



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 1  
1 Congress Street, Suite 1100  
BOSTON, MA 02114-2023

## ***FACSIMILE TRANSMISSION***

### **RESTRICTED INFORMATION**

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**From:** Ronald Fein, Assistant Regional Counsel

**Date:** November 18, 2009

**Number of pages including cover:** 8

**Return Fax:** 617-918-0040

**Message:**

NPDES Appeal Nos. 06-12, 06-13, 09-04

Mirant Kendall, LLC

Status Report and Motion to Extend Stay of Proceedings

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION I  
 ONE CONGRESS STREET SUITE 1100  
 BOSTON, MASSACHUSETTS 02114-2023

**VIA FAX AND VIA FIRST CLASS MAIL**

Eurika Durr, Clerk of the Board  
 Environmental Appeals Board (MC 1103B)  
 U.S. Environmental Protection Agency  
 Ariel Rios Building  
 1200 Pennsylvania Avenue, N.W.  
 Washington, D.C. 20460-0001

Re: NPDES Appeal Nos. 06-12, 06-13, 09-04  
 NPDES Permit No. MA 0004898  
 Mirant Kendall, LLC

November 18, 2009

Dear Ms. Durr,

Enclosed please find the original of the Region's assented-to Status Report and Motion to Extend Stay of Proceedings in the above-captioned case, with an attached certificate of service. The motion and the certificate of service have also been mailed to the Board and to counsel of record today. In lieu of five additional paper copies for the Board, an electronic copy has been posted to the CDX system.

Please note also that EPA Region 1 is moving offices and that the Office of Regional Counsel's new address, effective as of November 23, 2009, will be:

EPA Region 1 – MC ORA18-1  
 5 Post Office Square - Suite 100  
 Boston, MA 02109 - 3912

Sincerely,

Ronald A. Fein (JMA)

Ronald A. Fein, Assistant Regional Counsel  
 U.S. Environmental Protection Agency Region 1  
 617-918-1040  
 Fax: 617-918-0040

cc: Ralph A. Child, Esq., Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.  
 Kristy A. Bulleit, Esq., Hunton & Williams LLP  
 Peter Shelley, Esq., Conservation Law Foundation  
 Robert Brown, Esq., Massachusetts Department of Environmental Protection

ENVIR. APPEALS BOARD

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re: Mirant Kendall, LLC	)	
Mirant Kendall Station	)	NPDES Appcal Nos. 06-12, 06-13, 09-04
NPDES Permit No. MA 0004898	)	

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ENVIR. APPEALS BOARD

**STATUS REPORT AND  
MOTION TO EXTEND STAY OF PROCEEDINGS**

Respondent United States Environmental Protection Agency ("Agency"), Region 1 ("Region"), with the assent of the petitioners in this proceeding—Petitioner Mirant Kendall, LLC ("Mirant," the permittee), Petitioner Conservation Law Foundation ("CLF"), and Petitioner Charles River Watershed Association ("CRWA")—hereby provides this status report and respectfully requests that the Environmental Appeals Board ("Board") further stay all proceedings in this case by three months to allow for completion of settlement negotiations and the permittee's submission of a formal application for a permit modification. As explained below, the Region has transmitted a complete proposed permit modification to the parties, but the petitioners believe further revisions may be necessary. Thus, while the parties remain optimistic that settlement is close, they have not yet agreed upon a permit text.

**BACKGROUND**

The full history of this matter is amply set forth in prior Board orders. Briefly, these proceedings began in October 2006 with petitions for review of a National Pollutant Discharge Elimination System ("NPDES") permit that the Region issued for Mirant's Kendall Station power plant ("Permit"). The Permit includes both thermal discharge limits

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imposed under Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a), and cooling water intake structure requirements imposed under Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). Both Mirant and CLF (on behalf of itself and CRWA) filed petitions for review of the Permit. Each petition, albeit for different reasons, challenged the Permit's thermal discharge limits and its cooling water intake structure requirements imposed under Sections 316(a) and (b), respectively, of the Clean Water Act, as well as other provisions of the Permit. The Region eventually elected to withdraw the Permit's requirements imposed under Section 316(b) of the Act, and issued a Draft and then Final Permit Modification revising those requirements. Mirant filed a Petition for Review of Modified Permit, which the Board later consolidated with the existing appeals.

