

AR-1429

# United States Court of Appeals For the First Circuit

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No. 12-1860

IN RE: SIERRA CLUB, INC., ET AL.,

Petitioners.

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Before

Lynch, Chief Judge,  
Torruella and Thompson, Circuit Judges.

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## JUDGMENT

Entered: May 8, 2013

Petitioners Sierra Club and Our Children's Earth Foundation have filed a petition for a writ of mandamus, arguing that the EPA has unreasonably delayed reissuing NPDES permits to two steam electric power plants, Mt. Tom Station in Massachusetts and Schiller Station in New Hampshire. We have considered the various submissions.<sup>1</sup>

We hold at the outset that at least petitioner Sierra Club has standing to pursue this petition. See Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 972 (1st Cir. 1993) (noting that standing by one party as to each claim is sufficient); Friends of the Earth, Inc. v. Laidlaw Envntl. Servs. (TOC), Inc., 528 U.S. 167, 181-83 (2000) (discussing standing requirements). We also hold that our court has jurisdiction over petitioners' claims of unreasonable delay in the reissuance of the NPDES permits. See 33 U.S.C. § 1369(b)(1)(F) (vesting exclusive jurisdiction in courts of appeals to review "the Administrator's action ... in issuing or denying any permit under section 1342 of [the CWA]"); Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 535, 538 (1st Cir. 1997) (noting that party could pursue writ of mandamus from court of appeals to challenge agency inaction where appellate court is exclusive forum for review of agency action), citing Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) (TRAC).

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<sup>1</sup>We grant the motions to intervene by Public Service Company of New Hampshire and Mt. Tom Generating Company, and the motion for leave to file a response as amicus curiae by the Utility Water Act Group.

Turning to the merits of this petition, we note that mandamus is a drastic remedy, reserved for "extraordinary situations." Towns of Wellesley, Concord & Norwood, Mass. v. FERC, 829 F.2d 275, 277 (1st Cir. 1987) (internal quotations and citations omitted). While the EPA's delays in reissuing the NPDES permits are concerning and extensive, petitioners have not shown that mandamus is warranted under the circumstances presented here. See id. (discussing TRAC factors). The EPA states that it is working on the permits, but the process is complex and it must balance competing priorities with its limited resources, explaining that it has a significant backlog of expired permits in this region, and that it has prioritized permits that have greater environmental impact. Petitioners have not shown why these two particular permits should be moved ahead of the queue by our court. See, e.g., In re Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991) (denying mandamus, even though all other TRAC factors favored it, where "a judicial order putting [petitioner] at the head of the queue [would] simply move[] all others back one space and produce[] no net gain").

The EPA estimates that it will issue draft permits to Mt. Tom and Schiller by June 2014 and final permits by June 2016, and petitioners have replied that they are amenable to the EPA's schedule. While petitioners ask us to enforce this timetable, we decline to do so. The 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.

The petition for a writ of mandamus is denied.

By the Court:

/s/ Margaret Carter, Clerk.

cc:

Michael Kevin Callahan  
Nora Jo Chorover  
James Nelson Christman  
Amy J. Dona  
Michael D. Freeman  
Seth D. Jaffe  
Christopher Alan Sproul  
Spencer McCartney Taylor  
Lea J. Tyhach