

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

-----X  
In re: :  
: :  
MIRANT CANAL, LLC. : NPDES Permit No. MA0004928  
: NPDES Appeal No. 08-10  
-----X

1201 Constitution Avenue, NW  
Washington, D.C.

Thursday, December 18, 2008

The above-entitled matter came on  
for STATUS CONFERENCE at approximately 10:00  
a.m.

BEFORE:

EDWARD E. REICH

RECEIVED  
ENVIRONMENTAL APPEALS BOARD  
DEC 18 2008  
WASHINGTON, D.C.

ORIGINAL

1 APPEARANCES:

2 On behalf of Mirant Canal:

3 JAMES N. CHRISTMAN, ESQUIRE  
4 Hunton & Williams, LLP  
5 Riverfront Plaza, East Tower  
6 951 East Byrd Street  
7 Richmond, Virginia 23219-4074  
8 (804) 788-8368

9 KRISTY A. NIEHAUS BULLEIT, ESQUIRE  
10 Hunton & Williams, LLP  
11 1900 K Street, NW  
12 Washington, D.C. 20006  
13 (202) 955-1547

14 On behalf of Environmental Protection Agency:

15 MARK STEIN, ESQUIRE  
16 STEPHEN PERKINS, ESQUIRE  
17 RICHARD WITT, ESQUIRE  
18 Office of Regional Counsel  
19 U.S. EPA, Region 1  
20 1 Congress Street, Suite 1100  
21 Boston, Massachusetts 02114-0223  
22 (617) 910-1091

ALSO PRESENT:

Eurika Durr  
Gary Millstein

\* \* \* \* \*

1 P R O C E E D I N G S

2 JUDGE DURR: All rise. The  
3 Environmental Appeals Board of the United States  
4 Environmental Protection Agency is now in  
5 session for a status conference In re: Mirant  
6 Canal, LLC, Permit No. MA0004928, NPDES Appeal  
7 No. 08-10, the Honorable Judge Ed Reich  
8 presiding.

9 Please be seated.

10 JUDGE REICH: All right.

11 Good morning, Counsel. Thank you  
12 for participating in this status conference,  
13 both those of you who are here in person and  
14 those participating by videoconferencing.  
15 And we're here today pursuant to the Board's  
16 order of November 12 of this year scheduling  
17 this status conference.

18 I'd like to begin by asking Counsel  
19 to identify themselves for the record,  
20 beginning with Mirant Canal, and then  
21 Region I.

22 MR. CHRISTMAN: Thank you, Judge

1 Reich. I'm Jim Christman with the firm Hunton &  
2 Williams for Mirant Canal, and my partner,  
3 Kristy Bulleit, from here in Washington, D.C.  
4 And we also have Walter Stone, who is vice  
5 president, environment, for Mirant.

6 JUDGE REICH: Thank you. And do you  
7 have anybody joining us by videoconferencing?

8 MR. CHRISTMAN: We do. We have -- in  
9 Atlanta, we have Hugh Davenport, who is a senior  
10 vice president and deputy general counsel. And  
11 we have co-counsel, Ralph Childe, in Boston.

12 JUDGE REICH: thank you. And I  
13 assume you'll be the primary spokesperson for  
14 Mirant Canal?

15 MR. CHRISTMAN: Until I need help,  
16 yes.

17 JUDGE REICH: Okay, thank you.  
18 Region I?

19 MR. STEIN: Good morning, Your Honor.  
20 My name's Mark Stein. I'm the senior assistant  
21 regional counsel with EPA Region I in Boston.  
22 And here with me today are Stephen Perkins, the

1 director of our Office of Ecosystem Protection,  
2 which is the division that issues NPDES permits;  
3 and Richard Witt of the Office of General  
4 Counsel here in Washington.

5 JUDGE REICH: Okay, thank you. Let me  
6 begin with a little background for this status  
7 conference. The Board received a petition from  
8 Counsel for Mirant Canal on September 2, 2008.  
9 The petition was accompanied by a joint  
10 scheduling motion asking for an additional 28  
11 days to file a supplemental petition, and three  
12 months thereafter, for the Region to file a  
13 response.

14 One of the prominent issues raised  
15 in the petition related to the Section 316-B,  
16 Cooling Water Intake Structure Entrainment  
17 Standard.

