

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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In re :
: :
MIRANT KENDALL, LLC : Appeal No. 06-12
MIRANT KENDALL STATION : 06-13
: :
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1201 Constitution Avenue, NW.
Washington, DC 20460

Thursday, September 27, 2007

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ENVIR. APPEALS BOARD

The HEARING in this matter began at
approximately 10:30 a.m. pursuant to notice.

BEFORE:

JUDGE EDWARD E. REICH

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1 APPEARANCES:
 2 On behalf of Environmental Protection Agency:
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 On behalf of Petitioner Conservation Law
 11 Foundation and Charles River Watershed:
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 Conservation Law Foundation
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 On behalf of Respondent Mirant Kendall, LLC and
 15 Mirant Kendall Station:
 16
 RALPH A. CHILD, ESQUIRE
 17 Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
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1 PROCEEDINGS
 2 THE CLERK: All rise. The Appeals
 3 Board of the United States Environmental
 4 Protection Agency is now in session for a
 5 status conference in re: Mirant Kendall, LLC,
 6 Permit No. MA0004898, NPDES Appeal Nos. 06-12
 7 and 06-13. The Honorable Judge Edward Reich
 8 presiding. Please be seated.
 9 JUDGE REICH: Good morning,
 10 counsel, and thank you for coming this
 11 morning. We are here today pursuant to the
 12 Board's Order of August 21 of this year
 13 scheduling this status conference. I will
 14 ask counsel to identify themselves for the
 15 record in just a minute.
 16 My understanding is that we have
 17 participating this morning counsel for the
 18 two petitioners, one being Mirant Kendall the
 19 permittee in this matter and the other the
 20 Conservation Law Foundation and Charles River
 21 Watershed Association filing jointly and to
 22 whom for convenience I will refer to

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1 APPEARANCES (CONT'D):
 2 On behalf of Massachusetts Department of
 Environmental Protection:
 3
 ROBERT G. BROWN, ESQUIRE
 4 Massachusetts Department of Environmental
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 5 One Winter Street, Third Floor
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 7 ALSO PRESENT:
 8 EURIKA DURR
 9 CHERYL A. MACKAY, ESQUIRE
 DAVID WEBSTER
 SHAWN KONARY
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 12 * * * * *
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1 collectively as "CLF"; also, U.S. EPA Region
 2 I, the permit issuer; and by video, a
 3 representative of the Massachusetts
 4 Department of Environmental Protection
 5 participating in accordance with the Board's
 6 September 17, 2007, order granting leave to
 7 participate.
 8 First, let me introduce off to my
 9 left Cheryl McKay, counsel to the Board who
 10 is assisting me in this matter.
 11 Now I would like to ask counsel to
 12 identify themselves for the record, beginning
 13 with Mirant Kendall, then CLF, Region 1, and
 14 MADEP.
 15 MR. CHILD: Good morning, Your
 16 Honor. My name is Ralph Child, and I am with
 17 the law firm of Mintz Levin in Boston. I
 18 have two people with me who, if it's fine
 19 with you, can introduce themselves.
 20 JUDGE REICH: Okay.
 21 MS. BULLEIT: Good morning, Your
 22 Honor. I am Kristy Bulleit, I am with the

