



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
FIVE POST OFFICE SQUARE – SUITE 100
BOSTON, MASSACHUSETTS 02109-3912**

VIA ELECTRONIC FILING AND 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

October 15, 2010

Dear Ms. Durr,

Enclosed please find the original of a Joint 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 counsel of record today.

Sincerely,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
Mailcode: ORA18-1
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
Dr. Rae Stiening

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

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

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

Respondent United States Environmental Protection Agency (“Agency”), Region 1 (“Region”), Petitioner Mirant Kendall, LLC (“Mirant,” the permittee), Petitioner Conservation Law Foundation (“CLF”), and Petitioner Charles River Watershed Association (“CRWA”) provide this joint status report and respectfully request that the Environmental Appeals Board (“Board”) (1) further stay all proceedings in this case until January 14, 2011 in light of the successful completion of settlement negotiations and to allow for implementation of necessary further procedural steps, and (2) cancel the status conference scheduled for October 21, 2010. As explained below, the Region and Mirant have completed negotiations on a proposed administrative compliance order, Mirant has today formally requested a permit modification, and the Region intends to submit a permit modification for public notice very shortly.

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

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). The appeals have been stayed for a variety of reasons, including related Supreme Court litigation, a permit modification initiated by the Region, and, most recently, productive settlement discussions.

On May 12, 2010, the Region, with the assent of Petitioners, requested an extension of the stay to October 2010. The Region's request reported that the Region and Mirant had then agreed to all relevant portions on a proposed permit modification, and estimated that, by October 2010, four further tasks would be completed: (1) Mirant's submission of a request for a permit modification, (2) conclusion of negotiations regarding an administrative compliance order, (3) submission of the agreed draft permit modification for public comment, and (4) completion of a 30-day public comment process. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12, 06-13, & 09-04 (Status Report and Motion to Extend Stay of Proceedings) (filed May 12, 2010), Doc. No. 168, at 3-5 ("May 2010 Request").

On May 18, 2010, the Board granted the Region's request. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12, 06-13, & 09-04 (EAB, May 18, 2010) (Order Granting Extension of Stay and Scheduling Status Conference), Doc. No. 170 ("May 2010 Order"). The Board's order extended the stay to October 29, 2010, and required the following:

- (1) Mirant to notify the Board upon its submission to the Region of a formal request for permit modification;
- (2) The Region and Mirant to notify the Board upon their agreement to the terms of an administrative compliance order;
- (3) The Region to notify the Board upon its submission of a draft permit modification for public notice;

- (4) By October 15, 2010, the parties to submit, separately or jointly, a status report advising the 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; and
- (5) The parties to appear at a status conference on October 21, 2010.

STATUS REPORT

While the parties have not completed all of the steps envisioned in the May 2010 Request, the Region and Mirant are pleased to report that they have completed all of the essential steps, and the steps that remain are not expected to pose any obstacles to execution of the settlement.

Specifically, the Region and Mirant have agreed to both a draft permit modification and a proposed administrative compliance order. The draft permit modification requires Kendall Station to reduce its cooling water and discharge flow by approximately 95% (from 80 MGD to 3.2 MGD) under normal operating conditions. The draft permit modification also imposes additional protective operating conditions that further limit Kendall Station's heat discharge. These additional conditions are intended to prevent Kendall Station's heat discharge from warming the river basin above levels protective of fish populations.

Moreover, earlier today Mirant submitted to the Region a formal request for a permit modification, with its proposed requested permit modification attached. *See* Ex. 1 (Mirant's request for permit modification). The Region has also completed the elements of a package for public notice as required under 40 C.F.R. § 124.10. *See* Ex. 2 (draft public notice). Although certain steps (e.g., preparation of mailings and computer databases, placement of a legal notice in the Boston Globe) remain before the Region can formally open a public comment on a draft permit modification, the Region expects to open the

public comment period very shortly, and certainly well before the October 29 expiration of the stay.

Also, Mirant, CLF, CRWA and the Massachusetts Department of Environmental Protection have reached agreements (collateral to the EPA administrative consent order and final permit decision) that will lead to CLF, CRWA and Mirant requesting leave to withdraw their appeals as described below.

The parties intend this status report to satisfy the following requirements of the Board's May 2010 Order:

- (1) Mirant's notice to the Board upon its submission to the Region of a formal request for permit modification. *See* Ex. 1 (submitted to the Region today).
- (2) The Region and Mirant's joint notice to the Board upon their agreement to the terms of an administrative compliance order.
- (3) The parties' joint status report advising the 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.

While the parties have not completed all the steps envisioned in the May 2010 Request, the only steps not yet completed are submission of the draft permit modification for formal public notice (which will be completed well before the expiration of the stay), and allowing 30 days to pass (which will not).