18 That issue was whether the  
19 provisions of the final permit, which require  
20 a level of control comparable to use of a  
21 closed cycle cooling system, were a logical  
22 outgrowth of the draft permit on which public

1 comment was sought.

2 On September 12th -- did the mike  
3 go out? On September 12th, the Board issued  
4 an order on this particular issue, holding in  
5 abeyance the scheduling request. The Board  
6 asked the parties to address the potential  
7 applicability of 40 CFR Section 124.14(b), as  
8 well as the logical outgrowth issue.

9 In doing so, the Board felt it made  
10 more sense to examine this issue up front,  
11 because if it were to conclude that Mirant  
12 were correct, that would dictate a remand to  
13 the permit, making further resource-intensive  
14 and time-consuming review of the petition  
15 unnecessary at this time.

16 As requested, the Region filed a  
17 response dated October 10, and Mirant filed a  
18 reply dated October 30, after which the  
19 Board, by order of November 12th, scheduled  
20 this status conference.

21 I want to emphasize a few key  
22 things at this point. First, this is simply

1 a status conference, not an oral argument,  
2 and I do not intend to get into a discussion  
3 of the substance of the arguments.

4 Second, I have not, and more  
5 importantly, the Board has not, reached a  
6 firm resolution of the issues presented in  
7 the petition. Nothing said this morning  
8 should be read as reflecting a Board  
9 decision.

10 With that said, I do want, at this  
11 point, to posit a question primarily for the  
12 Region's consideration. I'm not asking for  
13 an answer this morning because I'm sure it  
14 will require some thoughtful analysis and  
15 consultation, but I do feel obligated to ask  
16 the Region to consider it.

17 As a framework for my question,  
18 this is how I see the case right now: I do  
19 believe Mirant Canal has raised some very  
20 serious concerns about whether the final  
21 permit provisions were in fact a logical  
22 outgrowth of the draft permit. I'm not

1 suggesting that the Board will necessarily  
2 reach that conclusion, but there is certainly  
3 a significant possibility of that result.

4 Under those circumstances, we can  
5 proceed in either of two ways. First, the  
6 Board can proceed with considering the permit  
7 as-is. If we do, it may take a little while  
8 before we can focus on the case, given  
9 competing demands on staff time. Once we do,  
10 we'll probably turn first to the logical  
11 outgrowth issue, and then, as necessary and  
12 appropriate, the other issues in the  
13 petition, after affording the parties the  
14 opportunity for additional briefing that they  
15 initially requested.

16 Having some familiarity with  
17 Section 316 issues from being the lead judge  
18 on the Dominion Energy-Braden Point case, I  
19 think resolving those issues will not be  
20 quick or easy. If we decide in favor of the  
21 Region, and Mirant Canal challenges the  
22 decision in court, there's always the



1 possibility of the First Circuit overturning  
2 our decision, including on the issue of  
3 adequate opportunity for comment on the final  
4 entrainment standard. That would largely put  
5 the process back at square one, but after  
6 very considerable further delay.

7           Alternatively, the Region could  
8 choose to withdraw the permit at this point  
9 and reopen the comment period at least as to  
10 the entrainment provisions. While that might  
11 or might not result in changes to the permit,  
12 it would remove one significant source of  
13 potential vulnerability from any future  
14 administrative and judicial appeals.

15           The benefits of eliminating this  
16 issue from future challenge, let alone  
17 potentially improving the permit, might well  
18 outweigh any up-front delay, particularly  
19 since the Board will not be addressing the  
20 petition immediately in any event.

21           So what I would like the Region to  
22 at least consider, and I want to emphasize

1 it's clearly the Region's choice at this  
2 point, is whether the environment might not  
3 be better served by withdrawing the permit  
4 and reopening the comment period on the  
5 entrainment issue.

6 I would ask that you advise the  
7 Board in writing by no later than December 5  
8 how you would like to proceed. It's the  
9 Region's decision, though, if the parties  
10 choose to confer about it. They are free to  
11 do so.

12 Because this was not raised with  
13 you in advance, I'm not requiring any party  
14 to comment on it at this time. But if any  
15 party does want to be recognized for any  
16 purpose, I would be pleased to do so.

17 MR. STEIN: Your Honor, this is Mark  
18 Stein. I guess I'd ask one point of  
19 clarification.

20 I actually think you did state this  
21 quite clearly, but just to be sure. What  
22 you're talking about, or at least suggesting

1 that we consider, is withdrawing the 316-B  
2 part of the permit, and not necessarily other  
3 parts of the permit, that we could obviously  
4 think that through whether that needed to be  
5 done as well if we were going to undertake to  
6 withdraw and go back to public notice. But  
7 you're speaking specifically to the 316-B  
8 provision.

