IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60891

LUMINANT GENERATION COMPANY, L.L.C.; OAK GROVE MANAGEMENT COMPANY, L.L.C.; BIG BROWN POWER COMPANY, L.L.C.; LUMINANT MINING COMPANY, L.L.C.; SANDOW POWER COMPANY, L.L.C.; TEXAS ASSOCIATION OF BUSINESS; TEXAS ASSOCIATION OF MANUFACTURERS; TEXAS OIL & GAS ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; STATE OF TEXAS,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Order on Motion to Amend and Enforce Judgment

Before BARKSDALE, GARZA, and ELROD, Circuit Judges.

PER CURIAM:

We previously issued an opinion in this case on March 26, 2012, vacating the EPA's disapproval of three regulations promulgated by Texas pursuant to the Clean Air Act. Because the EPA had acted on Texas's regulations more than three years after the time within which it was statutorily required to act, we instructed the EPA to approve or disapprove Texas's regulations "most expeditiously" on remand. The EPA has not yet approved or disapproved of Texas's regulations, and Texas has filed a motion to amend and enforce the

judgment. For the reasons that follow, we grant Texas's motion.

I.

As we explained in our prior opinion in this case, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, requires the EPA to identify air pollutants and to establish National Ambient Air Quality Standards (NAAQS). *Luminant Generation Co., L.L.C. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012). "The states, by contrast, bear the primary responsibility for implementing those standards." *Id.* (internal quotation marks omitted). The states do so by adopting and administering State Implementation Plans (SIPs). *Id.* When a state revises its SIP, the EPA performs the "ministerial function of reviewing SIPs for consistency with the Act's requirements." *Id.* (citing § 42 U.S.C. 7410(k)(3)). After a state submits a revision to its SIP to the EPA for review, generally the EPA must approve or disapprove of the revision within 18 months. *Id.*

On February 1, 2006, Texas submitted three regulations to the EPA for approval as part of a revision to Texas's SIP (Texas's SIP revision). These three regulations, found in 30 Tex. Admin. Code §§ 116.610(a), 116.610(b), and 116.617, establish the availability of a standardized permit for Texas entities that want to construct or modify certain pollution control projects governed by the Clean Air Act (the PCP Standard Permit).[1] The purpose of these standardized permits, as opposed to individual, case-by-case permits, is to authorize entities to construct or modify pollution control projects on an expedited basis.

On September 15, 2010, more than three years after it was statutorily

[1] Texas's PCP Standard Permit falls within the scope of what the EPA has labeled "minor" New Source Review (minor NSR), which is a subset of the permitting regime under the Clean Air Act that governs stationary sources that do not meet the threshold emission levels established for "major" NSR.

required to approve or disapprove of Texas's SIP revision, the EPA issued a final rule disapproving of Texas's PCP Standard Permit. In the EPA's view, Texas's PCP Standard Permit did not comply with the Clean Air Act.

We subsequently reviewed the EPA's decision. *Luminant Generation*, 675 F.3d 917. We determined that the EPA had based its disapproval of Texas's PCP Standard Permit on "purported nonconformity with three extra-statutory standards that the EPA created out of whole cloth" and that the EPA otherwise had provided no legal basis for its decision. *Id.* at 932. Accordingly, we vacated the EPA's disapproval of Texas's PCP Standard Permit and remanded to allow the EPA to reevaluate its decision according to the proper Clean Air Act standards. *Id.* Although, by remanding, we chose to defer to the EPA's reevaluation of Texas's PCP Standard Permit, we explained that the EPA's task on remand was likely not a difficult one:

> It is difficult to conceive, and the EPA has not suggested, how it could disapprove the PCP Standard Permit under the appropriate statutory factors. . . . In addition, we have already concluded that each of the EPA's grounds for disapproval was unlawful. Finally, when pressed at oral argument, the EPA was unable to identify any legal deficiency with the PCP Standard Permit—other than its supposed failure to meet the EPA's extra-statutory requirements that today we hold unlawful . . . .

Id. at 932 n.12.

