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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

ORIGINAL

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IN RE: : NPDES Appeal Nos.
MIRANT KENDALL, LLC : 06-12, 06-13, 09-04
MIRANT KENDALL STATION :
-----:

Washington, D.C.

Thursday, January 21, 2010

The following pages constitute the proceedings held in the above-captioned matter before the HONORABLE KATHIE A. STEIN, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C., before Natalia Kornilova, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 10:04 a.m.

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Hearing 01-21-2010

2

1 A P P E A R A N C E S

2 On behalf of the Plaintiff:

3 RONALD FEIN, ESQ.

4 Region 1

5 Boston, Massachusetts

6 PETER SHELLEY, ESQ.

7 Conservation Law Foundation

8

9 On behalf of Defendant Mirant Kendall:

10 RALPH A. CHILD, ESQ.

11 Mintz Levin Cohn Ferris Glovsky and Popeo, PC

12 One Financial Center

13 Boston, Massachusetts 02111

14 (617) 348-3021

15

16 Also Present:

17 MICHELLE WENZEL, ESQ., Counsel of the Board

18 EURIKA DURR, Clerk of the Board

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1 P R O C E E D I N G S

2 JUDGE STEIN: Good morning, counsel. Before we go
3 ahead and get started, let me make a couple of preliminary
4 remarks. With me here is Ms. Michelle Wenzel, who is
5 senior counsel to the Environmental Appeals Board and is
6 the counsel assigned to this case. And I also wanted to
7 request that people keep their shuffling of papers to a
8 minimum. We have had some challenges hearing in the
9 courtroom in the last couple of hearings that we held, and
10 to help the court reporter, if everybody, including myself,
11 could keep their shuffling of papers to a minimum, that
12 would be appreciated.

13 Secondly, if for any reason the court reporter
14 can't hear what you are saying, I'm going to ask her to let
15 me know so that you can go ahead and repeat yourselves so
16 that we're sure that we get a clear and accurate
17 transcript. If we could begin by having each counsel
18 introduce themselves and the party that they represent, I
19 would appreciate that.

20 MR. CHILD: This is Ralph Child for Petitioner
21 Mirant Kendall.

22 MR. FEIN: Ron Fein, F-E-I-N, Assistant Regional

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1 Counsel for Region 1, EPA, and with me in the rear is David
2 Webster, who's the manager of the Industrial Permits
3 Branch.

4 MR. SHELLEY: Peter Shelley, counsel for
5 Conservation Law Foundation and Charles River Watershed
6 Association.

7 JUDGE STEIN: Thank you. We scheduled this status
8 conference because I know that the parties have been
9 working hard on trying to reach a resolution of what I
10 understand is a fairly complex matter. At the same time,
11 this matter has been on our docket in one form or another
12 since October of 2006, and I know there have been various
13 phases where various aspects of the permit have been
14 withdrawn and new proposals on the table, but it would be
15 particularly helpful to the board to get a summary, either
16 from each of you or from a representative who speak for all
17 of you as to where things stand now and where we think we
18 need to go.

19 Our goal here this morning is not to cut off
20 productive settlement discussions, but to see if we can
21 have a clear understanding of the endgame for a reasonable
22 period of time in which to conclude if settlement is

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1 possible or not and then figure out if we're on a
2 settlement track or a litigation track. And, with that, I
3 will --

4 MR. FEIN: Your Honor?

5 JUDGE STEIN: Yes?

6 MR. FEIN: With your permission I'll remain seated
7 for the benefit of staying near the microphone. The good
8 news is that we can now report that we have made
9 substantial progress in the preceding months. And, in
10 particular, EPA, as well as the Massachusetts Department of
11 Environmental Protection, which is an co-permitting agency
12 with us although they're not a party to this appeal, have
13 reached an agreement with the company on all of the
14 substantive, important issues in a permit modification that
15 would include the elements of both the Section 316(A)
16 temperature variance and also the Section 316(B) cooling
17 water intake structure requirements.

