

October 24, 2006

**BY OVERNIGHT DELIVERY
RETURN RECEIPT REQUESTED**

Secretary Carlos M. Gutierrez
Department of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue, NW
Washington, DC 20230

Re: **MCZM's Conditional Concurrence (Objection) to
NPDES Permit No. MA0004898**

Notice of Appeal (or in the alternative, request to extend time)

Dear Sir:

This letter is submitted on behalf of Mirant Kendall, LLC ("Mirant Kendall") under 16 U.S.C § 1256(c) and 15 C.F.R. § 930.125 as a notice of appeal of a concurrence determination issued by the Massachusetts Office of Coastal Zone Management ("MCZM") regarding National Pollutant Discharge Elimination System Permit No. MA0004898 (the "NPDES Permit"). MCZM issued its concurrence determination as a letter, a copy of which is enclosed as Attachment A, addressed to Mirant Kendall and dated September 15, 2006. Region 1 of the U.S. Environmental Protection Agency ("EPA Region 1") issued the NPDES permit, a copy of which is attached as Exhibit B, on September 26, 2006.

Although facially labeled as a conditional concurrence, MCZM's concurrence determination actually was an objection to the NPDES Permit because it impermissibly reserves MCZM's final concurrence until MCZM can review specified implementation activities required by the final NPDES Permit. Therefore Mirant Kendall appeals MCZM's determination ("MCZM's conditional concurrence (objection)") because those reservations are beyond MCZM's authority and should be set aside under 15 C.F.R. § 930.129(b) as not in compliance with the Coastal Zone Management Act (the "Act").

Mirant Kendall also appeals whether MCZM has jurisdiction over the NPDES permit. The NPDES Permit concerns a facility located outside of the Coastal Zone or any other area within a geographic location description established under the approved Coastal Zone Management Plan in Massachusetts, and it does not appear that MCZM ever followed the necessary procedures in timely fashion to assert its jurisdiction over that facility. Nor did Mirant Kendall request MCZM's concurrence by filing any certification that its activities under the NPDES permit were consistent with enforceable coastal zone policies in Massachusetts. Accordingly, MCZM's conditional concurrence (objection) also should be set aside under 15

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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C.F.R. § 930.129(b) if the Secretary finds that MCZM had no jurisdiction to issue a concurrence determination.

Also, Mirant Kendall notes that it cannot accompany this notice of appeal with four copies of the administrative record for the NPDES Permit because that record has not yet been made fully available by EPA Region 1 in a fashion suitable for filing. Also, most of that voluminous record is immaterial to this appeal. Accordingly, Mirant Kendall seeks leave to forego filing of that record, or in the alternative, an extension of time for the formal docketing of this appeal until such time as the record is compiled, copied, and filed.

The applicable requirements for this notice of appeal are set out at 15 C.F.R. § 930, and are satisfied, as follows.

The Party Filing the Request

The party filing the notice of appeal is Mirant Kendall, the owner of the affected facility and the permittee under the NPDES Permit. The address and business address of the affected facility is Mirant Kendall Station, 265 First Street, Cambridge, MA 02142.

Authorized Representative

The undersigned is Mirant Kendall's authorized representative in this matter, with the address and contact information as indicated above. All filings to Mirant Kendall in this matter should be sent to the undersigned at Mintz Levin.

Filing Fee and Form

Enclosed as Attachment C is a check for \$500 which satisfies the application fee set out at 15 C.F.R. § 930.125(c).

Timeliness

MCZM dated its conditional concurrence (objection) September 15, 2006, addressed it to Mirant Kendall, and apparently provided it the same day by telefax to EPA Region 1. See Exhibit A. MCZM's conditional concurrence (objection) was not mailed or otherwise provided to Mirant Kendall, however, until a mailing postmarked Friday, September 22, 2006. *Id.* Mirant Kendall first received the conditional concurrence (objection) by mail on Monday, September 25, 2006.

Under 15 C.F.R. § 930.125(a), the time for filing this notice of appeal with the Secretary of Commerce expires on October 25, 2006, which is 30 days after Mirant Kendall's receipt of MCZM's conditional concurrence (objection). Because Mirant Kendall submits this notice of appeal on October 24, 2006, it is timely.