6	<p>1 law firm of Hunton & Williams in Washington, 2 D.C.</p> <p>3 MR. KONARY: Good morning, Your 4 Honor. I am Shawn Konary, director of 5 Environmental Policy and Regulatory Affairs 6 from Mirant.</p> <p>7 JUDGE REICH: Okay. Thank you. 8 CLF?</p> <p>9 MR. SHELLEY: Your Honor, Peter 10 Shelley for Conservation Law Foundation and 11 Charles River Watershed.</p> <p>12 JUDGE REICH: Okay. Thank you. 13 Region I?</p> <p>14 MR. FEIN: Your Honor, Ronald Fein 15 for the United States Environmental 16 Protection Agency, Region 1. With me at the 17 counsel table is James Curtin, the Office of 18 General Counsel. Sitting behind me are 19 Robert Stachowiak also from the Office of 20 General Counsel and David Webster, manager of 21 the Industrial Permits Branch in Region 1. 22 JUDGE REICH: Okay. And then</p>	8	<p>1 If I may, let me briefly summarize 2 my understanding of the position of each of 3 the parties in term to confirm that it is 4 correct. If you have any corrections that 5 you think need to be made to my 6 understanding, please go ahead and do that.</p> <p>7 Starting with the Region, as I 8 understand it the Region by way of its July 9 25, 2007, motion has requested a stay of all 10 proceedings before the Board until April 18, 11 2008, with the Region intending to withdraw 12 in accordance with 40 C.F.R. 124.19(d) 13 provisions of the permit, "informed by the 14 suspended portions of the Phase II rule" and 15 prepare a draft permit modification 16 addressing the portions of the permit so 17 withdrawn.</p> <p>18 In essence, as I understand it, the 19 Region is asking the Board to take no action 20 even on those portions not affected by the 21 impending withdrawal until it completes the 22 proposed permit modification at which time</p>
7	<p>1 participating in Boston we have Mass Dep. 2 MR. BROWN: Robert Brown of the 3 Office of General Counsel, MADEP. 4 JUDGE REICH: Okay. Thank you, Mr. 5 Brown. Since this is a status conference and 6 not an oral argument, I think we can proceed 7 somewhat less formally. But as you can see, 8 a transcript is being made of these 9 proceedings and the record will be part of 10 the Board's docket for these appeals. 11 While this was established as a 12 status conference, I would note that the 13 Board has before it three interrelated 14 motions related to potential stay of all or 15 part of these proceedings. 16 So I want to make sure that before 17 we adjourn this morning that I fully 18 understand the positions of the parties 19 because I would like to be able to have the 20 Board address those motions as soon as we can 21 and help establish the framework for 22 proceeding.</p>	9	<p>1 any appeal arising from the modification 2 would likely be consolidated with portions of 3 the current petitions not mooted by the 4 permit revision.</p> <p>5 The Region also requests a Board 6 order clarifying "With respect to the 7 portions of the permit that were neither 8 withdrawn under Section 124.19(d) nor 9 otherwise newly affected by the permit 10 modification neither the petitioners nor any 11 other party may file additional petitions for 12 review or provide new arguments not present 13 in the original petitions or supplements 14 thereto" filed to this date. 15 Mr. Fein, I have some questions 16 about the region's motion, but first I would 17 just like to ask if I'm correctly stating 18 your position or whether you would like to 19 make any clarifications to it? 20 MR. FEIN: That's a correct 21 summary, Your Honor. 22 JUDGE REICH: Okay. Thank you.</p>

10	<p>1 Mr. Brown, my understanding from the footnote</p> <p>2 in the filing you submitted to the Board is</p> <p>3 basically MADEP supports the action the</p> <p>4 Region is proposing to take; is that correct?</p> <p>5 MR. BROWN: That's correct, Your</p> <p>6 Honor.</p> <p>7 JUDGE REICH: Okay. Well, I have a</p> <p>8 couple of questions for you as well. My</p> <p>9 understanding of Mirant Kendall's position is</p> <p>10 that, for the reasons detailed in its motions</p> <p>11 of July 31, Mirant Kendall supports the</p> <p>12 Region's motion to the extent that it</p> <p>13 contemplates a withdrawal of the provisions</p> <p>14 informed for the Phase II rule, but requests</p> <p>15 that the entire permit be remanded to the</p> <p>16 Region for the Region to withdraw the permit</p> <p>17 in its entirety and develop a new complete</p> <p>18 permit.</p> <p>19 Mirant Kendall opposes the Region's</p> <p>20 request for a Board order addressing the</p> <p>21 permissible scope of public participation in</p> <p>22 the development of a revised permit or permit</p>	12	<p>1 expeditiously to proceed to develop new</p> <p>2 permit terms related to CWIS, that it opposes</p> <p>3 any stay for any aspect of the petitions that</p> <p>4 relate to permit provisions not being</p> <p>5 withdrawn and seeks instead to have the Board</p> <p>6 order the Region to file a response and have</p> <p>7 the Board then proceed to issue a decision on</p> <p>8 the merits as to those aspects of the</p> <p>9 petition.</p> <p>10 I also understand CLF, similar to</p> <p>11 Mirant Kendall, to be opposing the Region's</p> <p>12 request as it relates to Board issuance of an</p> <p>13 order dealing with scope of public</p> <p>14 participation in any further proceedings</p> <p>15 after withdrawal.</p> <p>16 Is that correct, Mr. Shelley?</p> <p>17 MR. SHELLEY: Your Honor, with</p> <p>18 respect to the first part, that's correct.</p> <p>19 With respect to the public comment, we are</p> <p>20 actually in line with the EPA's thinking,</p> <p>21 that the record on those issues is closed and</p> <p>22 should be closed to new additions or public</p>
11	<p>1 terms.</p> <p>2 Is that a correct statement, Mr.</p> <p>3 Childs?</p> <p>4 MR. CHILDS: Generally correct,</p> <p>5 Your Honor, yes.</p> <p>6 JUDGE REICH: How would you make it</p> <p>7 more than generally correct?</p> <p>8 MR. CHILDS: I think the focus of</p> <p>9 our request that the Board send the permit</p> <p>10 back is on the interrelationship between some</p> <p>11 of the provisions that the Region wants to</p> <p>12 withdraw and some of the other provisions</p> <p>13 that ought to be considered concurrently with</p> <p>14 the ones that it does want to withdraw.</p> <p>15 JUDGE REICH: Okay. I think we</p> <p>16 will probably get into that in just a little</p> <p>17 bit.</p> <p>18 Finally, my understanding from</p> <p>19 CLF's motion of August 1 is that while CLF is</p> <p>20 agreeable to the requested stay for</p> <p>21 provisions relating to the Phase II rule, I</p> <p>22 think that assumes the Region moves</p>	13	<p>1 comment or anything else related to the</p> <p>2 non-withdrawn portions which are closed. We</p> <p>3 are just objecting to their order at this</p> <p>4 point --</p> <p>5 JUDGE REICH: Right.</p> <p>6 MR. SHELLEY: -- anticipating a</p> <p>7 problem that hasn't happened yet. We think</p> <p>8 both EPA and the Board have adequate powers</p> <p>9 to deal with that.</p> <p>10 JUDGE REICH: Okay. I do think</p> <p>11 that was kind of my understanding, and I</p> <p>12 appreciate the clarification between the</p> <p>13 position on the issue in general and the</p> <p>14 order, what I was loosely focused on at that</p> <p>15 point.</p> <p>16 From what we have briefly just</p> <p>17 discussed and my review of the various</p> <p>18 motions, unless somebody corrects me at this</p> <p>19 point, I'm going to assume that nobody</p> <p>20 questions that the Region has the legal</p> <p>21 authority to withdraw permit terms under</p> <p>22 124.19(d) nor opposes the Region's request</p>

