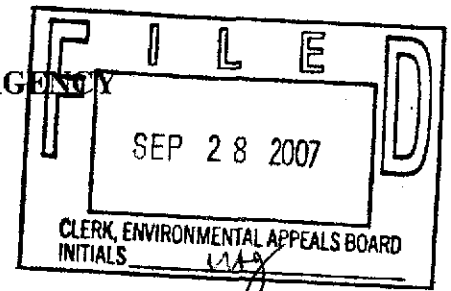


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Mirant Kendall, LLC,
Mirant Kendall Station

NPDES Permit No. MA0004898

NPDES Appeal Nos. 06-12, 06-13

ORDER EXTENDING STAY OF PROCEEDINGS

By motion dated July 25, 2007, U.S. Environmental Protection Agency ("EPA" or "Agency") Region 1 (the "Region") requests that the Board extend the stay of proceedings in the above-captioned cases until April 18, 2008, to allow the Region to develop a new permit modification addressing portions of the above-captioned permit ("Permit") that the Region intends to withdraw. On August 1, 2007, Petitioners Mirant Kendall, LLC ("Mirant"), and the Conservation Law Foundation together with the Charles River Watershed Association ("CLF"), filed separate responses to the Region's motion to extend the stay. Mirant moves to remand the entire Permit, not just the portions the Region intends to withdraw, while CLF objects to the Region's request that the Board stay consideration of those issues relating to the Permit provisions that are not being withdrawn.

To summarize the proceedings to date, the Region issued the Permit to Mirant on September 26, 2006, for its Kendall Station power plant. The Permit includes both thermal discharge limits, imposed under Clean Water Act ("CWA") § 316(a), and cooling water intake structure requirements, imposed under CWA § 316(b). On October 30, 2006, Mirant filed a Petition for Review of the Permit. CLF filed a Petition for Review of the Permit on the same

day. Both petitions challenge both the Permit's thermal discharge limits and its cooling water intake structure requirements, though for different reasons.¹

The Board most recently had stayed Mirant's and CLF's appeals pending a decision by the Second Circuit Court of Appeals on whether to grant rehearing by the panel or en banc in *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 (2d Cir. 2007). This case involved a challenge to the "Phase II Rule," one of the rules the Agency had adopted to implement § 316(b) of the Clean Water Act. The Court held, among other things, that certain portions of the Phase II Rule were inconsistent with § 316(b) and remanded the Rule to the Agency. The nexus to the instant proceeding is that the Permit's cooling water intake requirements were, according to the Region, "informed" at least in part by the Phase II Rule. In an order dated June 12, 2007, the Board ordered the Region to file a status report no later than twenty days after the Court of Appeals' order granting or denying rehearing. The Board also permitted Mirant and CLF to file responses within seven days of the filing of the Region's status report.

The Region filed its status report on July 25, 2007. In it, the Region reported that the Second Circuit had denied two petitions for rehearing or rehearing en banc in the *Riverkeeper* litigation. Respondent's Status Report and Motion to Extend Stay of Proceedings at 3. The Region also reported that on July 9, 2007, EPA had published a Federal Register notice formally suspending the Phase II Rule. *Id.* at 4. The Region stated that as a result of these developments, it has elected to withdraw, pursuant to 40 C.F.R. § 124.19(d), the portions of the Permit informed by the suspended portions of the Phase II Rule and to prepare a draft Permit modification addressing the withdrawn portions. *Id.* The Region's status report includes a motion to extend the stay of proceedings until April 18, 2008, to allow the Region

¹ Mirant and CLF also filed supplements to their Petitions for Review on December 28, 2006, and December 14, 2006, respectively. A November 22, 2006 Order Granting Joint Scheduling Motions permitted the Parties to file these supplements.

time to develop a new draft Permit modification and to avoid requiring the Region to defend conditions of the Permit that it intends to withdraw. *Id.* at 6. The Region proposes that if the Board receives a petition or petitions to review the new Permit modification, such petition(s) be consolidated with the existing, stayed, petitions covering Permit provisions not being withdrawn. *Id.* at 5. The Region also requests that the Board issue an order “clarify[ing] that with respect to the portions of the Permit that were neither withdrawn under section 124.19(d) nor otherwise newly affected by the permit modification, neither the Petitioners nor any other party may file additional petitions for review or provide new arguments not present in the original Petitions or supplements thereto that have been filed with the Board as of this date.” *Id.* at 6.

On August 1, Mirant and CLF filed separate responses to the Region’s status report. Mirant assents to a stay of the appeal until April 18, 2008, but opposes the Region’s proposal to withdraw only the provisions of the Permit informed by the Phase II Rule. Mirant’s Response to Respondent’s Status Report and Motion to Extend Stay of Proceedings (“Mirant’s Response”) at 1-2. Mirant instead requests that the Board remand the entire Permit. Mirant’s Motion to Remand the Permit to Region 1. According to Mirant, it is infeasible to withdraw only the portions of the Permit that are informed by the Phase II Rule because they are inextricable from other portions of the Permit. Mirant’s Response at 2-4. Mirant also argues that it would be arbitrary for the Region to consider newer field monitoring data for the Permit’s CWA § 316(b) provisions without considering how the data affect the other Permit requirements. *Id.* at 4-5. Mirant additionally explains its view that withdrawal of the entire Permit would facilitate the opportunity to moot some or all other issues under appeal. *Id.* at 5-6. Last, Mirant objects to the Region’s request for an order prohibiting parties from raising new arguments on “unaffected portions of” the draft permit. *Id.* at 6.

