

# Attachment 3



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Region 1**  
**5 Post Office Square, Suite 100**  
**Boston, MA 02109-3912**

September 21, 2016

Mark Kresowik  
Eastern Region Deputy Director  
Sierra Club's Beyond Coal Campaign  
50 F Street NW - 8th Floor  
Washington, DC 20001

Re: NPDES Permits for the Merrimack Station and Schiller Station Power Plants

Dear Mr. Kresowik:

Thank you for your letter of August 19, 2016, to Curt Spalding, Regional Administrator of the United States Environmental Protection Agency's Region 1 office (Region 1 or the Region), and Mark Stein, an attorney with Region 1's Office of Regional Counsel. Your letter expresses the Sierra Club's concern with the "slow pace" of the process for developing updated National Pollutant Discharge Elimination System (NPDES) permits for the Merrimack Station and Schiller Station power plants in New Hampshire. Moreover, you state that "[u]nless we are promptly assured that EPA intends to expedite its issuance of the final Merrimack and Schiller NPDES permits by a date certain, we will once again take legal action seeking an order compelling EPA to issue the overdue permits."

To begin with, we assure you that management and staff at Region 1 want nothing more than to issue the Merrimack and Schiller permits, and complete other important work, as fast as possible. The issue is not that these permits have been ignored or willfully delayed. Both permits are high priority work items. The timeline for the permits is the result of competing priorities, staffing limitations, the complexity of the work, and the care that is needed to do the job well. Below we provide some detail on these points. In addition, as you have requested, farther below we identify our current timeline for issuing the Merrimack and Schiller permits as expeditiously as possible. These target dates cannot be "carved in stone," but they represent our best current estimate of when we will be able to issue each permit.

I want to be clear that Region 1 did not develop and provide this estimated schedule to you only because you have threatened a lawsuit. The Region was already focused, and has been focused over time, on moving these permits ahead as fast as possible and we try to have and maintain internal schedules for such work items. That said, our timelines have to account for a variety of factors, including new legal developments, competing

priority work, staffing limitations and other factors discussed in this letter. Sometimes these factors require timelines to be adjusted. While Region 1 did not develop this estimated schedule for the permits because you have threatened a lawsuit, I also want to be clear that we *do* hope to avoid a lawsuit over this because litigation would inevitably further delay issuance of these permits (and the completion of other work as well). New litigation would add yet another time-consuming, high priority project to the existing workload of the managers, attorneys and technical staff assigned to these permits (among other projects). This would divert time and energy from completing the permits.

#### *Prior Estimated Permit Schedules*

On March 6, 2013, Region 1 filed a Declaration in *In re Sierra Club, et al.* (1<sup>st</sup> Cir., Case No. 12-1860) (the 2013 Declaration), the lawsuit you filed regarding the schedules for the Schiller Station and Mount Tom Station NPDES permits. (The suit did not assert a claim regarding the Merrimack station permit.) In the 2013 Declaration, Region 1 explained, among other things, why developing NPDES permits for power plants is often so difficult and time-consuming. The Region also detailed its track record of successfully issuing such permits and identified a range of priorities competing for the time of the staff at Region 1 with the specialized expertise needed to develop these permits. The Region also indicated that while the Schiller and Mount Tom permits were high priorities, several other power plant permits were even higher priorities at that time.

All that being said, Region 1 provided an estimated timeline for completing the Schiller and Mount Tom permits. Specifically, the Region estimated that draft permits could be issued for both facilities by June 2014 and final permits by June 2016. The Region made clear that the targeted dates were unavoidably subject to change and that a variety of circumstances could potentially delay completion of the higher priority permits, which could, in turn, contribute to delaying the Schiller and Mount Tom permits.

Since the 2013 Declaration was filed, many of those delaying circumstances occurred. For example, all of the following have transpired:

- *New Regulations:* On May 19, 2014, EPA signed new regulations setting technology requirements under Section 316(b) of the Clean Water Act for cooling water intake structures at existing facilities (the 2014 CWA § 316(b) Regulations). 79 Fed. Reg. 48300, 48424 (Aug. 15, 2014). This has necessitated careful consideration, and in some cases *reconsideration*, of proposed permit conditions to ensure consistency with the new CWA § 316(b) requirements.
- *New Regulations:* On September 30, 2015, EPA signed new Effluent Limitation Guidelines for the Steam-Electric Power Plant industrial category (the 2015 Steam-Electric ELGs). 80 Fed. Reg. 67838, 67893 (Nov. 3, 2015). This has necessitated careful consideration, and in some cases

*reconsideration*, of certain proposed effluent limits to ensure consistency with the ELGs.

