UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

VIA FAX 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
NPDES Permit No. MA 0004898
Mirant Kendall, LLC

August 15, 2007

Dear Ms. Durr,

Enclosed please find the originals of the following documents in the above-captioned case:

1. Respondent's Motion for Leave to File Response to Petitioner Mirant Kendall, LLC's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report
2. Respondent's Response to Petitioner Mirant Kendall, LLC's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report
3. Certificate of Service

Copies of the above have also been mailed to the Board and to counsel of record today. In lieu of five additional paper copies for the Board, electronic copies of each document have been posted to the CDX system.

Sincerely,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1

cc: Ralph A. Child, Esq., Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Peter Shelley, Esq., Conservation Law Foundation

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

In re: Mirant Kendall, LLC Mirant Kendall Station	)	NPDES Appeal Nos. 06-12, 06-13
NPDES Permit No. MA 0004898	)	

RESPONDENT'S MOTION FOR LEAVE TO FILE RESPONSE TO PETITIONER MIRANT KENDALL, LLC'S MOTION TO REMAND PERMIT AND RESPONSE TO STATUS REPORT AND TO CLF'S RESPONSE TO STATUS REPORT

Region 1 ("Region") of the United States Environmental Protection Agency hereby moves the Environmental Appeals Board ("Board") for leave to file the enclosed response to Petitioner Mirant Kendall, LLC's ("Mirant's") Motion to Remand the Permit to Region 1 and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings (Docket No. 83), and to Petitioners Conservation Law Foundation's and Charles River Watershed Association's (collectively, "CLF's") Status Report and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings (Docket No. 84) (collectively, "Petitioners' Responses"). Petitioners' Responses were filed in response to Respondent's Status Report and Motion to Extend Stay of Proceedings (July 25, 2007) (Docket No. 80) ("July 25 Status Report").

The Region seeks leave to file the enclosed response in order to advise the Board, in advance of a live status conference, of the grounds for the Region's opposition to certain aspects of Petitioners' Responses. Both CLF and Mirant request that the Board issue a

procedural order that differs materially from the order sought by the Region in its July 25 Status Report. The Region's response provides its legal and practical rationale for opposing the procedural orders proposed by both Mirant and CLF, and the Board's consideration of this response in advance of a live status conference will conserve judicial resources before and during that conference. The Region's response is timely because it has been filed within 15 days of service of Petitioners' Responses. See The Environmental Appeals Board Practice Manual (June 2004), at 38-39.

The Region respectfully requests that the Board permit the Region to file the enclosed response and, for the reasons stated in that response, deny Mirant's motion to remand the permit and the requests for procedural orders contained in Petitioners' Responses to the extent that such orders would differ from the order proposed in the Region's July 25 Status Report.

Respectfully submitted,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Fax: 617-918-0040

Date: August 15, 2007

Of Counsel:

Robert Stachowiak, Attorney-Adviser
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

BEFORE THE ENVIRONMENTAL APPEALS BOARD
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In re: Mirant Kendall, LLC Mirant Kendall Station	)	NPDES Appeal Nos. 06-12, 06-13
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RESPONDENT'S RESPONSE TO PETITIONER MIRANT KENDALL, LLC'S MOTION TO REMAND PERMIT AND RESPONSE TO STATUS REPORT AND TO CLF'S RESPONSE TO STATUS REPORT

Region 1 ("Region") of the United States Environmental Protection Agency ("Agency") respectfully submits to the Environmental Appeals Board ("Board") this response to Petitioner Mirant Kendall, LLC's ("Mirant's") Motion to Remand the Permit to Region 1 and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings ("Mirant's Response to Status Report"), and to Petitioners Conservation Law Foundation's and Charles River Watershed Association's (collectively, "CLF's") Status Report and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings ("CLF's Response to Status Report") (collectively, "Petitioners' Responses"). Petitioners' Responses were filed in response to Respondent's Status Report and Motion to Extend Stay of Proceedings (July 25, 2007) ("July 25 Status Report").