In addition—and critically for present purposes—we instructed the EPA to "approve or disapprove [Texas's PCP Standard Permit] *most expeditiously*" on remand. *Id.* at 933 (emphasis added). Such an instruction was appropriate in light of the EPA's dilatory behavior:

> Despite an eighteen-month statutory deadline, the EPA did not take action . . . until September 15, 2010. At that late date, the EPA disapproved the PCP Standard Permit—submitted four and a half years earlier—based on its purported nonconformity with three extra-statutory standards that the EPA created out of whole cloth. Moreover, the EPA did this in the context of a cooperative

> federalism regime that affords sweeping discretion to the states to develop implementation plans and assigns to the EPA the narrow task of ensuring that a state plan meets the minimum requirements of the Act.

Id. at 932. Our mandate issued on May 18, 2012.

More than 21 months have passed since our mandate issued in this case. The EPA has not yet approved or disapproved of Texas's PCP Standard Permit. As a result of this delay, Texas filed a motion requesting that we enforce the judgment in this case by giving the EPA six weeks, or alternatively ten weeks if the EPA chooses to take additional public comments, to approve or disapprove of Texas's PCP Standard Permit. Texas argues that it is at a loss to understand how the EPA, while under our order to act most expeditiously, has been unable to complete the task before it. The EPA's continuing failure to act, Texas argues, compromises its ability to effectively regulate the state's air quality and creates uncertainty in its regulated community.

The EPA admits that it has not yet acted on Texas's PCP Standard Permit. It nonetheless argues that its delay is reasonable. According to the EPA, it has "operated with a heavy workload of Clean Air Act-related duties" exacerbated by reductions in its budget and the recent shutdown of the federal government. Thus, the EPA requests that we deny Texas's motion and offers June 27, 2014, and November 26, 2014, as dates by which it could sign a proposed and final rule, respectively, regarding Texas's PCP Standard Permit. The EPA says that it will agree to submit status reports every sixty days to explain its progress towards final action. Alternatively, the EPA requests that we refer the issue to our court mediation program to seek a mutually agreeable timeframe.

II.

Parties subject to the decision of a federal appellate court are "without power to do anything which is contrary to either the letter or spirit of the

mandate construed in the light of the opinion of [the] court deciding the case." *Am. Trucking Ass'ns v. ICC,* 669 F.2d 957, 960 (5th Cir. 1982) (quoting *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977)). Accordingly, if on remand an agency has not fully complied with our mandate, "we have ample authority to issue an order directing compliance with our mandate." *Nat'l Grain & Feed Ass'n, Inc. v. OSHA*, 903 F.2d 308, 309 (5th Cir. 1990). Neither party disputes our power to do so here.

It is painfully apparent that the EPA has not complied or taken steps to comply with our clear mandate, which is approaching its second anniversary, to "consider [Texas's] regulations and approve or disapprove of them most expeditiously." *See Luminant Generation*, 675 F.3d at 933. The EPA does not even attempt to argue otherwise and admits that it has not yet proposed or taken final agency action on Texas's PCP Standard Permit. Therefore, the only question we must address is whether it is appropriate to direct the EPA to comply with our previously issued mandate.

We begin by fully recognizing that "an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings." *Nat'l Grain & Feed Ass'n,* 903 F.2d at 310 (quoting *Cutler v. Hayes,* 818 F.2d 879, 896 (D.C. Cir. 1987)). An "agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Id.* (quoting *Cutler*, 818 F.2d at 896). Nevertheless, such discretion is not without bounds. Agencies may not unreasonably delay their decision-making, particularly when their delay injures those subject to their authority. In some instances, we must "set a clear end point to the regulatory snarl." *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987).

To evaluate whether it is appropriate to compel an agency to action, we

employ a case-by-case approach, considering five factors[2]:

> (1) the length of time that has elapsed since the agency came under a duty to act, and any prospect of early completion; (2) the presence of any legislative mandate, and the degree of discretion given the agency by Congress with respect to timing; (3) whether injury will likely result from avoidable delay; (4) the presence or absence of bad faith on the agency's part; and (5) administrative necessity, the need to establish priorities given limited resources, and complexity of the task.

Nat'l Grain & Feed Ass'n, 903 F.2d at 310. If we determine that based on these factors relief is warranted, Texas refers to such relief as an order of enforcement, while the EPA refers to it as a writ of mandamus. Regardless of what label we give the relief sought, however, we apply the five factors listed above. *See id.* The weight of these factors establishes that the time is ripe to compel the EPA to action.