- *Litigation*: The new final NPDES permit issued to the General Electric Aviation facility in Lynn, MA, was appealed by the permittee. This litigation delayed the new permit from taking effect and made demands on staff time that delayed completion of other high priority work.
- *New Emerging Priorities*: After the 2013 Declaration was filed, prompt reissuance of the Northeast Gateway offshore liquefied natural gas (LNG) import terminal emerged as a high priority work item. Work on this permit demanded the attention of key staff, which contributed to delays in completing existing priority actions.
- *Extended Comment Periods & Responses to Comments*: Lengthier-than-usual comment periods, and/or extended time for responding to comments or issues more difficult or voluminous than expected, has been an issue for several permits.
- *Government Shutdown*: The Government shutdown of 2013 occurred after the 2013 Declaration was filed and had a delaying effect extending beyond just the specific period of the shutdown. The shutdown was highly disruptive due to the need to spend time planning for the shutdown, the lost work hours during the shutdown, and the large element of uncertainty that it injected into all of EPA's work.
- *Reduced Staffing*: Reduced staffing has also affected the pace of this permitting work as the Industrial Permits section lost three permit writers since the 2013 Declaration was filed, and only recently has been able to hire a new permit writer as a replacement for one of the losses. This has particularly affected the GE Aviation, Merrimack Station and Schiller Station permits.

Despite these, and other, factors causing delay, Region 1 has continued working diligently on its power plant permits since filing the 2013 Declaration. As a result, the Region has made good overall progress, meeting or exceeding some targets, and needing further time to meet others.

### ***Highest Priority Power Plant Permits***

In the 2013 Declaration, Region 1 indicated that the NPDES permits for the following three power plants were of higher priority than the Schiller and Mount Tom permits: General Electric Aviation; Merrimack Station; and Pilgrim Nuclear Power Station. As discussed below, EPA has made substantial progress for each.

*General Electric Aviation (Lynn, MA)*

Region 1 issued the new final NPDES permit for GE Aviation on September 30, 2014. This permit would have been issued sooner but the primary permit writer on the project left the Agency and the Region had to reassign the project to another permit writer. This was not a simple matter because the permit raised a variety of complex issues, including assessing the ramifications of the 2014 CWA § 316(b) Regulations.

Unfortunately, the final permit was then appealed. Ultimately, after months of negotiations, a variety of procedural filings in the permit appeal litigation, and issuance of certain modifications to the permit, the permit appeal was dismissed on September 29, 2015, and the new permit went into effect. Additional modifications needed to be issued in July 2016. Ultimately, the permit achieved a number of important environmental improvements, including reduced thermal discharges, reduced cooling water withdrawals, and improved control of stormwater discharges into a state-designated Area of Critical Environmental Concern.

*Merrimack Station (Bow, NH)*

For Merrimack Station, Region 1 issued the Draft Permit (on September 30, 2011) and completed the public comment period (on February 25, 2012) well prior to filing the 2013 Declaration. Since the Declaration was filed, however, Region 1 took the major step, based on new information, of issuing a Revised Draft Permit to the facility on April 18, 2014. The Revised Draft Permit altered the proposed effluent limits for pollutant discharges from the facility's flue gas desulfurization (FGD) system. Because of the substantial public interest in these effluent limits, EPA held an extended, two-tiered public comment process on the Revised Draft Permit. The comment period ended on October 22, 2014.

Since that time, the Region has continued working toward a new Final Permit, but has had to assess the ramifications of both the 2014 CWA § 316(b) regulations and the 2015 Steam-Electric ELGs. In addition to dealing with these regulatory issues, and working to consider and respond to public comments received on the CWA § 316(b) and FGD wastewater issues, the Region has also been engaged in substantial work to consider and respond to comments submitted on the facility's thermal discharge issues, as well as issues related to pollutant discharges other than FGD wastewater that are also affected by the new Steam-Electric ELGs.