Mirant and CLF assent to the Region's request for a nine-month stay in order to withdraw and modify, pursuant to 40 C.F.R. § 124.19(d), certain provisions of NPDES Permit No. MA0004898 ("Permit") pertaining to cooling water intake structures ("CWISs"). See Mirant's Response to Status Report, at 1; CLF's Response to Status

Report, at 1. However, Petitioners (for different reasons) oppose the Region's proposal to neither withdraw, modify, nor (during this nine month stay) respond to the Petitions' arguments concerning portions of the Permit that were not affected by the suspension of 40 C.F.R. Part 125 Subpart J (the "Phase II Rule").

As set forth more fully below, Mirant's request that the Region be ordered to withdraw the entire Permit is contrary to section 124.19(d)'s language, history, and intent, and the Board's precedent. Mirant's proposed course of action would delay protection of an important resource by unnecessarily prolonging the permit modification process. CLF's request, that the Region be ordered to respond to the remainder of the Petitions simultaneously with the development of permit modification concerning CWISs, may be motivated by goals that the Region shares. However, as a practical matter, this proposal would hamper both the process of modifying the Permit to address the suspension of the Phase II Rule and of litigating the other issues raised in the Petitions. In short, Petitioners' proposals are contrary to sound practice before the Board and would serve neither the protection of the Charles River nor judicial economy.

I. THE REGION, NOT MIRANT, IS ENTITLED TO DECIDE IN THE FIRST INSTANCE WHICH PROVISIONS OF THE PERMIT REQUIRE MODIFICATION, WHICH DATA ARE APPROPRIATE TO CONSIDER IN THE MODIFICATION PROCESS, AND WHICH ISSUES UNDER APPEAL SHOULD BE RESOLVED THROUGH A PERMIT MODIFICATION PROCESS.

A. The Region has an "Absolute Right" to Withdraw a Permit, or Portions Thereof.

As a general matter, "[s]ection 124.19(d) gives EPA regional offices an absolute right to withdraw portions or all of a permit at any time prior to the Board's rendering of a decision on a permit appeal." In re Wash. Aqueduct Water Treatment Plant, NPDES

Appeal No. 03-07, slip op. at 2 (EAB, Dec. 15, 2003) (emphasis added); In re Town of Ipswich Wastewater Treatment Plant, NPDES Appeal No. 00-19, slip op. at 8 n.5 (EAB, July 26, 2001) (region had "absolute authority" to withdraw one of two contested permit conditions). This "absolute right" includes the discretion to withdraw portions of a permit without withdrawing the permit in its entirety. See 40 C.F.R. § 124.19(d) (region may, after issuing a withdrawal notification, prepare a new draft permit "addressing the portions so withdrawn" while "[a]ny portions of the permit which are not withdrawn" remain unchanged and, if not stayed, continue to apply); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,281 (Dec. 11, 1996) ("EPA therefore proposes to clarify that the Regional Administrator may withdraw and reissue any NPDES . . . permit (or a contested condition thereof) prior to a decision of the EAB to grant or deny review under § 124.19(c).") (emphasis added).

Crucially, this "absolute right" is expressly vested in the Regional Administrator, who "may" exercise it – or not. Mirant has not identified, and the Region has not found, any precedent under section 124.19(d) or its predecessor wherein the Board ordered a region to withdraw a permit (or parts thereof) before deciding whether to grant review. Nor, in fact, has Mirant identified any authority suggesting that the decision to withdraw a permit, or portions thereof, is reviewable at all – whether after the fact or in advance.[1]

Finally, the specific procedure that the Region proposes in this instance – withdrawal and modification of portions of the permit, followed by consolidation of

[1] Indeed, the only reason this question even arises now is because the Region elected to announce in advance its intent to withdraw portions of the Permit. If the Region had simply issued the notice of withdrawal, then Mirant would in essence be arguing that the remainder of the Permit should be vacated and remanded – the remedy that would apply if Mirant were to prevail on the merits – before the Board had even had an opportunity to decide whether to grant or deny review.

petitions for review of the modified provisions with the existing petitions – is well-established practice before the Board. See, e.g., In re Carlota Copper Co., 11 E.A.D. 692, 706-07 (EAB 2004) (region withdrew two contested permit conditions; Board granted region's request to stay remaining conditions pending modification of withdrawn conditions; and petitioners filed new petitions after reissuance of withdrawn conditions); In re Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 352 (EAB 2002) (region withdrew and modified portions of permit in response to one of nine issues raised by petition; petitioners filed new petition regarding the modifications; and Board consolidated new petition with original petition concerning portions not withdrawn).

