

2007 AUG -1 AM 9: 57

ENVIR. APPEALS BOARD

July 31, 2007

VIA FEDEX

Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

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

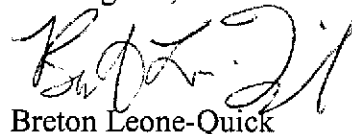
Dear Ms Durr:

I have enclosed originals plus five copies of the following documents for filing in the above-referenced appeal:

1. Petitioner Mirant Kendall LLC's Motion to Remand the Permit to Region 1;
2. Petitioner Mirant Kendall LLC's Request for a Status Conference; and
3. Petitioner Mirant Kendall LLC's Response to Respondent's Status Report and Motion to Extend Stay of Proceedings.

Please do not hesitate to contact me with any questions about this matter. Thank you for your continued attention.

Best regards,



Breton Leone-Quick

cc: Ronald A. Fein, Esq.
Cynthia Liebman, Esq.
Ralph A. Child, Esq.

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In re: Mirant Kendall, LLC)
Mirant Kendall Station) NPDES Appeal Nos. 06-12, 06-13
NPDES Permit No. MA0004898)
_____)

**PETITIONER MIRANT KENDALL LLC'S
MOTION TO REMAND THE PERMIT TO REGION 1**

Petitioner Mirant Kendall, LLC ("Mirant") respectfully requests that this Panel remand the Final NPDES Permit No. MA0004898 (the "Permit") issued by Region 1 of the United States Environmental Protection Agency (the "Region") that is currently the subject of this appeal.

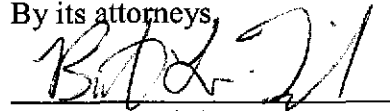
Mirant makes this request in light of the Region's stated intention to withdraw portions of the Permit that were informed by the "Phase II Rule," which was promulgated under § 316(b) of the Clean Water Act. The Region's request to withdraw only these portions of the Permit is impractical given that the Permit's 316(b) provisions cannot cleanly or conceptually be separated from its other provisions. Moreover, this selective withdrawal would be inefficient, would result in an arbitrary final Permit, and would forfeit any realistic chance of negotiating a mutually agreeable resolution of many of the Permit's requirements not informed by 316(b) or the Phase II Rule that are currently the subject of this appeal.

For further support of this Motion, Mirant relies on its Response to Respondent's Status Report and Motion to Extend Stay of Proceedings, filed herewith.

Respectfully submitted,

MIRANT KENDALL, LLC

By its attorneys,



Ralph A. Child

Breton Leone-Quick

Colin van Dyke

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Of counsel:

Sonnet Edmonds

Vice President and Assistant General

Counsel

Mirant Corporation

Dated: July 31, 2007

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

CERTIFICATE OF SERVICE

I, Breton Leone-Quick, hereby certify that copies of Petitioner Mirant Kendall LLC's Motion to Remand the Permit to Region 1 were sent on the 31st day of July 2007 to the following persons in the manner described below:

Original by FedEx Overnight Delivery

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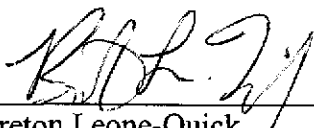
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Ronald A. Fein, Esq.
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Dated: July 31, 2007



Breton Leone-Quick

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Mirant Kendall Station) NPDES Appeal Nos. 06-12, 06-13
NPDES Permit No. MA0004898)
_____)

PETITIONER MIRANT KENDALL LLC'S
REQUEST FOR A STATUS CONFERENCE

Petitioner Mirant Kendall, LLC ("Mirant") respectfully requests a status conference before this Panel to discuss the issues raised in Respondent's Status Report and Motion to Extend Stay of Proceedings, Petitioner Mirant Kendall LLC's Motion to Remand the Permit to Region 1, and Petitioner Mirant Kendall LLC's Response to Respondent's Status Report and Motion to Extend Stay of Proceedings.

