NOTE

IN RE AMERICAN RIVERS AND IDAHO RIVERS UNITED

I. INTRODUCTION

The Federal Energy Regulatory Commission (FERC) will not be allowed to fail in exercising its duty of timely response to petitions. In *In re American Rivers and Idaho Rivers United*, the United States Court of Appeals for the District of Columbia Circuit held that, under the Federal Power Act (FPA), it had jurisdiction to hear claims of unreasonable agency delay.[1] The court also held that a writ of mandamus was the proper remedy to compel an agency to end its unreasonable delay. With this case of first impression, the court sent a message to the FERC, as well as other administrative agencies, that a failure to respond, while technically not a judicially reviewable answer to a petition, will not keep the courts from making sure an agency does its job.[2]

Under the Endangered Species Act (ESA), a group of environmental organizations petitioned the FERC to consult with the National Marine Fisheries Service (Service) of the National Oceanic and Atmospheric Administration (NOAA) to discuss the effects of the FERC's action on certain fish species. This occurred in 1997, more than six years later, the FERC had not issued an answer. The environmental organizations, American Rivers and Idaho Rivers United, petitioned the court for a writ of mandamus to compel the FERC to respond. Following the holdings of previous cases involving similar delays, the court held that the FERC's six-year delay in answering the environmental organizations' petition was unacceptable and issued a writ of mandamus to compel the FERC's response.[3]

This paper discusses and analyzes the court of appeals decision. First, it examines the factual underpinnings of the case. Second, it examines the case's regulatory and procedural background. The ESA, as well as the environmental organizations' various petitions, are examined in context of the case. Next, it examines the decision of the Court of Appeals for the District of Columbia. It examines the remedy sought, the standard for determining unreasonable delay, the FERC's arguments, and the court's decision. Finally, it analyzes the court's handling of similar cases and applies the case factors to the standard stated for determining unreasonable delay.

II. FACTUAL BACKGROUND

This case finds its background in the waters of the Snake River. In 1955, the Federal Power Commission (FPC), the FERC's predecessor, granted a

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1. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413 (D.C. Cir. 2004).

2. *In re American Rivers and Idaho Rivers United* is the first time that the United States Court of Appeals, District of Columbia Circuit has extended the FPA, in an unreasonable delay context, to the FERC.

3. *Am. Rivers*, 372 F.3d at 420; *See also* Pub. Citizen Health Res. Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987) (holding that the Occupational Safety and Health Administration's (OSHA) six year delay bordered on unreasonable delay); Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81 (D.C. Cir. 1984) (holding that the Civil Aeronautics Board's five year delay was unreasonable); MCI Telecomm. Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980) (holding that the FCC's four year tariff decisionmaking delay was unreasonable).

license to the Idaho Power Company (IPC) to build, operate, and maintain a hydropower project in the Hells Canyon area of the Snake River. The license was granted for a duration of fifty years. The project consisted of the Oxbow, low Hells Canyon, and Brownlee dams.[4] The FPC knew that this project would environmentally impact the region. At the time the FPC granted the license, it recognized that the project would adversely affect the area fish and wildlife.[5] The FPC also recognized that the anadromous[6] fish would be particularly affected by the granting of the license to the IPC.[7] As a result, the FPC required that the IPC take mitigation efforts such as fish ladders, fish traps, or other fish handling facilities in order to conserve the fish resources.[8] In accordance with the FPC and the Secretary of the Interior, the license also provided that the IPC must make reasonable modifications to preserve area fish.[9]

The FPC granted the license to the IPC in 1955. Thereafter, Congress enacted the Endangered Species Act (ESA) to protect various species of fish, wildlife, and plants from becoming extinct.[10] This legislation affected, and continues to affect, the locales of many hydropower operations nationwide, including the Snake River where IPC operations are located. Under the ESA, three of the anadromous fish species that make their home in the Snake River are listed as endangered, one species is listed as threatened, and hydropower development is stated as a population decline factor.[11] The Snake River sockeye salmon, the Snake River spring/summer Chinook salmon, and the Snake River fall Chinook salmon are all listed as endangered species.[12] In 1993, the Hells Canyon portion of the Snake River was listed as a critical habitat for the endangered salmon species.[13]