B. Mirant's Grounds for an Order Requiring the Region to Withdraw the Entire Permit are Generic and Not Compelling Here.

Mirant lists three reasons why the Region should be prohibited from withdrawing only certain portions of the Permit: some provisions of the Permit, though not directly pertaining to the permit provisions that the Region wishes to withdraw and modify, may nonetheless be indirectly affected by a modification; modifying only part of the Permit may result in the record containing more recent data with respect to modified provisions than un-modified provisions; and withdrawing the entire Permit could enable the Region, if it so desired, to start afresh and develop a new permit that might be less objectionable to Mirant.

Mirant's concerns are not unique to this appeal. Rather, they characterize many appeals where a regional office seeks to withdraw part, but not all, of a challenged permit, and represent tradeoffs inherent in the process of partial permit withdrawal. Mirant has not shown that these factors, which are not meaningfully limited or specific to the facts of this Permit, somehow apply with special force to this Permit, as opposed to every other permit

where a region elects to withdraw some but not all contested conditions. If Mirant's generic arguments could justify an order requiring the Region to withdraw this Permit in its entirety, then every exercise of section 124.19(d) authority would be subject to time-consuming motions to remand the entire permit on the same non-case-specific grounds that Mirant offers here. Such an approach is contrary to an important goal that the Board has emphasized in other contexts: "predictability and finality [in] the permitting process." In re New England Plating Co., 9 E.A.D. 726, 732 (EAB 2001).

To the extent that Mirant simply opposes the Regional Administrator's express authority under section 124.19(d) to withdraw "portions" of a permit while leaving in place the "portions of the permit which are not withdrawn," its arguments would more appropriately have constituted comments on section 124.19(d) during the Agency's rulemaking process, i.e., before the Agency promulgated a final regulation allowing a Regional Administrator to select which portions of an appealed permit to withdraw and which to defend despite these potential complications. Mirant's generic objections are essentially challenges to the regulation itself, and as such are inappropriate for this forum, untimely, and not compelling. See In re USGen New England, Inc. Brayton Point Station, 11 E.A.D. 525, 555-58 & n.55 (EAB 2004).

C. Mirant's Concerns Should Be Addressed by the Region in the First Instance Within the Process that the Region Proposed.

1. The Region, not Mirant, should decide which permit provisions may be indirectly affected by changes to the CWIS-related provisions.

Mirant argues that certain provisions of the Permit that do not directly pertain to the CWIS may be "inextricably intertwined" with the CWIS provisions. See Mirant's Response to Status Report, at 3. The Region acknowledges that there may be one or more

permit conditions that, though not directly pertaining to the CWIS, could somehow be affected indirectly by changes to the CWIS provisions. The Region cannot yet identify which, if any, conditions would be so affected, and does not anticipate being able to do so until it has made substantial progress towards development of the draft permit modification. Put simply, neither the Region nor Mirant can now assess which, if any, non-CWIS conditions might be indirectly affected by a set of proposed CWIS conditions that the Region has not yet developed. The fact that one or more non-CWIS conditions might fall into this category is not, however, a reason to require the Region to withdraw the entire Permit.

Furthermore, the determination of which, if any, non-CWIS conditions are affected by the development of new CWIS conditions should be made by the Region, not Mirant, in the first instance. Before issuing a draft permit modification, the Region will review the Permit and determine which, if any, non-CWIS conditions should also be withdrawn and subject to renewed public comment and potential modification, and provide written notification to Mirant, the Board, and all other interested parties identifying the provisions withdrawn. If any commenter disagrees with the Region's decision regarding the scope of the withdrawal and permit modification, and believes that a specific condition not withdrawn or modified is newly affected by the permit modification, then that commenter may raise the issue to the Region during the comment period for the draft permit modification, and, if the Region fails to satisfactorily address the commenter's concern, to the Board after the Region has issued the final permit modification. Cf. July 25 Status Report, at 6 (acknowledging that commenters may be entitled to challenge not just

conditions that were withdrawn and subject to permit modification, but also conditions "otherwise newly affected by the permit modification").