On June 12, 2007, this Panel issued an Order that, among other things, required the Region to "file a status report no later than 20 days after the Court of Appeals' order granting or denying rehearing or rehearing en banc in the *Riverkeeper* litigation." This Order also required the Region to include in its status report "two or more dates, mutually acceptable to all parties, for the rescheduled status conference." In the Region's subsequent Status Report and Motion to Extend Stay of Proceedings, the Region identified September 18 and 27, 2007 as two potential dates for a status conference.

Mirant now respectfully requests that this Panel schedule a status conference for this matter on one of the two days that the Region identified in its Motion, or on any other date convenient for the Panel and the parties. A status conference will provide this


Panel with more information and a better understanding of all of the issues involved with the Region's and Mirant's currently pending motions. Moreover, in its June 12, 2007 Order, this Panel appeared to recognize the potential value of a live status conference with the parties when it requested the Region to identify two dates for such a conference. Such a status conference would be even more beneficial for the Panel now, given the new issues raised by the Region and Mirant in their latest respective submittals. Such a conference would help assure that this appeal, and any proceedings on remand, progress in the most efficient and effective manner possible.

In further support of this request, Mirant relies on its Response to Respondent's Status Report and Motion to Extend Stay of Proceedings, filed herewith.

Respectfully submitted,

MIRANT KENDALL, LLC

By its attorneys,



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Breton Leone-Quick
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Counsel
Mirant Corporation

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NPDES Appeal Nos. 06-12, 06-13

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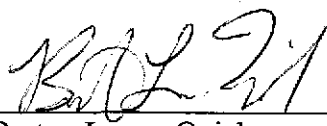
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PETITIONER MIRANT KENDALL LLC'S RESPONSE TO RESPONDENT'S STATUS REPORT AND MOTION TO EXTEND STAY OF PROCEEDINGS

Petitioner Mirant Kendall, LLC ("Mirant") respectfully submits this response to Respondent's Status Report and Motion to Extend Stay of Proceedings ("Motion"), which concern the referenced NPDES permit ("Permit").

In its Motion, Region 1 of the United States Environmental Protection Agency (the "Region"), the Respondent, requests a further stay of the current appeal until it files a status report by April 18, 2008. The stated reason is that the Region intends to withdraw certain to-be-identified Permit provisions that were "informed by" the now-suspended Phase II Cooling Water Intake Rule, and then to propose and replace those provisions along with new explanations. The Region also requests an order forbidding interested parties from later utilizing evidence and arguments from the Region's coming proceedings on the to-be-withdrawn Permit provisions during any subsequent proceedings on the non-withdrawn portions of the Permit.

In response, Mirant assents to a stay of this appeal until the Region files a status report by April 18, 2008. Mirant opposes, however, the Region's intention to withdraw

only portions of the Permit, and opposes the Region's request to foreclose interested persons from raising pertinent arguments in any subsequent proceedings on the Permit.

Simply put, the Region's attempt to withdraw only portions of the Permit is not feasible, would result in an arbitrary Permit, and would forego any realistic opportunity for Mirant and other interested persons to utilize further proceedings at the Region as an opportunity to resolve the full set of Permit provisions currently pending before this Panel. By seeking to withdraw just a portion of the Permit, the Region turns its back on a valuable opportunity to consider the serious issues raised by Mirant and others during this proceeding about other Permit provisions. Instead, the Region should withdraw the entire Permit for further public comment and re-proposal, which could conserve this Panel's resources by mooting all or a portion of the issues in this pending appeal, and also conserve the Region's resources that would otherwise be expended in analyzing and briefing the issues Mirant has currently appealed.

I. Provisions of the Permit "informed" by 316(b) are inextricable from other provisions in the Permit, and it is infeasible to withdraw only the 316(b) provisions.