18 We have not yet had time to reduce that agreement
19 in principle to a final written text that everyone has
20 circulated and signed off on, and I also want to leave to
21 Mr. Shelley the fact that his clients have a slightly
22 different position, but we have made enormous progress in

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1 being able to reach the agreement in principle on the
2 permit modification. There's still work left to be done,
3 both in terms of converting that to a written text which we
4 would then put out for public notice and there also remains
5 to be negotiated the terms of an administrative compliance
6 order, which would govern the schedule and interim
7 operating conditions and contingencies while the company
8 installs the technology for which we will be modifying the
9 permit. But having gotten past the major substantive
10 issues and the permit modification itself, we believe that
11 the hardest work is behind us and that -- I don't want to
12 say it's all downhill from here, but we can certainly see
13 the light at the end of the tunnel now.

14 JUDGE STEIN: Am I to understand that this
15 agreement in principle that the REACH IT and the permittee
16 have reached is beyond where you were when you submitted
17 your last request for extension of time?

18 MR. FEIN: Absolutely. And I'll allow Mr. Child
19 to modify that if he wants in any way, but I think at this
20 point we have -- with respect to the permit modification
21 itself as opposed to the administrative compliance order,
22 we have nothing left to negotiate with the company.

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1 MR. CHILD: Your Honor, there were, since the last
2 request for an extension, extensive, intensive and
3 successful negotiations.

4 JUDGE STEIN: Okay. And could you tell us, Mr.
5 Shelley, where your client stands with respect to this
6 agreement in principle? Are there major issues, minor
7 issues? I mean, obviously we have had three different
8 parties to this appeal, and I don't know whether what we
9 have done has resolved, at least in principle, the issues
10 with one of the parties but not the other party or whether
11 you see room for productive progress that still needs to be
12 made.

13 MR. SHELLEY: Thank you, Your Honor. I would say
14 we're also very close to agreement on what is being
15 proposed for this facility. We do have some concerns with
16 the temperature endpoint that EPA will have in its new
17 permit, although those concerns we expect to be largely, if
18 not entirely, mitigated by the new technology that the
19 company is proposing to install. So I guess our position
20 right -- and the other issue that we want to see some more
21 flesh on the bones is around the interim compliance order
22 that will be developed with the company. But we think,

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1 based on the tenor of the discussions and, I think, the
2 good faith on the part of the company and EPA to reach a
3 three-part agreement, that we were able to join with EPA
4 and say we think that this will successfully resolve all
5 the issues.

6 JUDGE STEIN: Well, I'm obviously very, very
7 pleased to hear this, and I'm not insensitive to the fact
8 that these 316(A) and 316(B) issues are challenging. With
9 that in mind, what is your best estimate of the time that
10 you would need to reach closure on the agreement in
11 principle, come to an understanding of the permit language
12 to be proposed and have a permit application submitted?

13 MR. FEIN: Your Honor, this is Ron Fein from
14 Region 1 again. We think that within 3 1/2 months we can
15 get the final permit text agreed to and have the company
16 submit a permit application and reach an agreement in
17 principle on the terms of the administrative compliance
18 order. And what I would like to propose -- and with the
19 board's permission I will move now orally or I can follow
20 up with a written request -- is for an additional extension
21 of the stay for 3 1/2 months, but with a status report at
22 the end of that term for this purpose. At the end of that

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1 period, assuming that we reach the agreement in principle
2 on the administrative compliance order, we would then need
3 an additional period of time to go through the public
4 notice on the permit modification itself and to reduce the
5 agreement in principle on the administrative order to a
6 writing, which would then be agreed to. And I don't want
7 to forecast exactly how long that latter phase would take,
8 but I think we can have this completely wrapped up by the
9 end of this calendar year.

10 JUDGE STEIN: I'd like to hear from the other
11 counsel as to their assessment of those proposed time
12 frames.

13 MR. CHILD: Your Honor, this is Ralph Child for
14 Mirant Kendall. We find those reasonable and certainly
15 join in the request.

16 MR. SHELLEY: Your Honor, Peter Shelley. I think
17 also that it's reasonable, assuming we're moving forward
18 productively, and I trust if any of us feel that the train
19 has come off the tracks at any point in that period, we
20 will be able to approach the board independently and try to
21 address any problems we have.