The Region's proposal – that the Region will make initial decisions, and petitioners may then challenge the Region's decisions to the Board – reflects the normal process of Board review of regional decisions. Mirant's proposal – that the Board decide in advance that the appropriate scope of a permit modification is much broader than the Region contemplates before the Region has even decided which provisions to withdraw and modify – is precisely backwards and would divest the Regional Administrator of the discretion conferred by section 124.19(d).

Finally, Mirant will suffer no prejudice from the Region's proposed course of action. If, in Mirant's view, the Region has failed to withdraw and modify a provision that was somehow newly affected by the Region's action, then Mirant may ask the Board to review that provision on the merits.

2. The Region may reasonably analyze data pertaining to permit provisions undergoing modification that is more recent than the data used to develop permit provisions not undergoing modification.

Mirant contends that it would be arbitrary for the Region to consider 2006 and 2007 field data in the context of a permit modification addressing CWIS provisions unless it re-opens all other provisions of the Permit in light of 2006 and 2007 field data. See Mirant's Response to Status Report, at 4-5.[2] But there is nothing inherently arbitrary about a region considering more recent data with respect to certain questions than with respect to others. Whenever a region initiates a permit modification, whether or not in the context of a withdrawal under section 124.19(d), commenters may submit new data pertaining to the

[2] Mirant incorrectly suggests that the Region only considered data through 2004 in issuing the final Permit. In fact, although the public comment period closed in 2004, the Region considered all field data that Mirant submitted, which included extensive data from 2005. See, e.g., Response to Comments, at A2, C4, H36.

proposed modification that post-dates the data used to develop other permit provisions. This possibility is not even limited to permit modifications: for example, under section 124.14, a region may re-open a public comment period in light of "substantial new questions," and may expressly limit the scope of the re-opened comment period "to the substantial new questions that caused its reopening." 40 C.F.R. § 124.14(c). Indeed, the possibility of new data is always present in any complex permit appeal, and the Board does not routinely require regions to revisit every issue for which new data might exist. Cf., e.g., In re Dominion Energy Brayton Point, LLC, NPDES Appeal 03-12, slip op. at 293-94 (EAB, Feb. 1, 2006) (remanding permit to region with respect to two specific issues, ordering region "to reopen the permit proceedings for the limited purposes identified with respect to the above-listed issues," and noting that region might need to reopen record for additional public comment, but not suggesting that region would be required to reopen record or consider additional data with respect to issues besides those remanded).

Finally, to the extent that this argument has any merit at all, the Region, not Mirant, is entitled to decide in the first instance which data to consider for which purposes, subject to Board review after the Region has made that decision.

3. The Region, not Mirant, should decide, and has decided, whether or not to start afresh and attempt to negotiate permit terms with the permittee.

Mirant suggests that withdrawing the entire Permit could enable the Region, if it so desired, to start afresh and develop a new permit that might be less objectionable to Mirant. Specifically, Mirant explains, a Board order requiring the Region to withdraw the entire Permit would "give[] the Region more flexibility with respect to a negotiated settlement." Mirant's Response to Status Report, at 6. As Mirant envisions, this process would involve the Region "issu[ing] a replacement Permit that contains many fewer – if any – disputed

provisions." Id. at 5. Mirant also explains that, under its proposal, "all of [the Permit's] provisions are subject to comment." Id. at 6.

The Region appreciates Mirant's efforts to identify procedural options that may offer an expedited pathway to a permit finally taking effect, particularly in light of the importance of protecting the Charles River. However, the Region does not agree that a return to square one, including an opportunity for Mirant to file fresh comments on every aspect of the Permit, to which the Region would then be required to respond, will move the process forward. Rather, it seems, Mirant proposes to turn the clock back to sometime well before June 2004, when the Region issued the draft Permit and supporting documents: in short, backward, not forward.

