.S.C. § 1362(11); 40 C.F.R. § 122.2 (def'n of *Effluent limitation*).

1. Federal Technology-Based Limits

Effluent limitations must, at a minimum, implement applicable federal technology-based standards. One such standard—that is applicable to the permits at issue in this case—is "the best available treatment technology that is economically achievable" ("Best Available Technology"). *See*, *e.g.*, 33 U.S.C. §§ 1311(b)(2)(A), (F), 1314(b)(2)(B). Technology-based effluent limitations restrict pollutant discharges, based on the degree of pollution control that can be achieved by application of particular technology-based standards.

The Best Available Technology is identified by investigating available technological options for an industrial category, with the objective of "elimination of discharge of pollutants if . . . such elimination is technologically and economically achievable" after considering certain statutory factors (*e.g.*,: the age of the equipment and facilities involved; the process employed; the engineering aspects of various types of control techniques; process changes; the cost of achieving pollutant reduction; and non-water quality environmental impacts). 33 U.S.C. § 1314(b)(2)(B); *see* 40 C.F.R. §

125.3(c)(2), (d). The option selected in light of those factors is considered the "Best Available Technology" for the industrial category under consideration.

Effluent limitations are then set for the industrial category based on the performance of the Best Available Technology ("Effluent Guidelines"), although dischargers can actually use any technology that meets their permit's effluent limitations. *See* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c)(2), (d); *Nat'l Res. Defense Fund v. EPA,* 568 F.2d 1369 (D.C. Cir. 1997). These industry-wide Effluent Guidelines are then used to set the corresponding effluent limitations for NPDES permits for individual facilities in those categories. *See* 40 C.F.R. pts. 405-471. In the absence of such industry-wide Effluent Guidelines, however, permitting authorities develop the effluent limitations for individual facilities by using their "Best Professional Judgment" to apply the Best Available Technology standard to the facilities on a case-by-case basis. 33 U.S.C. § 1342(a)(1)(B); *see* 40 C.F.R. § 125.3(c), (d). That case-specific analysis is, in essence, a "'mini-guideline' process," in which "the permit writer, after full consideration of the factors set forth in . . . 33 U.S.C. § 1314(b), . . . establishes the permit conditions 'necessary to carry out the provisions of [the CWA].' § 1342(a)(1)." *NRDC v. EPA*, 859 F.2d 156, 199 (D.C. Cir. 1988); *see also* 40 C.F.R. § 125.3(c)(2), (d).

2. Limits Based on State Water Quality Standards

Where technology-based limits will not result in meeting applicable state water quality standards ("State Standards"), permits must also require additional limitations necessary to meet those Standards. 33 U.S.C. § 1311(b)(1)(C). This requires additional analysis for each discharged pollutant. State Standards specify designated uses that the state's waterways must support (*e.g.*, high quality fish habitat, primary contact recreation), and specify narrative and numeric criteria necessary to protect those designated uses (*e.g.,* specific ambient water temperatures, levels of dissolved oxygen saturation). *Id.* § 1313; 40 C.F.R. § 130.3. Resulting water quality-based effluent limits for particular NPDES permits are determined by, in essence, back-calculating from the applicable State Standards to determine the limits needed to ensure compliance. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1).

3. Pre-November 2015 Effluent Limitations

For many steam electric power plants, including the Schiller and Merrimack plants at issue, waste heat and toxic contaminants from flue gas scrubbers and/or the handling and treatment of bottom ash and fly ash combustion by-products are important pollutants that their NPDES permits must address.[3] *See* 33 U.S.C. §

[3] Waste heat is excess heat absorbed by cooling water during the steam-drive power generating process in such facilities, while flue gas scrubbers remove pollutants and fly ash that otherwise would be released into the ambient air but may, depending on the process employed, transfer those pollutants to a wastewater by-product. Fly ash and bottom ash are waste materials generated during the combustion of, for example, coal.

1362(6); 40 C.F.R. § 122.44(b)(3). Between 1989 and 2015, EPA's Effluent Guidelines for the steam electric industry did not set Best Available Technology applicable to flue gas desulfurization wastewater, bottom ash transport water, or fly ash transport water. 40 C.F.R. pt. 423. Consequently, permitting authorities had to establish any Best Available Technology permit limits for pollutants from those constituents on a case-by-case basis, evaluating the statutory factors described in section 1314(b) on a Best Professional Judgement basis. *Supra* at 7-8; 33 U.S.C. § 1314(b) 40 C.F.R. § 125.3(c)(2), (d).