14	<p>1 for a stay at least as to those provisions; 2 is that correct?</p> <p>3 MR. SHELLEY: Correct, Your Honor.</p> <p>4 JUDGE REICH: Okay. So that being 5 the case, the immediate focus I think for the 6 Board is clearly on how to address the 7 various motions pending for either a stay or 8 for action relative to the appeal of 9 provisions not being withdrawn.</p> <p>10 As I alluded to earlier in that 11 regard, I do have a few questions. Although, 12 this again, as I said, is not a full-blown 13 hearing, but I think I would be helpful to 14 understand some of this.</p> <p>15 Mr. Fein, can you explain for me 16 what the status and the timing is of the 17 prospective withdrawal, assuming it is still 18 perspective, of the CWIS-related provisions?</p> <p>19 MR. FEIN: Yes, Your Honor. On 20 September 19, we held a meeting at which 21 counsel and clients for both Mirant and CLF 22 and CRWA were present as well as a number of</p>	16	<p>1 are doing is a draft permit modification 2 limited to --</p> <p>3 JUDGE REICH: Okay. Just one 4 thing, for clarification, you were pretty I 5 think precise in your motions in talking 6 about withdrawing the provisions that were 7 informed by the Phase II rule. I was 8 wondering if there was significance to that? 9 Are there any CWIS provisions that are not 10 being withdrawn?</p> <p>11 MR. FEIN: Your Honor, as I said, 12 we haven't yet determined precisely what --</p> <p>13 JUDGE REICH: But in terms of, I 14 mean, you did give some indication in one of 15 your filings of what you anticipated 16 withdrawing. I just didn't know whether I 17 should read into that reference to being 18 informed by the Phase II rule some 19 possibility that there were some 20 316(b)-related provisions that weren't 21 informed by that rule, and therefore would 22 not be withdrawn or whether you were</p>
15	<p>1 state agency officials, which petitioners 2 presented their views regarding the 3 appropriate 316(b) technologies that should 4 be subject for the modification.</p> <p>5 We are now analyzing the 6 information that they presented. Our 7 timeframe very approximately is a withdrawal 8 draft permit modification. We would probably 9 issue the withdrawal notice shortly before 10 the draft permit is issued.</p> <p>11 The reason for that is that we 12 don't know precisely which permit provisions 13 are modified, so we know which technology we 14 are going to propose. That timeframe, moving 15 forward to a public comment period and 16 response to comments, a public hearing, if 17 appropriate, consultation with other 18 agencies, if necessary, should get us to a 19 final permit modification by April.</p> <p>20 JUDGE REICH: So you think April 21 18, 2008, is still a realistic date?</p> <p>22 MR. FEIN: Assuming that what we</p>	17	<p>1 intending to withdraw anything that was 2 implementing 316(b). Are you saying you 3 haven't yet decided that?</p> <p>4 MR. FEIN: The first answer is we 5 haven't formally decided, but I would venture 6 that we will likely be withdrawing the 7 provisions that pertain to 316(b), most or 8 all of those provisions.</p> <p>9 It is possible that part of the 10 provisions will be able to stay and would not 11 require modification. But as I said in the 12 reply brief, we withdraw most or all of those 13 identified provisions.</p> <p>14 JUDGE REICH: Can I ask, Mr. Brown, 15 relative to Massachusetts, is the permit that 16 you issued -- I mean, was there literally a 17 jointly issued permit or did you issue a 18 parallel permit to what the Region issued or 19 neither?</p> <p>20 MR. BROWN: It is a jointly issued 21 permit, Your Honor, that is part and parcel 22 of the federal permit. The federal permit</p>