We first address the length of time that has elapsed since we issued our mandate and the reasonableness of the EPA's delay. "There is no *per se* rule as to how long is too long to wait for agency action, but a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal quotation marks and citation omitted).

Here, the EPA is counting in years. A November 26, 2014, deadline, as the EPA proposes, would allow it more than two and a half years to comply with our mandate. Such a deadline is unreasonable in our view, particularly because we directed the EPA to act "most expeditiously." Indeed, we directed

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[2] We recognize that these factors are derived from those used by the District of Columbia Circuit in evaluating the reasonableness of agency delay under the Administrative Procedure Act. *See Cutler*, 818 F.2d at 894–96; *see also* 5 U.S.C. § 706 (requiring courts to "compel agency action unlawfully withheld or unreasonably delayed"). As we have previously done, we utilize them here for the purpose of evaluating when it is appropriate to order an agency to comply with our previously issued mandate. *See Nat'l Grain & Feed Ass'n*, 903 F.2d at 310.

the EPA to do so after recognizing that it had taken four and a half years to act on Texas's SIP revision in the first instance. The EPA took that action only after a group of industry petitioners brought a mandatory-duty suit and the district court entered a consent decree requiring the EPA to approve or disapprove of Texas's SIP revision.

The EPA's failure to act in this case is all the more troubling in light of the second factor we consider in assessing agency delay, "the presence of any legislative mandate, and the degree of discretion given the agency by Congress with respect to timing." *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. The EPA attempts to skirt this issue by baldly asserting in a footnote that there is no legislatively mandated timeframe at issue here. We disagree.

To be sure, the Clean Air Act does not specify a timeframe for the EPA to respond to our mandate. But as explained in our prior opinion in this case, except for "a narrow exception not relevant here, the EPA must review and approve or disapprove a SIP revision within 18 months of submission." *Luminant Generation*, 675 F.3d at 921 (citing 42 U.S.C. §§ 7410(k)(1)(B), 7410(k)(2), and 7410(k)(3)). We disagree with the EPA's apparent view that this statutory timeframe no longer has any bearing on its duty to act in a timely manner. Rather, "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" in assessing the reasonableness of the agency's delay. *Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984); *see also Cutler*, 818 F.2d at 897 ("The reasonableness of [an agency's] delay must be judged in the context of the statute which authorizes the agency's action." (internal quotation marks omitted)). Here, the statutory timeframe specified in the Clean Air Act confirms our view that the EPA has unreasonably delayed responding to our mandate. The EPA's proposed November 26, 2014, deadline—which would give the EPA more than two and

a half years to comply with our mandate—ignores not only our direction to act "most expeditiously," but also the 18-month timeframe Congress provided in the Clean Air Act.[3]

We now turn to the third factor, "whether injury will likely result from avoidable delay." *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. Texas argues that the EPA's failure to approve or disapprove of its regulations harms the 1,500 or so entities that hold PCP Standard Permits issued pursuant to Texas's regulations. These entities, Texas argues, are in regulatory limbo, uncertain of the effectiveness their permits. More generally, Texas argues that the EPA's delay interferes with its prerogative to improve its air quality.

In response, the EPA argues that any injury resulting from its delay is minimal because Texas entities may apply for an alternative PCP standard permit that Texas has made available (the Alternative PCP Standard Permit). The Alternative PCP Standard Permit is similar, but not identical, to the PCP Standard Permit at issue in this case and is valid under Texas's SIP.[4] The EPA avers that it is not aware of any proposed pollution control projects that have not gone forward due to its delay.

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[3] The dissent takes the position that because we originally afforded the EPA some discretion in responding to our mandate, despite the 18-month statutory deadline, we are now curtailing that discretion by holding the EPA to a firm deadline. To the contrary, we think that the EPA has *exceeded* the extent of its discretion. Simply stated, we think that waiting two and a half years to take final action, as the EPA proposes, would not comply with our instruction to act "most expeditiously." The 18-month statutory deadline reinforces our view that the EPA has unreasonably delayed taking action. Thus, rather than curtailing the discretion we originally afforded the EPA or otherwise asking the EPA to do something contrary to our previously issued mandate, we are clarifying our previously issued mandate and giving the EPA more specific instructions in that regard. *See Am. Trucking Ass'ns*, 669 F.2d at 961.