Because each water body is different, water quality-based effluent limitations also have to be determined on a case-by-case basis in light of the State Standards applicable to the receiving water. Both Massachusetts and New Hampshire have established State Standards pertaining to the thermal condition of their waters, and to pollutants found in the waste streams from flue gas scrubbers, bottom ash and fly ash. *See* 314 Mass. Code Regs. 4.03(1)(a), 4.05(3)(b)(2)(a), (b) (2013); N.H. Rev. Stat. Ann. § 485-A:8(II), (VIII) and N.H. Code R. Env-Wq 1703.01(b) and 1703.13(b).

In addition, Clean Water Act Section 1326(a) provides that a thermal discharger may qualify for less-stringent effluent limits based on a variance from technology and water-quality-based effluent limitations for its waste heat discharges, if it can

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See 40 C.F.R. §§ 423.11(e), (f) and (g) (definitions of "fly ash," "bottom ash," and "once through cooling water). *See also* 80 Fed. Reg. 67,846 (Nov. 3, 2015) (flue gas desulfurization, fly ash and bottom ash transport wastewaters).

demonstrate that such variance-based limits will nevertheless assure the protection and propagation of the receiving water body's balanced, indigenous population of shellfish, fish, and wildlife. 33 U.S.C. § 1326(a); *see also* 40 C.F.R. pt. 125, Subpart H. Requests for such variances, which facility owners often make, require EPA to conduct additional site-specific scientific analyses of the proposed discharge and its effects on aquatic life, in conjunction with other sources of impact. *See id.* § 125.73(c).

4. Post-November 2015 Changes in Controlling Federal Effluent Limit Regulations

In November 2015, seven months before Region 1 had anticipated finalizing the Schiller and Mt. Tom permits at issue in *Sierra Club I*, EPA published new national Effluent Guidelines for the steam electric generating industry. 80 Fed. Reg. 67,838 (Nov. 3, 2015). All non-final permits developed under the previous regulations therefore must be re-evaluated, and if necessary, revised to conform to the new requirements.[4] *See* 40 C.F.R. § 122.4(a), (b).

The new regulations address, among other things, flue gas scrubber and bottom ash and fly ash transport water contaminants. They do not, however, address heat discharges. Therefore, permitting authorities must still conduct all of the case-by-case evaluations described above (*i.e.*, technology-based, State Standards-based, and CWA 1326(a) variance-based) to establish effluent limits for heat discharges, in addition to

[4] The new regulations also are being challenged by industry and public interest groups before the U.S. Court of Appeals for the Fifth Circuit. *See Southwestern Electric Power Co. v. EPA,* Case No. 15-60821 (5th Cir.).

determining requirements under the new regulations for flue gas scrubber, bottom ash and fly ash contaminants.

C. Setting Requirements for Cooling Water Intake Structures in NPDES Permits

Pursuant to CWA section 1326(b), NPDES permits must also include requirements addressing "the location, design, construction, and capacity of cooling water intake structures." 33 U.S.C. § 1326(b). Such intakes structures are a common feature of steam electric generating plants, and are an environmental concern because aquatic life can be harmed as millions of gallons per day of cooling water are taken into the plant. The intakes cause very small organisms, such as fish eggs and larvae, to be killed or damaged when they are pulled into the plant (entrained), and larger organisms, such as juvenile and adult fish, seals, sea turtles and shellfish, to be caught and held on intake screens (impinged). *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 213 (2009); Decl. ¶52.

Until August 2014, there was no single set of national regulations for cooling water intake structures associated with existing steam electric generating plants. Instead, permitting authorities had to determine what requirements reflect the statutory standard on a case-by-case basis, using their Best Professional Judgment. 40 C.F.R. §§ 122.44(b)(3), 125.90(b). Such determinations required them to compare available technological alternatives, determine which were feasible and which achieved the greatest reductions in adverse environmental impacts, as well as the cost of each

option, its non-water environmental effects, its energy effects, and a comparison of its costs and benefits to determine if those costs are warranted. *Id.* Such site-specific biological, engineering and economic analyses were exceedingly challenging, and raised a wide range of issues that often triggered extensive and conflicting public comment. Decl. ¶58.