9 JUDGE REICH: In terms of reopening it  
10 for purpose of public comment, yes. Although,  
11 as with Mirant Canal, which some of you are, I  
12 know -- I mean, Bryant Kendall (?), which some  
13 of you are familiar with, if we received a  
14 request to withdraw the 316-B, we probably would  
15 put the rest of the permit on review -- petition  
16 review on hold until the process played out, so  
17 we didn't have to deal with it piecemeal,  
18 because there can be interactions between the  
19 316-B part and the rest of the permit.

20 But as far as our suggestion for  
21 consideration, that goes exclusively to the  
22 entrainment issue, and again, only because of

1 the issue of logical outgrowth, not  
2 necessarily because anything relating to the  
3 merits of the decision.

4 MR. STEIN: Thank you, Your Honor.

5 JUDGE REICH: Would anybody else like  
6 to be recognized?

7 MR. CHRISTMAN: I don't think so,  
8 Judge.

9 JUDGE REICH: In that case, I'm going  
10 to adjourn this status conference. Again, I  
11 would like a response by December 5. And I  
12 would emphasize at this point the region is free  
13 to choose whatever path it wants, but I would at  
14 least like thoughtful consideration of the  
15 issue.

16 Thank you.

17 (Whereupon, at approximately  
18 10:10, the STATUS CONFERENCE was  
19 adjourned.)

20 \* \* \* \* \*

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22

C E R T I F I C A T E

This is to certify that the foregoing  
transcript in the Matter of:

MIRANT CANAL, LLC

BEFORE: EDWARD E. REICH

DATE: DECEMBER 18, 2008

PLACE: WASHINGTON, D.C.

represents the full and complete proceedings of  
the aforementioned matter, as electronically  
recorded and reduced to typewriting.

A handwritten signature in black ink, appearing to read "B. Stanley Ross", is written over a horizontal line.

B. STANLEY ROSS

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

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ENVIRONMENTAL PROTECTION AGENCY  
APPEALS BOARD  
WASHINGTON, D.C.  
12/18/08

2	4
<p>1 APPEARANCES:  2 On behalf of Mirant Canal:  3 JAMES N. CHRISTMAN, ESQUIRE  Hunton &amp; Williams, LLP  4 Riverfront Plaza, East Tower  951 East Byrd Street  5 Richmond, Virginia 23219-4074  (804) 788-8368  6  KRISTY A. NIEHAUS BULLEIT, ESQUIRE  7 Hunton &amp; Williams, LLP  1900 K Street, NW  8 Washington, D.C. 20006  (202) 955-1547  9  On behalf of Environmental Protection Agency:  10  MARK STEIN, ESQUIRE  11 STEPHEN PERKINS, ESQUIRE  RICHARD WITT, ESQUIRE  12 Office of Regional Counsel  U.S. EPA, Region I  13 1 Congress Street, Suite 1100  Boston, Massachusetts 02114-0223  (617) 910-1091  14 ALSO PRESENT:  15 Eurika Durr  16 Gary Millstein  17  18 * * * * *  19  20  21  22</p>	<p>1 Reich. I'm Jim Christman with the firm Hunton &amp;  2 Williams for Mirant Canal, and my partner,  3 Kristy Bulleit, from here in Washington, D.C.  4 And we also have Walter Stone, who is vice  5 president, environment, for Mirant.  6 JUDGE REICH: Thank you. And do you  7 have anybody joining us by videoconferencing?  8 MR. CHRISTMAN: We do. We have -- in  9 Atlanta, we have Hugh Davenport, who is a senior  10 vice president and deputy general counsel. And  11 we have co-counsel, Ralph Childe, in Boston.  12 JUDGE REICH: thank you. And I  13 assume you'll be the primary spokesperson for  14 Mirant Canal?  15 MR. CHRISTMAN: Until I need help,  16 yes.  17 JUDGE REICH: Okay, thank you.  18 Region I?  19 MR. STEIN: Good morning, Your Honor.  20 My name's Mark Stein. I'm the senior assistant  21 regional counsel with EPA Region I in Boston.  22 And here with me today are Stephen Perkins, the</p>
3	5
<p>1 PROCEEDINGS  2 JUDGE DURR: All rise. The  3 Environmental Appeals Board of the United States  4 Environmental Protection Agency is now in  5 session for a status conference In re: Mirant  6 Canal, LLC, Permit No. MA0004928, NPDES Appeal  7 No. 08-10, the Honorable Judge Ed Reich  8 presiding.  9 Please be seated.  10 JUDGE REICH: All right.  11 Good morning, Counsel. Thank you  12 for participating in this status conference,  13 both those of you who are here in person and  14 those participating by videoconferencing.  15 And we're here today pursuant to the Board's  16 order of November 12 of this year scheduling  17 this status conference.  18 I'd like to begin by asking Counsel  19 to identify themselves for the record,  20 beginning with Mirant Canal, and then  21 Region I.  22 MR. CHRISTMAN: Thank you, Judge</p>	<p>1 director of our Office of Ecosystem Protection,  2 which is the division that issues NPDES permits;  3 and Richard Witt of the Office of General  4 Counsel here in Washington.  5 JUDGE REICH: Okay, thank you. Let me  6 begin with a little background for this status  7 conference. The Board received a petition from  8 Counsel for Mirant Canal on September 2, 2008.  9 The petition was accompanied by a joint  10 scheduling motion asking for an additional 28  11 days to file a supplemental petition, and three  12 months thereafter, for the Region to file a  13 response.  14 One of the prominent issues raised  15 in the petition related to the Section 316-B,  16 Cooling Water Intake Structure Entrainment  17 Standard.  18 That issue was whether the  19 provisions of the final permit, which require  20 a level of control comparable to use of a  21 closed cycle cooling system, were a logical  22 outgrowth of the draft permit on which public</p>

