



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

341

December 30, 2004

Mr. Shawn Konary
Director, Environmental Affairs
Mirant Canal, L.L.C.
9 Freezer Road
Sandwich, MA 02563

Re: Supplemental Information Requirements pursuant to Section 308 of the Clean Water Act for Mirant Canal L.L.C. NPDES Permit Reissuance - [NPDES Permit No: MA0004928]

Dear Mr. Konary,

Mirant Canal Station's (Station) current NPDES permit to discharge into the Cape Cod Bay expired June 23, 1994. The permit was administratively continued, however, because the Station timely applied for permit reissuance. As a result, Mirant Canal remains subject to the existing permit until EPA issues it a new one.

Since the Station submitted its application for permit reissuance, EPA promulgated new regulations governing the development of permit requirements under Section 316(b) of the Clean Water Act (CWA § 316(b)) for large existing steam electric power plants. CWA § 316(b) requires that the location, construction, capacity and design of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impacts. The new CWA § 316(b) regulations addressing large existing power plants are referred to as the "Phase II Regulations" and were recently published in the Federal Register. 65 Fed. Reg. 41576 (July 9, 2004) (Final Rule). The Phase II Regulations became effective on September 7, 2004 and are promulgated at 40 C.F.R. Part 125, Subpart J.¹ Mirant Canal is subject to the Phase II Regulations based on the applicability provisions of 40 C.F.R. § 125.91.

The Phase II Regulations identify five different options from which a regulated facility may choose an approach for achieving compliance with the regulations. Permit application requirements vary based on the compliance alternative(s) selected and, for some facilities, include development of a Comprehensive Demonstration Study. See 40 C.F.R. § 125.95. The Phase II Regulations establish performance standards for the reduction of impingement mortality and, under certain circumstances, for the reduction of entrainment (e.g., reduce impingement

¹The "Phase I Regulations" apply to new facilities and were promulgated in December 2001.

mortality by 80 to 95 percent, and reduce entrainment by 60 to 90 percent). The applicability of the performance standards is determined by several factors, including the type of water body on which the facility is located and the facility's capacity utilization rate. Under the new regulations, the performance standards can be met by design and construction technologies, operational measures, restoration measures, or some combination thereof. *See* 40 C.F.R. § 125.94 (discussion of compliance alternatives).

To facilitate the NPDES permit review and development process, Mirant is required, pursuant to Section 308 of the CWA, to provide to EPA the information requested in this letter. Section 308 of the Clean Water Act, 33 U.S.C. §1318(a), authorizes EPA to require any person to provide information needed to, among other things, evaluate reissuance of an NPDES permit. Specifically, Section 308(a) of the CWA, 33 U.S.C. §1318(a), authorizes EPA to require the owner or operator of any point source discharge to make such reports and provide such information as may reasonably be required to

"carry out the objectives of ... [the CWA,] including but not limited to: (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition ... or standard of performance under [the CWA] ...; (2) determining whether any person is in violation of any such effluent limitation ... or standard of performance; (3) any requirement established under this subchapter or (4) carrying out section ... 1342 ... of [the CWA]"

Please be aware that failure to comply with this information request could, depending on the circumstances, subject Mirant to enforcement action pursuant to Section 309 of the CWA, 33 U.S.C. §1319.

Schedule for Information Collection and Submission

This letter establishes a schedule by which the Station must proceed to comply with the information collection and submission requirements of the Phase II Regulations. More detailed information regarding these requirements is contained in the regulations themselves. The Phase II Regulations in their entirety are contained in 40 C.F.R. 125, Subpart J (§125.90 through §125.99) and 40 C.F.R. 122.21(r). If you wish to request a more expeditious schedule, please make that request within the next 60 days.

1. Mirant Canal shall submit the Proposal for Information Collection (PIC) required by 40 C.F.R. §125.95(b)(1) as expeditiously as practicable and prior to the start of biological monitoring and/or information collection activities, but not later than October 7, 2006. *See* 69 Fed. Reg. 41631 (discussion of sequencing of submission of the PIC relative to submission of the Comprehensive Demonstration Study (CDS)). The PIC includes a description of the information that will be used to support the CDS. The Station must submit its PIC to EPA prior to starting information collection activities, but it may initiate such activities prior to receiving comments on the PIC from EPA. *See* 40 C.F.R. §§ 125.95(a)(1) and (b)(1). Still, EPA encourages the Station to try to submit the PIC early enough that EPA will have a reasonable opportunity to review and comment on it before

the Station must commence information collection activities.