22 JUDGE STEIN: Now, would there be any benefit to a

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1 status conference part way through that 3 1/2 months, or a
2 status report, or do you feel that during the course of the
3 3 1/2 months you have enough incentive of your own to keep
4 things moving, that the Court's assistance would not be of
5 any additional benefit? I'm not interested in running up
6 bills for any clients or unnecessarily holding status
7 conferences or having reports, but if it would be helpful,
8 we're certainly open to that.

9 MR. SHELLEY: Your Honor, this is Peter Shelley.
10 I think that would be a good idea, actually, to have a
11 status report and potentially a conference, although I
12 think we can maybe wait on that until -- schedule it
13 sometime shortly around this -- maybe the four-month period
14 that would allow us to report to the board on how well we
15 all did on this first set of tasks.

16 JUDGE STEIN: So you're suggesting that the report
17 and conference be at the end of the 3 1/2 months and not --

18 MR. SHELLEY: I think that would make the most
19 sense. We have worked pretty well together.

20 MR. CHILD: This is Mr. Child. I guess I heard
21 the suggestion to be that there would be a status report at
22 the end of the 3 1/2 months.

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1 JUDGE STEIN: Right.

2 MR. CHILD: And that's what I intended to propose,
3 Your Honor.

4 JUDGE STEIN: We will do that, and I think at that
5 point, depending on where you are, the board can assess
6 whether we'll simply schedule another status conference
7 after we get your report and figure out next steps from
8 there. I'm perfectly happy in the interest of time to take
9 the oral motion and the representations here as the basis
10 for the board's granting of a further order of stay and an
11 extension, and we will prepare such an order, which will
12 extend the -- probably extend the stay for about four
13 months and have a status report due in about 3 1/2 months,
14 and we will get that out to you in the next couple of days.

15 Is there anything -- I'm very, very pleased with
16 the progress, and let me just turn to Ms. Wenzel and see if
17 she has any questions before we adjourn the conference.

18 (No response)

19 JUDGE STEIN: Counsel, any further comments or
20 questions on your part?

21 MR. SHELLEY: No, Your Honor.

22 MR. CHILD: Nothing, Your Honor.

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1 JUDGE STEIN: And I want to tell you that it's
2 very helpful to have all three of you in the same room. We
3 had some scheduling glitches in a status conference last
4 week where we didn't know that we were missing a party, so
5 I really appreciate your cooperation even in being there
6 together. It also enables us, if there is questions and
7 discussion back and forth, to reach resolution, and I
8 commend you on your progress thus far and I am looking
9 forward to a positive report at the end of the 3 1/2
10 months. And don't hesitate to enlist the board's help if
11 you feel that there is a role that we can play in moving
12 this to closure.

13 MR. SHELLEY: Thank you, Your Honor.

14 MR. CHILD: Thank you.

15 JUDGE STEIN: Thank you. And with that the status
16 conference is adjourned.

17 (Whereupon, at 10:18 a.m., the proceedings were
18 concluded.)

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1 CERTIFICATE OF NOTARY PUBLIC

2

3 I, Natasha Kornilova, the officer before whom the
4 foregoing hearing was taken, do hereby certify that the
5 witness whose testimony appears in the foregoing pages was
6 recorded by me and thereafter reduced to typewriting under
7 my direction; that said hearing is a true record of the
8 proceedings; that I am neither counsel for, related to, nor
9 employed by any of the parties to the action in which this
10 hearing was taken; and, further, that I am not a relative
11 or employee of any counsel or attorney employed by the
12 parties hereto, nor financially or otherwise interested in
13 the outcome of this action.

14

15

Natalia Kornilova

16

Natasha Kornilova

17

Notary Public in and for the

18

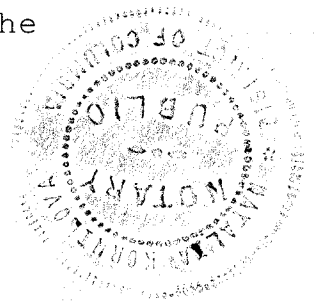
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20 My commission expires:

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