In August 2014, EPA published a national rule establishing Best Technology Available requirements (which are different form the Best Available Technology standard for effluent limits) for existing large facilities. 79 Fed. Reg. 48,300 (Aug. 15, 2014).[5] These regulations are comprehensive, both procedurally and substantively, and require permitting authorities to address specified engineering, biology, economic, energy and other technical issues related to the use of cooling water intake structures. *See* 40 C.F.R. Part 125, Subpart J; Decl. ¶65. Moreover, although the new regulations specify new standards and requirements, they still leave the technical analysis of the Best Technology Available to address entrainment to the individual permitting authorities, based on the conditions and factors associated with the specific facility. These analyses in Region 1 continue to trigger extensive and conflicting public comment. Decl. ¶¶65, 87(i), 89(g). As was the case for the new 2015 Effluent Guidelines, non-final Region 1 permits for facilities with cooling water intake

[5] This second set of new regulations also is being challenged by industry and public interest groups before the U.S. Court of Appeals for the Second Circuit. *Cooling Water Intake Structure Coal. v. EPA,* Case No. 14-4645 (2d Cir.) (consolidated).

structures had to be re-evaluated, and if necessary revised, to conform to the new 2014 requirements for cooling water intakes. *See* 40 C.F.R. §§ 122.43(a), (b)(1), 125.98(g).

FACTUAL BACKGROUND

As previously recognized by the Court, EPA continues to work diligently to address a backlog it has been tracking since 1992 of NPDES permits that have been administratively continued throughout the United States. Dec. ¶¶40-41; *see e.g., Sierra Club I,* 2013 WL 1955877, at *1. EPA Region 1 has been addressing its backlog by prioritizing the NPDES permits of greatest environmental and programmatic significance on its docket, including both new and backlogged permits. Decl. ¶¶12-13, 40-41.

NPDES permits for steam electric generating plants such as those at issue in this suit present a particularly large number of complex, specialized scientific, technical and legal issues that must be analyzed and resolved on a case-by-case basis. *Id.* ¶¶16, 43-76; *see supra,* at 7-14. Permitting for such facilities also is highly contentious, and generates large volumes of conflicting and often highly technical public comments from facility owners, the regulated community, and public interest groups. *Id.* ¶13, 46-47. Such permitting therefore must be performed, and the defense of subsequent administrative and judicial challenges be supported, by the same highly-trained Region 1 scientific and legal personnel. *Id.* ¶¶14, 79, 89(b), 98(a-b, d), 107-108.

In addition, the complicated regulatory regime for cooling water intake structures and effluent limitations—the issues of greatest interest to Sierra Club, and which consume huge amounts of permitting authority time and resources—has been in a state of flux since shortly after the *Sierra Club I* decision issued in 2013. *Id.* ¶¶58-66, 74-75; *supra* at 9-14. Consequently, a number of other non-final power plant permits, in addition to the proposed Schiller and Merrimack permits at issue here, had to undergo scientifically-complex and resource-intensive re-evaluation to determine whether revisions were necessary. *See* 40 C.F.R. §§ 122.43(a), (b)(1), 125.98(g); *Id.* ¶¶76. 84, 87(h), 90(c), 91(h).

Moreover, since the *Sierra Club I* decision, Region 1 has been in various stages of developing other high-priority NPDES permits, and a significant portion of the Region's time and resources were unexpectedly consumed to develop, propose and finalize a permit for the Northeast Gateway liquefied natural gas import terminal on short notice in 2014. Decl. ¶¶14, 92; *see infra* at n.7. Equally unexpectedly, the Region's lead attorney for power plant permitting had to devote a significant amount of time in 2015 and 2016 to developing national rulemakings needed to designate dredge spoils disposal sites in Long Island Sound. Decl. ¶¶93, 95. The Region's resources were further taxed by the retirement of one of its primary power plant permit writers, responding to several major Freedom of Information Act requests for records regarding power plant permits (including three for Merrimack alone), and

defending a number of administrative and federal court permit challenges. *Id.* ¶¶14, 89(b), 91(k, *l*), 95, 98(c).

Despite these very significant challenges, Region 1 has made—and continues to make—steady and significant progress on the permits at issue in this case and *Sierra Club I*. As the Agency represented it would do in *Sierra Club I*, Region 1 proposed and finalized the NPDES renewal permit for Mt. Tom. *Id.* ¶¶8, 79, 86. The Region also proposed the renewal permit for Schiller and collected voluminous public comments; re-examined the first proposed permit for Merrimack; issued a second, revised proposed permit for Merrimack; and collected voluminous public comments on it. Moreover, the Region is diligently working to address the complex scientific and economic issues raised in the public comments for Schiller and Merrimack in order to finalize both permits. *Id.* ¶¶8, 10, 87(i), 91(d, f, h), 99, 111.