Bases for Mirant Kendall's Appeal

Mirant Kendall owns and operates the Kendall Station, a 256-megawatt power plant located on the Charles River in Cambridge, Massachusetts. The Station has operated since the 1950s. Its currently effective NPDES Permit was issued by a renewal in 1988 and has remained in effect under an administrative continuance due to a timely renewal application in 1992. In February 2001 Mirant Kendall submitted a renewed application to EPA Region 1 for issuance of a renewal permit with certain modifications to the existing permit. EPA Region 1 issued a draft of the NPDES renewal permit in June 2004, and after public comments closed in October, 2004, issued the final permit on September 26, 2006. This renewal will take effect on December 1, 2006, excepting any provisions that are stayed due to appeals.

The Kendall Station is located outside of the Coastal Zone as established in Massachusetts. See 301 CMR 21.05 (definition of Coastal Zone); 301 CMR 21.99 (Boundary Appendix); and the Massachusetts Coastal Zone Management Plan, Vol. II, Chapter 5; Massachusetts Coastal Region and an Atlas of Resources (the MCZM Coastal Atlas) at p. 71, Plate 15. Mirant Kendall is not aware that the MCZM or the Massachusetts Coastal Zone Management Plan has ever designated the location of the Kendall Station under 15 C.F.R. § 930.53 as within a geographic location description at which a NPDES permit may affect a coastal use or resource. Mirant Kendall accordingly did not file a certification of CZM consistency of its proposed activities under the NPDES Permit with its renewed application to EPA Region 1 in February 2001, as it had not with prior NPDES renewal applications, and has not done so since.

Nevertheless, MCZM was interested in the potential effects of the water intake and discharges at Kendall Station on anadromous fish species. MCZM's representatives actively consulted with Mirant Kendall and EPA Region 1 on renewal of the NPDES Permit. In response, Mirant Kendall copied MCZM with all of its principal submissions to EPA Region 1, and also responded to all inquiries from MCZM as the permit renewal process unfolded during 2001 through 2006.

As far as Mirant Kendall is aware, however, MCZM did not provide timely notice of its intention to assert jurisdiction over the renewal of the NPDES Permit pursuant to 15 C.F.R. § 930.54(a) or 301 CMR § 21.06(b), nor did it seek the approval from the Director of the Office of Ocean and Coastal Resource Management to assert jurisdiction pursuant to 15 C.F.R. § 930.54(b). If so, MCZM's potential jurisdiction, if any, was waived. Nevertheless, MCZM issued the conditional concurrence (objection) on September 15, 2006, just ahead of the issuance of the NPDES Permit renewal by EPA Region 1 on September 26, 2006.

On its face, however, MCZM's conditional concurrence (objection) is not in compliance with the Act. MCZM explicitly conditioned its concurrence on MCZM's future review of additional submissions by Mirant Kendall under the final NPDES Permit, and explicitly reserved

the option to object to the NPDES Permit until it makes a later determination regarding those submissions. Specifically, MCZM stated:

CZM conditionally concurs with your certification and finds that the principal activity is consistent with the CZM enforceable program policies. However, certain conditions . . . have not been finalized . . . and our concurrence with your certification is contingent on CZM's review of [certain] elements . . . Should we determine that these elements of the NPDES permit are not consistent with our enforceable policies, we reserve the right to object to the permit, or request remedial action pursuant to 15 CFR part 930.65.

While it is permissible for MCZM to issue a conditional certification, if it has jurisdiction, any such conditions must be incorporated into the federal permit. 15 C.F.R. § 930.4(a). Accordingly, once MCZM issued a conditional concurrence, EPA was required to incorporate MCZM's conditions into the NPDES Permit or, alternatively, to defer issuance of the final permit until any unresolved conditions were removed. *Id.*¹ That is because unless MCZM's conditions were put into the final permit, 15 C.F.R. § 930.4(b) requires that "all parties shall treat the State agency's conditional concurrence as an objection." And the consequence of an objection, per 15 C.F.R. § 930.64, is that the federal permit may not be issued in conformity with the Coastal Zone Management Act.

Here, the final NPDES permit does not provide that MCZM has any role in the implementation of the permit, much less any provision indicating that the permit will not go into effect until MCZM's reservation of the right to object to the permit has been resolved. See the NPDES Permit attached as Exhibit B. Thus, MCZM's conditional concurrence is, in effect, an objection and, per 15 C.F.R. § 930.64, EPA Region 1 should not have issued the NPDES Permit. Alternatively, MCZM's reservation of a later right to object to the permit was not authorized under the Act or its regulations, and should be stricken on this appeal pursuant to 15 C.F.R. § 930.129(b).

Also, the entire concurrence should be overturned under 15 C.F.R. § 930.129(b) if the Secretary finds that MCZM did not properly have jurisdiction over the NPDES Permit. For the reasons outlined above, Mirant Kendall doubts that MCZM has such jurisdiction or ever provided proper notice or received proper approvals under 15 C.F.R. §§ 930.53 and 930.54.

