



VIA FIRST CLASS MAIL AND FAX

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 No. 06-13, Mirant Kendall Station, Mirant Kendal, LLC
NPDES Permit No. MA 0004898**

8/1/2007

Dear Ms. Durr,

Enclosed please find an original Status Report in the above-captioned matter. A copy was posted to the CDX system today. Therefore, five additional paper copies have not been included. The Status Report and Certificate of Service were mailed to counsel of record in NPDES Appeal Nos. 06-12 and 06-13, both pertaining to Mirant Kendall Station.

Sincerely,

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

_____)	
In re: Mirant Kendall, LLC)	
Mirant Kendall Station)	NPDES Appeal No. 06-13
)	
NPDES Permit No. MA0004898)	
)	
_____)	

**STATUS REPORT AND RESPONSE TO RESPONDENT’S STATUS REPORT
AND MOTION TO EXTEND STAY OF PROCEEDINGS**

The Conservation Law Foundation and the Charles River Watershed Association (collectively hereafter “Environmental Petitioners”) hereby file this status report in response to the Status Report filed by the United States Environmental Protection Agency, Region 1 (“the Region” or “EPA”). This status report also serves as Environmental Petitioners’ response to the Region’s Motion to Extend Stay of Proceedings, filed contemporaneously with its Status Report.¹

Environmental Petitioners respectfully request that the Environmental Appeals Board (“EAB” or “Board”) grant in part, and deny in part, the Region’s Motion for Stay of the appeal. Environmental Petitioners assent to the Region’s request for a stay only as to those aspects of the appeal directly related to permit conditions affected by EPA’s suspension of the “Phase II Rule” in light of Riverkeeper v. United States EPA, 475 F.3d 83 (2d Cir. 2007), and only pending timely reissuance of those permit conditions in a

¹ Environmental Petitioners were also served with Peitioner Mirant Kendall LLC’s Motion to Remand the Permit to Region 1 on July 31, 2007, which Environmental Petitioners oppose. Environmental Petitioners reserve the right to file additional opposition to Mirant Kenall’s Motion within 15 days, as authorized by the Environmental Appeals Board rules of practice.

draft permit modification. Environmental Petitioners object to the Region's request for a stay of proceedings with respect to those issues raised in their petition that are not affected by the formal suspension of the "Phase II Rule" and argue that it is appropriate to move forward on those aspects of their appeal contemporaneously with the Region's preparation of a draft modification of the permit as to the permit provisions previously being developed under the "Phase II Rule" provisions.

Environmental Petitioners support the request that the EAB grant a Status Conference on either September 18 or 27, 2007. Additionally, Environmental Petitioners request that the EAB instruct the Region to notify the parties in writing, prior to the status conference, which specific conditions of the permit it intends to withdraw pursuant to the Riverkeeper decision (either as directly affected by the Phase II Rule suspension or inseparable from that suspension), and which conditions it considers severable from the withdrawn conditions and therefore potentially ripe for adjudication.

It is Environmental Petitioners' position that the EAB should direct the Region to respond to all aspects of the appeal concerning the Permit's thermal discharge limitations under 316(a) of the Clean Water Act and to all other conditions which are severable from the withdrawn 316(b)-related conditions. Environmental Petitioners are mindful of the Region's understandable concerns about staff resource limitations that will make a simultaneous defense of the unstayed aspects of the Mirant Kendall permit and development of new permit conditions for the stayed aspects challenging for the agency. At the same time, Environmental Petitioners believe that ongoing injury to the Charles River is associated in significant part with the current thermal discharges from the Mirant Kendall facility, and therefore that expedient consideration of the 316(a) thermal variance

provisions is warranted. Moreover, procedural efficiency will result from resolving the legal disputes about the Region's ability to grant a variance for Mirant Kendall's thermal discharge at the same that that the agency is developing new provisions for cooling water intake under 316(b), and will hasten ultimate resolution of this dispute and the issuance of an adequate permit for this facility.

I. Environmental Petitioners' Status Report

The backdrop for discussion of this permit is the Charles River, a historic resource used for fishing, boating, swimming, and other recreation, and shared by millions of people in the Boston area. See Petition of CLF and CRWA, at 3. Fish and other organisms in the lower Charles are subject to a variety of well-recognized stressors, as outlined in CLF's comments on the Mirant Kendall Station Draft Permit at 14-15. In early July of 2007, the Charles River came perilously close to suffering a toxic algae bloom that would have closed the river to all recreation. See Beth Daley, Boston Globe, "Again, Algae May Spoil Charles Swim" (July 19, 2007) (Attached as Exhibit 1).