As detailed in Mr. Webster's Declaration, EPA presently anticipates that it can finalize both permits during 2017, taking into account its currently-known competing priorities, resource issues, and the need to transition newly-appointed national and regional Agency officials into the permitting process, particularly those who must approve the final permits. *Id.* ¶¶17, 96-99. As was true in *Sierra Club I,* however, the Region also reasonably foresees that it may need to adjust the schedule for particular permits during the course of the year, in the event of possible *bona fide* priority changes among the various permits it is developing, or unlikely (*e.g.,* government shutdowns) or other entirely unexpected events. *Id.* ¶¶18, 103-110. For example, the

relative permitting priority of the Merrimack and Schiller steam plants and other permitting actions is not entirely clear cut, now that the coal-burning units at Merrimack and Schiller operate at less than 20% of their capacity and it is reasonably foreseeable that these facilities could shut down in the near future for economic reasons. *Id.* ¶¶87(e-g, j), 91(j), 106 & USAPP-179, 186 (Ex. D, G). For all of these reasons, EPA does not believe that it can responsibly articulate an iron-clad date for completion of either the Schiller or Merrimack permit, although the Agency currently anticipates that both will be finalized within the 2017 calendar year and is working diligently toward that target.

STANDARD OF REVIEW

Mandamus is regarded as "'a drastic remedy, reserved for 'extraordinary situations.'" *In re Sierra Club*, 2013 WL 1955877 at *1 (quoting *Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987)); *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). "Among its ordinary preconditions are that the agency or official have acted (or failed to act) in disregard of a clear legal duty and that there be no adequate conventional means for review." *In re City of Fall River, Mass.*, 470 F.3d 30, 32 (1st Cir. 2006).

When evaluating whether an agency's alleged delay is "so 'egregious' as to warrant mandamus," this Court uses the factors set forth in *Telecomm. Res. & Action Coal. v. FCC,* 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"):

> 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 [for a court] to hold that agency action has been unreasonably delayed.

Wellesley, 829 F.2d at 277 (citing *TRAC*, 750 F.2d at 80); *see e.g., In re Sierra Club*, 2013 WL 1955877 at *1 (quoting *Wellesley*). This test is "very deferential to administrative agencies," *Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 82 n.9 (1st

Cir. 1998), and even "a finding that delay is unreasonable does not, alone, justify judicial intervention." *In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991). Agencies are entitled to substantial deference in establishing a timetable for completing administrative proceedings, as the courts have recognized that they are generally "ill-suited to review the order in which an agency conducts its business" and are "hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). Consequently, the courts also retain discretion to deny mandamus relief even when the elements for mandamus are otherwise satisfied. *In re Barr Laboratories, Inc.* 930 F.2d at 75; *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997). When the standard for mandamus relief is not met, however, the case should be dismissed. *See Sierra Club v. Thomas*, 828 F.2d at 799; *In re United Steelworkers of Am., AFL-CIO-CLC, v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986).

ARGUMENT

There is simply no reason to believe that the extraordinary remedy of a mandamus order is necessary to ensure that EPA will work diligently to finalize the Schiller and Merrimack permits during the 2017 calendar year—a time frame that the Region has determined will provide sufficient flexibility to balance the substantive and procedural demands of those permits with competing priorities and other logistical and resource challenges the Region reasonably anticipates. This Court already held that mandamus was not warranted with respect to the Schiller permit as of 2013,[6] and the Agency has worked diligently to complete the Schiller and Merrimack permits since that time. Quite simply, *there has been no unreasonable delay* with respect to these permits since *In re Sierra Club*, 2013 WL 1955877, at *1. And once again, Sierra Club has failed to offer any reason at all why the Schiller or Merrimack permits should be moved ahead of any other particular matter in EPA Region 1's priority-based queue. *See id.* Sierra Club's demand that the Region nonetheless be ordered to finalize the Schiller and Merrimack permits by June 2017, thereby subordinating other higher-

[6] Region 1 recognizes that, overall, the Schiller and Merrimack permits have been administratively continued for more than 20 years. As explained in *Sierra Club I*, however, the Region issued many other difficult power plant permits for facilities of higher environmental impact over most of those years pursuant to its robust program of addressing its backlog of these exceedingly difficult permits in priority order. *See* Decl.. ¶¶13-14, 42, 81 & USAPP-80-162 (Ex. A).

priority projects and potentially compromising both permits substantively and procedurally, is patently unreasonable and should be denied.