As a result of these environmental developments, a group of environmental organizations (organizations)[14] petitioned the FERC. The group asked the FERC to formally consult, under the ESA, with the Service regarding its ongoing regulation of the Hells Canyon area. The petition, filed in November 1997, requested an answer from the FERC within thirty days. The petition stated that the organizations would consider a lack of response in thirty days as a constructive denial of the petition, and thus, the organizations would file for a

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4. *Idaho Power Co.*, 14 F.P.C. 55 (1955).

5. *Am. Rivers*, 372 F.3d at 415.

6. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 76 (1993) (stating that "Anadromous" fish migrate upriver from the sea to breed in fresh water).

7. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 416 (D.C. Cir. 2004).

8. *Id.*

9. *Am. Rivers*, 372 F.3d at 416.

10. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000).

11. Endangered and Threatened Wildlife and Plants; Emergency Reclassification of the Snake River Spring/Summer Chinook Salmon and the Snake River Fall Chinook Salmon From Threatened to Endangered Status, 59 Fed. Reg. 54,840 (Nov. 2, 1994); Endangered and Threatened Species; Status of Snake River Spring/Summer Chinook Salmon and Snake River Fall Chinook Salmon, 59 Fed. Reg. 42,529, 42,530 (Aug. 18, 1994); Endangered and Threatened Species; Endangered Status for Snake River Sockeye Salmon, 56 Fed. Reg. 58,619, 58,622 (Nov. 20, 1991).

12. *Id.*

13. *See* Designated Critical Habitat; Snake River Sockeye Salmon, Snake River Spring/Summer Chinook Salmon, and Snake River Fall Chinook Salmon, 58 Fed. Reg. 68,543, 68,546 (Dec. 28 1993).

14. The group is comprised of American Rivers, the Northwest Environmental Defense Center, Oregon Natural Resources Council, Pacific Coast Federation of Fisherman's Associations, Inc., Trout Unlimited, Institute for Fisheries Resources, the Federation of Fly Fishers, and the Sierra Club.

rehearing. The FERC failed to respond. As a result, the organizations requested a rehearing from the FERC. The FERC denied the request because it claimed that there had been no final order from which the organizations could seek rehearing.[15]

III. REGULATORY AND PROCEDURAL BACKGROUND

A. The Endangered Species Act

Congress passed the ESA to protect various fish, wildlife, and vegetation from extinction because "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[16] The ESA protects both the fish and wildlife and the habitats necessary for these living things to survive.[17] In addition to identifying the "endangered"[18] or "threatened"[19] species, the ESA sets out procedures for determining which species are "endangered" or "threatened" and divides the responsibility of protecting these listed species between the Departments of Interior and Commerce.[20]

Also, section 7 of the ESA the requires that all federal agencies "insure that action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species" or "result in the destruction or adverse modification of habitat of such species . . . ."[21] Licensures are included in agency actions, such as the one that the FPC issued to the IPC. When an agency concludes that one of its actions may adversely affect a listed species, it is required to engage in a formal consultation with the Service.[22] This consultation typically results in the Service issuing either a "jeopardy" or "no jeopardy" opinion.[23] The Service must look at all of the cumulative effects of the agency action in coming to their conclusion.[24] In the event that the Service decides that an agency action is likely to jeopardize the species or its habitat, the opinion must set out feasible alternatives.[25] The Service is required to give credence to any agency expertise in regards to identifying and choosing

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15. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 417 (D.C. Cir. 2004); *Idaho Power Co.*, 82 F.E.R.C. ¶ 61,049 (1998) (stating that "[b]ecause there has been no order from which to seek rehearing, petitioners' rehearing request is premature and must be rejected." (footnotes omitted)).

16. 16 U.S.C. § 1531(a)(3) (2000).

17. *Id.* § 1531(b) (stating that the purpose of the Act is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . .").

