



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

By Federal Express and Electronic Submission

December 11, 2008
U.S. Environmental Protection Agency
Eurika Durr, Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: **In re Mirant Canal, LLC; Appeal Number NPDES 08-10**

Dear Ms. Durr:

In connection with the above-referenced permit appeal, please find enclosed for docketing an original of Region 1's Opposition to Mirant Canal, LLC's Request that the Board Direct Region 1 to Re-Notice Additional Permit Conditions.

As indicated in the Certificate of Service, copies of this report and motion have been served on all other parties to this proceeding by Federal Express.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlotte L. Withey".

Charlotte L. Withey
Office of Regional Counsel

cc: Recipients Listed on Certificate of Service

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

In re: Mirant Canal, LLC)
Mirant Canal Station) NPDES Appeal No. 08-10
NPDES Permit No. MA 0004928)

**REGION 1'S OPPOSITION TO MIRANT CANAL, LLC'S
REQUEST THAT THE BOARD DIRECT REGION 1 TO RE-NOTICE ADDITIONAL
PERMIT CONDITIONS**

Region 1 ("Region 1" or "Region") of the United States Environmental Protection Agency ("Agency" or "EPA") respectfully submits to the Environmental Appeals Board ("Board") this Opposition to Mirant Canal, LLC's Request that the Board Direct Region 1 to Re-Notice Additional Permit Conditions.

On December 4, 2008, Region 1 filed its Respondent's Status Report and Motion for Stay of Proceedings in the above-captioned permit appeal ("December 4 Status Report"). In this filing, Region 1 indicated its intention pursuant to 40 C.F.R. § 124.19(d) to withdraw certain provisions of the permit under appeal and re-notice them as draft permit conditions for public comment. Accordingly, the Region also asked the Board to stay the appeal. Also on December 4, 2008, Region 1 submitted the Board and others a notification letter from the Regional Administrator, in accordance with 40 C.F.R. § 124.19(d), which again stated the Region's intention to withdraw certain provisions of the permit and further explained the Region's planned course of action and the permit conditions to be withdrawn ("December 4 Notification Letter").¹

¹ As noted in the December 4 Status Report, at 2, Region 1 is withdrawing the conditions of the Permit that are based upon the Region's determination under section 316(b) of the Clean Water Act, 33 U.S.C. 1326(b), that closed-cycle cooling is the best technology available for reducing entrainment by Canal Station's cooling water intake structures. In the December 4 Notification Letter, at 2, Region 1 reiterated this point and indicated, accordingly, that

On December 8, 2008, Petitioner Mirant Canal, LLC (“Mirant”), filed its Answer to Region 1’s Status Report and Motion for Stay of Proceedings (“Answer”). In its Answer, Mirant assents to the Region’s request for a stay and agrees that Region 1 should withdraw and re-notice the particular permit conditions identified by the Region. *See Answer at 2.* However, Mirant also argues that “the statement of issues to be re-noticed is too narrowly drawn” *id.*, and “asks that the permit be re-noticed and opened for comment” on a broader set of issues that it contends are “‘inextricably intertwined’ with the BTA determination for entrapment.” *Id.* at 3-4.

There is no basis for Mirant’s request in the plain language, history, purpose or prior interpretation of section 124.19(d). As a general matter, “[s]ection 124.19(d) gives EPA regional offices an absolute right to withdraw *portions or all* of a permit at any time prior to the Board’s rendering of a decision on a permit appeal.” *In re Wash. Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07, slip op. at 2 (EAB, Dec. 15, 2003) (emphasis added); *In re Town of Ipswich Wastewater Treatment Plant*, NPDES Appeal No. 00-19, slip op. at 8 n.5 (EAB, July 26, 2001) (Region had “absolute authority” to withdraw one of two contested permit conditions). This “absolute right” includes the discretion to withdraw portions of a permit without withdrawing the permit in its entirety. *See* 40 C.F.R. § 124.19(d) (Region may, after issuing a withdrawal notification, prepare a new draft permit “addressing the portions so withdrawn”); Amendments to Streamline the National Pollutant Discharge Elimination System Program

the specific permit provisions being withdrawn are conditions I.A.2.f, I.A.7.f, I.A.8, I.A.13.g, and I.A.13.h. In addition, the Region explained:

Region 1 is only withdrawing and re-proposing the provisions of the Final Permit set forth in the paragraph above and is not seeking comment on other permit provisions. Nevertheless, the permitting agencies recognize the possibility that a commenter might wish to comment on additional permit conditions that the commenter believes are inextricably intertwined with the BTA determination for entrapment. Region 1 will consider and respond to any significant comments in this regard that it determines to be within the scope of this proposed action.