Whether the Region should withdraw the entire Permit and attempt to reach a "negotiated settlement" and "issue a replacement Permit that contains many fewer – if any – disputed provisions" is for the Region, not Mirant, to decide. If the Region were to reach that decision, it would not hesitate to so inform the Board and the parties. In the meantime, with the exception of CWIS provisions informed by the Phase II Rule and a possible (and likely small) set of non-CWIS provisions that might indirectly be affected by a modification of the CWIS provisions, the Region intends to defend the Permit as written. Mirant has not identified, and the Region has not found, any precedent wherein the Board remanded a complex NPDES permit on the grounds that the permittee (but no other party) thought a remand might facilitate settlement.

II. BIFURCATING THE PROCEEDINGS WOULD BE INEFFICIENT AND INEFFECTIVE.

CLF assents to the Region's request to stay those aspects of the proceedings that pertain to permit conditions affected by the suspension of the Phase II Rule, but opposes

the Region's request to stay the remainder of the proceedings pending the permit modification. See CLF's Response to Status Report, at 1-2. Instead, CLF proposes to bifurcate the proceedings, and asks the Board to direct the Region to respond to the Petitions insofar as they pertain to non-CWIS-related conditions at the same time as it develops a permit modification pertaining to CWIS-related conditions. See id. at 2.

The Region agrees with CLF's overarching goal of putting a protective permit into effect as soon as possible so as to control a thermal discharge that, the Region has found, has caused appreciable harm to the Charles River ecosystem. See generally Response to Comments, at C8. That said, CLF's proposal is impractical and inefficient, and would not likely achieve a more rapid resolution of this appeal. In theory, to be sure, the Region could attempt to simultaneously prepare its full written response to the Petitions, excepting the challenges concerning withdrawn provisions, while the same legal and technical staff involved in preparation of that response also engage in a permit modification involving potentially novel and complex technical and legal issues. But doing so would be unlikely to achieve CLF's aims and would constitute an inefficient and ineffective use of the Board's (and Region's) time.

First, the litigation would not be well framed before the Board if part of the appeal were briefed while part of the Permit was still undergoing modification. Although most of the Permit is in fact segregable from the portions that would be withdrawn, the Board will be in a better position to decide whether to grant review of the Petitions, and if so, to conduct that review, with the entire Permit (as modified) before it, not a mixture of defended and withdrawn provisions.

Second, a Board decision regarding the unaffected portions of the Permit, whether in the Region's favor or not, would probably not advance the date on which the Permit could be put into effect. If such a partial decision favored the Region (by denying review, or by granting review but deciding the merits in the Region's favor), that decision would likely not constitute "final agency action" under section 124.19(f)(1), and the provisions upon which the Region prevailed would likely not take effect, until the rest of the litigation was resolved. If, on the other hand, such a partial decision favored CLF (by remanding the non-withdrawn portions of the Permit to the Region), the Permit would not take effect until the Region completed the proceedings on remand and any further Board proceedings terminated, and any proceedings concerning the withdrawn and modified portions of the Permit were completed.

Third, if there are in fact (as Mirant urges) any non-CWIS provisions of the Permit that are "inextricably intertwined" with the CWIS provisions, and if any commenter disagrees with the Region regarding which provisions are so intertwined, judicial economy would not be well served if the Region were required to respond to Petitions before even receiving, let alone analyzing, comments on a modification that it has not yet proposed.

For these reasons, CLF's proposal would not make efficient use of the Board's (or the Region's) limited resources and is not a practical means for the permit modification and appeal to proceed. The Region advises the Board that if the Board does choose to bifurcate the proceedings as CLF proposes, then the Region is substantially less likely to be able to complete the permit modification by the date proposed in the Region's June 25 Status Report (April 18, 2008), which was based on the assumption that the staff involved would be able to focus their efforts on the permit modification.

III. AN ORDER TO LIMIT NEW ARGUMENTS TO PORTIONS OF THE PERMIT THAT WERE ACTUALLY WITHDRAWN, OR WERE NOT WITHDRAWN BUT ARE OTHERWISE NEWLY AFFECTED BY THE WITHDRAWN AND REISSUED PROVISIONS, WILL PROTECT THE REGION'S EXERCISE OF ITS OPTION TO WITHDRAW ONLY PART OF THE PERMIT.

