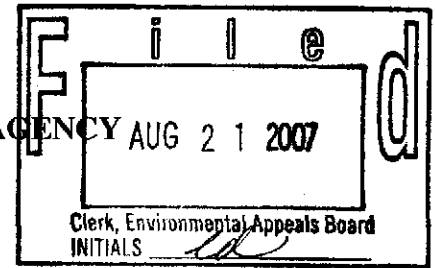


ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re:

Mirant Kendall, LLC,  
Mirant Kendall Station

NPDES Permit No. MA0004898

NPDES Appeal Nos. 06-12, 06-13

**ORDER SCHEDULING STATUS CONFERENCE**

By motion dated July 25, 2007, U.S. Environmental Protection Agency ("EPA") 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 draft 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/CRWA"), filed separate responses to the Region's motion to extend the stay. Mirant moved to remand the entire Permit, not just the withdrawn portions, while CLF/CWRA objected to the Region's request that the Board stay consideration of the issues relating to the Permit provisions that were not being withdrawn. Both Mirant and CLF/CRWA requested a status conference before the Board

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/CRWA 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.<sup>1</sup>

The Board most recently had stayed Mirant's and CLF/CRWA'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), which had challenged the "Phase II Rule." (The Permit's cooling water intake requirements were based, at least in part, on 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/CRWA to file responses within seven days of the filing of the Region's status report. The Board further required the Region to propose two or more days that would be acceptable to all parties for a status conference.

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 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 to develop a new draft Permit modification and to avoid requiring the Region to defend conditions of the Permit that it

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<sup>1</sup> 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.

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 proposes September 18 or 27, 2007, for a status conference. *Id.* at 6.

On August 1, Mirant and CLF/CRWA 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. Last, Mirant 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.

CLF/CRWA state that they assent 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/CRWA argue 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/CWRA request that the Board order the Region to respond to the aspects of

the Petitions that are not related to the Phase II Rule before the Permit modification is complete. *Id.* at 8. CLF/CWRA further request 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. *Id.*

Both parties request that the Board hold a status conference on September 18 or 27, 2007. Mirant's Request for a Status Conference at 1; CLF/CWRA's Response at 2.

On August 16, 2007, the Region filed a Motion for Leave to File Response to Petitioner Mirant's Motion to Remand Permit and Response to Status Report and to CLF's Response to Status Report, along with the associated Response. For good cause shown, the Region's motion is hereby GRANTED, and its Response accepted for filing. 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/CWRA's request to order the Region to respond to the other aspects of the Petitions before the Permit modification is complete. *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. The Board believes that this list of Permit conditions is adequate to satisfy CLF/CWRA's request.

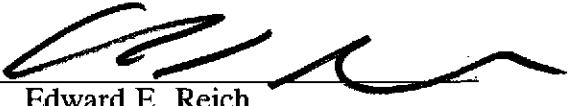
Mirant's and CLF/CWRA's requests for a status conference are hereby GRANTED. The Region, Mirant, and CLF/CWRA shall appear for a status conference to discuss their positions with respect to the Region's Motion to Extend Stay of Proceedings on Thursday, September 27, 2007, at 10:30 a.m., in the Administrative 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 EPA video-conferencing equipment shall contact the Clerk of the Board, at (202) 233-  
0122, no later than Thursday, September 13, 2007, to make arrangements for the use of such  
equipment.

So ordered.

Dated: August 21, 2007

ENVIRONMENTAL APPEALS BOARD

By:   
Edward E. Reich  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Scheduling Status Conference, 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:

By First Class Mail  
Postage Prepaid and  
Facsimile:

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Dated:

AUG 21 2007

  
Annette Duncan,  
Secretary