[4] Texas established the Alternative PCP Standard Permit subsequent to the EPA's decision to disapprove of the PCP Standard Permit at issue in this case. Because the EPA approved the method for adopting the Alternative PCP Standard Permit in 2003, it is currently available for use for Texas entities. *See* Approval and Promulgation of Implementation Plans, 68 Fed. Reg. 64,543, 64,547 (Nov. 14, 2013).

We agree with Texas's position. As the EPA admits, the pollution control projects covered by Texas's PCP Standard Permit are not currently authorized under Texas's SIP. Although the EPA is correct that Texas has made available the Alternative PCP Standard Permit for these entities, we see no reason to force them to jump through another regulatory hoop when the permits they now hold may in fact be valid under the Clean Air Act.[5] In the meantime, these permit holders must endure continuing uncertainty regarding the legality of their pollution control projects. *See Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983), *supplemented*, 705 F.2d 1343 (D.C. Cir. 1983) (explaining that excessive agency delay "creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans").

Moreover, by arguing that the availability of the Alternative PCP Standard Permit is sufficient to prevent any non-minimal injury due to the EPA's delay, the EPA is essentially offering its own assessment that Texas does not need its PCP Standard Permit—regardless of whether it is lawful under the Clean Air Act—in order to implement the NAAQS effectively or otherwise to fulfill the state's air quality needs. Such an argument is anathema to the "great flexibility" Texas possesses in implementing the Clean Air Act and the "narrow role to be played by the EPA." *See Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981); *see also Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (explaining that the EPA's "overarching role is in setting standards, not in implementation").

Fourth, we consider "the presence or absence of bad faith on the agency's part." *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. If we determine that an

[5] Indeed, in the eight or so years since Texas first submitted its SIP revision to the EPA for approval, the EPA has not suggested any lawful basis for disapproving Texas's PCP Standard Permit. *See Luminant Generation*, 675 F.3d at 932 n.12.

agency's delay is the result of bad faith, we "should conclude that the delay is unreasonable." *Cutler*, 818 F.2d at 898. In assessing this factor, we look to whether the agency is "making good-faith progress." *See Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. In *National Grain & Feed*, for example, we concluded that an order of immediate enforcement was not necessary because the agency was "working to accommodate the court's requirements" and had "convinced us that [it was] making good-faith progress." *Id.* at 309–10; *see also Telecomm. Research and Action Ctr.*, 750 F.2d at 80 (retaining jurisdiction to receive progress reports but concluding that enforcement was not justified because the agency "assured [the court] that it [was] moving expeditiously").

Here, in contrast, we see no evidence that the EPA is "making good-faith progress" to act on Texas's PCP Standard Permit. According to the EPA, taking action on Texas's PCP Standard Permit will require it to (1) conduct a technical review of its action, culminating in a Technical Support Document, (2) draft and publish a notice in the Federal Register, setting forth its proposed rule, (3) respond to any public comment on the proposal, and (4) publish a final rule. The EPA has not provided any evidence that it has even taken the first of these steps required to comply with our May 18, 2012, mandate.[6] Thus, in no way has the EPA "convinced" us that it is currently progressing towards a final rule. *See Nat'l Grain & Feed Ass'n*, 903 F.2d at 310.

Nor are we persuaded by the EPA's justification for its inaction. The EPA argues that until August 2013 Texas never told the EPA that Texas's PCP

[6] Texas argues that the EPA can bypass the notice-and-comment procedure, and thus act sooner, by issuing a direct final rule pursuant to 5 U.S.C. § 553(b)(3)(B). It reasons that a direct final rule is appropriate given the EPA's long delay, the fact that the EPA has already developed a record relevant to the Texas's SIP revision, that the EPA already provided an opportunity for notice and comment, and that the EPA has taken direct final action for even controversial rulemakings. Although a direct final rule may indeed be appropriate here, our decision does not turn on the availability of the direct final rule procedure.

Standard Permit was a priority. This argument not only belies any notion that the EPA was making good-faith progress to comply with our May 2012 mandate, it also shows complete disregard of our own directive to act "most expeditiously." The EPA's other justification, administrative necessity, is likewise not compelling, as we examine below.

Finally, the fifth factor we consider is the administrative necessity of the EPA's delay, its need to establish priorities, and the complexity of the task. *See Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. The EPA argues that its delay is administratively justifiable, explaining that as a practical matter it has limited resources and that it has been adversely affected by budget cuts, mandatory furloughs, and the recent government shutdown. It has provided what is essentially a to-do list, showing that it has placed a high priority on other matters important to Texas such as greenhouse gas permitting, responding to citizen petitions, and other judicially imposed orders.