GROUND FOR FURTHER RELIEF

A further extension of the stay of proceedings is essential for the parties to finalize the draft permit modification, resolve the outstanding appeals, and complete execution of the settlement. Notwithstanding the Region's and Mirant's agreements, the settlement is not yet complete, for the following reasons. First, after conclusion of the 30-day public comment period, the Region must consider any public comments requesting changes in the draft permit modification, and as a result the final permit modification may differ from the

draft permit modification. Second, while Mirant has agreed that it will not appeal the final permit modification as long as it does not differ materially from the draft permit modification, 40 C.F.R. § 124.19(a) allows any person who files comments on the draft permit modification to petition for Board review.

Third, even assuming that no petitions for review are filed with respect to the final permit modification, the parties anticipate that certain procedural steps must be undertaken before the Region can issue a “final permit decision” under 40 C.F.R. § 124.19(f)(1)(i). Specifically, the Region and Mirant anticipate that, assuming the final permit modification does not differ materially from the draft permit modification, then shortly after the expiration of the deadline for petitioning for review of the final permit modification under 40 C.F.R. § 124.19, Mirant will request the Board’s leave to withdraw NPDES Appeal Nos. 06-12 and 09-04. Similarly, CLF and CRWA anticipate requesting the Board’s leave to withdraw NPDES Appeal No. 06-13.

Therefore, the parties jointly request that the proceedings be further stayed to allow for execution of the above steps. 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 parties (and the Board) would be forced to divert their time and effort to proceedings that the parties presently anticipate can be dismissed within three months.

The parties also request that the status conference scheduled for October 21, 2010 be cancelled or rescheduled to January 2011, for two reasons. First, the parties believe that a status conference at this point is not necessary given the progress described above.

Second, October 21 may fall within the public comment period for the draft permit modification, which could potentially limit the Region's ability to discuss at the status conference certain issues in the pending appeals that may overlap with matters that will be subject to an ongoing public comment period.

REQUESTED RELIEF

The parties jointly propose that the Board stay all proceedings in this matter until January 14, 2011, and cancel the October 21, 2010 status conference. The parties propose to submit the following additional status reports to the Board:

- (1) By 3 business days after submission of a draft permit modification for formal public notice, the Region will notify the Board.
- (2) By 10 business days after the conclusion of the 30-day public comment period, the Region will notify the Board whether it has received any comments requesting changes to the draft permit modification, and if so, whether this proposed schedule should be revised.¹
- (3) By 5 business days after issuing a final permit modification, the Region will notify the Board.²
- (4) By 10 business days after the expiration of the deadline under 40 C.F.R. § 124.19 for seeking review of the final permit modification, Petitioners Mirant, CLF, and CRWA will either request the Board's leave to withdraw their respective appeals, or inform the Board why they have not done so.³

(continued on next page)

¹ The Region estimates this be approximately November 30, but, in light of Thanksgiving, proposes that the deadline be set in terms of business days after actual conclusion of the public comment period.

² If no comments requesting changes are received, this would likely occur in late November.

³ Assuming that the proposed schedule proceeds as described above, this would occur in early January 2011.

The parties respectfully request that the Board extend the stay of proceedings to January 14, 2011, with the interim status reports proposed in this request, and, in light of the concrete progress described above, cancel the October 21, 2010 status conference. If the Board declines to cancel the status conference, the parties are prepared to participate remotely through videoconferencing and/or telephone conferencing, and have initiated communications with the Clerk of the Board regarding technical arrangements.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,

Ronald A. Fein

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
5 Post Office Square, Suite 100 ORA18-1
Boston, MA 02109-3912
October 15, 2010

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

MIRANT KENDALL, LLC

By its attorney,

Ralph A. Child

Ralph A. Child, Esq.
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
October 15, 2010

**CONSERVATION LAW FOUNDATION, INC. and
CHARLES RIVER WATERSHED ASSOCIATION**

By their attorney,

Peter Shelley

Peter Shelley, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
October 15, 2010

CERTIFICATE OF SERVICE

I, Ronald A. Fein, hereby certify that copies of the foregoing Joint Status Report and Motion to Extend Stay of Proceedings were sent on the 15th day of October 2010 to the following persons in the manner described below:

Posted to CDX electronic system
Copy by first class mail (with exhibits)

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

Copy by e-mail
Copy by first class mail (without exhibits)

Peter Shelley, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110

Copy by e-mail
Copy by first class mail (without exhibits)

Ralph A. Child, Esq.
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Copy by e-mail
Copy by first class mail (without exhibits)

Kristy A. Bulleit, Esq.
Hunton & Williams LLP
1900 K Street NW
Washington, DC. 20006-1109

Signed: October 15, 2010

Ronald A. Fein