



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

VIA ELECTRONIC FILING AND VIA 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

May 12, 2010

Dear Ms. Durr,

Enclosed please find the original of the Region's assented-to 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 the Board and to counsel of record today. In lieu of five additional paper copies for the Board, an electronic copy has been posted to the CDX system.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald A. Fein".

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

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 January 21, 2010, the Board convened a status conference to discuss the progress of settlement discussions. At the status conference, the parties represented that they had reached an agreement in principle on all major substantive issues to be implemented through a permit modification. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Jan. 21, 2010) (Transcript from Status Conference held January 21, 2010), at 5. At the same time, the Region noted that the parties still needed to reduce the agreement in principle to a final written permit modification, and to negotiate the terms of an administrative compliance order that would govern the schedule and interim operating conditions and contingencies while Mirant installs the technology at issue. *See id.* at 5-6. The Region orally moved for an extension of the stay. *See id.* at 8.

On January 28, 2010, the Board issued an order extending the stay to June 3, 2010, ordered the parties to submit a status report by May 13, 2010, and ordered the parties to attend a status conference on May 20, 2010. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Jan. 28, 2010) (Order Granting Extension of Stay and Scheduling Status Conference). On its own motion, the Board later rescheduled the status conference to May 18, 2010. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Apr. 14, 2010) (Order Rescheduling Status Conference).

STATUS REPORT

The Region and Mirant have reached agreement on all relevant portions of a permit modification that the Region would issue under 40 C.F.R. § 124.5 and which would, in concert with an administrative compliance order, resolve Mirant's appeals *in toto*.¹

After the January 21, 2010 status conference, the Region reduced the agreement in principle to a permit text, and circulated it to the Massachusetts Department of Environmental Protection (MassDEP) and the Massachusetts Office of Coastal Zone Management for review under their respective authorities. On March 15, 2010, the Region sent the petitioners a revised proposed draft permit modification, including both the permit and relevant attachments.² On April 7, 2010, Mirant provided a marked-up revision with several comments. On May 7, 2010, the Region provided the petitioners a further revision that responded to Mirant's April 7 requested changes. After further discussions, on May 12, 2010, the Region provided the petitioners an additional revision. Notwithstanding possible minor future technical adjustments, the Region and Mirant represent that they have agreed to the permit modification text.

To be sure, the agreed-upon draft permit modification does not itself resolve the entire appeal: for example, the draft will need to be submitted for public comment, which could result in the need for further evaluation and/or discussions. Further, since compliance with the contemplated conditions of the permit modification will require the installation of new equipment by Mirant, the limits and conditions applicable to permitted operations and discharges until the new equipment is installed and operating still require

¹ CLF and CRWA have not yet endorsed the proposed permit modification, but do not object to the stay being extended and the permit modification being submitted for public notice.

² The permit includes a variety of attachments, several of which are not relevant at all, or are not essential, to the issues under settlement. The discussion in this Status Report focuses on those necessary to settlement.

resolution.³ However, the agreed-upon draft permit modification text marks a significant milestone in the resolution of this matter, and paves the way towards a final permit modification which the petitioners here would not appeal.

GROUND FOR FURTHER RELIEF

A further extension of the stay of proceedings is essential for the parties to complete the settlement negotiation process and implement the next phase of the settlement. Within the next few weeks, Mirant will submit a formal request for a permit modification, requesting that the permit be modified to reflect the agreed-upon text. In parallel, EPA will develop a statement of basis under 40 C.F.R. § 124.7 for the proposed permit modification, and the parties will begin serious discussions regarding the terms of administrative order to govern operation of the plant until the new equipment is installed and operating, including (without limitation) schedule and milestones for the operational changes. Once the terms of an administrative compliance order have been resolved, EPA will submit the draft permit modification for public notice under 40 C.F.R. § 124.10. Adding the required 30-day public comment period for a permit modification, and a short amount of time to review any comments submitted, the Region believes that by October 2010 it can estimate the time for any remaining steps needed to complete the settlement and resolve the appeal.

Therefore, the Region, with the assent of the parties, requests that the proceedings be stayed until the end of October 2010, and proposes to submit a status report and request for what the Region hopes will be the final extension of the stay no later than October 15,

³ The parties had hoped to have reached an agreement in principle on the administrative compliance order by this date, but due to unexpected complications with the permit text itself, have not made as much progress as hoped in that respect.

2010. The Region continues to believe that this matter may be finally and completely resolved by the end of this calendar year.

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 Region (and the Board) would be forced to divert their time and effort to issues that could instead be entirely resolved through settlement discussions.

REQUESTED RELIEF

The Region, with the assent of the petitioners, proposes that the Board stay all proceedings in this matter until October 29, 2010; and that the Region and Petitioners, preferably jointly but separately if they are unable to agree, submit by October 15, 2010 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.

The Region, with the assent of the petitioners, also proposes that, in light of the status of settlement negotiations, a status conference will not be necessary, and requests that the status conference be cancelled.


(continued on next page)

The Region represents that its counsel has discussed this Status Report and Motion to Extend Stay of Proceedings with Petitioners' respective counsel, and that Petitioners assent to the motion.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,



Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
Tel: 617-918-1040
Fax: 617-918-0040
Date: May 12, 2010

Of Counsel:

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

CERTIFICATE OF SERVICE

I, Ronald A. Fein, hereby certify that copies of the Region's assented-to Status Report and Motion to Extend Stay of Proceedings were sent on the 12th day of May 2010 to the following persons in the manner described below:

Original by first class mail
Copy posted to CDX electronic system

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

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

Copy by e-mail
Copy by first class mail

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

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

Signed: May 12, 2010