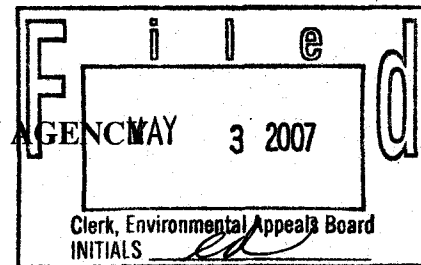


ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re:

Mirant Kendall, LLC,  
Mirant Kendall Station

NPDES Permit No. MA0004898

NPDES Appeal Nos. 06-12, 06-13

**ORDER GRANTING MOTION TO EXTEND STAY OF PROCEEDINGS**

By motion dated April 30, 2007, U.S. Environmental Protection Agency Region 1 (the "Region"), with the assent of Petitioners Mirant Kendall, LLC ("Mirant"), the Conservation Law Foundation ("CLF"), and the Charles River Watershed Association ("CRWA"), requests that the Environmental Appeals Board (the "Board") extend the stay of proceedings in the above-captioned matter by approximately one month, in light of extensions requested in *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 (2d Cir. 2007) ("*Riverkeeper*") – the parallel litigation that provided the grounds for the initial request for a stay.

This matter relates to NPDES Permit No. MA0004898 (the "Permit"), issued by the Region on September 26, 2006, for Mirant's 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 and CRWA together filed a Petition for Review of the Permit on the same day. Both Petitions challenge the Permit's thermal discharge limits and its cooling water intake structure requirements. Mirant and CLF/CRWA 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 Petitioners to file these supplements, and also required the Region to respond to the Petitions by April 9, 2007.

On March 1, 2007, the Region filed a Motion for Stay of Proceedings, in which it explained that it had developed the Permit's cooling water intake structure requirements using Best Professional Judgment ("BPJ"), pursuant to and guided by a provision of the so-called "Phase II Rule,"<sup>1</sup> which EPA promulgated in 2004 under the authority of the CWA. On January 25, 2007, however, the Second Circuit issued an opinion in *Riverkeeper* – a case challenging the Phase II Rule – and remanded significant portions of the Rule to EPA. At the time the Region filed the Motion for Stay of Proceedings, the parties to the *Riverkeeper* litigation had until March 12, 2007, to file a petition for rehearing,<sup>2</sup> or until April 25, 2007, to file a petition for certiorari if no party requested a rehearing. Motion for Stay of Proceedings at 3.

In the Motion for Stay of Proceedings, the Region argued that the *Riverkeeper* decision may have substantial implications for this appeal. The Region explained that "Mirant and CLF/CRWA, albeit for different reasons, challenged both the Region's decision to use BPJ informed by the Phase II Rule, and the manner in which the Region did so. Thus, the decision may bear upon the Section 316(b) issues raised in both petitions." *Id.* The Region further argued that a stay of the proceedings in this matter was necessary "because the ultimate effect of the decision remains unsettled, and, therefore, any briefing may result in unnecessary expenditure of time and resources by the parties and the Board." *Id.*

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<sup>1</sup> EPA promulgated the Phase II Rule on July 22, 2004, under CWA § 316(b), to address cooling water intake structures at large power plants such as Kendall Station. The Phase II Rule became effective on September 7, 2004.

<sup>2</sup> The Second Circuit granted the United States' request that this deadline be extended to April 26, 2007.

On March 14, 2007, the Board granted the Region's Motion for Stay of Proceedings, in consideration of the Region's arguments and in the interest of judicial economy. In the Order Granting Motion to Stay, the Board also directed the Region to submit a status report by May 2, 2007, advising whether the Board should extend the stay, establish a revised briefing schedule for the Region's response to the Petitions, or take other appropriate action. The Board further directed Mirant and CLF/CRWA to file responses to the Region's status report by May 9, 2007, and directed all of the parties to appear for a status conference on May 16, 2007. *See* Order Granting Motion to Stay at 3.

In the April 30, 2007, Motion for Extension, the Region argues that the Board should extend the stay in light of several relevant developments since the filing of the Motion for Stay of Proceedings. The Region states, *inter alia*, that, upon the request of the U.S. Solicitor General, the Supreme Court extended the time within which to file a petition for a writ of certiorari to May 25, 2007,<sup>3</sup> and that the Utility Water Act Group, an industry petitioner in the *Riverkeeper* litigation, requested that the Second Circuit extend the deadline for filing a petition for an en banc rehearing until May 14, 2007. *Id.* at 3. As a result of these events, the Region advises that it is unable to report whether any party in the *Riverkeeper* litigation will seek further review of the *Riverkeeper* decision in any forum. *Id.*

In the Motion for Extension the Region requests that, in the interest of judicial economy, the Board extend the stay of proceedings, relieve Petitioners of the obligation to file a response by May 9, 2007, and postpone the status conference to reflect the status of the *Riverkeeper* litigation. The Region specifically proposes to submit a status report by June 6, 2007, advising whether the Board should further extend the stay, establish a revised briefing schedule, or take

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<sup>3</sup> As of the date of the Motion for Extension, the United States had not yet decided whether to petition for certiorari. Motion for Extension at 3.

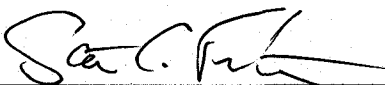
other appropriate action. The Region further proposes that the Board revise the dates by which Petitioners' responses are due. The Region finally proposes that, in its status report due June 6, 2007, it will offer one or more dates mutually acceptable to the Region and the Petitioners for the rescheduled status conference, or, if the parties are unable to agree on such dates, so advise the Board.

The Board agrees with the Region that, in the interest of judicial economy, the stay in this matter should be extended. For good cause shown, the Board hereby grants the Motion for Extension, as specified below. By no later than June 6, 2007, the Region shall submit a status report advising whether the Board should further extend the stay, establish a revised briefing schedule for the Region's response to the Petitions, or take other appropriate action. In this status report the Region also shall propose at least two dates, mutually acceptable to the Region and all Petitioners, for the rescheduled status conference. If the parties are unable to agree with respect to such dates, the Region should so advise. By no later than June 14, 2007, the Petitioners shall file any response they have to the Region's status report.

So ordered.

Dated: May 3, 2007

ENVIRONMENTAL APPEALS BOARD

By:   
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Scott C. Fulton  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing Order Granting Motion to Extend 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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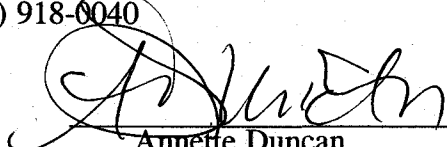
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Dated: MAY - 4 2007

  
Annette Duncan,  
Secretary