<p style="text-align: right;">18</p> <p>1 specifically identifies the state portions of 2 the permit and the parties' rights under that 3 permit. 4 JUDGE REICH: Are the provisions 5 relating to CWIS part of the state part of 6 the permit, or is that just a question for 7 EPA? 8 MR. BROWN: I believe, Your Honor, 9 that the portions of the permit that 10 addressed cooling water intake structure are 11 part of the federal permit and part of the 12 state permit. Certain terms of that permit, 13 however, are attributable to the state's 14 water quality certification. 15 JUDGE REICH: What is the state's 16 intention relative to the state permit 17 relative to the CWIS provisions if the Region 18 withdraws, from a federal standpoint, its 19 provisions? Are they going to remain in the 20 state permit, or are you going to withdraw 21 those provisions? Or, what happens those 22 provisions in the meanwhile?</p>	<p style="text-align: right;">20</p> <p>1 the outcome of these proceedings. 2 JUDGE REICH: Okay. Mr. Fein, and 3 I realize you are still sorting through this, 4 but at this point do you see any of the 5 provisions relating to thermal discharge 6 standards as being sufficiently affected by 7 the withdrawal of the 316(b) provisions that 8 you would withdraw those as well? 9 MR. FEIN: Your Honor, we don't 10 anticipate that would be in the case. But in 11 the process of developing the draft permit 12 modification, we will take a close look 13 throughout the rest of the permit, and if 14 there are any issues that are not directly 15 pertaining to 316(b), cooling water intake 16 structure requirements, but are somehow 17 indirectly affected such that they would 18 benefit from withdrawal and reissuance, 19 subject to renewed public comment, we will do 20 that. 21 JUDGE REICH: Okay. I assume you 22 have looked at the discussion in the Mirant</p>
<p style="text-align: right;">19</p> <p>1 MR. BROWN: The state permit is 2 currently pending a parallel proceeding 3 before the state appeals office. We envision 4 the need to revisit the cooling water intake 5 structure issues based on how EPA applies its 6 best professional judgment to those issues. 7 We don't know if the permit will 8 become more stringent or less stringent as a 9 result of that review, so it is possible that 10 we may need to reissue the water quality 11 certification and make appropriate changes in 12 the state permit accordingly. 13 JUDGE REICH: Is the state permit 14 stayed by operation of appeals? 15 MR. BROWN: Yes, the state permit 16 is currently stayed by rule of the Agency. 17 Now, in addition to the stay of the permit, 18 there is an appeal pending of the water 19 quality certification that we issued. That 20 has been stayed as well. 21 JUDGE REICH: Okay. Thank you. 22 MR. BROWN: That stay is pending</p>	<p style="text-align: right;">21</p> <p>1 Kendall filing, it's on page 3, where they 2 talk about the interrelationship of 3 provisions addressing 316(a) and those 4 addressing 316(b) and why they are linked? 5 In fact, I think they quote the 6 response to comments with the Region saying 7 that the limits operate in tandem. I gather 8 none of what is in there at this point you 9 find persuasive in terms of a need to 10 withdraw any of the 316(a) provisions? 11 MR. FEIN: Not at this point, Your 12 Honor. Again, as I said, if in the process 13 of developing the draft permit modification 14 or in the process of public comment, if a 15 party identifies to us a issue that requires 16 withdrawal and modification, we will look 17 into that. 18 But, for example, the thermal 19 avoidance temperatures are what they are. 20 They are not affected by the suspension of 21 the -- much of the basis for the 316(a) 22 limits will stand. It is conceivable, I</p>