Id.

Regulations: Round Two, 61 Fed. Reg. 65,268, 65,281 (Dec. 11, 1996) (“EPA therefore proposes to clarify that the Regional Administrator may withdraw and reissue any NPDES . . . permit (*or a contested condition thereof*) prior to a decision of the EAB to grant or deny review under § 124.19(c).”) (emphasis added).

In order to effectuate its right to withdraw specific conditions, the Region must also have the ability to limit the scope of the new comment period to the newly proposed provisions (and any other “inextricably intertwined” provisions). Otherwise, the Region’s discretion to withdraw particular provisions of a Permit under 124.19(d) would be meaningless, since the Region could potentially have to address comments on *any* condition in the new draft permit, whether it was affected by the withdrawn conditions or not. By requiring the Region to consider a new round of comment on unchanged provisions that it has already taken comment on, such a procedure would undermine the primary purpose of 124.19(d), which is to allow for “more timely resolution” of appeals, 61 Fed. Reg. 65,281 (Dec. 11, 1996).

Mirant does not contest the Region’s right to withdraw particular provisions of the Permit under 40 C.F.R. § 124.19(d), yet it requests that a further set of conditions be re-noticed for comment because, in its view, these conditions will be affected by the withdrawn conditions. In effect, Mirant is requesting that the Board rule that the series of conditions identified by Mirant is “inextricably intertwined” with the withdrawn provisions.

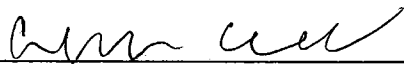
However, given the discretion conferred upon the Region under 124.19(d) to determine which permit provisions to withdraw, the determination of which issues are inextricably intertwined with the withdrawn provisions is one that should also be left to the Region in the first instance. As indicated in the December 4 Notification Letter, if any commenter disagrees with the Region’s decision regarding the scope of the withdrawal and re-proposal, then that commenter may raise the issue to the Region during the comment period, and may later appeal

the issue to the Board if the Region fails to satisfactorily address the commenter's concern. For the Board to rule on this issue now, however, would be premature, since the Region has not yet had an opportunity to consider the issue in light of all public comments and formulate a response, and it would require consideration of the substance of the permit itself, at the same time as the appeal of the permit is being stayed. It also might require certain issues to be litigated unnecessarily because it is possible that the Region's response to comments on this issue will be satisfactory to Mirant.

Finally, Mirant will suffer no prejudice should its request be denied. If, in Mirant's view, the Region has failed to withdraw and modify a provision that was somehow newly affected by the Region's action, then Mirant may ask the Board to review whether adequate notice was provided for that provision and whether it is appropriate on the merits.

Respectfully submitted,

Date: December 11, 2008

 for Mark Stein
Mark A. Stein, Senior Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
Tel: (617) 918-1077
Fax: (617) 918-1029

Of Counsel:

Richard T. Witt, Attorney
Office of General Counsel (2355A)
U.S. EPA
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Tel: 202-564-5496
Fax: 202-564-5477

In re: Mirant Canal, LLC
NPDES Appeal No. 08-10

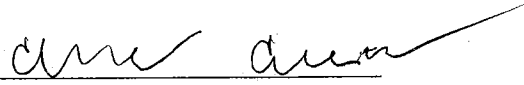
CERTIFICATE OF SERVICE

I, Charlotte L. Withey, hereby certify that on this 11th day of December, 2008, I served true copies of Region 1's Opposition to Mirant Canal, LLC's Request that the Board Direct Region 1 to Re-Notice Additional Permit Conditions on the following parties in the manner indicated:

Via Federal Express

James N. Christman, Esq.
Hunton & Williams LLP
Riverfront Plaza East Tower
951 East Byrd Street
Richmond, VA 23219

Ralph A. Child, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02211


Charlotte L. Withey
Office of Regional Counsel
U.S. EPA - Region 1
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023
Tel: (617) 918-1038
Fax: (617) 918-0038