

Section X Easement Issues

Comment X.A:

Mirant comments that:

Several proposed changes to the existing permit either directly (new fish return lines) or indirectly (likely need to replace the traveling screen systems) may require Mirant Canal to seek additional or modified easements from the U.S. Army Corps of Engineers. At present, the Canal Station has the benefit of extensive easements granted at various times by the Corps or its predecessors to authorize the initial construction and subsequent expansion of a generating station on land now held in fee by the Corps of Engineers along and in the Cape Cod Canal. Typically those easements restrict Mirant Canal's facilities to facilities shown on specific plans developed in connection with the grant of the various easements and their amendments. Accordingly, installation of new facilities such as the fish return systems, which depending on the design, may extend beyond any existing easements, and modifications to facilities shown on existing easement plans, may require the Corps to grant additional easements or agree to modify existing easements.

The Canal Station also is subject to or the beneficiary of a variety of additional easements from or to railroad companies, electric companies, and others associated with rail lines, electric transmission lines, natural gas pipelines, and other facilities concomitant with the operation of a major generating station. Depending on the final designs of any additional modifications required in order to comply with the final permit, modifications or additions to some of easements also may be required. There can be no guarantee that Mirant Canal would be successful in obtaining such easements within any particular time or at all.

Accordingly, the final permit should not contain any deadlines or effective dates (a) for installations of such modifications, or (b) for compliance with permit conditions that can be met only through obtaining all necessary easements and making the installations operational, without taking account of the time required to obtain those easements. Alternatively, the final permit should abjure deadlines while placing an obligation on Mirant Canal periodically to report on its progress.

Response X.A:

EPA's inclusion of final limits with effective dates within the Permit is fully consistent with its clear duty to include requirements that will result in actual, not merely potential, compliance with the Clean Water Act (CWA) and its implementing regulations.¹ The CWA sets forth a total

¹ If Mirant Canal anticipates that it will be unable to comply with the terms of its discharge permit because of an inability to obtain necessary easements or supplemental permits (*e.g.*, permits from U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act for any structures affecting the Cape Cod Canal, waterways license from DEP for any new structures or changed uses in the Cape Cod Canal), the appropriate remedy is not to undercut the protectiveness of the permit and the overarching policy objectives of the CWA by prospectively rendering the permit requirements unenforceable, but to reasonably accommodate such contingencies in an administrative

prohibition on the discharge of pollutants, except pursuant to specific authorization, such as an NPDES permit issued pursuant to section 402 of the CWA. CWA § 402(a) and 40 C.F.R. §§ 122.43(a) and 122.44 require that NPDES permits include limits and conditions necessary to meet applicable federal technology-based standards. Federal technology-based standards represent the minimum level of pollution control to be required by an NPDES permit, while any more stringent limits required by any state water quality standards or other state law requirement are also to be required. *See* CWA §§ 301(b)(1)(C) and 401(a)(1) and (d), 33 U.S.C. §§ 1311(b)(1)(C) and 1341(a)(1) and (d).

With regard to cooling water intake structures, CWA § 316(b) imposes a technology-based standard providing that:

[a]ny standard established pursuant to section 301 or section 306 of this Act and applicable to a point source *shall require* [emphasis added] that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

Therefore, an NPDES permit issued to a facility with CWISs should, in general, include limits reflecting the BTA for minimizing adverse environmental impacts under CWA § 316(b) and 40 C.F.R. §§ 125.90(b) and 122.43(b)(3), and any necessary more stringent water quality-based standards. *See* 40 C.F.R. §§ 122.4(d) and 122.44(d).

Under the Section 402(a)(1) of the CWA, NPDES permits may only be issued:

upon condition that such discharge *will meet* [emphasis added] either (A) all applicable requirements under sections [301 and 316], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Federal regulations implementing the NPDES program echo this principle, stating “No permit may be issued [w]hen the conditions of the permit *do not provide for compliance* [emphasis added] with the applicable requirements of CWA, or the regulations promulgated under CWA.” *See* 40 C.F.R. § 122.4(a).

As specified in paragraph I.A.13 of the Final Permit, EPA has determined that in order to satisfy this BTA standard, the Permittee must reduce impingement by making improvements to the facility’s fish return system and must reduce current levels of entrainment of marine organisms through the facility’s CWIS to an extent comparable to the use of closed-cycle cooling. Accordingly, these conditions and standards of performance must be included in the Permit as enforceable permit terms. The commenter’s proposal to remove the effective dates relative to permit requirements that require outside approvals or necessitate facility upgrades is inconsistent with the Clean Water Act and its implementing regulations. The statute imposes compliance

compliance order and, failing that, to potentially modify or terminate the permit. *See* 40 C.F.R. § 122.62 and 40 C.F.R. § 122.64(a)(1) (citing “noncompliance by the permittee with any condition of the permit” as a cause for terminating the permit during its term or for denying a permit renewal application).

deadlines for satisfying technology-based requirements that must be satisfied. The Permit includes requirements that EPA has determined to be necessary to comply with the CWA. Under the Company's proposal, these legally mandated requirements would not have clear, enforceable compliance dates, and they might potentially never actually become effective, enforceable conditions of the Permit should, for instance, the Company fail to secure a necessary approval or encounter construction delays. In such a case, the discharge and associated activities would continue unabated notwithstanding the presence of nominal permit limits. The permitting scheme proposed by the commenter would provide for conditional, rather than mandatory, compliance with permit limits, which EPA believes would be contrary to law, and indeed stand the CWA on its head.

With this said, it is obvious that Mirant Canal will need a certain amount of time to install the upgrades to enable it to comply with the new permit limits.² EPA expects to impose a reasonable compliance schedule in an Administrative Compliance Order issued pursuant to CWA § 309(a). It is important that compliance be attained with reasonable expedition to comply with statutory requirements and because of the environmental damage the plant's cooling system is causing and will continue to cause until the permit's limits are complied with. EPA and MassDEP expect to discuss this compliance schedule further with the Permittee. If the Permittee does encounter delay in achieving compliance, EPA is willing to work with the Permittee to develop an administrative order, under which EPA would, as a matter of enforcement discretion, provide reasonable additional time as appropriate, for the Permittee to achieve compliance.

² The CWA prohibits a compliance schedule from being included in the permit under the present circumstances. Since the statutory deadline for meeting any applicable technology-based effluent limits has already passed, NPDES permits must require immediate compliance with any such limits included in the permit. *See In re: Brunswick Steam Electric Plant* (EPA GCO 41, 1976).