<p style="text-align: right;">22</p> <p>1 can't foreclose the possibility that a permit 2 condition that is not directly related to 3 316(b) would require withdrawal and 4 reissuance, but at the moment we are not 5 anticipating that. 6 JUDGE REICH: Okay. I am 7 relatively new to this case so I'm not, I 8 will admit, as familiar as I ultimately may 9 need to be with the rather extensive 10 petitions for review and supplemental 11 petitions for review. 12 Are there any real significant 13 316-related provisions that aren't at the 14 moment effectively stayed by the fact that we 15 have these petitions before us, or were all 16 of the more significant provisions part of 17 one or the other petitions for review? 18 MR. FEIN: Your Honor, the 19 petitions were quite broad and at the moment 20 the entire permit is stayed. 21 JUDGE REICH: Have you notified 22 parties that that is the scope of the stay,</p>	<p style="text-align: right;">24</p> <p>1 whether all in all it is better for the 2 Region to reopen the whole permit whereas we 3 have argued, and I'd be happy to provide some 4 further detail on this, it is pretty clear 5 that there are substantial linkages between 6 the issues that they want to withdraw and the 7 really critical issues that they don't want 8 to withdraw at this point. 9 JUDGE REICH: I am wondering, in 10 terms of efficiency for the Board, how we get 11 ourselves smart enough to understand 12 everything that is involved in this permit 13 proceeding and the proceedings, to kind of 14 decide whether that is the case or not 15 without taking up a lot of time to decide 16 that issue that the Region could be sort of 17 proceeding down the road it is proceeding. 18 I mean, I understand that there can 19 be interrelationships. It is not my first 20 316 case, and I've seen that before. But I 21 understand the sort of complexity of it. 22 It would seem to me that what</p>
<p style="text-align: right;">23</p> <p>1 that it covers the entire permit? 2 MR. FEIN: We have not yet sent out 3 a letter under 124.16 that would identify the 4 issues. 5 JUDGE REICH: Okay. Thank you. 6 Mr. Child, in terms of what you have 7 requested the Board to do, do you think that 8 the Board actually has the authority to 9 compel the Region to withdraw more of the 10 permit terms than the Region voluntarily 11 chooses to withdraw under 124.19, given that 12 we haven't even addressed the merits of the 13 petitions yet? 14 MR. CHILD: Your Honor, I recognize 15 that the rules do not specifically provide 16 that authority. I think our position would 17 be that as the Board looks at this case and 18 the issues in it, it is within the Board's 19 inherent authority as a review board in 20 control of its docket, trying to bring 21 efficiency to a process that is inherently 22 not efficient, has the authority to determine</p>	<p style="text-align: right;">25</p> <p>1 would, in essence, be second-guessing the 2 region up front would require a comfort level 3 and an understanding of the 4 interrelationships of the terms of the permit 5 that I'm not going to get from a superficial 6 reading of it. 7 MR. CHILD: Well, we would be happy 8 to provide as much help in that exercise as 9 Your Honor can stand. But I think that, as 10 you indicate from your past experience, it is 11 pretty clear on the face of things that there 12 are those kinds of interrelationships. 13 Then, when you apply that knowledge 14 to a modicum of information, they are going 15 to be happy to go through the history of this 16 permit proceeding for you for a minute, it's 17 quite clear to us anyway and I think we can 18 satisfy Your Honor that there are many issues 19 that overlap. 20 We are quite concerned that some of 21 the information that the Agency will have to 22 consider on the 316(b) issues that it is</p>

<p style="text-align: right;">26</p> <p>1 taking back about the nature of the river and 2 the nature of the plant and their 3 interrelationships as it affects 316(b) a lot 4 of new information is going to be considered 5 by the Region on the issues it wants to 6 withdraw.</p> <p>7 But it doesn't want to reopen the 8 same set of issues on the thermal, even 9 though they are related, because they don't 10 want to have to deal with the new 11 information, which we think favors our 12 position.</p> <p>13 JUDGE REICH: I assume if there are 14 provisions that the Region does not withdraw 15 and you think should be withdrawn, then at 16 the point which you are commenting on the 17 provisions that they have repropose, you are 18 probably going to make that argument I would 19 assume?</p> <p>20 MR. CHILD: That's a safe 21 assumption.</p> <p>22 JUDGE REICH: The Region will have</p>	<p style="text-align: right;">28</p> <p>1 us.</p> <p>2 It sound like, and we kind of knew 3 that from the way they had filed the document 4 initially, that this is somewhat of an 5 ongoing process. Do you think you have 6 gotten a fair response to your request in 7 terms of having a sense of where the Region 8 is going on that issue?</p> <p>9 MR. SHELLEY: Yes, Your Honor. We 10 think they did a good job.</p> <p>11 JUDGE REICH: Do you basically 12 agree that there is not such an 13 interrelationship between 316(a) and 316(b) 14 that action taken on 316(b) should 15 necessarily drive action on 316(a)?</p> <p>16 One reason I ask that is in your 17 filing, and you are obviously talking about 18 this for a different purpose, but I think you 19 yourselves made the point that there is this 20 interrelationship.</p> <p>21 Because you indicated, for 22 instance, depending on where the Board came</p>
<p style="text-align: right;">27</p> <p>1 to address it, and they will come back to the 2 Board I think in that case in a slightly 3 differently posture, in a slightly different 4 context.</p> <p>5 MR. CHILD: I think that from their 6 procedural route, that would happen as you 7 describe. I think our objective is to try to 8 shortcut some of that and get back to the 9 real issues with the Region rather than 10 deferring it.</p> <p>11 JUDGE REICH: Well, I think that is 12 -- I appreciate that. I think that is the 13 one common theme that I see in all the 14 filings, and I'm so pleased to see that, is 15 everybody would like to move this proceeding 16 in an efficient and, hopefully, relatively 17 prompt way. It is just different perceptions 18 on the best way to accomplish that result.</p> <p>19 Mr. Shelley, in your motion, you 20 asked that the Region indicate which terms it 21 was <i>intending to withdraw</i>. It did to a 22 certain degree in the response it filed with</p>	<p style="text-align: right;">29</p> <p>1 out with the 316(a) variance, that could 2 affect the permissible volume of cooling 3 water, which then could affect the 4 application of 316(b).</p> <p>5 In a way that was almost suggesting 6 to me the kind of interrelationship that 7 Mirant Kendall was arguing exists to support 8 the idea that the whole permit should be 9 reconsidered.</p> <p>10 MR. SHELLEY: Your Honor, I think 11 that their one circumstance, in all candor, 12 where we see the kind of issue you are 13 raising, actually creating that 14 cross-connection between 316(a) and (b) would 15 be if Region 1 determined that a closed-loop 16 cooling system, BTA, at that facility in 17 which case it would be very little or limited 18 thermal discharge coming out of the plant.</p> <p>19 So under those set of circumstances 20 which we have asked for -- which we think is, 21 based on everything we know, highly unlikely 22 as an outcome but we are not trying to</p>

