

Section II Procedural Comments

Comment II.A: EPA and DEP as Intended Recipients of These Comments

Mirant comments that:

The permitting documents are ambiguous as to whether the draft renewal Permit No. MA 0004928 and the other permitting documents were issued by EPA alone or by EPA New England and DEP acting jointly or severally. Mirant Canal understands, however, that the final permit will be issued as a permit by EPA New England under the Federal Clean Water Act and by DEP under the state Clean Waters Act, each pursuant to EPA New England's and DEP's respective permitting authorities. Under the state's permitting procedures, DEP is required to prepare and issue a fact sheet or statement of basis for every draft surface water discharge permit and also to respond to comments on the draft permit. 314 C.M.R. §§ 2.05, 2.09. Accordingly, Mirant Canal directs these comments both to EPA New England and DEP, treats the permitting documents as if they were issued by both agencies, and anticipates that each agency will respond to these comments.

Response II.A:

EPA is responsible for issuing NPDES permits under the Federal Clean Water Act within the Commonwealth of Massachusetts, since Massachusetts has not received authorization from EPA to administer the NPDES permit program within its borders. Massachusetts maintains separate water pollution control permitting authority under Massachusetts law. Generally, as here, when the Region issues an NPDES permit in Massachusetts under the Clean Water Act, MassDEP will concurrently issue a water permit pursuant to the Massachusetts Clean Waters Act. Thus, under this joint permitting scheme, the Draft Permit, Fact Sheet, Final Permit and Response to Comments are issued concurrently by EPA and MassDEP pursuant to the separate federal and state legal authorities. The Fact Sheet and Responses to Comments reflect the conclusions of both EPA and MassDEP, unless otherwise noted.

Comment II.B: § 401 Water Quality Certification

Mirant comments that:

In addition to issuing renewal Permit No. MA 0004928 as a surface water discharge permit under the Massachusetts Clean Water[s] Act, Mirant Canal expects that DEP will certify the final renewal permit under § 401 of the Clean Water Act, 33 U.S.C. § 1341, and under 40 C.F.R. § 124.53 and 314 C.M.R. 9.09. Fact Sheet, section 9.0. In addition to their other purposes, these comments are directed to DEP for purposes of its consideration of that certification.

Response II.B:

The comment is noted. The Commonwealth of Massachusetts has certified the Final Permit in accordance with Section 401(a) of the Clean Water Act. *See* Massachusetts' Section 401 Water Quality Certification ("WQC"), dated February 8, 2008.

Comment II.C: Comments to MCZM

Mirant comments that:

The Massachusetts Office of Coastal Zone Management (MCZM) must certify that the final renewal Permit No. MA 0004928 is consistent with MCZM's enforceable policies under the Coastal Zone Management Act. In addition to their other purposes, these comments are directed to MCZM for its consideration in making that determination.

MCZM's enforceable policies at 301 C.M.R. 21 include Water Quality Policy #1, which is simply stated:

Ensure that point-source discharges in or affecting the coastal zone are consistent with federally-approved state effluent limitations and water quality standards.

301 C.M.R. 21.98(3).

For the reasons elaborated in Mirant Canal's submissions in the Administrative Record and in these comments, renewal of the Canal Station's NPDES permit as requested by Mirant Canal will be consistent with state effluent limitations and water quality standards.

Response II.C:

MCZM has determined that the renewed permit is consistent with its enforceable program policies. *See* Letter from Leslie-Ann McGee to Shawn Konary, dated March 10, 2008.

Comment II.D: Incorporation of Prior Submissions

Mirant comments that:

Mirant Canal incorporates each of its prior communications and data submissions to EPA New England or DEP concerning the renewal or modification of Permit No. MA 0004928 as comments on the draft renewal permit. This incorporation by reference includes all submissions by Mirant Canal or its predecessors concerning the permit dating from the initial renewal application in 1994 to the date of these comments. It also incorporates any such submissions by Mirant Canal whether or not they have been identified by the Agencies as part of the Administrative Record, because if they are not in the Administrative Record, they should be. All issues raised by any of those submissions are preserved for purposes of 40 C.F.R. § 124.13.