The Region has requested that the Board clarify in its order that, with respect to portions of the Permit that are neither withdrawn under section 124.19(d) nor otherwise newly affected by the forthcoming permit modification, no party may raise new arguments in the context of a petition to review the permit modification. See July 25 Status Report, at 6. Such an order is needed to make clear to all parties that the permit modification is not an opportunity to raise arguments that they could have, but did not, raise with respect to existing permit conditions that have nothing to do with the permit modification. Petitioners oppose this request for different reasons: Mirant argues that it would be unlawful, and CLF that it would be overbroad and unnecessary. Compare Mirant's Response to Status Report, at 6, with CLF's Response to Status Report, at 7-8.

The Region's request pertains to those provisions that have not been withdrawn, modified, or in any way newly affected by the permit modification. The Permit under appeal is complex and includes numerous provisions, many of which have nothing to do with the CWIS-related provisions and will not be affected at all by any modifications to the CWIS-related provisions. The Region requests the clarification so that its exercise of its option under section 124.19(d) does not become an invitation for existing (or new) Petitioners to raise new arguments on unrelated provisions that could have been, but were not, timely raised.

Mirant argues that such an order would be unlawful because, in its view, section 124.19(d) requires a region to reissue an entire Permit, such that every provision of the

Permit – even conditions that were not contested, not withdrawn, not modified, and not affected by the withdrawal and modification – is subject to renewed public comment and, consequently, an opportunity for new challenges to be raised. This view is compatible with Mirant's request that the region be ordered to withdraw the entire permit, but, if the region does in fact have the discretion to withdraw portions of a permit, Mirant's view of the ensuing comment and petition process would render the partial withdrawal option a nullity. If a region's withdrawal of one permit condition meant that the entire permit was necessarily subject to a brand new round of public comment on every single condition of the permit, and consequently to an unlimited opportunity to belatedly raise issues that should have been raised in the original petitions, then there would be no difference between withdrawing a single condition and withdrawing the entire permit. Mirant does not identify, and the Region has not found, any instance where the Board has so interpreted section 124.19(d), or where it has allowed new arguments to be raised on provisions that were not withdrawn.

To the contrary, in similar contexts, the Board has accepted new petitions to review the withdrawn and reissued permit conditions, and consolidated those petitions with the original petitions pertaining to the provisions neither withdrawn nor modified. See, e.g., Carlota Copper Co., 11 E.A.D. at 706; Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. at 352. Unless the Board accepts Mirant's argument that partial permit withdrawal and reissuance violates section 124.19(d), allowing commenters to raise belated arguments on unaffected permit provisions would mean that the exercise of the Region's "absolute right to withdraw portions . . . of a permit," Wash. Aqueduct Water Treatment Plant, slip op. at 2, necessarily involves waiving the Agency's carefully crafted filing requirements

under section 124.19(a). If that were the case, parties who never commented on the provisions during the actual public comment period, or who did not raise particular arguments by the filing deadline, could have a second bite at the apple – surely not the intent of section 124.19(d).

Finally, Mirant's argument, if accepted, would not serve judicial economy in this case or in general because it would discourage regions from ever withdrawing individual permit conditions under section 124.19(d). When the Board finds error in one or two provisions of a complex permit, it does not usually vacate the entire permit; rather, it remands just those issues where it finds the region fell short. See, e.g., Dominion, slip op. at 293-94. Indeed, in Dominion, the Board specifically instructed the parties in its remand order that, while the Region's decision on remand was subject to appeal under section 124.19, "[t]he subject matter of any such appeal must be limited to the [remanded] issues." Id. at 294. But under Mirant's view, a region that voluntarily acknowledges a potential problem in a permit before the Board grants or denies review is placed in a worse position (essentially, a full remand) than a region that litigates to the end and receives a narrow remand from the Board. That, too, cannot be the intent of section 124.19(d).