I. EPA HAS NEARLY COMPLETED, NOT DELAYED, PERMITTING OF THE SCHILLER PLANT AT ISSUE IN *SIERRA CLUB I*, AS WELL AS THE MERRIMACK PLANT, WHICH WAS NOT AT ISSUE IN THAT CASE.

The federal courts have long held that mandamus is an extraordinary remedy that is only appropriate in truly extraordinary situations. No order whatsoever, much less a mandamus order, is warranted or necessary to ensure that EPA Region 1 completes the last item at issue in *Sierra Club I* (*i.e.*, finalizing the already-proposed Schiller permit) and finalizes the already-proposed Merrimack permit within an appropriate time frame. Since this Court last explored EPA Region 1's NPDES permitting in *Sierra Club I*—and expressly held that mandamus was *not* warranted—EPA Region 1 has worked diligently and has succeeded in completing nearly all of the work formerly at issue, as well as a substantial amount of other higher-priority work. *See* Decl. ¶14. This is true despite significant challenges that included comprehensive changes in two major sets of controlling federal regulations, unexpectedly having to fully permit the Northeast Gateway natural gas import terminal on short notice,[7]

[7] The Northeast Gateway import terminal unexpectedly became a time-sensitive, urgent permitting priority in 2014. New England was experiencing a significant shortfall of natural gas needed for power generation during cold weather, due to low pipeline capacity coupled with the region's heavy reliance on natural gas for both home heating and electrical generating. The facility had difficulty complying with its original NPDES permit, and the Region had to determine whether that permit could

issuing proposed permits for the higher-priority and enormously complicated Pilgrim nuclear and Merrimack stations,[8] issuing the higher-priority final permit for General Electric Aviation facility[9] and resolving the subsequent administrative appeal of the permit, the loss of the Region's senior permit writer, needing to address four large FOIA responses related to the Merrimack and Pilgrim permits, and defending a number of administrative and federal court challenges of previously-issued permits. *See supra* at 7-16; Decl. ¶¶9, 13-14, 89(b), 91(k)-*(l)*, 95, 98(c).

The Agency also is continuing to work diligently on the extensive and complex analyses necessary to respond to the voluminous and conflicting public comments for

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be revised to allow gas imports while also protecting the marine environment, and then develop, propose and finalize the revised permit before winter, so that the projected energy shortfall did not have to be made up with more-polluting and more-expensive oil-burning units. Decl. ¶¶92(a-f).

[8] While the Pilgrim nuclear power plant is scheduled to stop generating power in June 2019, it must undergo a lengthy decommissioning process thereafter during which certain pollutant discharges will continue. In the meantime, public interest remains high and the plant's open-cycle cooling system withdraws approximately 510 million gallons/day of water from Cape Cod Bay, and discharges numerous pollutants from many different waste streams. In contrast, Merrimack withdraws approximately 287 million gallons/day, and Schiller withdraws approximately 100. Decl. ¶¶87(d), 90(a-b), 91(a).

[9] During *Sierra Club I*, the GE Aviation facility was a higher priority than Schiller, because its power and steam generating facilities were directly across the Saugus River from another power plant that withdraws large volumes of cooling water and discharges wastes into a state-designated Area of Critical Environmental Concern. GE also challenged the final permit, diverting significant EPA Region 1 resources that otherwise would have been devoted to NPDES permitting. Decl. ¶¶89(a-c).

both the Merrimack and Schiller permits. Decl. ¶¶87(i), 91(d, f, h). Even if Sierra Club's proposed June 2017 deadline provided adequate time for that scientific work and the required administrative process to finalize and issue both permits—which it does not—it would disrupt the Agency's work on existing higher-priority projects and reduce the Agency's ability to respond to unexpected emergencies like the recently-issued Northeast Gateway permit. *Id.* ¶¶15-17, 100, 105. For all of these reasons, the extraordinary remedy of mandamus simply is not appropriate here, and Sierra Club's petition should be denied.

II. THE *TRAC* FACTORS ALSO WEIGH HEAVILY AGAINST MANDAMUS IN THIS CASE.

The application of the *TRAC* factors to this case—where EPA has worked diligently in the face of profound challenges since *Sierra Club I* to complete nearly all the work at issue—only emphasizes that there have been no unreasonable delays and there is no "extraordinary situation" before the Court of the kind for which mandamus is reserved.