¹ Mirant Kendall notes that 15 C.F.R. § 903.4(a)(2) imposes a duty upon the applicant and the federal agency immediately to notify the state agency, here, MCZM, if a conditional concurrence contains any unacceptable provision. Although EPA Region 1 apparently received MCZM's conditional concurrence (objection) on or about September 15, 2006 by telefax, it failed to fulfill that duty prior to issuing the final permit on September 26, 2006. Mirant Kendall did not have a reasonable opportunity to notify MCZM because it received MCZM's conditional concurrence (objection) only on the day prior to issuance of the NPDES permit by EPA Region 1.

Relief Sought by this Appeal

Mirant Kendall files this notice of appeal and requests that the Secretary overturn MCZM's objection by excising MCZM's conditions and issuing an unqualified concurrence that the NPDES Permit is consistent with the objectives and purposes of the Coastal Zone Management Act.

Alternatively, Mirant Kendall requests that the Secretary overturn MCZM's concurrence determination by finding that MCZM lacked jurisdiction over the NPDES Permit.

Mirant Kendall notes that it expects to file a separate appeal of the NPDES Permit to EPA's Environmental Appeals Board, and along with other demonstrations of clear error by EPA Region 1, expects to assert in that appeal that EPA Region 1 erred, if MCZM has jurisdiction, by issuing the NPDES Permit over MCZM's conditional concurrence (objection). Mirant Kendall nevertheless files this appeal to obtain direct relief from MCZM's impermissible determinations.

Reservation

Mirant Kendall notes that further proceedings in the matter of the NPDES permit may lead MCZM to issue revised or additional concurrence determinations. Mirant Kendall reserves its full rights to contest any issue that arises in such proceedings, including whether any conditions to a revised concurrence would prevent Mirant Kendall from operating the Kendall Station in a fashion that is consistent with the objectives and purposes of the Act.

Request for Relief from Filing Copies of the Consolidated Record, or in the alternative, Request for Extension of Formal Docketing of this Appeal

Mirant Kendall recognizes that 15 C.F.R. § 930.127(i)(2), which applies to appeals regarding permits for an energy project such as the Kendall Station, calls for it to submit, along with this notice of appeal, four copies of the consolidated record maintained by the lead federal agency, including (to the extent practicable) one copy in electronic form. Mirant Kendall requests relief from this requirement.

First, the record maintained by EPA Region 1 is not in condition to file along with this notice of appeal. Many of the documents identified in the Region's index have not been made available to the public at this time, nor has Mirant Kendall received the consolidated record in electronic form. Second, Mirant Kendall's appeal to the Secretary of Commerce is limited to a narrow issue arising from the face of MCZM's conditional concurrence (objection), whereas the record of the NPDES permit involves at least 676 documents comprising thousands of pages. As that record would not aid resolution of this appeal, Mirant Kendall requests leave to forego filing of the record.

In the alternative, Mirant Kendall requests that the Secretary not formally docket this appeal and instead, extend the time for Mirant Kendall to file the appeal until EPA Region compiles the administrative record in a fashion suitable for filing.

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Request for Relief from Filing Copy of Applicant's Consistency Certification

Mirant Kendall recognizes that 15 C.F.R. § 930.127(c) calls for it to submit, along with the brief due within 30 days of filing this notice of appeal, a copy of the applicant's consistency certification. As described above, however, MCZM's assertion of jurisdiction here arose despite the facts that the Mirant Kendall Station is not located in the Coastal Zone as defined in Massachusetts and that Mirant Kendall has never filed a consistency certification for the NPDES Permit. While Mirant Kendall certainly believes that its activities are consistent with the enforceable coastal zone policies in Massachusetts, no such certification was made to MCZM or required. Accordingly, Mirant Kendall requests leave not to file such a certification with its brief.

I certify that copies of this notice of appeal and its exhibits have been sent this day by regular mail to the persons identified below. Thank you for your consideration.

Best regards,


Ralph A. Child

cc: Joel LaBissoniere
Assistant General Counsel for Ocean Services
National Oceanic and Atmospheric Administration

Susan Snow-Cotter
Director, MCZM

Ronald Fein
EPA Region 1

Robert Brown
MassDEP

Shawn Konary
Mirant Kendall

Attachments:

- Ex. A - MCZM's Conditional Concurrence (Objection) dated 9/15/06
- Ex. B - NPDES Permit No. MA0004898 issued 9/26/06
- Ex. C - Filing Fee