<p style="text-align: right;">30</p> <p>1 foreclose that even for ourselves at this 2 point -- that is the one circumstance where 3 Agency action on 316(b) could dramatically 4 adjust what happens on 316(a). 5 One of our arguments we're for with 6 316(a) at this point, however, is based on 7 sort of a reverse connection, which we think 8 is very critical. That is, if we are 9 accurate that Region I 316(a) variance is not 10 based on the right legal standard and that a 11 stricter thermal regime needed to be 12 protected in the Charles River, then that 13 determination could change maybe not what 14 Region I determines for BTA for 316(b), but 15 how the company thinks about the cost/benefit 16 of different technologies that they are going 17 to use to address both problems. 18 Our biggest concern is that the 19 Board would actually agree with us under 20 316(a), that the Agency's action did not 21 adequately ensure protection of that balanced 22 indigenous population, require the Agency to</p>	<p style="text-align: right;">32</p> <p>1 we are very sensitive to that issue. 2 We would rather -- but again, we 3 are looking at overall the most likely way to 4 reduce the overall time of getting this 5 permit reissued they are operating under, a 6 1988 permit, different operating 7 circumstances, what we would propose would be 8 to allow Region 1 to expand the time for 9 coming back and concluding their 316(b) 10 analysis, give them more months on that end, 11 rather than use that reason to justify not 12 moving forward here. 13 The second point, and again I have 14 to say even after 30 years of experience this 15 is my first EAP appearance, so I'm a neophyte 16 here. But the workload that is required to 17 respond to the petitions, hold the record 18 together, or perhaps do any briefing that the 19 Board might allow is quite manageable and 20 falls mostly on the legal department. 21 So the engineering staff, although 22 they are going to be involved in that, are</p>
<p style="text-align: right;">31</p> <p>1 lower the thermal regime and therefore change 2 the whole calculation for the company. 3 That's why we want to get that done 4 right now, because the record is ready to go 5 on it. I think as the counsel for Region 1 6 said it is about what is out there in the 7 river much more so than what is happening at 8 the plant and its technology. 9 JUDGE REICH: If the Region is 10 correct in stating that it really only has a 11 finite amount of resources to devote 12 essentially to this matter and resources 13 devoted to, in essence, litigating the 316(a) 14 aspects of the petitions will be drawn away 15 from working on the revisions for 316(b) and 16 delay getting that part of it done, would you 17 still prefer to see that happen? 18 MR. SHELLEY: Your Honor, we 19 acknowledge and recognize, as I think we said 20 in our papers, that the resource limitations 21 are accurate. We have even more extreme 22 resource limitations in our little group, so</p>	<p style="text-align: right;">33</p> <p>1 free to continue to work on some of the BTA 2 issues. We think it needs to be done, 3 otherwise this process is actually likely to 4 take longer rather than shorter. 5 The other point I would like to 6 agree to in advance, the other potential 7 delay or staff resource issue that we could 8 possibly foresee would be in the circumstance 9 that the petition was accepted, reviewed, and 10 the Board agreed with either Mirant or CLF 11 and CRWA's position. 12 We would certainly agree ahead of 13 time that any judicial review of a Board 14 order that adversely affected us, we would 15 agree to an order staying our 30-day appeal 16 rights until the full permit was available 17 for judicial review. 18 JUDGE REICH: Okay. 19 MR. SHELLEY: So we think that part 20 of it actually can be managed in a way that 21 will minimize that part of the case, which 22 could be a big time saver.</p>