Blooms of the blue-green cyanobacteria (commonly referred to as "blue-green algae") that were present in the Charles River are linked to warm water temperatures, nutrients, and sunlight, as well as other factors. See EPA Determinations Document for the Mirant Kendall Station Permit, at 47 (June 8, 2004). ("Both the number as well as the duration of cyanobacteria blooms may increase with the addition of waste heat to the lower basin.") In addition to their effects on human recreation, the blooms "may cause fish populations to be less able to cope with the additional stress of elevated water temperatures...." Id. The danger is not over for this summer; as air and water temperatures in August and early September in Boston are typically warm.

While scientists have not yet been able to directly model the causal relationship between heat input from the Mirant Kendall plant to the cyanobacteria blooms in the lower Charles, it is logically inevitable that the addition of heat to a water body that is already thermally and otherwise stressed, plays some role in altering the balance of aquatic life. See U.S. EPA Region 1 and Massachusetts DEP, Draft Total Maximum Daily Load for the Lower Charles River, CN 301.0, at 63-64 (February, 2007)

It is with this background context of continued stress and degradation of the Charles River resource and the people who use or want to use this resource in mind that Environmental Petitioners request that the Board grant, in part, and deny, in part, the Region's Motion for Further Stay of Proceedings, and deny wholly the Motion of Petitioner Mirant Kendal, LLC ("Mirant") to remand and reopen the entire permit. A new permit for Mirant Kendall, fully meeting the requirements and aspirations of the Clean Water Act, should be in place as rapidly as possible, not mired in the delays that EPA's motion contemplates. See Region's Status Report and Motion, at 6 (requesting that the EAB clarify that "neither the Petitioners nor any other party may file additional petitions for review or provide new arguments" with respect to portions of the permit neither withdrawn nor newly affected by the forthcoming permit modification).

II. Stay of 316(b) and Other Non-Segregable Conditions Is Appropriate

EPA has requested a stay of this appeal on the grounds that portions of the Final Permit were "informed by" aspects of the Phase II Rule since remanded by Riverkeeper v. EPA and formally suspended by the EPA. Therefore, it is appropriate that the Region withdraw the 316(b)-related conditions for reissuance under the proper legal standard and with sufficient justification in the administrative record.

III. EAB Review of the 316(a) Thermal Conditions Should Not Be Stayed.

Mirant Kendall's efforts to use the Region's withdrawal of a limited set of conditions in light of the Riverkeeper case as an excuse for further delay in meeting its entire range of obligations under the final permit should be rejected. As explained below, both the exigencies of the water quality problems facing the lower Charles River in the vicinity of the plant and the interest of judicial and administrative economy favor immediate consideration of the appealed 316(a) thermal discharge variance.

a. Withdrawal or Remand of the Entire Permit is Not Appropriate Under 40 C.F.R. § 124.19.

This provision is not authority for indefinite delay in the issuance and effect of final permits. To the contrary, Section 124.19 anticipates that the Regional Administrator may withdraw "portions" of a permit and "prepare a new draft permit . . . addressing the portions so withdrawn" even while other parts of a permit continue to proceed in final resolution: "[a]ny portions of the permit which are not withdrawn and which are not stayed under §124.16(a) continue to apply." 40 C.F.R. §124.19.

b. The EAB May Consider Portions of the Appeal Independently.

Similarly, there is no prohibition against the EAB processing fewer than all of the issues raised through petitions. The Environmental Appeals Board Practice Manual anticipates that in certain situations, the EAB may "grant[s] review of some of the issues raised in the petition," may "request further briefing on those issues for which review was granted," and may "direct the parties to prepare for oral argument on specified issues." E.A.B. Practice Manual at 37.

c. Failure to Proceed With Consideration of 316(a)-Related Portions Of the Appeal Would Result In More Delay.

The legal and factual issues associated with Environmental Petitioners' petition with respect to the thermal discharge variance granted by the Region in the challenged permit are entirely separate from the issues associated with the withdrawn elements of the permit. The Region in its Motion for a Stay recognizes the functional and legal distinctions between these issues. Rather than delay consideration of Environmental Petitioner's challenge of this variance at this point, however, the Region asks that the EAB delay consideration of these issues at this time. Mirant Kendall asks that these issues as well be withdrawn from the EAB's jurisdiction, wholly defeating Environmental Petitioners' rights to seek review of the variance.