6	<p>1 comment was sought.</p> <p>2 On September 12th -- did the mike</p> <p>3 go out? On September 12th, the Board issued</p> <p>4 an order on this particular issue, holding in</p> <p>5 abeyance the scheduling request. The Board</p> <p>6 asked the parties to address the potential</p> <p>7 applicability of 40 CFR Section 124.14(b), as</p> <p>8 well as the logical outgrowth issue.</p> <p>9 In doing so, the Board felt it made</p> <p>10 more sense to examine this issue up front,</p> <p>11 because if it were to conclude that Mirant</p> <p>12 were correct, that would dictate a remand to</p> <p>13 the permit, making further resource-intensive</p> <p>14 and time-consuming review of the petition</p> <p>15 unnecessary at this time.</p> <p>16 As requested, the Region filed a</p> <p>17 response dated October 10, and Mirant filed a</p> <p>18 reply dated October 30, after which the</p> <p>19 Board, by order of November 12th, scheduled</p> <p>20 this status conference.</p> <p>21 I want to emphasize a few key</p> <p>22 things at this point. First, this is simply</p>	8
7	<p>1 a status conference, not an oral argument,</p> <p>2 and I do not intend to get into a discussion</p> <p>3 of the substance of the arguments.</p> <p>4 Second, I have not, and more</p> <p>5 importantly, the Board has not, reached a</p> <p>6 firm resolution of the issues presented in</p> <p>7 the petition. Nothing said this morning</p> <p>8 should be read as reflecting a Board</p> <p>9 decision.</p> <p>10 With that said, I do want, at this</p> <p>11 point, to posit a question primarily for the</p> <p>12 Region's consideration. I'm not asking for</p> <p>13 an answer this morning because I'm sure it</p> <p>14 will require some thoughtful analysis and</p> <p>15 consultation, but I do feel obligated to ask</p> <p>16 the Region to consider it.</p> <p>17 As a framework for my question,</p> <p>18 this is how I see the case right now: I do</p> <p>19 believe Mirant Canal has raised some very</p> <p>20 serious concerns about whether the final</p> <p>21 permit provisions were in fact a logical</p> <p>22 outgrowth of the draft permit. I'm not</p>	9
6	<p>1 suggesting that the Board will necessarily</p> <p>2 reach that conclusion, but there is certainly</p> <p>3 a significant possibility of that result.</p> <p>4 Under those circumstances, we can</p> <p>5 proceed in either of two ways. First, the</p> <p>6 Board can proceed with considering the permit</p> <p>7 as-is. If we do, it may take a little while</p> <p>8 before we can focus on the case, given</p> <p>9 competing demands on staff time. Once we do,</p> <p>10 we'll probably turn first to the logical</p> <p>11 outgrowth issue, and then, as necessary and</p> <p>12 appropriate, the other issues in the</p> <p>13 petition, after affording the parties the</p> <p>14 opportunity for additional briefing that they</p> <p>15 initially requested.</p> <p>16 Having some familiarity with</p> <p>17 Section 316 issues from being the lead judge</p> <p>18 on the Dominion Energy-Braden Point case, I</p> <p>19 think resolving those issues will not be</p> <p>20 quick or easy. If we decide in favor of the</p> <p>21 Region, and Mirant Canal challenges the</p> <p>22 decision in court, there's always the</p>	8
7	<p>1 possibility of the First Circuit overturning</p> <p>2 our decision, including on the issue of</p> <p>3 adequate opportunity for comment on the final</p> <p>4 entrainment standard. That would largely put</p> <p>5 the process back at square one, but after</p> <p>6 very considerable further delay.</p> <p>7 Alternatively, the Region could</p> <p>8 choose to withdraw the permit at this point</p> <p>9 and reopen the comment period at least as to</p> <p>10 the entrainment provisions. While that might</p> <p>11 or might not result in changes to the permit,</p> <p>12 it would remove one significant source of</p> <p>13 potential vulnerability from any future</p> <p>14 administrative and judicial appeals.</p> <p>15 The benefits of eliminating this</p> <p>16 issue from future challenge, let alone</p> <p>17 potentially improving the permit, might well</p> <p>18 outweigh any up-front delay, particularly</p> <p>19 since the Board will not be addressing the</p> <p>20 petition immediately in any event.</p> <p>21 So what I would like the Region to</p> <p>22 at least consider, and I want to emphasize</p>	9