18. 16 U.S.C. § 1532(6) (2000) (defining "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary [of the Interior or Commerce] to constitute a pest . . . .").

19. *Id.* § 1532(20) (defining "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range").

20. 16 U.S.C. § 1533 (2000).

21. *Id.* § 1536 (a)(2) (2000).

22. 50 C.F.R. § 402.14 (1989).

23. 50 C.F.R. § 402.14 (g)(4) (stating that the Service shall "[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.").

24. *Id.*

25. 50 C.F.R. § 402.14(h)(3) (1989) (stating that "[a] 'jeopardy' biological opinion shall include reasonable and prudent alternatives, if any").

reasonable alternatives.[26]

B. Petitioning the FERC

In November of 1997, a group of environmental organizations concerned about the IPC's effect on the endangered species of salmon in Hell's Canyon, petitioned the FERC to initiate a consultation with the Service. The organizations based their request for consultation on the FERC's ongoing regulation of the Hell's Canyon operation. The organizations requested that the FERC take action within thirty days in order to prevent further damages to the endangered species and their habitat. The petition stated that a lack of response within the stated timeframe by the FERC would be taken as a constructive denial of the petition. Additionally, the FERC's constructive denial would result in a request for a rehearing.

The FERC did not respond. Therefore, the organizations filed for a rehearing under the assumption that the FERC had constructively denied their petition. The FERC denied the request for a rehearing and sent the organizations notice of this denial.[27] As a result, the organizations decided to petition the court.[28]

C. Petitioning the Ninth Circuit

The organizations asked the court to review the FERC's refusal to initiate consultation with the Service.[29] The court held that it lacked jurisdiction under the Federal Power Act (FPA) and dismissed the case.[30] The FPA states that an aggrieved party may obtain a review of a final order in the United States Court of Appeals.[31] The court determined that the FERC's denial of a rehearing did not come within the meaning of "order" in the Act.[32] The court, citing *Cities of Riverside & Colton v. FERC*, stated that an "action is not a reviewable as an order 'unless and until [it] impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.'"[33] Thus, the FERC's failure to act was not deemed an order which could be reviewed.

This dismissal did not extinguish the organizations' desire to force the FERC into consultation with the Service. Subsequent to the dismissal by the Ninth Circuit, the organizations continued to submit requests asking that the FERC either grant the original petition and initiate consultation, or formally deny the petition.[34] Denial would create a basis for a cause of action in a United States

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26. 50 C.F.R. § 402.14(g)(5) (1989).

27. *Idaho Power Co.*, 82 F.E.R.C. ¶ 61,049 (1998).

28. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 417 (D.C. Cir. 2004).

29. Am. Rivers v. FERC, 170 F.3d 896, 896 (9th Cir. 1999).

30. *Id.* at 897 (stating that the FERC's notification to the organizations that it was rejecting their request for rehearing was not a reviewable order).

31. Federal Power Act § 313, 16 U.S.C. § 825l(b) (2000) (stating that "[a]ny party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee . . . to which the order relates is located . . . or in the United States Court of Appeals for the District of Columbia . . .").

32. *Am. Rivers*, 170 F.3d at 897.

33. *Id.* (quoting Cities of Riverside & Colton v. FERC, 765 F.2d 1434, 1438 (9th Cir. 1985)).

34. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 417 n.10 (D.C. Cir. 2004) (listing some of

Court of Appeals.

IV. DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The United States Court of Appeals for the District of Columbia heard the organizations' plea for a writ of mandamus to compel the FERC to act on the organizations' initial petition. In contrast to the Ninth Circuit, this court found jurisdiction in the Federal Power Act.[35] The court relied on *Telecommunications Research & Action Center v. FCC*, (*TRAC*) which held that "a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."[36] An agency should not be entitled to keep a case from judicial intervention based solely on the notion that it refuses to issue a reviewable decision.