There are no time savings or review savings that would be gained by deferring this review. In fact, upon consideration of the thermal discharge portions of the appeal, the EAB may determine that the 316(a) variance was, as Environmental Petitioners have asserted, based on erroneous factual and legal determinations. The consequent measures needed to comply with 316(a), assuming Environmental Petitioners prevail, will likely require significant reductions in the volume of cooling water utilized by the plant below the 70 million gallons per day specified in the final permit. As the Region has explained, the volume of cooling water used in the open cycle cooling system and to its velocity as it enters the intake system are important considerations in the application of performance standards under 316(b). EPA Determinations Document for the Mirant Kendall Station NPDES Permit, at 182 (June 8, 2004). These are the elements of the permit that the Region is proposing to withdraw. It doesn't make sense to Environmental Petitioners for the Region to proceed with that process before the legal basis for the variance on which those provisions may depend is determined by the EAB. At a minimum, a decision to

sequence the EAB review of the thermal variance issue until after the Region re-issues the new cooling water requirements will potentially add years to the final resolution of this permit. The current ecological conditions of the Charles River and the public impacts associated with the on-going loss of uses of the river associated with the thermal conditions in the river cannot justify such a course of action, simply for the convenience of the agency.

IV. Board Should Reject EPA's Request To Order Limits On Public Participation

EPA's request that the Board instruct Petitioners regarding the scope of their right to comment on aspects of this permit is unnecessary, would potentially proscribe regulatory rights to public participation, and should be denied. Forty C.F.R. Part 124 establishes a public participation process for permit appeals, including provisions for public comment on draft permits and draft permit modifications. See 40 C.F.R. §§ 124.10(a)(ii), 124.11, 124.12, 124.13. These regulations amply explain that any aspects of the draft permit modification anticipated by EPA in its Status Report would be subject to public comment during a 30-day comment period and entitled to a public hearing if one is requested. See 40 C.F.R. § 124.11.

The scope of comment would include any issues implicated by the draft permit modification and the administrative record for such draft permit modification. See 40 C.F.R. §§ 124.9, 124.10. The regulations also state that parties wishing to challenge a condition of a draft permit must raise all issues and supporting arguments concerning that condition prior to the close of the public comment period. 40 C.F.R. § 124.13. Thus, while conditions of the Mirant Kendall Station permit that have already proceeded through the public comment process and are now the subject of this appeal would not be

entitled to further comment solely because a portion of the permit were withdrawn, there may be a need for the public, including Petitioners, to comment broadly or specifically on issues related to the withdrawn conditions. The scope of the right to comment on the draft permit reissuance would more appropriately be addressed by EPA in its Response to Comments for such draft permit modification or addressed by the Board on a case-by-case basis. Given that Part 124 amply explains the public's right to comment on draft permits, there is no need at this time for the Board to issue any order regarding the scope of comment on the draft permit reissuance.

V. Request for Status Conference

CLF and CRWA request that the Board grant a Status Conference on either September 18 or 27, 2007, as specified in EPA's Status Report.

VI. Requested Course of Action

WHEREFORE, Environmental Petitioners and the Region respectfully request that the EAB order as follows:

- A status conference is scheduled for either September 18 or 27, 2007
- On or before the Status Conference, the Region will notify the parties which conditions of the proposed permit it intends to withdraw, and which conditions it considers severable from the withdrawn conditions.
- The Region's request regarding future rights of public comment is denied.
- The Region is directed that it shall respond to all aspects of the Petitions for review concerning thermal discharge and the 316(a) variance that are not properly withdrawn.
- Environmental Petitioners are granted 15 days to respond to Petitioner Mirant Kendall, LLC's Motion to Remand the Permit to Region 1.

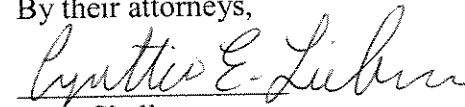
Respectfully submitted,

CONSERVATION LAW FOUNDATION,

and

**CHARLES RIVER WATERSHED
ASSOCIATION**

By their attorneys,



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Dated: August 1, 2007

CERTIFICATE OF SERVICE

In re: Mirant Kendall Station, Mirant Kendall, LLC, NPDES Appeal 06-13

I hereby certify that a true and correct copy of the foregoing Status Report in the above-captioned matter was served on each of the following persons in the following manner on this 1st day of August, 2007.

