



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
1 Congress Street, Suite 1100
BOSTON, MA 02114-2023

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From: Ronald Fein, Assistant Regional Counsel

Date: May 26, 2009

Number of pages including cover: 8

Return Fax: 617-918-0040

Message:

NPDES Appeal Nos. 06-12, 06-13, 09-04

Mirant Kendall, LLC

Joint Status Report and Motion to Extend Stay of Proceedings



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

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APPEALS BOARD

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

May 26, 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
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
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617-918-1040
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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

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33 U.S.C. § 1326(b). 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. After substantial delays caused by federal court litigation pertaining to a nationally-promulgated regulation under Section 316(b) of the Clean Water Act, the Region elected to withdraw the provisions of the Permit affected by the developments concerning that regulation, and issued a Draft and then Final Permit Modification revising the Permit's requirements under Section 316(b). Mirant submitted to the Board a Petition for Review of Modified Permit, which the Board later consolidated with the existing appeals.

In parallel with the above developments, however, the parties had begun settlement discussions, and on February 25, 2009, the parties filed a Joint Status Report and Motion to Extend Stay of Proceedings, requesting a further three-month extension for the purpose of engaging in settlement discussions. On February 26, 2009, the Board granted the motion. *See In re Mirant Kendall, LLC, Mirant Kendall Station*, NPDES Appeal Nos. 06-12 & 06-13 (EAB, Feb. 26, 2009) (Order Granting Joint Motion to Extend Stay of Proceedings). In its order, the Board required the parties to submit a status report and propose a further course of action by May 27, 2009.

STATUS REPORT

During the past three months, 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 engaged in

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serious and substantive settlement discussions. In particular, the parties have discussed the possibility of Mirant's installing technology that would substantially reduce both its thermal discharge and its cooling water intake flow. The parties have been attempting to come to agreement on the structure and terms of a NPDES permit modification that would resolve this matter without the need for any further litigation before the Board.

In pursuit of this end, the parties have met several times at EPA's office in Boston, and, at EPA's request, Mirant has provided extensive technical data, which in some instances has taken weeks to compile. However, due to the complexity and sensitivity of the environmental setting, the technology under discussion, and potential mechanisms for permit compliance, the parties have as yet been unable to agree on permit details. Nevertheless, the parties are optimistic that further discussion will enable the parties to reach a settlement in principle in the near future. While many important details have yet to be resolved, the parties are currently engaged in good-faith negotiations and believe that settlement is likely.

GROUNDS FOR FURTHER RELIEF

The parties believe that a further extension of the stay of proceedings, for four 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 four months is necessary to reach a conceptual agreement on these issues that could subsequently be embodied in a permit modification and interim compliance order.

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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 October 5, 2009;
2. That the Region and Petitioners, preferably jointly but separately if they are unable to agree, submit by September 24, 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,



Ronald A. Fein, Assistant Regional Counsel
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Tel: 617-918-1040
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Date: May 26, 2009

Of Counsel:

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In re Mirant Kendall: LLC
NPDES Appeal Nos. 06-12, 06-13, 09-04
Joint Status Report and Motion to Extend Stay of Proceedings

MIRANT KENDALL, LLC

By its attorneys,

Ralph A. Child / by RAF

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

By their attorney,

Peter Shelley / by RAF

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Date: May 26, 2009

In re Mirant Kendall, LLC
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CERTIFICATE OF SERVICE

I, Ronald A. Fen, hereby certify that copies of the parties' Joint Status Report and Motion to Extend Stay of Proceedings were sent on the 26 th day of May 2009 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
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

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Signed: May 26, 2009