<p style="text-align: right;">34</p> <p>1 JUDGE REICH: Okay. Thank you. 2 Mr. Fein, going to a different aspect of what 3 you have asked for, which is the order 4 basically admonishing the world at large that 5 they cannot comment on matters in the 6 development of the revised permit terms that 7 are not related to the 316(b) process either, 8 because the implement 316(b) or they are 9 necessarily connected with it, I am still 10 having trouble I will admit as to what the 11 purpose is? 12 I mean, isn't it in fact true as I 13 think both petitioners argue that 124 kind of 14 speaks for itself as to what the scope of 15 public participation is? I am concerned that 16 if, and there is a lot of interpretation of 17 124, we impose on that process a Board order 18 now you're having to parse the Board order as 19 well as 124 to figure out what it is we 20 intended. I'm not sure how that really 21 advances things. 22 I mean, you seemed mostly to be</p>	<p style="text-align: right;">36</p> <p>1 earlier. 2 Obviously, with respect to 3 petitions that were withdrawn and modified or 4 issues that were not withdrawn and modified 5 but upon which there is a colorful argument 6 raised by the petitioners that they should 7 have been withdrawn and modified, they are 8 somehow newly affected by the modification, 9 the Region obviously has no opposition to the 10 parties bringing those before the Board. 11 The value of an advance order 12 simply to provide some degree of advanced 13 certainty and clarity so that while I agree 14 with you that Part 124 does speak for itself. 15 I'm not sure that Mirant's view of what it 16 means is the same as ours. In the Mirant's 17 motion for a remand it states on the sixth 18 page that 124.19(d) requires that the newly 19 issued draft permit can be commented on in 20 the same manner as any other draft permit, 21 which necessarily means that all of its 22 provisions are subject to comment.</p>
<p style="text-align: right;">35</p> <p>1 wanting to send a signal to Mirant Kendall I 2 think by raising the issue. I suspect you've 3 sent the signal, and you guys will have the 4 opportunity to kind of argue about it later 5 on in a proper forum. But I'm still having a 6 hard time really understanding the value of a 7 Board order at this point. 8 MR. FEIN: Thank you, Your Honor. 9 First, to clarify, the request was not for an 10 order limiting the scope of what parties can 11 comment on, but rather on the scope of what 12 would be subject to new petitions. 13 Our concern is quite plainly that 14 this process of withdrawing and modifying the 15 316(b) provisions not reopen the entire 16 permit to new arguments raised in 17 supplemental petitions that could have been 18 raised in the original filing period but were 19 not, either for new petitioners who neglected 20 to file petitions but now wish to or from 21 existing petitioners who wish to raise new 22 arguments that again could have been raised</p>	<p style="text-align: right;">37</p> <p>1 What I foresee, and I am attempting 2 to forestall, is a truckload of boxes of 3 comments concerning provisions that have not 4 changed and have not been affected in any way 5 by the modification. 6 JUDGE REICH: Now I'm a little 7 confused. Because I thought -- you corrected 8 my understanding and indicated that you were 9 really looking for an order that addressed 10 what could be appealed to the Board, and now 11 we seem to be back talking about what is 12 permissible in terms of comments. 13 MR. FEIN: Oh, Your Honor, if we 14 had that order in advance, then we could have 15 a one-sentence response to all of those 16 comments, "See Board Order, Docket Number 17 Such-and-Such." 18 Lacking that order if we're 19 required to take a risk that our 20 interpretation of 124.19 is not the Board's 21 and that we might be conservative and in the 22 alternative feel obligated to respond on the</p>

<p style="text-align: right;">38</p> <p>1 merits to all of those, I'm not saying that's 2 what we would do, but we would certainly have 3 to consider a two-part response. 4 One is procedural and the other in 5 the alternative on the substance so as not to 6 get a remand if we err in that. With the 7 order, it would save us the second step. 8 JUDGE REICH: Okay. Do either of 9 the petitioners having heard that have a 10 different view about whether having an order 11 like that could help expedite the process? 12 MR. SHELLEY: We think the rule 13 speaks for itself. 14 JUDGE REICH: Okay. 15 MR. CHILDS: Your Honor, our 16 position would be the same as CLF's, I think 17 the rule speaks for itself. It will sort out 18 in the later process. 19 JUDGE REICH: Okay. Thank you. 20 Let me ask whether any of the persons here, 21 and that includes Mr. Brown up in the Region, 22 has anything else that they want to bring to</p>	<p style="text-align: right;">40</p> <p>1 The one thing that did become clear 2 through that discussion is that there are a 3 lot of interrelationships between whatever 4 the region decides on the intake and the 5 316(a) issues, and let me just identify two 6 or three key ones. 7 One, as Mr. Shelley mentioned, it 8 is clear to us that the Region is considering 9 again whether or not cooling towers are the 10 answer or a part of the answer. Indeed, I 11 have with me the agenda that the Region 12 distributed at the meeting last week. The 13 very first item is: "EPA is particularly 14 interested in site-specific feasibility of 15 the following technologies," and lists 16 cooling towers. 17 We spent a goodly portion of the 18 meeting last Wednesday talking about that, 19 and we're preparing a submission for next 20 week at the Region's request that will 21 address cooling towers and feasibility issues 22 around them.</p>
<p style="text-align: right;">39</p> <p>1 the Board's attention that we haven't already 2 covered. Obviously, you can assume we have 3 read what you've filed with us, but is there 4 something else that we need to be discussing 5 that we haven't already discussed? 6 MR. CHILDS: Your Honor, I would 7 like to just elaborate on the issue of the 8 interrelationship between 316(a) and 316(b) 9 in this case. 10 As Mr. Fein mentioned, there was a 11 meeting just last week that was, from our 12 perspective, a very preliminary meeting where 13 the region asked us on short notice to come 14 in and provide information on a very long 15 list of very complicated topics having to do 16 essentially with the intake structure and the 17 benefits of an intake structure at various 18 potential locations. 19 We reviewed very quickly probably 20 about half a dozen different technological 21 answers. None of those had the benefit of 22 any real engineering analysis.</p>	<p style="text-align: right;">41</p> <p>1 Another technology that was 2 discussed at that meeting was called 3 "variable-speed drives," which allow a plant 4 like this to reduce the amount of flow 5 through with effects both on the amount of 6 intake and the 316(b) issues, but also of 7 course would have a variety of impacts on the 8 nature of the plant's discharge. 9 Third, and then I'll stop, both the 10 Region and CLF, as shown in their comments, 11 have been very interested in having the 12 cooling water intake structure located not at 13 the plant's current intake, which is on this 14 canal just off the Charles River, but rather 15 out at the head of the canal in the Charles 16 River itself. 17 Were there structures of the sort 18 that they are considering out there, that 19 would have major impacts on the water out in 20 the river. Entrainable and impingeable 21 organisms that might be excluded by such a 22 device would be excluded straight into the</p>