Original by First Class U.S. Mail and
FAX
Copy posted to CDX Electronic system

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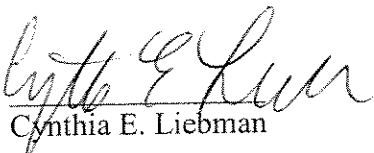
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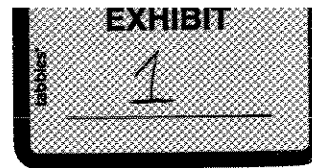
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Dated August 1, 2007


Cynthia E. Liebman

The logo for boston.com, featuring the word "boston" in a bold, lowercase, sans-serif font, followed by ".com" in a smaller, lowercase, sans-serif font.

THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

Again, algae may spoil Charles swim

The Boston Globe

By Beth Daley, Globe Staff | July 19, 2007

After an outbreak last year of toxic blue-green algae forced the cancellation of the first-ever Charles River swim race, organizers scheduled this year's event more than a month earlier to avoid a repeat. Now, two days before the race, the algae are back, threatening the event and the effort that transformed the river from an industrial-era soup to a sparkling waterway in which people could do the breast stroke.

Fluorescent filaments of the organisms, known as cyanobacteria, began forming in the river last week, and by yesterday, they streaked the Esplanade lagoons a psychedelic green. The organisms secrete toxins that can irritate the skin, eyes, and ears of people who come in contact with it. Ingesting even a small amount of the tainted water could cause diarrhea, but a person would have to drink an enormous quantity to become seriously ill.

State officials plan to post signs today at Magazine Beach in Cambridge and along the Esplanade on the Boston side, warning people to be on the lookout for the telltale flecks, filaments, and mats of blue-green algae and to keep children and pets away from the water if they spot such indicators. State health officials say they have had no reports of any person or animal falling ill because of the outbreak. Fish and waterfowl appear unaffected.

"This has the potential to affect the whole recreation season," said Kate Bowditch, director of projects for the Charles River Watershed Association, as she snapped pictures of the blue-green algae downstream of the Harvard Bridge yesterday.

The Charles was the inspiration for the 1960s Standells' song "Dirty Water," but the state and federal governments have since spent millions of dollars to scrub the river clean of litter, sewage, and industrial waste.

"The outbreak is disappointing, but I don't feel discouraged that we are not making progress in the river; we are," Bowditch said. "But this is the next thing we need to focus on."

Last week, tests showed little toxicity in the Charles. But since then, the bloom has visibly grown and may have become more potent, prompting officials to plan another round of tests today and tomorrow. Based on those tests, officials will decide tomorrow if the race is still on. State, federal and community environmental and health officials are gathering today to discuss the results of samples collected so far.

Blue-green algae are not true algae, but cyanobacteria. They are usually present in amounts so small they are harmless, but can undergo exponential growth spurts when exposed to nutrients contained in contaminants such as lawn fertilizer and Canada goose droppings that wash into waterways.

State and federal environmental officials suspect that this year's bloom is occurring now because of optimal conditions for growth: lots of sunshine, warm water, and low water levels that concentrate nutrients. Scientists are uncertain exactly why water levels are low, but say it appears related to rainfall totals upstream and the amount of water communities are using.

The cleaner Charles may even be partly to blame. As water visibility improves, light can penetrate deeper to reach the microorganisms and jump-start their growth, a federal environmental official said.

"We're seeing better clarity toward the mouth of the basin . . . but that is where we are seeing some of this algae," said Tom Faber, a water quality engineer for the US Environmental Protection Agency in Boston.

The EPA is about to release new guidelines that govern how much phosphorus, a key nutrient, can be in the river. Those guidelines are expected to spark efforts to control nutrients flowing from roadways, stormwater

pipes and other sources.

"We need to reduce those levels of nutrients," said Bruce Berman, of Save the Harbor/Save the Bay, an advocacy group. "We're taking substantial steps to inform the public [about the outbreak] but we still need to do more to address this problem."

This year's outbreak is small compared with last year's, when more than 1 million cells per milliliter of water were recorded near the Museum of Science. State officials post advisories if cell counts exceed 70,000 cells per milliliter. So far, only one test result -- at the Charles River Dam on July 10 -- exceeded that count.

As for the swim, organizers are hoping that more rain in the forecast will reduce algae levels enough to allow the event to go forward.

However, if it rains too much, the race could be canceled because of bacteria washed into the Charles. ■

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