As the Region explained in the Background Section of its Motion, the Permit contains several provisions regulating Kendall Station's intake that were promulgated under § 316(b) of the Clean Water Act, and more specifically, under the "Phase II Rule" that was in effect when the Region issued the Final Permit. As the Region also noted, the Phase II Rule has now been withdrawn following a decision by the Second Circuit Court of Appeals.

Given these developments, the Region wishes to reconsider those provisions, and intends to withdraw only the portions of the Permit that it deems were "informed" by the

now withdrawn Phase II Rule. The provisions of the Permit informed by or promulgated under § 316(b) and the Phase II Rule are, however, inextricably intertwined with the Permit's remaining provisions, including those promulgated under § 316(a) of the Clean Water Act and other sections.

For example:

- The Permit includes in-stream temperature limits justified partly on the asserted basis that they are necessary to prevent thermally stressed fish from being impinged, even though impingement is the type of harm already addressed by the Permit's 316(b) provisions. RTC, at H40.¹⁷ While Mirant has disputed the Region's position as it relates to thermal stress and impingement, the larger point is that any reproposal of the Permit's 316(b) provisions also must consider whether the Permit's temperature limits are still necessary and appropriate to prevent impingement, and how those or other temperature limits will interact with whatever 316(b) requirements the Region proposes.
- According to the Response to Comments document, the Permit includes impingement requirements that the Region states are necessary to achieve the applicable water quality standards. See, e.g., RTC, at H17-18, H30, H43. Also according to the Response to Comments document, the Permit includes entrainment related conditions that are not based on the 316(b) requirements of the Phase II Rule, but instead on the MassDEP's assessment of the general water quality in the Lower Charles River Basin, and the agency's evaluation of what entrainment requirements are necessary to achieve applicable water quality standards. RTC, at H17-18. Mirant disputes the applicability of the water quality standards to both impingement and entrainment, and also disputes the adequacy of any analysis purporting to show that impingement and entrainment have the reasonable potential to cause or contribute to any violation of those standards. Nevertheless, because the Region's asserted basis for the 316(b)-related limits is tied to the same water quality assessment on which the 316(a)-related thermal limits are based, the two sets of limits are inextricably linked. Therefore, a reconsideration of the Permit's 316(b) provisions necessarily entails re-examination of the Permit's 316(a) provisions that also were designed to achieve the applicable water quality standards.
- The Region has indicated that the Permit's 316(a) and 316(b) requirements act in tandem with one another in the sense that if the 316(a) requirements are successful in attaining a "robust" Balanced Indigenous Population, then the Permit could contain less stringent 316(b) requirements. RTC, at H35.

¹⁷ Citations to "RTC, at ___" refer to the Region's Response to Comments document for the Permit, which is part of the administrative record for this appeal.

Therefore, under the Region's own analysis, it is impossible to divorce the consideration of one from a consideration of the other, given that the 316(b) requirements are directly linked to the impact that the 316(a) requirements have on the Balanced Indigenous Population.

- The extensive biological sampling and monitoring provisions in the Permit exist -- in part -- to measure the effects of both the Permit's 316(a) and 316(b) provisions. See, e.g., RTC, at C76, H18-19. For this reason, it is impossible to individually segregate these provisions as being informed by either 316(a) or 316(b).

Given that it is not feasible to parse the provisions in this Permit into distinct categories depending on whether those provisions were informed by or otherwise relate only to § 316(b) and the Phase II rule, the only practical solution is for the Region to withdraw and reconsider the entire Permit.

That approach will also ensure that the parties do not engage in unnecessary appeals to this Panel should the murky issue arise of whether a Permit provision is "informed" by or relates to 316(b) and the Phase II Rule, or whether it is a provision that can -- with certainty -- be said to solely relate to EPA's other sources of authority. A complete withdrawal or remand, therefore, will be the cleanest and most efficient way for the Region to redraft the Permit without inviting additional conflict or uncertainty of process.

II. It would be arbitrary for the Region to consider the 2004 to 2007 field monitoring data for the Permit's 316(b) provisions without considering how those data affect the other Permit requirements.

