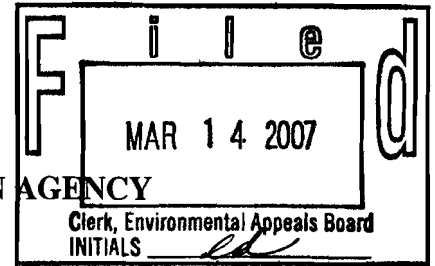


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Mirant Kendall, LLC,
Mirant Kendall Station

NPDES Permit No. MA0004898

NPDES Appeal Nos. 06-12, 06-13

ORDER GRANTING MOTION TO STAY

By motion dated March 1, 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") stay the proceedings in the above-captioned matter until May 2, 2007, in light of a recent decision of the United States Court of Appeals for the Second Circuit (the "Second Circuit"), which the Region asserts has potentially substantial implications for this appeal.

This appeal 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 Parties to file these supplements, and also required the Region to respond to the Petitions by April 9, 2007.

In its Motion for Stay of Proceedings, the Region explains 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 "Phase II Rule." 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.¹ On January 25, 2007, however, the Second Circuit issued an opinion in a case challenging the Phase II Rule, and remanded significant portions of the Phase II Rule to EPA. *See Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 (2d Cir. 2007). According to the Region, the parties to the *Riverkeeper* litigation have until March 12, 2007, to file a petition for rehearing,² or until April 25, 2007, to file a petition for certiorari if no party requests a rehearing. Motion for Stay of Proceedings at 3.

The Region states that the *Riverkeeper* decision may have substantial implications for this appeal. The Region explains 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.* at 3. The Region further argues that a stay of the proceedings in this matter is 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.*

¹ The Phase II Rule became effective on September 7, 2004.

² According to the Motion for Stay, the United States requested that this deadline be extended to April 26, 2007.

The Board agrees with the Region that in the interest of judicial economy the proceedings in this matter should be stayed. For good cause shown, the Board hereby stays the above-captioned matter as specified below. By no later than May 2, 2007, the Region shall submit a status report 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. Mirant and CLF/CRWA shall file any response they have to the Region's status report by no later than May 9, 2007. The Region, Mirant, and CLF/CRWA shall appear for a status conference to discuss this matter on Wednesday, May 16, 2007, at 11:00 a.m., in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Counsel for any of the parties who wish to participate in the status conference via the Board's video-conferencing equipment shall contact the Clerk of the Board, at (202) 233-0122, no later than Wednesday, May 9, 2007, to make arrangements for remote participation.

So ordered.

Dated: March 14, 2007

ENVIRONMENTAL APPEALS BOARD

By: Scott C. Fulton
Scott C. Fulton
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Motion to Stay, 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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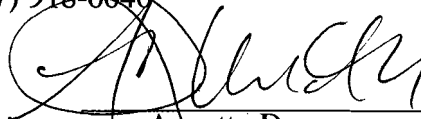
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Dated:

MAR 14 2007



Annette Duncan,
Secretary