A. A Rule of Reason Supports EPA's Post-*Sierra Club I* Actions and 2017 Time Frame for Final Action on the Schiller and Merrimack Permits.

The first *TRAC* factor, "'the time agencies take to make decisions must be governed by a rule of reason,'" is more than satisfied by EPA's completion of all permitting activities at issue in *Sierra Club I* except finalizing the Schiller permit, and its anticipated completion of the Schiller and Merrimack permits during the 2017

calendar year. *In re Core Commc'n, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *TRAC,* 750 F.2d at 80). The "rule of reason . . . cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). The reasonable time frame for agency action will depend in large part on "the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Id.* An "administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings," *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987), particularly when the proceedings present "complex scientific and technical issues," *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985).

EPA's December 2017 time frame represents less than one year from today to complete the final steps of the permitting process for the Schiller and Merrimack permits, as part of EPA Region 1's carefully-considered program to reduce its NPDES backlog in priority order (*i.e.,* based on the programmatic importance and the environmental impact of each item on its docket). This time frame is eminently reasonable in light of the complex, facility-specific, watershed-specific, ecological, technological and economic analyses the Region must conduct in order to evaluate and respond to the voluminous and conflicting public comments received for the proposed Schiller and Merrimack permits. *See supra* at 16; Decl. ¶¶16-17, 87(i), 91(d, f, h), 97, 99. For the same reasons, compounded by the many other logistical and

resource challenges the Agency encountered from 2013 and 2016, Sierra Club cannot credibly argue that any of the Agency's post-*Sierra Club I* permitting actions with respect to Schiller or Merrimack were *unreasonably* delayed. Indeed, it is telling that they do not even attempt to do so.

In stark contrast, the truncated June 2017 time frame urged by Sierra Club would deny the Region the time needed to conduct these analyses and reach considered results that are appropriately protective of public health and the environment and that are not arbitrary, capricious, or an abuse of discretion. *See Sierra Club v. Thomas*, 828 F.2d at 798-99. In addition, rushed and less fully-considered decisions are more likely to result in future challenges to the resulting permits and increase the risk of time-consuming remands to the Agency, thereby further delaying implementation of the very permit protections Sierra Club desires.[10] *Id.*; *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 555 (D.C. Cir. 1999) ("[T]he agency's plan may well shorten the overall period of delay by resolving issues that would otherwise become the subject of litigation."). EPA has never disputed that the

[10] Contrary to Sierra Club's protestations, Pet. Br. at 19-24, the reasonableness of EPA's permitting actions, from 2013 through its anticipated completion of the Schiller and Merrimack permits during the 2017 calendar year, is not undermined by the five-year term for NPDES permits under 33 U.S.C. § 1342(b)(1)(B), and the Administrative Procedure Act provision that the permits be administratively continued by operation of law upon filing of a timely and complete renewal application. 5 U.S.C. § 558. The courts have long concluded that, even in the face of a statutory deadline—which is not present here—a delay of years does not warrant mandamus relief when the administrative proceedings present complex issues. *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d at 554; *Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 476-78 (D.C. Cir. 1998).

length of the administrative continuances of the prior Schiller and Merrimack permits are significant, but nothing in EPA's actions since *Sierra Club I* supports Sierra's Club's view that the Court is in a better position than the Agency to determine the time needed to ensure that the final permits both be substantively correct and become effective as soon as is reasonably practicable given other competing priorities.

For all of these reasons, EPA believes that its December 2017 time frame for completing both the Schiller and Merrimack permits represents the application of a sound "rule of reason" to these two permits within the context of the Region 1 NPDES backlog and other responsibilities. The first *TRAC* factor therefore weighs strongly against a finding of unreasonable delay or a mandamus order in this case.