10	12
<p>1 it's clearly the Region's choice at this  2 point, is whether the environment might not  3 be better served by withdrawing the permit  4 and reopening the comment period on the  5 entrainment issue.</p> <p>6 I would ask that you advise the  7 Board in writing by no later than December 5  8 how you would like to proceed. It's the  9 Region's decision, though, if the parties  10 choose to confer about it. They are free to  11 do so.</p> <p>12 Because this was not raised with  13 you in advance, I'm not requiring any party  14 to comment on it at this time. But if any  15 party does want to be recognized for any  16 purpose, I would be pleased to do so.</p> <p>17 MR. STEIN: Your Honor, this is Mark  18 Stein. I guess I'd ask one point of  19 clarification.</p> <p>20 I actually think you did state this  21 quite clearly, but just to be sure. What  22 you're talking about, or at least suggesting</p>	<p>1 the issue of logical outgrowth, not  2 necessarily because anything relating to the  3 merits of the decision.</p> <p>4 MR. STEIN: Thank you, Your Honor.</p> <p>5 JUDGE REICH: Would anybody else like  6 to be recognized?</p> <p>7 MR. CHRISTMAN: I don't think so,  8 Judge.</p> <p>9 JUDGE REICH: In that case, I'm going  10 to adjourn this status conference. Again, I  11 would like a response by December 5. And I  12 would emphasize at this point the region is free  13 to choose whatever path it wants, but I would at  14 least like thoughtful consideration of the  15 issue.</p> <p>16 Thank you.  17 (Whereupon, at approximately  18 10:10, the STATUS CONFERENCE was  19 adjourned.)  20 * * * * *  21  22</p>
11	
<p>1 that we consider, is withdrawing the 316-B  2 part of the permit, and not necessarily other  3 parts of the permit, that we could obviously  4 think that through whether that needed to be  5 done as well if we were going to undertake to  6 withdraw and go back to public notice. But  7 you're speaking specifically to the 316-B  8 provision.</p> <p>9 JUDGE REICH: In terms of reopening it  10 for purpose of public comment, yes. Although,  11 as with Mirant Canal, which some of you are, I  12 know -- I mean, Bryant Kendall (?), which some  13 of you are familiar with, if we received a  14 request to withdraw the 316-B, we probably would  15 put the rest of the permit on review -- petition  16 review on hold until the process played out, so  17 we didn't have to deal with it piecemeal,  18 because there can be interactions between the  19 316-B part and the rest of the permit.</p> <p>20 But as far as our suggestion for  21 consideration, that goes exclusively to the  22 entrainment issue, and again, only because of</p>	

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