In parallel with the above developments, however, the parties had begun settlement discussions. In particular, the parties discussed the possibility of Mirant's installing technology that would substantially reduce both its thermal discharge and its cooling water intake flow. The Board has thrice granted the parties' joint motions to extend the stay of proceedings for the purpose of engaging in settlement discussions. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Feb. 26, 2009) (Order Granting Joint Motion to Extend Stay of Proceedings); *In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, June 9, 2009) (Order Granting Joint Motion to Extend Stay of Proceedings); *In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Sept. 29, 2009) (Order Granting Joint Motion to Extend Stay of Proceedings) ("September 29 Order"). In the September 29 Order, the Board extended the stay of proceedings until November 24, 2009, and required the parties to submit by November 19, 2009 a status report that would

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advise the Board on the progress of settlement discussions and whether it is appropriate to continue the stay, establish a revised briefing schedule, or take other appropriate action.

### **STATUS REPORT**

The parties have continued to engage in serious and substantive settlement discussions concerning the structure and terms of a NPDES permit modification that would resolve this matter without the need for any further litigation before the Board.

On September 25, 2009, the Region transmitted to Mirant, CLF, and CRWA a partial draft permit modification intended to resolve all issues pertaining to cooling water intake structure requirements under Section 316(b) of the Clean Water Act. On October 8, 2009, Mirant responded with proposed revisions to that partial draft permit modification and for the remainder of the permit text. On November 5, 2009, the Region transmitted to the other parties a complete draft permit modification intended to resolve all issues under dispute in this permit appeal.

Petitioners have informed the Region that they do not yet fully agree to the Region's November 5 proposed permit modification. However, petitioners have also informed the Region that they believe that continued negotiations may be fruitful and at this point they prefer to continue attempt to resolve this matter through settlement.

### **GROUND FOR FURTHER RELIEF**

A further extension of the stay of proceedings, for three additional months, is essential for the parties to attempt to resolve their remaining differences and reach agreement upon a proposed permit modification. This three month period is necessary for the parties to reach two significant milestones. First, the parties will diligently attempt to resolve all outstanding issues with the permit modification text itself. Second, assuming an

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agreed text has been reached, the permittee would submit a formal application for a permit modification, requesting that the permit be modified to reflect the agreed-upon text.

To be sure, an agreed-upon draft permit modification would not itself resolve the entire appeal: for example, the draft would need to be submitted for public comment, which could result in the need for further evaluation and/or discussions. Further, since compliance with the contemplated conditions of the permit modification will require the installation of new equipment by Mirant, the limits and conditions applicable to permitted operations and discharges until the new equipment is installed and operating still require resolution. However, an agreed-upon draft permit modification text, and accompanying application for permit modification, would mark a significant milestone in the resolution of this matter, and pave the way towards an agreed-to final permit modification which the petitioners here would not appeal.

Such a resolution would further the goals of the Clean Water Act by achieving important environmental benefits without protracted litigation, and would conserve administrative and judicial resources by avoiding unnecessary briefing of issues that could be resolved by settlement. Absent a continuation of the stay during this time period, the Region (and the Board) would be forced to divert their time and effort to issues that could instead be entirely resolved through settlement discussions.

#### **REQUESTED RELIEF**

The Region, with the assent of the petitioners, proposes that:

1. The Board stay all proceedings in this matter until February 24, 2010;
2. The Region and Petitioners, preferably jointly but separately if they are unable to agree, submit by February 17, 2010 a status report advising the

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Board on the progress of their settlement discussions and advising the Board whether it is appropriate to continue the stay, establish a revised briefing schedule, or take other appropriate action.

The Region represents that its counsel has discussed this Status Report and Motion to Extend Stay of Proceedings with Petitioners' respective counsel, and that Petitioners assent to the motion.

Respectfully submitted,

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1**

By its attorney,

*Ronald A. Fein (MA)*

Ronald A. Fein, Assistant Regional Counsel  
U.S. Environmental Protection Agency Region 1  
Tel: 617-918-1040  
Fax: 617-918-0040  
Date: November 18, 2009

Of Counsel:

Richard T. Witt, Attorney-Adviser  
Office of General Counsel  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

In re Mirant Kendall, LLC  
NPDES Appeal Nos. 06-12, 06-13, 09-04  
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CERTIFICATE OF SERVICE

I, Mark A. Stein, hereby certify that copies of the Region's assented-to Status Report and Motion to Extend Stay of Proceedings were sent on the 18<sup>th</sup> day of November 2009 to the following persons in the manner described below:

Original by first class mail  
Copy posted to CDX electronic system  
Copy by fax

Eurika Durr, Clerk of the Board  
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Signed: November 18, 2009