2. The Station shall submit a CDS pursuant to 40 C.F.R. § 125.95 as expeditiously as practicable, but not later than January 7, 2008. The purpose of the CDS is to characterize impingement mortality and entrainment by Mirant Canal's cooling water intake structures, to describe the operation of the facility's cooling water intake structures, and to confirm that the technologies, operational measures, and/or restoration measures already installed, or that the Station proposes to install, at the facility meet the applicable compliance requirements of 40 C.F.R. § 125.94.
3. Consistent with 40 C.F.R. § 125.95(a)(2), the Station shall also submit to EPA by January 7, 2008, the information required by 40 C.F.R. §§ 122.21(r)(2), (3) and (5), which includes:
 - a) Source Water Physical Data
 - b) Cooling Water Intake Structure Data
 - c) Cooling Water System Data
4. In accordance with 40 C.F.R. § 125.94, Mirant Canal must select and implement, or have already implemented, one of the five compliance alternatives for providing the best technology available for minimizing adverse environmental impact at the Station. Beyond the PIC and the CDS, the particular studies and information that are required depend on which of the five compliance alternatives will be the basis of Mirant Canal's permit. EPA requests that the Station propose a preliminary compliance alternative selection with its PIC submittal (to be submitted no later than October 7, 2006) and a final compliance alternative selection with the CDS submittal (to be submitted no later than January 7, 2008).

Permit Based on Best Professional Judgement

Aside from the requirement that the Station meet the schedule for information collection and submission described above, be aware that EPA may issue a permit for Mirant Canal Station based on best professional judgement (BPJ) during this time period. This permitting approach is consistent with both the 316(b) Phase II regulations and recent analysis provided by EPA in the "316(b) Phase II Implementation Question and Answer Document" (August 19, 2004), which is posted on the Agency's website (www.epa.gov/waterscience/316b). In Section 2 of that document, Question & Answer No. 3 explains how to address permitting circumstances like those of Canal:

Q3: The draft permit is proposed after the 316(b) Phase II rule takes effect. At the time of permit issuance, the facility has not submitted the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the permit?

A3: The 316(b) limitations in the proposed and final permit would be based on BPJ under authority of 40 C.F.R. § 125.95(a)(2)(ii). The permit would also need to include a schedule requiring the facility to submit the comprehensive demonstration study and other information required by 40 C.F.R. § 125.95 as expeditiously as practicable but not later than January 7, 2008.

According to this guidance, in the case described above, the 316(b) limitations in the final permit would be based on BPJ "under authority of 40 C.F.R. § 125.95(a)(2)(ii)."

Specifically, 40 C.F.R. § 125.95(a)(2)(ii) of the Phase II Regulations states the following (emphasis supplied):

(ii) If your existing permit expires before July 9, 2008, you may request that the Director establish a schedule for you to submit the information required by this section as expeditiously as practicable, but not later than January 7, 2008. *Between the time your existing permit expires and the time an NPDES permit containing requirements consistent with this subpart is issued to your facility, the best technology available to minimize adverse environmental impact will continue to be determined based on the Director's best professional judgment.*

In this case, Canal Station's permit expired in 1994 and the permittee has not to date submitted all of the information required by the Phase II Regulations. Therefore, EPA may issue draft and final permits to the Station with § 316(b) limits that "continue to be determined based on the Director's best professional judgment."

If EPA were to issue the Station a permit with BPJ-based § 316(b) limits, the Agency anticipates that the permit would also include an appropriate schedule by which the Station would be required to complete and submit the information required by the Phase II Regulations. The propriety of including such a schedule in the permit is also suggested by the Question & Answer quoted above.

Whether EPA chooses the option of reissuing your expired permit based on a BPJ determination of BTA, or chooses to delay permit reissuance until after review of the information submissions required by the Phase II Regulations, depends on a number of factors including but not limited to:

- your permit expiration date;
- the expected environmental benefits of a renewed permit;
- the adequacy of the information available to serve as the basis for your renewed permit;
- the potential environmental impacts of your intake and discharge;
- economic and energy considerations;
- operational changes at your plant;
- the availability of technologies;

- the government resources needed to reissue your permit and competing work priorities for those resources; and
- an overall assessment of public interest, including environmental justice concerns.

EPA is currently assessing these factors in the context of Mirant Canal Station. Based on the Station's specific situation and progress made to date, it appears likely that EPA will continue to take steps to reissue your NPDES permit on a BPJ basis consistent with 40 C.F.R. § 125.95(a)(2)(ii), with the release of a Draft Permit for public comment prior to the October 7, 2006 due date of your Proposal for Information Collection.

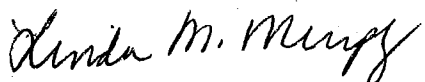
With regard to the information that must be submitted under this letter, Mirant may assert a business confidentiality claim with respect to part or all of the information submitted to EPA in the manner described at 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 CFR Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to Mirant. Please note that effluent information may not be regarded as confidential business information.

Please address your information submittals to:

Sharon Zaya
Massachusetts Office of Ecosystem Protection
U.S. EPA Region 1
One Congress Street, Mail Code CIP
Boston, MA 02114-2023

EPA looks forward to working with you on your new permit and the implementation of the new 316(b) Phase II regulation. If you have any questions concerning the required information requested above, please contact Sharon Zaya at (617) 918-1995. She is looking forward to speaking with you.

Sincerely,



Linda Murphy, Director
Office of Ecosystem Protection

cc. Mark Stein, EPA
Glenn Haas, MA DEP
Sharon Zaya, EPA