A. Appropriateness of the Remedy

The organizations asked the court of appeals for a writ of mandamus to force the FERC to respond to the organizations' initial petition. Mandamus is a remedy, which is to be granted only in extreme circumstances.[37] The court determined that the FERC's delay fit the definition of "extreme circumstances."[38] It relied on *Cutler v. Hayes*, in holding that unreasonable delay on the part of an agency fits the definition of an extreme circumstance that warrants a writ of mandamus because it shows a "breakdown of regulatory processes."[39] The court also relied on *In re Bluewater Network*, which held that a writ of mandamus is a remedy used only when there is an obvious lack of action by an agency with an obvious duty to act.[40] Therefore, to qualify for the writ of mandamus, it must be shown that the FERC had a duty to act and that it unreasonably delayed action.

B. Standard for Determining Unreasonable Delay

Two elements must be shown to prove unreasonable delay. The first element is met when it is shown that the agency had a duty to act. The second element is met if it can be proven that the agency unreasonably delayed its action under the duty. The test enunciated in *TRAC* for assessing agency delays guided the court.[41] The factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason," (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that

the letters sent on behalf of the organizations requesting relief from the FERC).

35. *Id.* at 417.

36. *Am. Rivers*, 372 F.3d at 417 (quoting Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) (holding that a court of appeals has exclusive jurisdiction to compel agency action in cases alleging unreasonable delay)).

37. *Id.* at 418; *See* BLACK'S LAW DICTIONARY 980 (8th ed. 2004) (stating that mandamus is "[a] writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly").

38. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004).

39. *Id.* (quoting Cutler v. Hayes, 818 F.2d 879, 897 (D.C. Cir 1987)).

40. *Am. Rivers*, 372 F.3d at 418; *See also In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (holding that an "issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act").

41. *Am. Rivers*, 372 F.3d at 418; *See also In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999) (using the factors outlined in *Telecomms. Research & Action Ctr.*, 750 F.2d at 80 (D.C. Cir. 1984) as a means of assessing agency delay).

> statutory scheme may supply content for this rule of reason, (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, (5) the court should also take into account the nature and extent of the interests prejudiced by delay, and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"[42]

The court of appeals cited to *TRAC*, and even generally followed *TRAC*, but the court failed to do a factor by factor analysis of the above factors (the TRAC factors), rather the court focused on the unreasonable delay.[43] However, the court stated that there is no set rule for defining what constitutes an unreasonable delay. The court stated that a reasonable time to wait for agency action was normally measured in weeks or months.[44] Thus, the FERC's six-year delay was far from reasonable. Despite the FERC's arguments, which are discussed below, the court granted the organizations' motion for the remedy of a writ. This writ compelled the FERC to issue a response to the 1997 petition.[45]

C. The FERC's Arguments

The FERC raised several arguments in defense of its inaction, none of which addressed the reasonableness of its six-year delay in answering the petition. First, the FERC contended that it was not required to address the petition at all.[46] Second, the FERC asserted that, because of its current involvement regarding other litigation over the Snake River water rights, its response could not be required. Further, the FERC asserted that it had done what was requested under the petition.[47] The court gave no credence to any of the FERC's arguments.

First, the FERC asserted that it was not required to respond merely because a petition requesting agency action was filed.[48] The FERC also stated that the ESA does not require agency/service consultation merely because a license has a re-opener clause.[49] Thus, the FERC claimed that the ESA threshold for consultation with the Service was not crossed.[50]

In rejecting the FERC's first argument, the court cited the Administrative Procedures Act (APA), which provides that all agencies must conclude matters presented to it; and do so within a reasonable time period.[51] The Court of Appeals for the District of Columbia determined that it had the power under the FPA and under its own ability to preserve jurisdiction to issue a writ compelling

42. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted).

43. It can be speculated that the court did not feel the need to do a the factor by factor analysis of the TRAC factors because the FERC's delay was so egregious.

44. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004).

45. *Id.* at 420.

46. *Am. Rivers*, 372 F.3d at 418.

47. *Id.* at 419.

48. *Am. Rivers*, 372 F.3d at 418.

49. *Id.*

50. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004).