Response II.D:

Under applicable federal regulations, EPA is only required to respond to materials submitted *during* the public comment period. See 40 C.F.R. § 124.17(a)(2). “That is, within the interval of time between the beginning and end of the public comment period, not before, not after.” *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 706 (EAB 2002); *see also, In re City of Phoenix, Arizona Squaw Peak and Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 524-31 (EAB 2000); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000) (“Permitting authorities are under no obligation to consider comments received after the close of the public comment period.”). To be sure, under appropriate circumstances a party can “put the permit issuer on formal notice of any continuing objections” noted before the start of the comment period, by “register[ing] the objections with the permit issuer *during the public comment period.*” *Avon* at 706 n.14 (emphasis in original). However, commenters are obligated to raise all issues “with a reasonable degree of specificity and clarity during the comment period,” so that EPA “need not guess the meaning behind imprecise comments.” *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002); *see also Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978) (“Administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ‘ought to be’ considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters ‘forcefully presented.’”). Therefore, a commenter attempting to incorporate to pre-comment period submissions into its comments must identify those submissions with a reasonable degree of specificity and clarity.

The Permittee’s blanket incorporation by reference of “all submissions by Mirant Canal or its predecessors concerning the permit dating from the initial renewal application” since 1994 into its comments is unreasonable and does not provide EPA with sufficient clarity about the Company’s particular concerns to enable the Agency to craft meaningful responses. See 40 C.F.R. § 124.13. Thus, EPA will only respond to significant comments in the Permittee’s submission dated February 3, 2006 (received on February 7, 2006), and declines the invitation to respond to a set of unspecified materials submitted to the agency over the last thirteen years. The Permittee has not made even a cursory attempt to catalogue such materials, explain their relevance to any particular Draft Permit condition, or specify any portions of the materials that it

does not believe require a response. As such, the Permittee's proposed incorporation by reference will likely engender disputes over which materials are actually in the possession of EPA and confusion over how to apply the materials to the Draft Permit conditions.¹ This would frustrate the very purpose of the public comment period, which is to provide predictability and finality to the permitting process. *See, e.g., In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 816 (Adm'r 1989) ("Just as 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,' so too is the agency's opportunity to respond to those comments meaningless unless the interested party clearly states its position," quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988) (internal citations omitted). Indeed, the Permittee's generic incorporation by reference would force the Region into the position of construing materials that pre-dated issuance of the Draft Permit as "comment" on the subsequent draft. In this regard, it is well settled that under EPA's permitting regulations permit issuers need not "guess the meaning behind imprecise comments," *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002), and are "under no obligation to speculate about possible concerns that were not articulated in the comments." *In re New England Plating Co.*, 9 E.A.D. 726, 735 (EAB 2001).

Mirant's broad claim of issue preservation is also not consistent with NPDES regulations. For the purposes of the Environmental Appeals Board (EAB) review, an issue is not preserved simply because it is generally reflected somewhere in the administrative record. Instead, the issue must have been raised during the public comment period with a reasonable degree of specificity and clarity. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.10 (EAB 1999) (burden is on the petitioner to establish that issues were raised during the comment period; "It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below."). It is not sufficient for a commenter to have raised only a more general or related argument during the public comment period. *See, e.g., Teck Cominco Alaska Incorporated, Red Dog Mine*, 11 E.A.D. 457, 479-82 (EAB 2004) (comment on Alaska's water quality criteria fails to provide basis for appeal of suspended solids effluent limit that allegedly violates Alaska's antidegradation rule); *In re City of Marlborough, Mass. Easterly Wastewater Plant*, 12 E.A.D. 235, 243 (EAB 2005) (comment on length of time an interim phosphorus limit will be in effect is inadequate basis for preserving for appeal a challenge to the stringency of the limit).

Comment II.E: Failure to Share Working Draft of Permit

Mirant comments that:

EPA New England and DEP commonly share their working draft of an NPDES renewal permit with a prospective permittee to resolve permit details in a cooperative manner before issuing a draft permit for public comment. Consultants and counsel working for Mirant Canal have direct, current experience of this practice. Mirant Canal requested that the Agencies follow that practice with respect to the renewal of Permit No. MA 0004928.

¹ Any comments submitted during the public comment period are properly part of the administrative record. 40 C.F.R. § 124.18(b)(1). Materials submitted before or after the public comment period may be part of the administrative record insofar as they meet the requirements of 40 C.F.R. § 124.18.

Instead, the Agencies issued a draft permit for public comment without providing the opportunity for Mirant Canal to review a working draft. As a direct consequence and as detailed in other comments submitted herewith, the draft permit contains many unworkable provisions. The Agencies should reconsider the draft permit in light of these and other public comments, and issue a new draft permit for public comment.