CLF's argument is somewhat different. CLF agrees with the Region that "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." CLF's Response to Status Report, at 7-8. CLF also points out that "there may be a need for the public, including Petitioners, to comment broadly or specifically on issues related to the withdrawn conditions." Id. at 8. The Region agrees with this proposition as well. CLF

objects to the Region's proposal, however, because "Part 124 amply explains the public's right to comment on draft permits, [so] there is no need at this time for the Board to issue any order regarding the scope of comment on the draft permit reissuance." Id. Put simply, CLF asserts that Part 124 so clearly supports the distinction that the Region puts forth (between conditions that have been directly or indirectly affected by the modification, and conditions that have not) that an order to that effect is unnecessary.

The Region agrees that Part 124 clearly supports the Region's distinction, but nevertheless a clarifying order is appropriate, particularly in light of Mirant's position. As noted above, Mirant challenges a central tenet shared by the Region and CLF: that conditions of the Permit that have already proceeded through the public comment process would not be entitled to further comment and/or new arguments on review solely because different, unrelated portions of the permit were withdrawn. Resolving this question now will enable the Region to focus on responding to comments pertaining to CWIS-related provisions, rather than on untimely objections to unrelated provisions, and may prevent substantial delays. The Region therefore urges the Board to answer this question in its order granting the Region's motion to stay the proceedings.

Finally, the Board should deny CLF's request that the Region be ordered to notify the parties on or before the status conference which conditions of the Permit it intends to withdraw, and which conditions it considers severable from the withdrawn conditions. As a general matter, the Region intends to withdraw parts or all of Parts I.A.2.d, I.A.2.e, I.A.11, I.A.14.d.7, I.A.14.d.9, I.A.14.d.11, and I.A.16 of the Permit, and as little as necessary of the rest of the Permit. However, the Region will not be able to provide a final list of withdrawn conditions until it has made substantial progress towards the draft permit

modification, for the simple reason that the Region will not know what provisions of the Permit are indirectly affected by changes to the CWIS-related provisions until it knows what the CWIS-related provisions will be. See supra at 6.

IV. CONCLUSION

For the reasons set forth above, the Region requests that the Board:

1. Grant the Region's unopposed motion to stay the proceedings with respect to CWIS-related provisions until April 18, 2008, so that the Region may withdraw and modify such conditions;

2. Grant the Region's motion to stay the proceedings with respect to all other provisions until April 18, 2008, so that the appeal may proceed on the basis of the Permit as modified;

3. Grant the Region's request for a clarification that, while any commenter may, within 30 days of the issuance of the Region's final permit modification, petition for review of that permit modification, the scope of such petitions shall be limited to portions of the Permit that were withdrawn under section 124.19(d) or were otherwise newly affected by the permit modification;

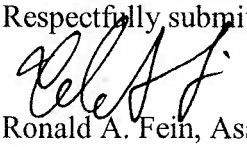
4. Deny Mirant's motion to remand the entire Permit;

5. Deny CLF's request for an order directing the Region to notify the parties on or before the status conference which conditions of the Permit it intends to withdraw, and which conditions it considers severable from the withdrawn conditions; and

6. Deny CLF's request for an order directing the Region to respond to other aspects of the Petitions before the permit modification is complete.

The Region assents to Petitioners' requests for a live status conference to be held on September 18 or 27, 2007, or on any other date convenient for the Board and the parties. The Region also assents to CLF's request for leave to file a timely response to Mirant's Motion to Remand the Permit to Region 1 and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings.

Respectfully submitted,



Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Fax: 617-918-0040

Date: August 15, 2007

Of Counsel:

Robert Stachowiak, Attorney-Adviser
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

In re: Mirant Kendall, LLC
NPDES Appeal Nos. 06-12, 06-13

CERTIFICATE OF SERVICE

I, Ronald A. Fein, hereby certify that copies of the foregoing (1) Respondent's Motion for Leave to File Response to Petitioner Mirant Kendall, LLC's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report, and (2) Respondent's Response to Petitioner Mirant Kendall, LLC's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report, were sent on this 15th day of August 2007 to the following persons in the manner described below:

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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

Fax (202) 233-0121

Copy by fax
Copy by e-mail

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

Fax (617) 350-4030

Copy by fax
Copy by e-mail

Ralph A. Child, Esq.
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Fax (617) 542-2241

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