51. *Id.*; 5 U.S.C. § 555(b) (2000) (stating that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it").

the FERC's action.[52] Additionally, the court determined that the FERC is obligated to respond to the petition, not because of the ESA action or re-opener clause, but because the APA requires it to respond.[53] The court also stated that it did not care how the FERC answered the petition, just that it answered it at all.[54]

Second, the FERC argued that it did not have a duty to answer the petition because of its involvement in the litigation over the Snake River water rights. The FERC claimed that because the ESA consultation could be affected by the outcome of the ongoing water rights litigation, it should not be forced to act until that litigation is finalized.[55] The FERC also stated that it had completed the requirement listed in the 1997 petition, which was to initiate consultation under the ESA. The court did not agree with the FERC's reasoning. The court stated that the FERC's asserted compliance with the requests of the 1997 petition ran directly opposite to its position that it did not need to respond to the request for consultation.[56]

The Court of Appeals for the District of Columbia, despite never doing a factor by factor analysis of the TRAC factors, stated that neither of the FERC's two positions specifically matched any of the considerations stated in the factors.[57] Thus, the court found the FERC arguments off point and unpersuasive. The court stated that the FERC should have offered arguments indicating that their delay was predicated upon a practical impediment, or on a "higher or competing priority," which required the agency's attention.[58] The court of appeals acknowledged that this type of delay is uncharacteristic of the FERC's normally efficient response to petitions.[59]

V. ANALYSIS

A. *The Court's Handling of Similar Unreasonable Delays*

This is not the first case that the Court of Appeals for the District of Columbia Circuit has dealt with a question of unreasonable delay in the context of agency inaction. In *Public Citizen Health Resource Group v. Brock*, the court of appeals held that the Occupational Safety and Health Administration (OSHA) was on the verge of unreasonably delaying action.[60] In *Public Citizen*, OSHA delayed issuance of a final rule regarding short-term exposure to the toxin, ethylene oxide, for almost six years. OSHA presented evidence to the court that, during the six years of inaction, it was continually working on the construction of a final rule, but was suffering from budgetary concerns.[61] Further, OSHA provided the court with a specific timetable showing that the final rule would be issued in March of 1988.[62] The court, although displeased with OSHA's

52. *Am. Rivers*, 372 F.3d at 419.
53. *Id.*
54. *Am. Rivers*, 372 F.3d at 419.
55. *Id.*
56. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004).
57. *Id.*
58. *Am. Rivers*, 372 F.3d at 420.
59. *Id.*
60. Pub. Citizen Health Res. Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987).
61. *Id.* at 629.
62. *Pub. Citizen Health Res. Group*, 823 F.2d at 629.

sluggishness, held that OSHA had not unreasonably delayed issuing a final rule. The court stated that OSHA was on the cusp of an unreasonable inaction and that any delay past the March 1988 deadline would be improper [63]

In *Air Line Pilots Association International v. Civil Aeronautics Board*, the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (C.A.B.) had unreasonably delayed action.[64] The court reasoned that the C.A.B.'s decision to wait five years before holding evidentiary hearings to adjudge claims for unemployment payments was improper.[65] The court held that the C.A.B. had not offered enough evidence to justify such a long delay.[66] Thus, the court compelled the C.A.B. to hold hearings to resolve the relevant questions regarding the unemployment payments.[67] In addition, the court held that the court of appeals has exclusive jurisdiction over cases involving unreasonable agency delay.[68]

MCI Telecommunications Corp. v. FCC, involved an agency delay of four years.[69] The Court of Appeals for the District of Columbia held that the Federal Communications Commission's (FCC) delay regarding tariff decisionmaking constituted an unreasonable withholding of agency action.[70] The court determined that the FCC had 30 days to create a workable schedule to resolve MCI's petition for review of the FCC's tariff decisions.[71] The court held that it would supervise the FCC in order to ensure a just solution was reached in an expeditious manner.[72]

These cases demonstrate various methods in which the Court of Appeals for the District of Columbia Circuit handles cases concerning unreasonable delays. In contrast to the *American Rivers* court, the court did not use TRAC factors for guidance in any of the above cases.[73] The court merely adopted a flexible standard of reasonableness, in which it carefully examines the particular circumstances of each case to determine what constitutes an unreasonable delay. The court was also flexible in the remedies that it awarded for unreasonable delay. In summation, the key consideration in compelling agency action is the reasonableness of the alternatives and the reasonableness of the remedies.