During proceedings involving any withdrawn and re-issued provisions of the Permit, the Region and, if there is an appeal this Panel, will consider additional and substantial monitoring data that Mirant and others have gathered to date since the Region closed the comment period on the draft of the permit in 2004 and issued the final Permit in September 2006. The Region would be acting arbitrarily were it to consider or rely

upon these new data up through 2007 or later in redrafting the 316(b) provisions, while simultaneously refusing to consider the same new data regarding other requirements in the Permit for which those data are equally or more pertinent. Rather, the Region should withdraw the entire Permit for review in light of all intervening data. That is so especially because the Region itself has recognized that the limited data set available to it during the drafting of the Permit resulted in a certain amount of uncertainty with respect to establishing appropriate requirements. See, e.g., RTC, at C3, C9, C18.

III. Withdrawal of the entire Permit would facilitate the opportunity to moot some or all other issues under appeal.

A partial withdrawal of the Permit does little to advance a timely resolution of this appeal. If the entire Permit were withdrawn or remanded, it would enable Mirant, other interested parties, and the Region to resolve as many issues currently subject to the appeal as possible. It is important to recognize that some of the issues under appeal are relatively minor and could easily be resolved with a modicum of good faith discussion. The Region could then issue a replacement Permit that contains many fewer -- if any -- disputed provisions. Such a result will conserve the resources of all of the parties as well as this Panel. Without a remand of the entire Permit, the opportunity for such a resolution would be forfeited without any compelling reason.

There will be no prejudice to the Region if the entire Permit is withdrawn. First, as discussed above, remanding the entire Permit allows for the possibility that certain issues currently on appeal can be resolved without the Region having to spend its resources analyzing and briefing these issues for this Panel. Second, remanding the entire Permit imposes no requirements or burdens on the Region. Either the Region will participate in a dialogue towards a resolution or it will not. A remand of the entire Permit

does not force the Region's hand but rather gives the Region more flexibility with respect to a negotiated settlement. Given that there is nothing to lose but much to gain with respect to a remand of the entire Permit, it represents a very risk-free manner in which the issues on this appeal can either be resolved or narrowed.

Third and finally, the Region's apparent concern about withdrawing the entire Permit is that it does not want to open the door for parties to raise arguments on the new draft permit that were not raised during the original public comment period. In fact, the Region seeks an order from this Panel prohibiting any new issues on any appeal of "unaffected portions" of the draft permit. But that request deprives Mirant -- and all other interested parties -- with the process due under 40 C.F.R. § 124.19(d). This regulation provides that after the Region withdraws a part of a permit, it then must issue a new draft permit, which "shall proceed through the same process of public comment and opportunity for a public hearing *as would apply to any other draft permit subject to this part.*" 40 C.F.R. § 124.19(d) (emphasis added). The clear import of this language is that the newly issued draft permit can be commented upon in the same manner as any other draft permit, which necessarily means that all of its provisions are subject to comment.

Accordingly, an order from this Panel that limits the parties' ability to comment on and present evidence pertinent to the entire Permit during the proceedings on the withdrawn provisions, and to base any subsequent appeals on such comments and evidence, would contravene § 124.19(d) and its explicit rights with respect to meaningful participation in the NPDES Permit process.


CONCLUSION

This Panel should issue the requested stay, but also should require the Region to withdraw the entire Permit for all of the reasons stated above. Mirant respectfully requests that this Panel issue an order remanding the entire Permit to the Region in lieu of the Region's intention to selectively withdraw portions of the Permit. Mirant also respectfully requests that this Panel deny the Region's attempt to limit public comment on the new draft permit that it issues upon remand.

Respectfully submitted,

MIRANT KENDALL, LLC

By its attorneys,



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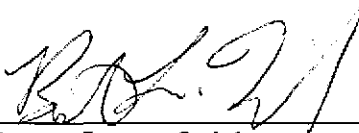
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