We are not unsympathetic to the administrative constraints the EPA faces, as we must remember that an "agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Id.* (quoting *Cutler*, 818 F.2d at 896). Here, however, the EPA has reached and exceeded the outer-limits of its discretion, and we are not persuaded that administrative necessity justifies further delay.[7]

Weighing heavily on our decision is that the EPA has not articulated any concern that the task before it is a difficult or complex one. *See Nat'l Grain & Feed Ass'n, Inc.*, 903 F.2d at 310 (listing the "complexity of the task" as a factor to consider in assessing agency delay). We recognize that, before issuing a final

[7] We assume that several of the EPA's obligations, which had December 2013 deadlines, no longer compete with the EPA's obligation in this case for EPA resources. Moreover, some of the EPA's obligations, such as responding to our decision in *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012), originated well after our mandate issued in this case.

rule, the EPA must undertake the various procedural requirements imposed by the Administrative Procedure Act. Missing from the EPA's argument, however, is any explanation as to how difficult these procedures may be or how long they might take.[8]

Although there may be instances where the complexity of an issue demands leniency in evaluating agency delay, this is not such a case. *Cf. Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 476 (D.C. Cir. 1998) (recognizing "the limits of [the court's] institutional competence in the highly technical area at issue"). The EPA plays a "narrow statutory role in the SIP approval process," and the task before it here appears to be a straightforward one. *Luminant Generation*, 675 F.3d at 926. As we explained in our prior opinion, the EPA's ministerial task on remand is to ensure that Texas's regulations meet the "minimal" Clean Air Act requirements that govern SIP revisions to minor NSR.[9] *Id.* at 932. Indeed, using the proper Clean Air Act standards, "[i]t is difficult to conceive, and the EPA has not suggested, how it could disapprove the PCP Standard Permit." *Id.* at 932 n.12.

In any event, the EPA's explanation for its delay is not sufficient to overcome the other factors we have considered, including that the EPA has allowed more than 21 months to pass without responding to our directive to act "most expeditiously" and that its proposed timeframe would extend its delay to upwards of two and a half years. *See Cutler*, 818 F.2d at 898 (explaining that an agency's justifications for delay "become less persuasive as

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[8] We disagree with the dissent's view that the EPA's suggested deadlines of June 27, 2014, and November 26, 2014, for a proposed and final action, respectively, adequately explain how long the EPA expects action *in this case* will take.

[9] The minor NSR permitting program, unlike major NSR permitting, is not subject to particularly extensive or complex regulation. *See Luminant Generation*, 675 F.3d at 922. Indeed, "[t]he EPA has recognized that . . . 'the [Clean Air] Act includes no specifics regarding the structure or functioning of minor NSR programs.'" *Id.* (quoting 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009)).

delay progresses"). Importantly, the EPA has delayed action in the face of a statute that requires the EPA to take action—indeed, under a defined timeframe. *See* 42 U.S.C. §§ 7410(k)(1)(B), 7410(k)(2), and 7410(k)(3); *cf. Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983) ("*Absent a precise statutory timetable* . . . an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference." (emphasis added)).

III.

For the foregoing reasons and the protracted history of this case, we conclude that relief is warranted. We therefore order the EPA to issue a final rule regarding 30 Tex. Admin. Code §§ 116.610(a), 116.610(b), and 116.617 by May 19, 2014, which is the first business day following the second anniversary of our mandate in this case. *See, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (ordering the FCC to comply with the court's order by a specific date); *In re Am. Rivers and Idaho Rivers United*, 372 F.3d at 420 (ordering the FERC to act within 45 days of the court's opinion). IT IS SO ORDERED.

EMILIO M. GARZA, Circuit Judge, dissenting:

While I share my colleagues' dissatisfaction with the EPA's delay, I see no need in this case to resort to the "extraordinary" remedy of mandamus. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Instead, I would retain jurisdiction and require regular status reports, as the EPA has proposed.