This work was slowed for a period by the retirement of the primary permit writer assigned to the project. While the project was reassigned to another experienced permit writer, time was inevitably lost as the new employee came up to speed on the project.

In sum, finalizing the Merrimack Station permit remains a very important priority for Region 1. While the Region notes that the facility's actual environmental effects have been reduced in recent years because of the power plant's reduced operations, the permit is still significant because the facility is seeking a permit that authorizes operation at the

higher levels experienced in the past, and because current operations can still be substantial on a seasonal basis (e.g., during warm summer conditions).

Moreover, Region 1 has investigated New Hampshire's recent utility restructuring program, which is calling upon the facility's owner, Eversource, to divest itself of Merrimack Station and other generating assets. From this research, the Region has learned that there are no current plans or requirements to close the facility. Therefore, Region 1 continues to approach this permit as an important priority. The Region has made significant progress on the permit but has more to do. Farther below we identify our current target date for completing this permit.

#### *Pilgrim Nuclear Power Station (Plymouth, MA)*

At the time of the 2013 Declaration, Region 1 was working on a new NPDES permit for the Pilgrim Nuclear Power Station (Pilgrim) but had not yet issued a draft permit. Since that time, the new 2014 CWA § 316(b) regulations were issued, which included a new provision specifically pertaining to nuclear power plants. Region 1 continued its work to develop a new draft permit, now taking into account the new regulations. Then the company announced plans to cease electrical generation by the Pilgrim facility in 2019. Region 1 engaged in more information gathering related to this change in the facility's plans and again recalibrated its draft permit.

The Region issued a new draft permit for Pilgrim in May 2016, taking into account the new regulations, the facility's current operations and its future plans for terminating operations. Region 1 has received substantial public comments representing a range of viewpoints and is now working to consider and respond to these comments and finalize the permit.

#### *Reissuance of the Northeast Gateway NPDES Permit*

In the Declaration, one of the successfully completed NPDES permits described by Region 1 was the permit issued to the Northeast Gateway offshore LNG import terminal. Although not a power plant *per se*, the permit for this facility, like those for power plants, involves thermal discharge limits and cooling water intake requirements under CWA § 316(b). Therefore, the same expertise required for power plant permits was also required for the Northeast Gateway permit. What was unforeseen at the time of the Declaration was the importance that would become attached to renewal of the Northeast Gateway permit in late 2014.

The urgency of prompt reissuance of the Northeast Gateway permit was the product of several factors. First, the region's reliance on natural gas both for generating electricity and for heating homes during cold weather, coupled with a dearth of pipeline capacity for importing gas into the region, had resulted in a regional shortfall during cold weather of natural gas needed for generating electricity. This winter shortfall was going to be made up by dirtier, more expensive oil-burning peaking units unless additional natural gas could be supplied to the region. Northeast Gateway was in position to help supply this

natural gas. Since issuance of the original NPDES permit to the facility, however, it had become apparent that the facility could not fully comply with the terms of its original permit for certain technical/engineering reasons. These issues had only become apparent after this innovative facility began operations. Therefore, adjustments to the original permit were needed to enable the facility to continue operations.

As a result, it became important for EPA to address reissuance of Northeast Gateway's permit before the winter to determine if and how the permit could be revised to enable the facility to operate, while also protecting the environment consistent with the Clean Water Act. If the permitting could be completed, it was expected to benefit both the environment and consumer pocketbooks by enabling more natural gas to be brought into the region, thereby reducing the need to use dirtier, more expensive oil-burning units to meet peak demand, while also ensuring that the Northeast Gateway's operations did not harm the marine environment.

Region 1 issued the new draft permit on November 20, 2014, and a new final permit on December 23, 2014.

#### ***Permits Addressed in In re Sierra Club***

##### **Mount Tom Station**

Region 1 met the proposed schedule for the NPDES permit for Mount Tom Station. In *In re Sierra Club*, the Region estimated that it could issue a draft permit to Mount Tom Station by June 2014 and a final permit by June 2016. Region 1, in fact, issued the draft permit in April 2014, and the final permit in September 2015.