B. Health and Welfare Concerns Also Weigh Against Mandamus in This Case.

The second *TRAC* factor, the length of delay when human health and welfare are at stake, also weighs strongly against granting mandamus in this case. EPA Region 1's *entire* NPDES permitting docket involves the health and welfare of aquatic and marine environments and related ecosystems, which in turn directly affects human health and welfare. *See Sierra Club v. Thomas*, 828 F.2d at 798. Whether human and environmental health and welfare benefit or suffer "depends crucially upon the competing priorities that consume EPA's time, since any acceleration here may come at the expense of delay of EPA action elsewhere." *Id.* "Reshuffling the agency's files" to require final action on the Schiller and Merrimack permits within five months after

briefing closes—two facilities whose coal-burning units have operated at less than 20% of their capacity in recent years and which may close in the foreseeable future—would jeopardize not only the quality of the permits themselves and their administrative records, but also would deny the environmental and human health benefit that would flow from EPA Region 1's work on other projects of competing priority. *See e.g., In re Barr Laboratories, Inc.*, 930 F.2d at 76; Decl. ¶¶15-18, 87(e-g, j), 91(j), 97, 99-100, 102-103, 105 & USAPP-179, 186 (Ex. D, G).

The second *TRAC* factor recognizes that health and welfare concerns, on balance, are more important than purely economic concerns. It does not stand for the proposition that EPA should be deprived of the time reasonably necessary for complex decision-making and mandated administrative process, especially where *all* of the NPDES permits in EPA Region 1's carefully-managed backlog directly impact environmental and human health and welfare. This second *TRAC* factor therefore weighs against a finding of unreasonable delay and a mandamus order in this case as well.

C. EPA's Need to Balance Competing Priorities Also Weighs against Mandamus in This Case.

As in *Sierra Club I*, the third *TRAC* factor—the effect that expediting agency action may have on agency activities of a higher or competing priority—still weighs most heavily against mandamus. *See Sierra Club I,* 2013 WL 1955877, at *1. Congress has assigned EPA very broad responsibilities not only under the CWA, but also under

other equally complex environmental statutes. *Sierra Club v. Thomas*, 828 F.2d at 798. Congress also has provided EPA with finite, and potentially diminishing, resources to meet these competing responsibilities. *Id.;* Decl. ¶¶42, 97, 100, 102, 105, 110. While these structural challenges have not changed significantly since *Sierra Club I*, EPA Region 1 has worked diligently (and with considerable success) implementing its carefully-managed plan to address its NPDES permit backlog *in priority order*.

Inexplicably, just as EPA is addressing the very last item from *Sierra Club I* (i.e., the final Schiller permit, having completed the proposed and final Mt. Tom permits, and proposed Schiller permit), Sierra Club again requests the same relief this Court denied before: "'a judicial order putting [two NPDES permit renewal applications] at the head of the queue'" which would "'simply move[] all others back one space and produce[] no net gain.'" *Id.* at *1 (quoting *In re Barr Laboratories*, 930 F.2d at 75). That clearly is no remedy at all, especially where Sierra Club once again fails to "show[] why these two particular permits should be moved ahead of the queue by [this] court." *Sierra Club I*, 2013 WL 1955877, at *1.

Indeed, EPA Region 1 has made reasoned policy decisions that action on other permits and facilities is even more compelling, and that precipitously finalizing the Schiller and Merrimack permits would be counterproductive. As this Court recognized before, these two permits are among a significant number of NPDES permits, including other backlogged permits, with respect to which EPA Region 1 is implementing a clearly-articulated plan to address *in priority order*. *Sierra Club I*, 2013

WL 1955877, at *1. The priority of the Schiller and Merrimack permits also has not remained static, as the plants' coal-burning operation levels have sunk well below 20% and there is a distinct possibility that one or both facilities may be shut down for economic reasons. Decl. ¶¶87(e-g, j), 91(j), 106 & USAPP-179, 186 (Ex. D, G).

Since *Sierra Club I*, the Region also has completed permits for other higher-priority power plants and facilities, such as the GE Aviation and the Northeast Gateway final permits, and the Pilgrim Nuclear Power Station draft permit. *See supra* at nn.7-9; Decl. ¶¶14, 89-90, 92, 94-95. Other significant work, including NPDES permits for facilities that directly affect human health and welfare (*e.g.*, municipal sewage treatment plants, municipal separate storm sewer systems), whether backlogged or not, also must be appropriately prioritized. EPA Region 1 is significantly concerned that EPA's ability to manage priorities in the greater public interest could be lost if this Court orders a schedule for the permits of greatest interest to Sierra Club, and particularly if that emboldens other parties to disrupt the Agency's ongoing work by bringing similar actions in other contexts.[11] Decl. ¶108.