Examining the Court of Appeals pre-*American Rivers* decisions brings some interesting issues to light. First, the court's holding might have been different had they applied the reasonableness standard, similar to *MCI Telecommunications Corp.*, as opposed to finding guidance in the TRAC factors.[74] However, it is difficult, if not impossible, to imagine how the Court of Appeals could rule otherwise, given the facts of the case, even under a standard

63. *Id.*

64. Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81 (D.C. Cir. 1984).

65. *Id.* at 85.

66. *Air Line Pilots*, 750 F.2d at 85.

67. *Id.* at 88.

68. *Air Line Pilots*, 750 F.2d at 83.

69. MCI Telecomm. Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980).

70. *Id.* at 342.

71. *MCI Telecomm. Corp.*, 627 F.2d at 345–46.

72. *Id.*

73. While the other cases were decided after *TRAC,* it should be noted that MCI was decided before the court enunciated the TRAC factors.

74. MCI Telecomm. Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980).

of reasonableness. The court stated that the FERC's almost seven-year delay was "nothing less than egregious."[75] Moreover, in the above-mentioned cases, the same court held that lesser delays did not meet the reasonableness standard.[76] Thus, it seems obvious that, even under a reasonableness standard, the FERC's delay would be considered unreasonable.

Second, the outcome might have been different if the FERC had given the court a specific timetable for its response, as OSHA did in *Citizen Health Resource Group v. Brock*. The FERC's delay may have been justified if a specific future response date was provided in light of a competing priority, e.g. OSHA's budgetary problems in *Citizen Health Resource Group*.[77] The FERC might assert that its other pending litigation involving the Snake River was the competing priority that had held up the response. Still, given the court's stern admonishment of the FERC and their quick disposal of all of the FERC's arguments, it is difficult to think that the court would have found for the FERC even if it posited a specific date for response and a competing priority. A six-plus-year delay seems to appear almost per se unreasonable.

B. Applying the TRAC Factors to American Rivers

The court in the *American Rivers* case was guided by the TRAC factors in determining that the FERC had unreasonably delayed action.[78] However, the court never specifically analyzed those factors as they relate to the case. This section analyzes how those factors may have been applied.

The first TRAC factor provides that an agencies' decisionmaking timeframe be governed by a "rule of reason."[79] The "rule of reason" assumes that an agency decision will be made within a reasonable time.[80] In *MCI Telecommunications Corp. v. FCC*, the Court of Appeals for the District of Columbia construed a reasonable time to mean typically months, or even "a year or two, but not several years or a decade."[81] Thus, it is obvious that the FERC violated the "rule of reason" in waiting almost seven years to respond to the organizations' petition.

The second TRAC factor determines if Congress has provided a timeframe that it expects a certain agency to act.[82] In *American Rivers*, it does not appear that Congress has specified a timeframe in which the FERC must act. However, via the APA, Congress provides that all agencies should handle all matters brought to their attention "within a reasonable time."[83] Therefore, under both factor one and factor two, the FERC's almost seven-year delay is unreasonable.

The third TRAC factor states that delays, which appear reasonable in an

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75. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004).

76. *See e.g.*, Citizen Health Res. Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987); *See also* Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81 (D.C. Cir. 1984); *See also MCI Telecomm. Corp.*, 627 F.2d at 322).

77. Pub. Citizen Health Res. Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987).

78. *Am. Rivers*, 372 F.3d at 418.

79. *Id.* at 418.

80. MCI Telecomm. Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980).

81. *Id.*

82. *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004).

83. 5 U.S.C. § 555(b) (2000).

economic sphere are less reasonable when human health is at stake.[84] *American Rivers* does not deal directly with an issue of human health or welfare. However, it deals directly with the effect that the FERC's regulation has on the health and welfare of certain endangered or threatened species of fish, which the loss of has been construed as incalculable.[85] Additionally, when dealing with endangered species, quick action is extremely important in order to avoid irreparable harm. Once a species is lost it cannot be reborn. If taken into consideration from this perspective, factor three weighs against the FERC as well.

