



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, 09-04
NPDES Permit No. MA 0004898
Mirant Kendall, LLC

February 24, 2009

Dear Ms. Durr,

Enclosed please find the original of the parties' Joint Status Report and Motion to Extend Stay of Proceedings in the above-captioned case, with an attached certificate of service. The motion and the certificate of service have also been mailed to the Board and to counsel of record today. In lieu of five additional paper copies for the Board, an electronic copy has been posted to the CDX system.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Fein".

Ronald A. Fein, Assistant Regional Counsel
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cc: Ralph A. Child, Esq., Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Kristy A. Bulleit, Esq., Hunton & Williams LLP
Peter Shelley, Esq., Conservation Law Foundation
Robert Brown, Esq., Massachusetts Department of Environmental Protection

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
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, 09-04
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NPDES Permit No. MA 0004898)	
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**JOINT STATUS REPORT AND
MOTION TO EXTEND STAY OF PROCEEDINGS**

The parties to this proceeding—Petitioner Mirant Kendall, LLC (“Mirant”), Petitioner Conservation Law Foundation (“CLF”), Petitioner Charles River Watershed Association (“CRWA”), and Respondent United States Environmental Protection Agency (“Agency”), Region 1 (“Region”)—hereby provide this status report and respectfully request that the Environmental Appeals Board (“Board”) further stay all proceedings in this case by three months to allow for the parties to undertake settlement negotiations. As explained in more detail below, the parties have already begun serious discussions and believe they can resolve this matter without the need for further litigation before the Board.

BACKGROUND

On September 26, 2006, the Region issued a final National Pollutant Discharge Elimination System (“NPDES”) permit for Mirant’s Kendall Station power plant, NPDES Permit No. MA0004898 (“Permit”). The Permit includes both thermal discharge limits imposed under Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a), and cooling water intake structure requirements imposed under Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). On October 30, 2006, both Mirant and CLF (on behalf of itself and CRWA) filed Petitions for Review of the Permit. Each petition, albeit for different

reasons, challenged the Permit's thermal discharge limits and its cooling water intake structure requirements imposed under Sections 316(a) and (b), respectively, of the Clean Water Act, as well as other provisions of the Permit.

The resolution of this proceeding was complicated by parallel developments concerning a nationally-promulgated regulation under Section 316(b) of the Clean Water Act. *See generally In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13, at 1-4 (EAB Sept. 28, 2007) (Order Extending Stay of Proceedings). Briefly, while this matter was pending, a regulation known as the "Phase II Rule," upon which the Permit had partly relied, was remanded to the Agency by the United States Court of Appeals for the Second Circuit, and was subsequently withdrawn by the Agency. *See id.* at 2. Consequently, the Region elected to withdraw the provisions of the Permit affected by the developments concerning the Phase II Rule. The Region sought, and the Board granted, a series of extensions to the stay of proceedings to enable the Region to prepare a Draft Permit Modification, submit the Draft Permit Modification for public comment, and prepare a Final Permit Modification and Response to Comments.

On December 18, 2008, the Region issued the Final Permit Modification with accompanying Response to Comments.¹ On the same day, the Region submitted a status report and assented-to motion for a further extension of the stay of proceedings. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13, Doc. No. 131 (Respondent's Status Report and Motion to Extend Stay of Proceedings). As the Region explained, it had elected, pursuant to 40 C.F.R. § 124.19(a), to specify in the notice that accompanied the permit decision that petitions for review could be filed within 45

¹ Both are available from <http://epa.gov/ne/npdes/mirantkendall/index.html>.

days (rather than 30 days) after service of notice of the decision, and therefore petitions for review would not be due until February 2009. *See id.* at 2. The Region, with the assent of all Petitioners, requested that the stay of proceedings be extended to the end of February 2009, and proposed to submit by February 27, 2009 a proposed revised briefing schedule that would advise the Board on how best to consolidate the various petitions and proceed with respect to all aspects of the appeal. *See id.* at 2-3.

On December 29, 2008, the Board granted the Region's motion and extended the stay of proceedings until March 6, 2009. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB Dec. 29, 2008) (Order Granting Unopposed Motion for Sixth Stay of Proceedings). The Board instructed the parties to file a status report (preferably jointly but separately if need be) with the Board by February 27, 2009, and to propose a revised briefing schedule that would advise the Board on how best to consolidate the petitions for review and proceed with all aspects of the pending appeals.

STATUS REPORT

On or about February 2, 2009, Mirant submitted to the Board a Petition for Review of Modified Permit.² The parties are unaware of any other petitions for review pertaining to the December 18, 2008 Final Permit Modification.

In parallel, however, all parties—Mirant, CLF, CRWA, and the Region, as well as the Massachusetts Department of Environmental Protection (“MassDEP”), which co-issued the Permit and Final Permit Modification with the Region—have entered into serious and substantive settlement discussions. Most recently, the above parties met on February 3, 2009, and discussed the outlines of a potential permit modification and interim

² Mirant's Petition for Review of Modified Permit has been docketed by the Board as NPDES Appeal No. 09-04. References herein to “this matter,” “this case,” and the “proceedings” therein are intended to apply to NPDES Appeal Nos. 06-12, 06-13, and 09-04.

compliance order that could resolve this matter without the need for further litigation.

While many important details have yet to be resolved, the parties are currently engaged in good-faith negotiations and believe that settlement is likely.

GROUND FOR FURTHER RELIEF

The parties believe that a further extension of the stay of proceedings, for three months, is essential so that the parties may engage in detailed and substantive settlement discussions. During this time, Mirant, CLF, CRWA, the Region, and MassDEP will attempt to reach conceptual agreement on a broad array of legal, policy, and technical issues pertaining to both a potential permit modification and an interim compliance order. The parties believe that three months is necessary to reach a conceptual agreement on these issues that could subsequently be embodied in a permit modification and interim compliance order.

Such a resolution would further the goals of the Clean Water Act by achieving important environmental benefits without protracted litigation, and would conserve administrative and judicial resources by avoiding unnecessary briefing of issues that could be resolved by settlement. Absent a continuation of the stay during this time period, the Region (and the Board) would be forced to divert their time and effort to issues that could instead be entirely resolved through settlement discussions.

REQUESTED RELIEF

The parties jointly propose the following course of action.

1. That all proceedings in this matter be stayed until June 5, 2009;
2. That the Region and Petitioners, preferably jointly but separately if they are unable to agree, submit by May 27, 2009 a status report advising the

Board on the progress of their settlement discussions and advising the Board whether it is appropriate to continue the stay, establish a revised briefing schedule, or take other appropriate action.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,



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Date: February 24, 2009

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MIRANT KENDALL, LLC

By its attorneys,



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**CONSERVATION LAW FOUNDATION and
CHARLES RIVER WATERSHED ASSOCIATION**

By their attorney,

Peter Shelley / by [Signature]

Peter Shelley

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Date: February 24, 2009

CERTIFICATE OF SERVICE

I, Ronald Fein, hereby certify that copies of the parties' Joint Status Report and Motion to Extend Stay of Proceedings were sent on the 24th day of February 2009 to the following persons in the manner described below:

Original by first class mail
Copy posted to CDX electronic system
Copy by fax

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Signed: February 24, 2009