<p style="text-align: right;">42</p> <p>1 location of the plants outfall, in other 2 words, right into the hottest part of the 3 river.</p> <p>4 All of those considerations as they 5 arise under the 316(b) set of issues are 6 directly going to implicate all of the 316(a) 7 issues in terms of everything that the 8 permits require out in the river in terms of 9 all the buoys, and there is the issue around 10 whether or not there will be a diffuser. It 11 all gets thrown together.</p> <p>12 JUDGE REICH: Okay.</p> <p>13 MR. CHILD: We are quite confident 14 that we will be commenting into the Region's 15 proposed permit on the 316(b) issues with 16 quite a bit of information as to how it 17 affects the 316(a) issue.</p> <p>18 Thank you.</p> <p>19 JUDGE REICH: Okay. I have heard 20 as a minimum the Region to be open to 21 considering the interrelationships as the 22 proceeding evolves.</p>	<p style="text-align: right;">44</p> <p>1 things that are best decided by the Region in 2 the first instance. As Your Honor alluded 3 to, to resolve the question of what and how 4 much is interrelated now would require 5 delving fairly deeply into the merits before 6 the Region has even had a chance to come up 7 with the draft permit modification let alone 8 to deal with respect to the non-316(b) 9 provisions.</p> <p>10 JUDGE REICH: Okay. I understand. 11 Yes, sir?</p> <p>12 MR. SHELLEY: Your Honor, could I 13 just add one final comment, briefly, and that 14 is from our perspective and I think it is 15 certainly shared by EPA, that time is of the 16 essence here.</p> <p>17 This plant has repowered recently, 18 operating under a 1988 permit that was issued 19 in a whole different operating regime 20 facility. There are environmental problems 21 in the river that we believe this plant is 22 associated with.</p>
<p style="text-align: right;">43</p> <p>1 MR. FEIN: Yes, Your Honor. It is 2 quite conceivable that there could be a few 3 provisions that would be indirectly affected. 4 If I may briefly respond to what was just 5 said, I would just note that the September 19 6 meeting, there is nothing about it that is in 7 the record before the Board.</p> <p>8 JUDGE REICH: No, I understand 9 that. I take that as nothing more -- as 10 further illustration because there were 11 illustrations in what was filed with the 12 Board that there are interrelationships and 13 potential interrelationships. Don't take it 14 as anything broader than that.</p> <p>15 MR. FEIN: And so Mirant stated at 16 the meeting, the EPA did not make any 17 statements agreeing to any of those 18 statement.</p> <p>19 JUDGE REICH: Right.</p> <p>20 MR. FEIN: I would just add that 21 many of the issues that Mr. Child has raised, 22 with respect to the interrelationships, are</p>	<p style="text-align: right;">45</p> <p>1 The interests of EPA and CLF and 2 CRWA, in terms of moving to a new 3 appropriately restricted permit, are quite 4 different practically. We would urge the 5 Environmental Appeals Board to work with 6 those thermal portions and the legal standard 7 that has to be applied narrow enough that it 8 could be resolved fairly quickly.</p> <p>9 JUDGE REICH: Okay. Thank you. I 10 think I have probably heard enough to kind of 11 understand where the parties are coming from 12 and therefore I -- let me just check with Mr. 13 Brown, whether you have anything to add?</p> <p>14 MR. BROWN: Thank you, Your Honor. 15 I think the parties have covered it well.</p> <p>16 JUDGE REICH: Okay. Thank you. In 17 that case, I am going to adjourn the status 18 conference. Again, I thank counsel for their 19 participation, and even more so for the 20 quality of the filings before the Board. I 21 think they were quite good, quite clear, and 22 quite helpful in understanding where we stand</p>

1 on this matter.
2 Thank you.
3 (Whereupon, at 11:15 a.m., the
4 HEARING was adjourned.)
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