The fourth TRAC factor examines whether compelling agency action would effect the agency's higher priorities.[86] In *Public Citizen Health Research Group v. Auchter*, the court of appeals for the District of Columbia circuit held that when documented risks are presented, delays are even less reasonable even if the agency presents claims of higher competing priorities.[87] In litigating *American Rivers*, the FERC claimed that its delay was caused by more important priorities. The FERC claimed that their other Snake River litigation influenced their decision to hold off action. However, given the relevance of protecting endangered species, the incalculability of the loss of a species, the ESA's plain language mandating that agencies act to prevent species loss, and, perhaps most importantly, the documented damage on local fish species by hydroelectric plants, it is hard to fathom a higher priority for an agency.[88] Therefore, factor four weighs against the FERC.

The fifth TRAC factor requires the court to account for the "nature and extent of the interests prejudiced by delay . . . ."[89] The *American River* court addressed the potential loss of at least one species of fish. This is a sensitive subject that begs to be handled quickly. The FERC delayed action for almost seven years. It would be reasonable to assert that species and habitat attrition could have occurred in seven years. In addition, the longer the FERC delayed, the greater the potential for irreparable damage. This should weigh heavily against the FERC.

Finally, the sixth TRAC factor states that, in determining whether an agency action is unreasonably delayed, agency impropriety need not be found.[90] It need not be shown that impropriety on the part of the FERC was a part of its delay. Thus, the FERC's motives in delaying action are irrelevant to the determination of unreasonable delay. Therefore, the key issues for determination are the other

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84. *Am. Rivers*, 372 F.3d at 418.

85. Tenn. Valley Auth. v. Hill, 98 S. Ct. 2279, 2293 (1978) (stating that "the Report stated: '[a]s we homogenize the habitats in which these plants and animals evolved, . . . we threaten their—and our own—genetic heritage. *The value of this genetic heritage is, quite literally, incalculable*.'" (emphasis in original) (quoting the Report of the House Committee on Merchant Marine and Fisheries on H.R. 37)).

86. *Am. Rivers*, 372 F.3d at 418.

87. Pub. Citizen Health Research Group v. Autcher, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (holding that OSHA must expedite ethylene oxide (EtO) rulemaking in light of the documented risks that EtO presented to various workers and any children that those workers may later conceive).

88. 16 U.S.C. §1536(a)(2) (2000); *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 416 (D.C. Cir. 2004).

89. *In Am. Rivers*, 372 F.3d at 418; *See also* Pub. Citizen Health Research Group v. FDA, 740 F.2d 21, 34 (D.C. Cir. 1984) (stating that especially in cases involving issues of public health, agency impropriety need not be found).

90. *Am. Rivers*, 372 F.3d at 418.

five factors and their application to the facts of the case.

The application of the TRAC factors likely leads to a conclusion that the FERC's delay was unreasonable. All six factors weigh against the FERC. Factors one and five weigh especially heavy in favor of the organizations. With regard to the TRAC factors, the court made the correct decision in deciding against the FERC.

VI. CONCLUSION

The relevance of this case lies in the Court of Appeals for the District of Columbia's holding that the FERC's failure to respond was not enough to keep the court from passing judgment on the agency. The court was not willing to let the FERC use a legal technicality to hide from what the court deemed to be an agency obligation. The court determined that, under the APA, the FERC had a duty to answer any issue that came before it. Once a duty was established, the court determined whether the delay in responding to the issue was reasonable. Using the TRAC factors and, more importantly, the principle of reasonableness, the court found that an almost seven-year delay was unreasonable and, therefore, warranted an issuance of a writ of mandamus to compel agency action. Therefore, the Court of Appeals mandated that the FERC issue a judicially reviewable response to the environmental organization's petition. The court sends out a message that this sort of untimely response will not be tolerated.

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