

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

In re: Mirant Canal, LLC)

) NPDES Appeal No. 08-10

)
NPDES Permit No. MA 0004928)
_____)

**RESPONDENT'S STATUS REPORT AND
MOTION FOR STAY OF PROCEEDINGS**

Region 1 ("Region") of the United States Environmental Protection Agency ("EPA") hereby provides this status report and respectfully requests that the Environmental Appeals Board ("Board") stay the proceedings in this case in light of the Region's decision, pursuant to 40 C.F.R. § 124.19(d), to withdraw certain provisions of the challenged permit and to re-notice them as draft permit conditions for further public comment.

BACKGROUND

On August 1, 2008, Region 1 issued a final National Pollutant Discharge Elimination System ("NPDES") permit to Mirant Canal Station ("Final Permit"). On September 2, 2008 Mirant filed a petition for review of the Final Permit with the Board ("Petition"). As a result the Final Permit is stayed, and Canal Station's existing permit, last issued in 1989, remains in effect. On September 12, 2008 the Board issued an order directing the Region "to file a preliminary brief responding solely to Mirant Canal's contention that it was not provided an adequate opportunity to comment on the contents of Part 1.A.13.g of the final permit due to changes between the draft and final permits" on or

before October 14, 2008. The Region filed its brief on October 14 and Mirant filed its response on October 30. The Board convened a status conference on November 19, 2008, at which the Board discussed practical considerations related to the notice-and-comment issue with the parties, while indicating that it had not yet reached a decision on the issue. In light of these considerations, the Board requested the Region to further consider whether to withdraw the Final Permit's entrainment reduction requirements, re-notice them as draft permit conditions for public comment, and seek a stay of the existing permit appeal pending resolution of the permit conditions in question. The Board directed the Region to report back to the Board on its decision by December 5, 2008.

STATUS REPORT

After further consideration, Region 1 has decided that, pursuant to 40 C.F.R. § 124.19(d), it will withdraw the conditions of the Final Permit that are based upon the Region's determination under section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b), that closed-cycle cooling is the best technology available for reducing entrainment by Canal Station's cooling water intake structures, and it will re-notice these provisions as draft permit conditions for additional public comment. While Region 1's view, as set forth in its brief of October 14, 2008, is that re-noticing these permit conditions for additional public comment is not legally required, the Region clearly has the discretionary authority to take such action and has now decided that doing so would be desirable in this case. This action will moot the pending notice-and-comment issue and the associated practical concerns noted by the Board. The Region intends to issue a letter to the Board, the Petitioner and various other interested parties to provide notification of the Region's

decision in this regard and to identify the specific conditions of the Final Permit that will be withdrawn and re-noticed as draft permit conditions for public comment.

GROUND FOR STAY

The Region requests that the Board stay this permit appeal proceeding so that the Region may, pursuant to 40 C.F.R. § 124.19(d), withdraw the permit conditions in question, re-notice them as draft permit conditions for public comment, consider public comments received, write responses to the significant comments received and prepare new final permit conditions. After new final permit conditions are issued, any party with requisite standing may appeal to the Board, and any appeals can be consolidated with the existing appeal. The requested stay will enable the Region to exercise its option under section 124.19(d) to pursue the above-described course of action and will conserve judicial resources by not requiring either the Board or the parties to deal with an appeal concerning permit conditions that the Region proposes to withdraw, or an appeal concerning only part of a permit.

Specifically, the Region requests that the Board stay these appeal proceedings until June 1, 2009. This date is necessary in order to give the Region a reasonable amount of time to (1) re-notice the withdrawn portions of the Permit, (2) hold a public comment period and a public hearing, (3) consider and respond to public comments, and (4) develop and issue final permit conditions addressing the withdrawn portions of the Permit. Region 1 acknowledges, however, that it is currently impossible to know how much time will be needed to respond to comments on the draft permit conditions. Region 1 expects that it will be able to make a better prediction after it has a chance to review the comments that

have been submitted. Therefore, Region 1 also proposes that it would file a status report within two weeks of the close of the comment period on the new draft permit conditions and seek additional relief as warranted.

REQUESTED RELIEF

In the interest of judicial economy and to enable the Region to proceed pursuant to section 124.19(d), the Region requests that the Board issue an order staying these permit appeal proceedings until June 1, 2009.

The Region represents that its undersigned counsel has discussed this Status Report and Motion for Stay of Proceedings with Petitioner's counsel, who indicated that Petitioner would file a reply to this Status Report and Motion for Stay of Proceedings.

Respectfully submitted,

Dated: December 4, 2008



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