



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

December 18, 2008

Dear Ms. Durr,

Enclosed please find the original of Respondent's 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 blue ink, appearing to read "Ronald A. Fein".

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

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.**

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

**RESPONDENT’S STATUS REPORT AND
MOTION TO EXTEND STAY OF PROCEEDINGS**

Region 1 (“Region”) of the United States Environmental Protection Agency, with the assent of Petitioners Mirant Kendall, LLC, the Conservation Law Foundation, and the Charles River Watershed Association, hereby provides this status report and respectfully requests that the Environmental Appeals Board (“Board”) extend the stay of proceedings in this case to allow for filing of petitions for review of a final permit modification.

As explained in more detail below, the Region has signed the final permit modification pending which this proceeding has been stayed, and requests that the stay be extended through February 2009 pending filing of petitions for review of the permit modification and preparation of a proposed revised briefing schedule by the parties.

BACKGROUND

This proceeding has been stayed to enable the Region to withdraw and modify certain provisions of the 2006 final permit that set forth requirements for cooling water intake structures under section 316(b) of the Clean Water Act (“CWA”). *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13, at 1 (EAB

Nov. 25, 2008) (Order Granting Unopposed Motion for Fifth Stay of Proceedings). In the Region's most recent status report, filed November 21, 2008, the Region estimated that it would require until December 18, 2008 to finalize the permit modification and response to comments. *See id.*

STATUS REPORT

The Region has finalized, and will issue forthwith, a final permit modification addressing cooling water intake structure requirements under section 316(b) of the CWA. In its sole discretion as provided by 40 C.F.R. § 124.19(a), the Region has elected to specify in the notice that will accompany the permit decision that petitions for review may be filed within 45 days (rather than 30 days) after service of notice of the decision. *See* 40 C.F.R. § 124.19(a) ("The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action *unless a later date is specified in that notice.*") (emphasis added). Thus, any petitions for review will not be due until February 2009.

GROUND FOR FURTHER RELIEF

The Region requests that the stay be extended to the end of February 2009 and that the parties be given an opportunity to attempt to agree on a revised briefing schedule to propose to the Board. Until the deadline for filing petitions for review has passed and any petitions have been filed, it would be premature to propose a particular revised briefing schedule. Pursuant to 40 C.F.R. § 124.19(a), any person who filed comments on the draft permit modification or participated in the public hearing—including persons who did not petition for review of the 2006 final permit—may file a petition for review of the final permit modification by the date specified in the notice accompanying the decision.

Moreover, the issuance of the final permit modification moots most or all of the portions of the already-filed petitions for review that pertain to the 2006 final permit's requirements for cooling water intake structures under section 316(b) of the CWA, and certain related monitoring requirements.

Consequently, after the Region receives any petitions for review of the final permit modification, the Region intends to confer with all petitioners to discuss how to consolidate such petitions with the existing petitions for review of the 2006 final permit, and to attempt to agree upon a revised briefing schedule to propose to the Board.

In the meantime, judicial economy would be served by extending the stay of the existing proceedings. Absent a continuation of the stay during this time period, the Region (and the Board) would be forced to spend time addressing portions of the already-filed petitions that might be mooted or changed by the parties' February 2009 petitions.

REQUESTED RELIEF

The Region, with the assent of Petitioners, proposes the following course of action.

1. That the proceedings continue to be stayed through February 2009;
2. That all parties (the Region, existing Petitioners, and any new petitioners), preferably jointly but separately if they are unable to agree, submit by February 27, 2009 a proposed revised briefing schedule that will advise the Board on how best to consolidate the various petitions and proceed with respect to all aspects of the appeal.

The Region represents that its undersigned counsel has discussed this Status Report and Motion to Extend Stay of Proceedings with Petitioners' respective counsel, and that Petitioners assent to the motion.

Respectfully submitted,



Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
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Date: December 18, 2008

Of Counsel:

Richard T. Witt, Attorney-Adviser
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I, Ronald A. Fen, hereby certify that copies of the foregoing Respondent's Status Report and Motion to Extend Stay of Proceedings were sent on the 18th day of December 2008 to the following persons in the manner described below:

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

Eurika Durr, Clerk of the Board
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Signed: December 18, 2008