CLF states that it assents to the Region's request for a stay only as to those aspects of the appeal directly related to Permit conditions affected by the suspension of the Phase II Rule. Status Report and Response to Respondent's Status Report and Motion to Extend Stay of Proceedings ("CLF/CRWA's Response") at 1. CLF argues that it is appropriate to move forward with those aspects of the appeal that are not affected by the suspension of the Phase II Rule, and doing otherwise would result in more delay. *Id.* at 5-7. Accordingly, CLF requests that the Board order the Region to proceed to respond to the aspects of the Petitions that are not related to the Phase II Rule. *Id.* at 8. Last, like Mirant, CLF objects to the Region's request that the Board issue an order limiting the scope of arguments in any future appeals. *Id.* at 7.²

On August 16, 2007, the Region filed a Response to Petitioner Mirant's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report.³ In its Response, the Region explains further its rationale for withdrawing the Permit terms informed by the Phase II Rule, while requesting a stay of the Permit terms not informed by the Phase II Rule. The Region asks that the Board deny Mirant's motion to remand the entire Permit. Region's Response at 16. The Region also asks that the Board deny CLF's request to order the Region to now respond to those aspects of the Petitions not affected by the withdrawal. *Id.* The Region further lists the Permit conditions that it intends to withdraw, with the qualification that it would not be able to provide a final list of withdrawn conditions until it has made substantial progress toward the draft Permit modification. *Id.* at 15-16.

²CLF further requested that the Board order the Region to notify the parties on or before the status conference which Permit conditions it intends to withdraw, and which conditions it considers severable from the withdrawn conditions. As discussed below, the Region identified such conditions in a subsequent filing with the Board and CLF indicated at the status conference that it believed its request had been satisfied in this regard.

³ The Board accepted this Response for filing in its Order Scheduling Status Conference on August 21, 2007.

On August 21, 2007, the Board directed the Region, Mirant, and CLF to appear for a status conference on September 27, 2007, to discuss their positions with respect to the Region's Motion to Extend Stay of Proceedings. On September 13, 2007, the Massachusetts Department of Environmental Protection ("MassDEP") requested leave to participate in the status conference, based on its interest in the proceedings as the state regulatory agency that jointly issued the Permit. The Board granted MassDEP's motion on September 17, 2007.

The Region, Mirant, CLF, and MassDEP participated in a status conference on September 27, 2007. The parties discussed their views with respect to the Region's request to extend the stay. No new issues were raised, and the Board believes that the status conference helped to clarify the parties' positions with respect to the issues that currently are pending.

After a review of all arguments of the various parties, the Board believes the most appropriate course of action is to grant the Region's motion, and deny the Mirant and CLF motions to the extent they are inconsistent with it. All parties agreed at the status conference that the Region had the authority to withdraw the permit provisions at issue and the Board sees no reason to interfere with the Region's proposed course of action in this regard.

As to remanding the entire Permit with the direction that the entire Permit be withdrawn, the Board believes that this would not materially advance this proceeding.⁴ With respect to ordering the Region to respond to those aspects of the petitions that are not affected by the anticipated withdrawal, the Board accepts the Region's determination that bifurcating the proceedings, thereby delaying the development of the § 316(b) provisions⁵, and ultimately

⁴Accordingly, the Board need not address the question of whether the Board even has the authority to direct a broader withdrawal at this stage of the proceeding.

⁵CLF acknowledged at the status conference that requiring the Region to immediately
(continued...)

having the Board deal with the Permit in a piece-meal fashion, is not a practical and resource-efficient way of proceeding.

Thus, for good cause shown, the Board hereby GRANTS the Region's request to extend the stay of proceedings until April 18, 2008. The Board DENIES the Mirant Motion to remand the entire Permit to the Region. The Board DENIES CLF's request that the stay be denied, and the Region be ordered to file a response, as to those aspects of the petitions not affected by the withdrawal.

With respect to the Region's request that the Board issue an order "clarifying" the limits on issues that may be raised in any future appeal, the Board believes that 40 C.F.R. part 124 speaks for itself and hereby DENIES the Region's request for a clarification order.

So ordered.

Dated: September 28, 2007

ENVIRONMENTAL APPEALS BOARD

By: 

Edward E. Reich
Environmental Appeals Judge

⁵(...continued)

litigate the issues affecting the non-withdrawn portions of the permit would delay development of § 316(b) provisions, though it believed this would still be preferable to a stay of all issues.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Extending Stay of Proceedings, in the matter of Mirant Kendall, LLC, Mirant Kendall Station, NPDES Petition Nos. 06-12, 06-13, were sent to the following persons in the manner indicated:

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Dated: SEP 28 2007


Annette Duncan,
Secretary