Response II.E:

The purpose of the public comment period is to inform the permit issuer of potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final. The public comment period, rather than the distribution of a pre-publication courtesy draft, remains the only legally required mechanism for a commenter to point to any problems with a permit provision. As evidenced by the Introductory section of this Response to Comments, comments submitted by the Permittee and others have in fact led to numerous changes in the Draft Permit. The remedy available to a party that still objects to a condition of the Final Permit is to seek review of such condition through the administrative appeals process.

EPA and MassDEP often, but do not always, share a courtesy copy of the draft permit with a permittee. Neither EPA nor MassDEP are under any obligation to provide a draft permit to a permittee prior to the official draft permit being published for public notice and comment by all interested parties. The decision is left to the individual permit writer and their supervisor. In this case, distribution of pre-publication was not deemed to be necessary. The Draft Permit was primarily based on facility-specific information submitted by the Permittee in its permit renewal application. This information was clarified and supplemented by numerous contacts between EPA and the Permittee.

Comment II.F: Reservation of Right to Supplement Comments

Mirant comments that:

As shown by the body of these comments, the Draft Permit proposes many significant and complicated changes from the existing permit, and would require major modifications to the Station's facilities and operations. EPA issued the Draft Permit without any significant prior discussion of those proposals with Mirant Canal or sharing a preliminary draft, and did so on December 22, 2005, just prior to a well-established holiday period over the following 10 days, with a comment deadline of January 20, 2006.

Given the complexity of the proposed changes, the need for Mirant Canal to coordinate its staff, consultants, and counsel to prepare comments, and the numerous ways that the Draft Permit overlooks important facts about the Canal Station and its physical circumstances, that short time for comments, starting out with a holiday time, clearly was insufficient for Mirant Canal to have an adequate opportunity to provide detailed comments and supporting materials. It was unreasonable for EPA to impose such a comment deadline in the circumstances.

By a letter of January 13, 2006, Mirant Canal accordingly requested an extension of the comment period by 60 days, citing to the need for Mirant Canal to have an adequate opportunity to evaluate the proposed physical and operational changes. By a letter of January 18, 2006, EPA granted an extension of just 15 days.

That 15 day extension is unreasonably short in these circumstances. While Mirant Canal has developed these fairly comprehensive comments by that deadline, the time has not been sufficient to conduct any detailed analyses of the cost or engineering feasibility of some of the proposed physical modifications or of the associated permitting and land use requirements. Nor has Mirant Canal had an adequate opportunity to collect the full range of supporting materials for its comments. Where EPA has taken more than 10 years to issue the proposed renewal permit but has not been willing to engage in any advance discussion of its proposed changes to the Station, where providing 45 additional days for the preparation of comments would not have any material adverse consequences, and where it is extremely unlikely that EPA will issue the final permit with any immediacy, it was entirely unreasonable for EPA to refuse to provide the requested extension.

Accordingly, while Mirant Canal submits these comments now, it also reserves the right to supplement these comments with further comments and supporting evidence as material to the issues raised by its comments and the Draft Permit.

Response II.F:

The NPDES regulations do not extend the right for Mirant to supplement these comments with further comments and EPA could not give it such a right without reopening the public comment period across the board to all parties. The vast majority of EPA-issued permits have public comment periods of only 30 days, which EPA has found to be sufficient even where complex technical matters are at issue. This timeframe is consistent with and satisfies EPA procedural regulations regarding public comment periods for NPDES draft permits. *See* 40 C.F.R. § 124.10(b). Even though other parties were also conducting a detailed technical review of the Draft Permit, and timely submitted comments, EPA received only one request for an extension to the public comment period. In consideration of Mirant's interest in having a fuller opportunity to evaluate modifications to Canal Station, the absence of additional requests for extensions of the comment period, and EPA's interest in issuing an environmentally protective permit in a reasonably expeditious manner in furtherance of the legal requirements and policy goals of the Clean Water Act, EPA extended the public comment period an additional 15 days. EPA observes the comment period was sufficient for the Permittee to assemble "fairly comprehensive" comments. (In the time since the Draft Permit was issued, EPA has not received from the Permittee any additional cost and/or feasibility analyses or other materials in support of its comments. Given the Permittee's apparent view that materials submitted by it outside the public comment period should at the very least be made a part of the administrative record of the permit, this would appear to indicate that the comment period was of sufficient length to adequately apprise the Region of potential issues with the permit).