I find problematic the majority's assessment of the five factors conditioning our authority to compel agency compliance through the vehicle of mandamus.[1] The majority raises valid concerns in its discussion of the first two factors—the length of delay and the relevant legislative mandate. *See Nat'l Grain & Feed Ass'n, Inc. v. O.S.H.A.*, 903 F.2d 308, 310 (5th Cir. 1990). But in the end, the order's arbitrary deadline of May 19, 2014,[2] is only six months earlier than the EPA's estimated date of final action—November 26, 2014—and will not prevent this delay from being "counted in . . . years." *Ante* at 6 (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)). For such minimal gains, and (as explained below) on such tenuous grounds, I see no reason for curtailing the discretion that we originally afforded the EPA, knowing full well that the 18-month statutory timeframe had long since passed.

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[1] The majority curiously implies that the "label we give the relief sought" is immaterial. *Ante* at 6. However, our precedents teach that a writ of mandamus is the "appropriate remedy to enforce the judgment of an appellate court." *Am. Trucking Ass'ns, Inc. v. I.C.C.*, 669 F.2d 957, 960 (5th Cir. 1982). Indeed, the five-factor test applied by the majority is an analysis for considering the propriety of the writ's issuance. *See Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious *as to warrant mandamus*." (emphasis added)). Because a writ of mandamus is at issue, we must ensure that on balance, the five factors favor such a weighty remedy.

[2] The majority's only explanation for this choice of deadline is that it happens to be "the first business day following the second anniversary of our mandate in this case." *Ante* at 13.

Regarding the third factor of injury, Texas has not offered sufficient proof of concrete injury to either regulated parties or the public. *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. Uncertainty inheres in any regulatory delay; a writ of mandamus should require more than Texas's speculation about potential enforcement risk and weakened incentives for voluntary installation of pollution controls. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (looking to "economic harm" and danger to "human lives"). Furthermore, I disagree with the order's conclusion that the EPA is "essentially offering its own assessment that Texas does not need its PCP Standard Permit . . . in order to implement the NAAQS effectively . . . ." *Ante* at 9. The EPA's reasonable position, rather, is that Texas's need for the PCP Standard Permit is less pressing than other matters demanding EPA attention.

The majority's consideration of the fourth factor of bad faith is similarly deficient and, furthermore, has potentially dangerous consequences. *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310. Implicitly conceding the absence of bad faith, the majority turns the factor on its head by claiming that the absence of bad faith must be proven by evidence of good faith. The majority misunderstands cases in which we and the District of Columbia Circuit observed that the agency at issue had shown it was making "good-faith progress" or "moving expeditiously." *Ante* at 10 (quoting *Nat'l Grain & Feed Ass'n*, 903 F.2d at 310, and *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984)). Those cases establish merely that evidence of progress is *sufficient* to show a lack of bad faith, not that such evidence is *necessary*, and for good reason: The majority's inversion of the bad faith factor has the potential to disrupt agency operations by creating an incentive for agency staff to take visible but meaningless actions on all pending matters, in order to avoid even the appearance of failing to make "good-faith progress."

Turning to the fifth and final factor of administrative necessity, the majority concedes that the EPA must manage numerous competing priorities. But curiously, the majority concludes that necessity is lacking for the sole reason that the EPA has not explained why this rulemaking presents "difficult or complex" issues and "how difficult . . . procedures [required by the Administrative Procedure Act] may be or how long they might take." *Ante* at 11–12. The EPA has stated that it "anticipates agency signature on a proposed action . . . by June 27, 2014, with signature on a final action by November 26, 2014,"[3] and that because the agency "expects adverse comments" in this contested matter, a direct final rule is not appropriate. The order declines to require direct final rulemaking, correctly recognizing that this decision should rest with the EPA. I accordingly see no basis for faulting the EPA's adequate explanation of the necessity justifying delay.

Respectfully, I dissent from the order.

[3] The majority faults the EPA for not adequately explaining how long action "*in this case* will take." *Ante* at 12 n.8. In proposing its deadlines, the EPA has taken into account other competing priorities, as it must. The majority's novel requirement that the EPA must provide a time estimate for this particular rulemaking in isolation is both unprecedented and unpurposed. Even assuming *arguendo* that Texas has accurately estimated that the EPA can complete the required rulemaking in only "a fraction of [two months]," I see no practical value in having such information, unless we have the power to scrutinize, prioritize, and reorganize the EPA's workload—tasks that the majority seems all too eager to undertake. *See ante* at 11 n.7.