In the 2013 Declaration, the Region had explained that Mount Tom Station was operating at a low capacity and was at risk of closing, but that Region 1 could not be certain that the facility would close and, therefore, needed to develop the new permit. As it worked on the draft permit, the Region had to take account of the soon forthcoming 2014 CWA § 316(b) regulations. After the draft permit was issued, Mount Tom Station announced that it would cease electrical generation in October 2014. The facility still had certain pollutant discharges, however, and still required an NPDES permit. Region 1 met with the company to understand its plans for the facility and then developed and issued a final permit for Mount Tom Station in September 2015.

##### **Schiller Station**

In the 2013 Declaration, Region 1 estimated that it could issue a draft permit to Schiller Station by June 2014 and a final permit by June 2016. Region 1, in fact, issued the draft permit in September 2015, but has not yet issued the final permit.

In developing the draft permit, the Region had to take account of both the 2014 CWA § 316(b) Regulations and the forthcoming 2015 Steam-Electric ELGs. Region 1 granted requests that the public comment period for the draft permit be extended and the

comment period was closed on January 27, 2016. The Region has received a substantial number of comments representing conflicting views about a number of issues. The Region has begun the work of considering and responding to these comments.

Region 1 has also evaluated the operating status of Schiller Station. As discussed in the 2013 Declaration, Schiller Station's coal-burning units now operate at a very low capacity factor and, thus, have relatively lesser actual effects on the marine environment. The facility's wood-burning unit, however, operates more frequently. Region 1 has also considered Schiller Station's likely future operations in light of New Hampshire's recent utility restructuring mandates that call upon Public Service Company of New Hampshire to divest itself of its electrical generating assets, such as Schiller Station (and Merrimack Station). The Region has learned that despite continued low capacity operations by Schiller Station, there are currently no firm plans or requirements to close any of the units at the facility. Moreover, the company is still requesting a permit to authorize full-scale operations. Therefore, Region 1 continues to regard developing a new final permit for Schiller Station as an important priority.

Finally, one of the permit writers working on Region 1's Schiller Station permit team has gone to work part time for another EPA office on a year-long "detail." The Industrial Permits Section has not been given a replacement for that employee. While the employee may be able to devote some limited time to the Schiller permit from his remote location, this has an effect on the speed with which we can complete this permit action.

#### ***Estimated Timelines for Final Permits for Merrimack Station and Schiller Station***

As with prior schedule estimates, it is impossible to be *certain* when Region 1 will issue final permits for these two facilities. As always, there are a host of factors that could emerge to alter present schedule estimates. Indeed, one problem is that our lead attorney for this work, Mark Stein, is also the Region's lead attorney on matters under the Marine Protection, Research, and Sanctuaries Act (MPRSA). He has been immersed in a series of high priority matters under the MPRSA in recent months and there is a threat of litigation pertaining to these matters. As a result, we cannot currently be sure about what competing demands will be made for his time in the coming months.

Another potential problem is that litigation was filed pertaining to both the 2014 CWA § 316(b) Regulations and the 2015 Steam-Electric ELGs. If applicable legal requirements are altered again as a result of this litigation, it could require Region 1 to revisit various aspects of these permits and further delay final permit issuance.

That said, and assuming we get reasonable legal support for developing the final permits in the coming months, and that other staffing resources remain available, we would estimate issuing final permits for Merrimack Station by June 30, 2017, and for Schiller Station by September 30, 2017 (two years after the draft permit). This represents an appropriately expedited schedule reflecting our sense that these permits are high priorities for Region 1's NPDES permitting program. We note that litigation over the permits could delay when the permits are completed and become effective. Indeed, if EPA issues the

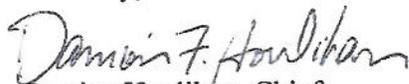
Merrimack Station permit first, litigation over that permit could potentially affect our ability to get the Schiller Station permit out two months later. To be clear, litigation on one permit might not affect the schedule for the other, but such an effect is possible. In addition, we want to be clear that EPA could always need to reorder its future priorities in light of evolving issues, policies and leadership direction, and this letter does not change that. This letter does, however, reflect our current priorities.

We hope this letter is helpful in explaining our efforts on the power plant permits, to date, and informing you of the dates by which we estimate that we will issue final permits for Merrimack Station and Schiller Station. These are highly significant permits for our office and we remain committed to completing them.

Please let me know if you have any questions about the above discussion. You can contact me at (617) 918-1586, or you can have Zack call Mark Stein at (617) 918-1077.

Thank you for your cooperation.

Sincerely,



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cc (by email):  
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