Moreover, significant work remains to be done to address the complex ecological, technological and economic issues raised in the voluminous and conflicting public comments for the Schiller and Merrimack permits before they can be finalized,

[11] As discussed *supra* at 14, the defense of NPDES permit-related litigation (including this case) is supported by the Region's permitting staff, both legal and scientific. *See also* Decl. ¶¶14, 79, 89(b), 98(a-b), 107-108.

particularly for the re-proposed Merrimack permit. *See supra* at 7-13; *Decl.* ¶¶15-16, 91(d, f). The severely truncated time frame urged by Sierra Club would make it impracticable for the Agency to do so, thereby jeopardizing the scientific and legal soundness of the permits, and increasing the likelihood of administrative and legal challenges that could delay the effective date of challenged provisions for years. *See supra,* at 24-26.

EPA is not arguing that the Schiller and Merrimack permits are unimportant, but rather, that their schedules should not be accelerated at the expense of their own validity and the Region's efforts to balance other work of competing priority. The third *TRAC* factor therefore weighs strongly against a finding of unreasonable delay and mandamus in this case as well.

D. Sierra Club Does Not Identify an Interest Prejudiced by EPA's December 2017 Time Frame.

The fourth *TRAC* factor, the nature of the interests prejudiced by delay, also does not weigh in favor of mandamus. In its current Petition, Sierra Club essentially complains that EPA did not complete the very last steps of the Schiller and Merrimack permitting processes in the time frame that this Court expressly *declined* to mandate in *Sierra Club I*. *Sierra Club I*, 2013 WL 1955877, at *1 ("While petitioners ask us to enforce this timetable [for the Mt. Tom and Schiller permits], we decline to do so."). As it turns out, EPA's completion of the Mt. Tom permit and all but the very last step of the permitting process for Schiller and Merrimack in the face of serious

challenges, *supra* at 21-22, shows that this Court was correct when it stated that, "The EPA recognizes the importance of completing its review and reissuance of these NPDES permits, and [there is] no reason to think that the EPA will not work diligently to complete its tasks." *Id.* Sierra Club has no *bona fide* "interest" that has been prejudiced by EPA's diligence in performing the work this Court anticipated that it would perform.

E. There Is No Allegation of Impropriety.

Finally, while the fifth *TRAC* factor provides that the Court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed,'" it is telling that Sierra Club has *never* suggested that EPA acted in bad faith. *See TRAC*, 750 F.2d at 80 (citations omitted). Nor has there been any "lassitude" on EPA's part. Rather, as explained above and in the Webster Declaration, EPA has been working diligently to address the complex technical and scientific issues involved in issuing NPDES permits to the Mt. Tom, Schiller, and Merrimack steam electric power plants, and other facilities in its backlog and current application list in priority order. Decl. ¶¶8-17, 85-92, 94. For the many reasons detailed in the Webster Declaration, EPA Region 1 reasonably determined based on current facts that it may need until as late as December 2017 to complete action on the Schiller and Merrimack permits. Therefore, to the extent this factor has any bearing on this case at all, it also counsels *against* a finding of unreasonable delay and a mandamus order in this case.

For all of the foregoing reasons, Sierra Club failed to demonstrate either that EPA unreasonably delayed the completion of the Schiller and Merrimack permits, or that the situation before the Court otherwise is so extraordinary that a mandamus order is necessary to ensure that the Agency will work diligently to complete them within a reasonable time frame. Consequently, the Court should deny Sierra Club's Petition.[12]

CONCLUSION

For all these reasons, the Court should deny and dismiss the Petition for a Writ of Mandamus.

[12] Even if the Court had some concern about the potential for future delay, it should deny Sierra Club's request for imposition of a court-ordered timetable. *See* Petition, at 2. The cases cited by Sierra Club in support of this request—*Idaho Conservation League* and *Pesticide Action Network*—are wholly inapposite insofar as they involved the appropriate form of court-ordered relief *after* a finding of unreasonable delay had already been made. The Court rejected such a finding in *Sierra Club I*, and for the reasons discussed above, it should do so here as well. If the Court dismisses the Petition, as EPA believes it should, Petitioners can always renew it should EPA take significantly longer than anticipated to complete its work.

Respectfully Submitted,

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Dated: January 12, 2017

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that the foregoing Response complies with Federal Rules of Appellate Procedure 21(d) and 32(c)(2), because it is proportionately spaced, uses the 14-point Garamond typeface which complies with the requirements of Rule 32(a)(6), and contains 7,795 words, exclusive of those parts exempted by Rule 32(f). I have relied on Microsoft Word's calculation feature.

Date: January 12, 2017

/s/ Heather E. Gange
Heather E. Gange

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following party or its counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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